The Roots of Restorative Justice: Universal Process or from the West to the East?

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Special Article

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Introduction

Restorative justce has become a worldwide movement today. But few studies has focused on the source of this development. Understanding the roots of restorative justice is important in our understanding of the nature of the restorative justice and it forms. It is a important theoretical undertaking for the development of restorative justice theories.

One account about the history of restorative justice is that restorative justice has been developed from the West first. In Rick Sarre's work (1999), restorative justice dated back to 1900s, claiming Nils Christie and Albert Eglash as the forefathers of restorative justice. Another competing narrarive has been that restorative justice is a recent approach to criminal justice that began in the 1970s in North America and has become an international phenomenon. This kind of narrative regards restorative justice as an innovative system (Mulligan, 2009). Zehr and Harry (1998) also pointed out that, in the mid- to late-1970s, a small group of community activists, justice system personnel, and a few scholars in both North America and Europe, advocated restorative justice principles and its precursor, victim-offender reconciliation. The first Victim Offender Reconciliation Program (VORP) was conducted at Kitchener, Ontario in 1974. From the late 1970s to the early 1980s, a number of experimental programs based on restorative justice principles and modeled after the Kitchener program were initiated in several jurisdictions in North America and Europe, with the first VORP in the United States located in Elkhart, Indiana, in 1978 (Umbreit, 1988; Umbreit et al., 2005; Peachey, 1989). So a large number of scholars marked the 1970s as the birthing phase of restorative justice movement. After that, restorative justice movement gained bigger and bigger influence and gained official support slowly. Scholars have recognized that one major source of restorative justice is related to the dissatisfaction of the citizens with the justice system and consider it is unfair. People started to realize the value of different criminal justice traditions in different cultures. Then it happened at Australia and New Zealand that some pioneers started to learn criminal justice practices from the native Maori which were mainly a kind of approach of mediation. Though this kind of approach was very different from the tradition of Western criminal justice at that time, it shows promising direction. Western scholars and criminal justice experts started to summarize those criminal justice pratices and developed a series of approaches. What followed was specificly named models and pratices in restorative justice with specific regulations in detail. Restorative justice

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emerged as a legitimate justice model. Because of its attractive results, restorative justice then spreaded to North America and Europe immediately, and was imitated and improved.

According to this kind of description, the development of restorative justice is mainly by a historical reason, that is, restorative justice was created in one place, and then spreaded from one place to another as a historical process. Under this narrative, restorative justice in other countries such as in the East is considered as learned from Western countries. For example, the first restorative justice conference in China was hold in NanJing University in 2004, and restorative justice experts from America came to import knowledge of restorative justice. It shows that restorative justice was learned by China from America which could be seen as a historical spreading process.

However, is this really the case? If we could find the same practices or principles as restorative justice from the traditional criminal justice of China, and restorative justice naturally fit well in the society of China, then how should we consider this issue? Can we still say that restorative justice were learned from Western society? Or we should say that we just learned the name or the words of "restorative justice"? In this paper, I propose that restorative justice principles have been developed independently in different countries in the East, with independent roots, rather than from predominantly learned from the West.

Actually another narrative has been popular for a long time, which proposed that restorative justice is neither new nor novel—it is an archetype of justice nearly as old as human society itself. According to this narrative, restorative justice has been "the dominant model of criminal justice throughout most of human history for all of the world's peoples." It is "the most ancient and prevalent approach in the world to resolve harm and conflict" (Mulligan, 2009). And also Weitekamp (1999) indicated that "restorative justice has existed since humans began forming communities." In support of this claim, Weitekamp (1999) cites evidence from a diverse range of sources from the practices of ancient indigenous Australian and Eskimo communities, to the Code of Hammurabi, the Laws of Ethelbert of Kent and even Homer's *Iliad* (Mulligan, 2009). It is perhaps epitomized in Braithwaite (1999)'s widely quoted remark that restorative justice has been the dominant model of criminal justice throughout most of human history for all the world's peoples. This is also what we support in this paper. What this paper wants to answer is the question that what is the reason of restorative justice. My answer is that the creation and development of restorative justice is under universal reasons that are common to West and East. Human beings share some common recognization about what is justice, and this shared recognization exists in diverse cultures. If we can clarify that restorative justice developed independently in different countries, we could attest that statement. To do so, examples of China and India are presented in the following part.

In this paper, I would like to argue that restorative justice develops independently at different places all over the world, it is not initiated from Western academia and spreading to other places such as the East. Actually, Western scholars first discovered restorative justice and named it. I'll clarify how restorative justice is developed in the Eastern society, and confirm that restorative justice exists independently in different places of world by taking China and India for example.

Restorative Justice in China

Traditional China

Firstly, I'll elaborate spirits of restorative justice in Chinese traditional society. Confucius, an ancient Chinese sage, influenced Chinese thought and the cultures of many East Asian countries for over two thousand years. The core concepts of his philosophy and his legal cultural principles are in stark contrast with the modern Western criminal justice tradition. John Braithwaite (2002) once wrote "Confucius is the most important philosopher of restorative justice" and also pointed out that it is "a pity that so few Western intellectuals are engaged with the possibilities for recovering, understanding and preserving the virtues of Chinese restorative justice while studying how to check its abuses with a liberalizing rule of law". I'll introduce the major Confucian philosophical ideas that reflect strong characteristics of restorative justice.

1. *Ren* and *Li*: The Core Concepts of Confucianism Philosophy

Confucianism is a broad system of thought, consisting of many concepts and ideas. However, the most fundamental concept, which is usually used as a starting point for understanding and summarizing Confucius's system of thought, is the concept of *ren*. When asked what is *ren*? Confucius answered, "*Ren* means loving others". The concept reflects the fundamental idea of humanity and secularism in Confucianism. Humanity and the human world were the focus of Confucian philosophy.

Confucius sought ideal harmonious human-society relationships and harmonious human-nature relationships. A king ruling his countries based on the idea of *ren*, would be practicing *ren zheng* (benevolent rule), this is decisively important in achieving a harmonious society. In such a society, the social structure and social order is described by the concept of *li*, which reflects the Confucian theory of government and social control. *Li* is central to the Chinese traditional legal culture and legal system. *Li* has many meanings. Originally, *li* was developed in the Zhou dynasty (11 century B.C. to 256 B.C.) as a system of rites and codes of conduct to regulate stratified relationships among upper class members of clans. It ensured that their conduct conformed to social stratification, the expected roles and conduct in performing rituals relating to a variety of occasions.

Confucius systematically developed this concept to emphasize *li* as moral code. *Li* embodies Confucius's idea of social order and social relations in a harmonious and just society, which stresses that *li* is taught to people through moral education. Moral codes and legal codes are basic tools of social control in any society; the importance of *li* becomes particularly clear when we discuss Confucius's principle that stresses the priority of moral codes in social control. *Li* has an intertwined relationship with *ren*. *Ren* is the inner spirit of *li*. When *ren* is forgotten, *li* becomes only a formality, it is broken from the inside. Confucius called this situation as called *li ben le huai* (meaning, the *li* and rituals are broken, the country is broken). The concept of *ren* and *li* describes an ideal harmonious society.

2. *Li* and *Fa*: The Restorative Emphasis in Administration of Law

In the Chinese legal tradition, the major early rival with Confucianism was legalism. Legalists advocated using *fa*, or formal law, as the main means of social control. Over the course of two thousand years of imperial history, China had developed many important legal codes. Although Confucius did not deny the utility of formal law and punishment, he stressed the superiority and effectiveness of the moral code *li* over *fa*. Confucius said: "Regulated by *fa* or law, the

people will know only how to avoid punishment, but will have no sense of shame. Guided by virtues and *li*, the moral code, they will not only have a sense of shame but also learn to correct their wrong doings of their own accord" From Confucius' point of view, *fa*, or formal law, focuses on punishment, while *li*, or moral code, emphasizes prevention.

When order and harmony are disrupted by disputes and crimes, for Confucius the ultimate objective is to restore order and harmony, to restore the social relationships to their original state. This is better achieved by applying *li* first; *fa* is applied as a supplement when *li* alone is not sufficient to correct the offender's mistake. This principle is influentially expressed in various forms to guide the administration of law. One influential form of the expression is: *De Zhu Xin Fu*. The phrase means that *De* or education is the major approach in the administration of law, while *xin*, or punishment, is only a supplemental measure. Another form of this expression is *Chu Li Ru Xin*—only when *li* does not resolve the problems, is punishment used. Another influential form of this expression with the same essence is *Ming De Sheng Fa*, that is, care and education must be clearly conveyed, the use of punishment must be very cautious. Punishment is only a tool, while moral teachings and internalization of ethics are the fundamental purpose. Only by restoring social relationships through *li*, can the solution have a longlasting effect.

3. Harmony and *wu song* (no law suit) is the goal of justice

Confucius said: "In applying *li*, seeking harmony is the most valuable aspect." In social interactions among human beings, seeking harmony and reconciliation was fundamental and most valuable. Derived from this principle, *wu song*, (no lawsuit) was the highest purpose of the law. Confucius said: "The way I try a lawsuit is not different from others. But it would be better still if there were no lawsuits." In contrast to Western tradition, the upholding of the law was not the objective of the legal process. The ultimate objective of law was to achieve harmony and restore peace.

Wu song (no law suit) as the ultimate goal of legal processes was morally correct. A moral person who resolved problems with others would avoid resorting to litigation. He or she was one who practiced *ren*, who was frank and open, who was considerate to others, who was compromising, who did not place personal interest above the harmony of communities. Suing someone in court was considered to be shameful and mean; it usually was not the deed of a noble person. Although corruption was one reason for people not to bring disputes to court, the most important reason for Chinese to dislike litigation was found in the fundamentals of Confucius's ideas. When two parties went to court, the judge/administrator typically would repeatedly advise both parties to settle privately. With this Confucian tradition, mediation, or *tiao jie*, was most extensively developed. All villages were familiar with various types of mediation and the rules of arbitration. These rules included asking a respectable elderly person to intervene, to investigate, to discuss the matters among the parties, and the party at fault admitting his or her mistake and apologizing according to the traditional rules and format used in the village. Other solutions to disputes were making symbolic or substantial compensation, having respected important locals ask for saving the face of the party at fault by accepting a symbolic solution, letting the party who has the larger fault arrange a banquet and have respected locals attend, and persuading the party at lesser fault to accept a subtle apology to end the matter.

4. *Tian li ren qing* (fair and consistency with human feelings) as a Concept of Justice

In contrast with the conventional Western conception of justice, the paramount principle of justice in traditional China was that resolution must be fair and consistent with human feelings (*tian li ren qing*). Fairness was based on finding truth. The methods or procedures used to find the truth do not matter. The rights of the suspect were rarely a concern, as long as the truth was found. The idea of due process was unknown in Traditional China. The concept of rights was moral rather than legal.

Traditional Chinese were not very concerned with what legal codes stipulated. They were more comfortable applying the common sense rules from their tradition and accepting a decision that was consistent with their feelings. The courts might not follow the legal code if it was deemed to be in conflict with the general sense of what was morally right and fair. Legal rules typically yielded to "justice", which was what was felt to be a reasonable solution for the consequences of an offense. Courts often applied rules beyond just the law to reach a solution. Law and legal codes were adopted according to human feelings and Confucian ethics. Again, the purpose of justice is to maintain and restore human relations and peace, not to uphold written law.

Howard Zehr (1990) stressed that the conventional Western concept of justice is allocating blame and punishment. In contrast, in the view of restorative justice, it is "a process in which all the parties search for reparative, reconciling, and reassuring solutions." Wesley Cragg (1991) emphasized that restorative justice is a process that "respected the feelings and humanity of both the victim and the offender". These ideas about justice moved beyond the conventional Western conception of justice that saw the government and the offenders as the sole parties involved. The principle of restorative justice emphasizes that the ultimate goal of justice was not just to punish the offenders and protect their due process rights.

Although serious limitations and drawbacks existed with the Confucian philosophy, our discussion suggests that many of his ideas from two thousands years ago are consistent with modern restorative principles. Current restorative justice has yet to strengthen its theoretical development; Confucius's ideas provide a good source of insight.

Contemporary China

As we can see, not only restorative justice spirits developed in traditional China, but also restorative justice practices inherited from tradition can be found in contemporary Chinese criminal justice system in which actually Western criminal justice model dominates. It could be reflected from those several aspects: mediation practices, criminal legislations, juvenile justice and community based correction. Western legal and cultural influences do have become part of legal education and governmental reforms of China, and the 1996 criminal procedural law and the 1997 criminal law were influenced by Western cultural and legal thinking, but most practices compatible with restorative justice should date back to Chinese legal tradition and were laid foundation much before the time when restorative justice movement took place.

A typical legal practice which manifests Confucianism in dealing with criminal cases in contemporary China is the people's mediation practice, which, to a large extent is compatible with the restorative justice practices (Liu et al., 2012). Mediation is often practiced for less severe or misdemeanor cases. The most popular forms include mediation by a People's mediation committee, by the town's legal service, by law firms, by respected family clan leaders in rural areas, by relatives and friends, by respected seniors, or by neighbors (Liu and Palermo, 2009). The Temporary Rule for Organization of People's Mediation Committees (1954) established the official status of mediation in China by stipulating the nature, the tasks, the organization, and the methods for mediation activities. Later series of laws, including the 1989 Rules for the Organization of a People's Mediation Committee and the 1990 Rule of Resolution of People's Disputes, consist of specific articles about people's mediation mechanism. Specifically, mediation must be based

on voluntary participation of both the offender (s) and the victim (s) ; it has to be in compliance with the laws, regulations, and policies that are published and in effect; either party (the offender or the victim) has the right to suspend the mediation at any time and seek formal trial by court (Liu et al., 2012). Although China's mediation mechanism is highly compatible with the western practice of restorative justice, the rudimentary motive of applying mediation or victim-offender reconciliation in China is different from that in many Western societies (Liu and Palermo, 2009). The typical Western restorative justice movement is a response to the problems (such as high recidivism rates) of justice system. The restorative justice practices in contemporarily China have developed largely independent of the influential movements outside of China. Rather, the main impetus comes from the persistent influence of traditional Confucian legal culture (Liu and Palermo, 2009).

Criminal legislations with restorative features reflects from several simple articles. Article 36 of the Criminal Law: "compensation for the economic losses" or "his liability for civil compensation to the victim" are cleared ordered (Peoples' Congress of PRC, 1997). Chinese Criminal Law and Criminal Procedural Law allow certain criminal offenses to be handled by informal procedures. And Article 37 of the Criminal Law: for minor offenses criminal punishment can be replaced by non-criminal punishment. What's more, law allows certain criminal offenses to be handled by informal procedures. These offenses include: 1) offenses victims choose not to file officially; 2) minor criminal offenses; and 3) offenses that the State decides not to prosecute (see Criminal Procedural Law article 170). More examples are as follows. Offenses victim can choose not to prosecute include insults and slander (article 246), intervention of freedom of marriage by force (article 257), abuse (article 260), occupying properties of others (article 270). Article 172 of the Criminal Procedural Law stipulates that the court can mediate some criminal offenses. Article 15 of the Criminal Procedural Law stipulates that criminal cases withdrawn by victims or cases where victim sought no prosecution are not liable to criminal punishment. Article 37 of the Criminal Law stipulates that for minor offenses criminal punishment can be replaced by non-criminal punishment. These include reprimands, ordering the offender to promise to repent for his or her criminal actions, to pay compensation and apologize, or the application of administrative punishment.

Primary purpose of juvenile justice is "to educate, persuade, and save juvenile offenders." Consistent with restorative justice, the Chinese juvenile justice system emphasizes the principle that "education as priority, punishment as supplement" (De Zhu Xin Fu). The public strategy applied to juvenile delinquency is known as "comprehensive treatment," which rely on a wide range of social organizations, particularly the community, to solve the problems. They include the family, neighborhoods, schools and the police, as well as other authorities. community leaders, families, victims and offenders all face the problems of a juvenile offense together, discussing the issue and devising a treatment plan that helps the juvenile offender to understand and correct his mistakes in a helpful community environment, to repair the harm done, and to restore prior relationships.

What about community based correction? It is compatible restorative justice with their emphasis on community participation, helping offenders to recognize and show remorse for their mistakes, and the re-integration of offenders into society. Community correction emphasizes the participation of the community in the process in order to educate the offenders' thinking, to provide legal and moral education, to correct their unhealthy psychology and behavior, to help them to recognize their mistakes and repent for them, and to be willing to give up past patterns of antisocial behavior and reintegrate themselves into the community.

After a comprehensive review of Chinese criminal justice, we can draw some conclusions undoubtedly. Restorative justice values are central in Confucius traditions and restorative justice practice exist in many areas. Impetus for restorative justice programs within China seems to have come largely from the persistent influence of traditional legal culture. Little spillover from the Western movement seems to have taken place in China. The concept of restorative justice has only recently been introduced to Chinese scholars by their foreign colleagues; however, the idea and practice is rooted in Ancient legal culture. Restorative justice programs in China have developed largely independent of the influential movements outside of China.

Restorative Justice in India

India is another example to demonstrate the restorative justice is rooted independently rather than learned from the West. I would review particularly based on the work by S. M. Jaamdar (2011) the development of restorative justice in India to illustrate my point.

The Indian Criminal justice system

As explained by S. M. Jaamdar (2011), the Indian formal criminal justice system, as it stands today, has nothing 'Indian' in its form, content, or practice except what has been developed in its practice over the last 150 years by the lawyers and the Indian judiciary including the post-independence Constitutional framework. An eminent jurist of India (M. C. Setalwad) who said that Indian judicial system did not suit India in one of his public lectures in Patna Law College reversed his opinion when he became Chairman of the Indian Law Commission (Setalwad, 1970). Under similar circumstances of a lawyer's private opinion conflicting with his professional opinion, Lord Kilbrandon in Lynch case said: "that law reform by lawyers for lawyers (unless in exceptionally technical matters) is not socially acceptable". That is what the present Indian Criminal justice is! It was evolved by superimposing an alien British system on the pre-existing Indian judicial system by the British colonial administration in the 18th and 19th centuries (Bipin, 1990; Bhardwaj, 2001). Excluding the revision of Criminal Procedure Code in 1973 and a few amendments to the Indian Penal Code and the Indian Evidence Act, no major changes have been made to the criminal justice system in India in the last six decades since it got freedom from the United Kingdom (Bhardwaj, 2001, p. 36).

The Indigenous Justice Systems in India

Before British advent, being an ancient civilization, India had, and even today has, its own home-grown and parallel system of justice which settles disputes-civil or criminal-in traditionally acceptable ways (Jaamdar, 2011; Bipin, 1990). Nothing is more just than a third party decision which is acceptable and satisfactory to the victim, the offender and the community in which they live. It may not be a 'perfect' system in comparison to its European and British counterparts. Judging from the standpoints of equality before law, the rule of law, and the prevailing sense of equity, the ancient Indian judicial systems suffered from the caste-based discriminations which prescribed unequal punishments for equal crimes according to the status of the offender in the Varnashram system of Hindu social hierarchy. The colonial rulers did not like the discriminatory practices and they were right (Jaamdar, 2011; Macaulay, 1843 (1900)). But the traditional systems of justice in India as laid down in the Smritis such as the most influential Code of Manu, or the much used Code of Yajnavalkya or the Arthashastra of Kautilya, excluding the inequality before law, had their own merits and major strengths in other respects. Instead of

reforming the defects in the old system, the colonial rulers, misled by the egotists like Thomas Bobbington Macaulay (who suffered from the bloated notions of British superiority), chose to ignore the positive aspects and abolished the old systems altogether (Smith, 2003). They threw the baby out with bath water.

Resilience and Change

S. M. Jaamdar (2011) argues that India did change but the change was not so dramatic as one finds in the American, Australian and African continents which were colonized for about the same period by the European countries-Britain, Spain, Portugal, France and the Netherlands. As a sub-system of the overall social system, the indigenous traditional systems of settling criminal or civil disputes even to this day prevail to a considerable extent, in some mutant forms in the rural, informal, and tradition bound villages of India (Kidder, 1978). The two competing systems co-exist where the formal system of justice supercedes the informal system whenever they clash. These clashes are reflected in nine different conflicts between the native and alien systems (Jaamdar, 2011). It result in aversion to formal judiciary and further problems such as unreported crimes and over-burdened judiciary. Traditional informal justice systems prevailing in India seem to serve a great deal and actually solve more problems. S. M. Jaamdar (2011) presented the major traditional informal justice practices (Jaamdar, 2011).

1. Informal Dispute Settlement Systems

The indigenous Indian systems of justice were a matter great debate between two opposing schools of thought among the colonial rulers and British intelligentsia. While a band of British administrators like William Bentinck, Richard Temple, Lord Dalhousie, and Macaulay condemned anything Indian, there were others generally known as orientalists like John Shore, Charles Metcalf, Henry Lawrence, Malcom, Munro, and Curzon who staunchly defended and praised native Indian systems (John Keay, 2001). They indeed sought during their times to retain, strengthen and confer formal powers upon them (Smith, 2003).

India is predominantly a rural society. The Census of India 2011 reports that there are 640,867 villages as against 7,742 towns in the country. While pace of urbanization has increased steadily and the urban population in India rose from 15 per cent at the time independence (1947) to 31.16 per cent in 2011, the rest 68.84 per cent lives in villages of varying sizes. 80 per cent of the villages have population less than 1,000 and 236,004 villages have less than 500 people in each.

80 per cent of Indian villages are primarily peasant communities comprising about 100 to 200 families. In such small well-knit age-old habitats, which Ferdinand Tonnies described as "gemeinschaft" communities (1935), residents know each other since their birth and judge each other according to the codes of conduct imposed by the local customs, traditions, folkways and mores rather than the standards of behaviour imposed by the secular laws. They are irritated by those laws which seem opposed to the well-defined and long standing traditions. That is where social legislations seem relatively weaker. In almost every such village the common mode of dispute settlement is primarily local, informal and traditional—be it civil or criminal. In small, simple, and traditional societies deviant behaviour is controlled through customary practices which are very effective and do not even look like punishments.

2. Dispute Settlement by the Family and Kinship

Family and kinship form the first level of dispute settlement in India. In these blood relations the inter-personal, intra and inter-familial conflict management cannot be punishment oriented unless the conflict involves death or serious chronic violence (Jaamdar, 2011). The conflict resolution among members of the family and kinship is almost always aimed at amicable conclusion satisfactory to all the parties to the dispute which is the cornerstone of restorative justice. Since conflicts within and between the families tend to be mostly resolved in their early stages by the timely and proper intervention of the other members of the families (Chadha, 2012) such resolutions are more effective and lasting.

3. Caste Panchayats

The caste panchayats proved the second level of dispute settlement in Indian villages (Jaamdar, 2011). The disputes between two families in the same caste or sub-caste not related by marriage are usually dealt with by their caste panchayats. In the Hindu social structure caste as a defining feature consists of the four-fold hierarchy comprising of Brahmin, Kshatriya, Vaishya, and Shudra. Each caste-class has specific social status, status related mutual duties and obligations to other caste groups in the society. Among these four caste classes there are thousands of castes and sub-castes varying from one region to another. Caste is by birth only and marriage is permitted only within the same caste. The caste identity, purity, and continuity are maintained by the caste-specific intra-caste authority structures called "caste Panchayats" which are very powerful though unelected and non-statutory. They have the force of tradition which induces nearly blind compliance to their dictates by the caste members (Jaamdar, 2011).

These Informal Panchayats, whether secular or caste limited, are different from formal and statutory Village Panchayats created for development purposes and village administration. The village panchayats elected by the local people hold office for fixed periods and they are expected to collect local taxes from the residents for the purpose of providing basic services to the people. Elected panchayats do not have judicial, quasi-judicial or general conflict resolution powers.

In the North India informal caste panchayats are known as Khap Panchayats. They are very powerful. Their members are generally elders or influential members of the same community as that of the parties to the dispute. Their decisions have the same effect as that of Islamic Fatwas (Jaamdar, 2011; Raina, 2012).

In other areas these bodies are generally known as Caste Panchayats which decide cases affecting their caste or its members such as inter-caste marriages, sagotra marriages and sapinda marriages. They also decide minor family disputes, succession and inheritance, maintenance and adoption, division of property among family members. They deal with minor criminal conducts between the members and families belonging to their caste.

The caste panchayats generally impose hefty penalties on its erring members which amount is used for the common services to the caste group. It is also common to impose punishment in the nature of restitution, compensation or community service on the errant members. Community feast is occasionally imposed as a penalty. The extreme form of punishment involves ex-communication of the delinquent family and its members usually for a fixed period. Once ex-communicated no other members of the said caste would talk, help, cooperate or otherwise have any link or relation with the punished family. No one in the same caste would marry the girls or boys of the defiant family. No one would come forward to perform funeral rites or participate in the funeral of the dead member. They are totally unwanted and un-invited for all social festivities or celebrations such as village fairs, sports, of festivals. Ex-communication resembles banishment or exile practiced in the past. It is interesting to note that punished persons comply with the orders of the panchayats. Rare are the cases taken to the formal criminal courts against such decisions. But extreme forms of ex-communcation are some times reported

to the police who find it difficult to prove since most people do not cooperate (Hayden, 1983). Issues, crimes and disputes involving members of different castes are referred to more secular informal panchayats of the village (Jaamdar, 2011).

4. Informal Village Panchayats

There are occasions when inter-personal or inter-family disputes or moderate or minor crimes, are not resolved by the family, its kinship and caste panchayats. Such cases may end up at the third level of dispute settlement in rural India called informal panchayats (Jaamdar, 2011). They are committees consisting of village elders irrespective of caste. These institutions vary from region to region but they are all local, informal and traditional authority structures. "Panchayat" literally means a team of five. They are not elected but they command much greater respect than the legally elected panchayats (Gnanambal, 1973). These informal Panchayats are more secular and they try to resolve issues, disputes or crimes involving different caste members (Sabaha Khan, 2012). They were more powerful during the feudal period and most of the feudal lords were themselves acting as heads of such Panchayats (Khan S., 2012). The second Police Commission of 1902 had also recommended the use of local community for resolving local crimes and delinquencies locally (Bhardwaj, 2001, p. 59).

At the request of the disputing parties, or sometimes on its own (when the alleged violations affect the whole community) the committee meets at a convenient time and place and deliberates on the disputes or the issues involved. The elders hear both the parties and the witnesses if any (Bhardwaj, 2001). There is no question of telling lies as everyone knows everyone else since their birth and they have to live together till their death in the tiny villages of 100 to 500 families. They analyse the issues in the traditional style and arrive at a decision (Hayden, 1981). There are instances of, though rare, where the guilty party does not own up the fault, mistake, or crime, being asked to prove his or her innocence by resorting to the trial by ordeal or trial by divine intervention resembling the days of inquisition or witch-trials in Europe. Most common method of inquisition involves the accused being asked to hold the right hand over the burning flames, or dip the hand in the pot of boiling oil. If the flames of fire do not burn, or boiling oil does not scald the hand the person is presumed innocent and praised. Such cases are extremely rare these days though they occur occasionally. But extraction of confession through mild torture is not uncommon. Most of the decisions of informal Panchayats tend to be middle paths or compromises between the disputing parties so that neither is harmed seriously but the aggrieved party's interests are taken care of more or less to its satisfaction.

In most cases settled by the panchayats punitive damages or fines are imposed which amounts are appropriated to the committee account used for the common services in the village. In civil matters the guilty party is made to make amends or pay damages to the affected party. In some cases the guilty party is also made to arrange for a community feast or contribute to a common cause. The most common punishment comprises of admonition of the erring party after a long sermon based on the age-old value systems, mores, taboos, and folkways. By their informal, moral, and social sphere of influence they bring about an amicable settlement to which both parties most often agree. In many cases, the religious leaders, local religious institutions, village headmen play a major role in dispute settlement.

In any informal dispute resolution situation in villages, the elders of the village know the character and background of the complainants, the accused and the local witnesses. They can judge the quality, reliability and truth of the evidence placed before them. Consequently, the decisions the local arbiters arrive at would be much more accurate and correct than the ones in

the formal courts (Hayden, 1984). Almost all such decisions would be acceptable to the parties and binding on them. There is no appeal. But the persons not accepting the local decisions can always approach the formal courts. However, such defiant conduct would be viewed seriously by the local people and often invite avoidable social consequences.

The modes of justice delivery described above are simple and direct, local and speedy, cheaper and effective, thus satisfactory to all parties to the dispute as well as to the village community. These systems are NOT things of the past but they survive even to this day to a considerable extent in rural India. Frequently, we come across extreme cases of decisions of the Panchayats such as Khap Panchayats in Northern India which even award death penalty to youngsters marrying outside their castes or marrying within forbidden gotras. We also come across cases of Caste Panchayats imposing punishments of excommunication or banishment from the village. It is in such cases that traditional dispute settlement systems come in direct conflict with the formal criminal justice system in India (Jaamdar, 2011).

5. Socio-Religious Methods of Restorative Justice

Apart from informal Panchayats dealing with dispute settlements in rural India, in some regions there are unique but well accepted institutions effectively administering informal justice and settling numerous types of disputes. Three such institutions in Karnataka deserve a brief narration for the restorative justice they deliver including Dharmasthal Manjunath Temple, Sirigere Math, and Hinchigere Math.

The Summary

The foregoing analysis presents a unique combination of existence of two parallel systems of dispute settlement in India—one, the formal British created criminal justice system and the other, the informal traditional system—where there arises a clash between the two the former prevails. The traditional system prevails largely in rural India which comprises majority of the county's population and the formal system is dominant in urban India covering about one third of the people.

The basic social institutions of family, marriage, religion and the local community in India are still robust and capable of controlling and containing by and large the deviant behaviours of their members informally without involving in a majority of cases the punitive agents of formal criminal justice system-the police, the courts and the prisons.

It is the traditional system which is founded on the basic elements of restorative justice. Whether it is family or kinship, caste panchayat or traditional secular panchayat, all of them settle disputes and crimes keeping in mind the long term impact of their decisions on the offenders, victims and the community. While the victims must be compensated and consoled, the criminals should also be reconciled and reformed so that they would not menace the society again. The indigenous systems of conflict resolution are simple, local and restorative and therefore desirable in the long run. It is these systems which have made India a low crime country.

Restorative Justice Measures in the Formal Criminal Justice System in India

The existing system of formal justice in India-civil and criminal—already has in it many elements of restorative justice. With a few enabling arrangements they can be effectively harnessed for the practice of a more balanced justice in place of a moth-eaten system of only retributive punishments. For instance, section 89 of the Civil Procedure Code recognises mediation as an Alternative Dispute Resolution method. Its constructive use has begun recently. Many High Courts in India have taken initiative to set up mediation centres under their direct guidance and

supervision which are showing encouraging results by quickly resolving the cases transferred to them from the regular courts. Secondly, the power of courts to award damages or compensation in some categories of civil disputes serves the interests of the affected persons and provides much needed relief while vindicating their rights and rightly penalizing the wrong doers.

Similarly, several provisions in the Criminal Procedure Code, 1973 provide scope for practice of restorative justice if certain institutional arrangements can be made without great changes in the existing system. For instance, the provisions in the Code of Criminal Procedure for withdrawal of complaint (Section 257), withdrawal from prosecution (Section 321), power of the magistrate to stop prosecution (Section 258), compounding of cases with or without permission of the court (Sections 320), plea bargaining (Sections 265A to 265L) and power of the courts to order restitution by the offender (section 357) and payment of compensation from state funds (section 357A) allow enough scope to orient our criminal justice system towards restorative practices if some more institutional arrangements are made.

It could be possible for the Legal Services Authority to evolve a system of screening all new cases filed in the courts of JMFC which seem to be amenable for amicable settlement and redressal of victim grievances under any of the above provisions. During the screening the cases found suitable for processing under any of the above cited provisions of the Criminal Procedure Code may be referred for settlement by mediation. Adequate number of mediators and conciliators who could intervene in all such cases may be trained and posted in each JMFC courts. Once mediation reaches a settlement such cases may be withdrawn from prosecution or compounded or prosecution stopped by the magistrate or plea bargaining may be done. This type of Victim-Offender Mediation (VOM) will help in removing or at least reducing the ill-will, animosity, and bad blood between the offender and the victim which will enable restoration of normalcy in the relationship between the offender and the offended and the peace in the society.

The present system based on retribution and state inflicted punishment either acquits the criminal (in a majority of cases) or punishes him (in just a few cases) according to law. It does not care for the victim or the community or re-establishment of strained relationships and broken peace or stability in the society. If the present system of justice has to change on the lines of traditional justice it has to absorb some elements of informality. Additionally, through these arrangements it could be possible to reduce crowding of cases in the courts, expedite early decisions and improve the faith of the people in the judiciary.

From the victim's point of view, the scope for restitution of victims of crime from offenders (under section 357) or state funded victim compensation (under section 357A) can be effectively used to help the hapless victims of crime particularly in cases of victims of serious bodily harm and sexual offences. The system of state funded compensation for the victims of crime is relatively new to India and they are yet to take off.

The relative ignorance of a large number of members of subordinate judiciary and the self-interest of lawyers seem to have hindered the constructive use of the above cited legal provisions for the propagation of restorative justice in India. It may be said that the very concept of restorative justice, as it is emerging in the developed countries sounds quite new to the formal Indian judiciary. In the following sections some emerging practices under the rubric of Alternative Dispute Resolution Methods in India are discussed briefly.

Alternative Dispute Resolution Measures in India:

Overwhelming pendency of cases and long delays in the delivery of justice in the mainstream judiciary has compelled India to adopt several Alternative Dispute Resolution (ADR) methods in recent years (Jaamdar, 2011). Most of such measures are primarily diversions from the rigid formal judicial system. Some ADRs deal with more specialized fields which require assistance of experts in the respective fields of knowledge (Jaamdar, 2011).

Conclusion

Examples of China and India shows that restorative justice developed independently in China and India and has independent developing process. Understanding about restorative justice makes us have a more integrated conception about justice itself. We also have got the knowledge from more literature that restorative justice spirits exist in much more diverse society with diverse traditional culture. We human beings have common cognition about justice which is the restorative justice itself. We can not say that Western society don't have the restorative justice spirit, but we can only say that restorative justice emerged much more later compared with other societies. Restorative justice is the common result of people's aspire for justice and the common cognition about justice. At last, almostly we can say that restorative justice is the instinct pursuit of human beings.

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