AN INTRODUCTION TO RESTORATIVE JUSTICE PRACTICES IN TAIWAN

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Abstract

The core concept of restorative justice has long existed and been practiced in Taiwan's criminal justice system. It has however, been marginalised for a very long period of time. That was until 2003 when Taiwan began pursuing a polarised approach to its criminal policy with both 'leniency' and 'punishment' policies coexisting. Restorative justice has become a key component of Taiwan's leniency criminal policy.

This paper examines current restorative justice practices in Taiwan. After providing a short history of restorative justice in Taiwan, the paper will focus on the various legislative bases for restorative justice at different levels within Taiwan's criminal justice system. Restorative justice practices examined by this paper include mediation, deferred prosecution, and the restorative justice pilot programme. The paper concludes by comparing each of these restorative justice practices and suggests that mediation and deferred prosecution should be applied to more types of crime. Additionally, the paper concludes that more research needs to be done to evaluate these practices.

Introduction

Restorative Justice is an approach to justice that focuses on the needs of victims and offenders, instead of satisfying abstract legal principles or punishing the offender. Sherman (2003:11) argues that restorative justice is 'any means that can produce reconciliation between victims, offenders and their supporters, minimising anger and leaving all satisfied that they have been treated fairly while justice has been done'.

Restorative justice is neither a new nor an innovative criminal justice concept. Indeed, the principles which underpin restorative justice have existed for millenniums and have been used as a dominant model in criminal justice systems throughout most of human history and for perhaps all the world's people (Braithwaite, 2002; Sheu et al., 2006). Before the rise of nation-states in Europe, the restorative justice model was practiced widely in Germanic and Mediterranean tribes. However, it was decisively set aside with the Norman Conquest of

much of Europe at the end of the Dark Ages. Since then, the idea of crime has transformed from injurious to persons into matters of fealty to a felony against the king (Braithwaite, 2002; Sherman, 2003; Weitekamp, 1989).

Restorative justice was rekindled in the West with the establishment of an experimental victim-offender reconciliation programme in 1974 in Canada, and then spread to many countries, including Australia, Singapore, the United Kingdom, South Africa, and the United States (Braithwaite, 2002:8). Compared with non-restorative approaches (i.e. incarceration, probation, court-order restitution etc.), Latimer et al. (2005:138) found that 'restorative justice programmes are a more effective method of improving victim and/or offender satisfaction, increasing offender compliance with restitution, and decreasing the recidivism of offenders'. There has always been a struggle between restorative justice and retributive justice in Taiwan. Although we can see some criminal justice programmes are restorative rather than retributive (i.e. mediation), retributive justice remains an important role in the past few decades (Sheu, 2003). To some extent, we can say that the role of restorative justice has been marginalised to the degree that it has become ritualised in the practice of Taiwanese criminal justice. However, over the past ten years, restorative justice has been given resurgence in Taiwan and it has now become a mainstream feature of the criminal justice system.

This paper will introduce the transformation of the Taiwanese criminal justice system from a retributive justice model to a restorative justice model and it will examine the restorative justice programmes and practices currently applying in Taiwan, including mediation, deferred prosecution for adults, and the new restorative justice pilot programme*.

**There are some restorative justice programs which apply only to juvenile delinquents, such as the diversion system. However, this paper focuses on the programs which apply to everyone.*

The development and practice of restorative justice in Taiwan

Restorative justice was rekindled in Taiwan in the late 1990s. Influenced by a world wide atmosphere supporting a polarised approach to criminal policy, in 1997 the Ministry of Justice (MOJ) of Taiwan organised a committee to review the criminal policy which applied at that period of time. In 1999, and based on the results of that review, the White Book on Prosecution Reform was published by the MOJ. In the White Book, the MOJ proposed three urgent issues which needed to be addressed: crimes were becoming more serious, limitations were being imposed on judicial resources and the prison system was becoming overloaded. MOJ argued that the best way to solve these three critical issues was to establish a polarised approach to its criminal policies with both punishment and leniency criminal policies coexisting (Ministry of Justice, 1999).

The aim of the polarised approach to criminal policy, according to the White Book, was to adopt both a lenient and harsh approach to criminal activity. MOJ suggested that those criminals who committed serious crimes and who were at a high-risk of committing more crimes should be treated strictly by giving them their 'just desert'. However, for minor

criminals, MOJ suggested that diversion techniques should be applied, such as mediation, deferred prosecution, and probation. This new policy direction was expected not only to prevent negative influences that might occur when putting serious criminals with minor offenders in jail; it would also help to relieve the tension on the available limited judicial resources and reduce overcrowding within the prisons (Ministry of Justice, 1999).

Amendments to Taiwan's Criminal Code and Code of Criminal Procedure were required to accommodate the suggestions made in the White Book. Except for the mediation system, which already existed, amendments to Articles 253-1 to 253-3 relating to deferred prosecution were enacted in February 2003 and took effect in September the same year. Later, in 2005, amendments to the Criminal Code and the Enforcement Act of the Criminal Code were enacted to implement the idea of a polarised approach to criminal policy. This was the most significant change to the Criminal Code and the Enforcement Act of the Criminal Code in the past 70 years (Taiwan High Prosecutors Office, 2010).

In order to enlarge the use of restorative justice within the legal system and to encourage mediation between victims and offenders through conferencing, the MOJ proposed a restorative justice pilot in 2010. Eight prosecutor offices initially joined the pilot, including Ban-chiao, Shi-ling, Kaohsiung, Miao-li, Tai-chung, Tai-nan, I-lan, and Pung-hu (Xiang, 2010). Previously, mediation and deferred prosecutions could only occur before or during a trial. The new pilot practice was expanded to include all phases of a trial, including offenders who were under the prosecution process, or who were in prison or on probation.

Attribution for this rapid change to Taiwan's justice system needs to be credited to Professor Chuen-Jim Sheu. He was the first person to conduct significant academic research into restorative justice practice in Taiwan. In 2002, he presented a paper entitled 'On the Theory of Restorative Justice' at the 2002 Symposium on Criminology Theory and its Applications (Sheu, 2002). This was the one of the first Taiwanese papers to focus on this issue, and after publication Professor Sheu then devoted himself to research into restorative justice practices in Taiwan. Professor Sheu and his research team have conducted extensive research into restorative justice practices in Taiwan, including meditation, deferred prosecution, and the restorative justice practice in the indigenous tribes of Taiwan (i.e. Sheu, 2003; Sheu et al., 2008; Sheu et al., 2006). Encouraged or stimulated by professor Sheu, other scholars also started researching restorative justice both theoretically and empirically (i.e. Chen, 2003; Huang, 2007). This all led to the change of criminal policy in Taiwan.

Current restorative justice practices in Taiwan

As mentioned previously, there are currently several restorative justice programmes practiced in Taiwan. Although some of them might not totally fit comfortably into accepted restorative justice principles, to some extent, these programmes demonstrate how restorative justice can operate and to what extent they can benefit society. This paper will focus specifically on three programmes that are practiced in Taiwan, i.e. mediation, deferred prosecution, and the new restorative justice pilot.

1. Mediation

With the aim of reducing caseloads before courts, Chinese society has long made use of mediation when dealing with conflict and crime. This can be traced back to the Hang and T'ang dynasties where mediation was used to solve civil disputes and minor crime issues. Using elders in a family, or respected and trusted people to act as mediators, most cases could be solved satisfactorily with only a few ever going to court. The current 'Act on Mediation at Villages, Towns and Counties',（鄉鎮市調解條例）enacted in 1931 by the Ministry of Interior, Republic of China, provides rules in relation to the powers of mediation committees The current version was amended in 2009 and came into force in the same year.

In Taiwan there are two ways to start the mediation mechanism: (1) Petition by litigants or, (2) when a case is affiliated in a district court, under an order by a court of first instance:

1. **Petition by litigants**
   For civil cases and criminal cases chargeable only upon a complaint by victims*, mediation can be petitioned either verbally or in writing by litigants. The petition is made to a mediation committee and must be submitted before the closing argument in the first trial (Articles 1 and 10). However, Article 11 of the Act regulates that the petition needs to be agreed by all litigants in civil disputes and by victims in criminal cases.
2. **Under an order by a district court**
   In the 2005 amendments, district courts were given the power to transfer cases at their first trial for mediation. This was an important expansion of the application of the Act and allowed more cases to be mediated. According to Article 12 of the Act, criminal cases with a supplementary civil action are also subject to mediation under an order by a district court in the first trial of a case. That is, use of mediation under an order by a district court is no longer limited to civil cases or criminal cases that are chargeable only upon complaint by victims. It can be applied to all criminal cases with a supplementary civil action.

Table 1 shows the number of mediation cases and their rate of settlement in Taiwan between 2001 and 2009. An increase in the total number of mediation cases, rising from 92,396 cases in 2001 to 124,804 cases in 2009 can be seen. This is mainly the result of increased mediations in criminal cases. There is a drastic increase in the mediation of criminal cases which doubled from 34,973 cases in 2001 to 76,903 cases in 2009. Mediation of civil cases has kept steady at around 50,000 cases per year. The number of mediators rose from 3,756 in 2001 to 3,963 in 2009 (Ministry of Interior, 2010).

* *In Taiwan, some criminal cases are chargeable only upon a complaint made by a victim or a person who has rights to make the complaints (usually victims' family members or relatives). These cases are usually minor crimes or related to individual legal interests, such as adultery, minor injury, and offenses against reputation and credit such as defamation and insult. For these cases, police and prosecutors can not start an investigation and prosecution if there is no complainant who presses charges.*

Table 1: Cases of mediation

Year	No. of Mediators	Grand-Total			Civil Cases			Criminal cases		
		Settled	Un-settled	Settled rate%	Settled	Un-settled	Settled rate%	Settled	Un-settled	Settled rate%
2001	3,756	67,308	25,088	72.8	38,998	18,425	67.9	28,310	6,663	80.9
2002	3,762	64,212	26,599	70.7	33,534	18,183	64.8	30,678	8,416	78.5
2003	3,807	75,512	26,217	74.2	33,335	16,770	66.5	42,177	9,447	81.7
2004	3,841	80,604	21,937	78.6	32,987	13,522	70.9	47,617	8,415	85.0
2005	3,811	84,108	24,343	77.6	35,890	14,924	70.6	48,218	9,419	83.7
2006	3,790	85,799	26,041	76.7	35,309	14,901	70.3	50,490	11,140	81.9
2007	3,932	86,148	25,869	76.9	32,743	15,126	68.4	53,405	10,743	83.3

Source: Ministry of Interior (2010)

When it comes to settlement rates, criminal cases are more likely to reach settlement than civil cases. The settlement rate for civil cases is usually around 70% or less while the settlement rate for criminal cases is usually more than 80%, or even as high as 85% in 2004.

It need not be surprising to see that criminal cases have a higher settlement rate. In criminal cases, penalties are usually reduced if criminals are able to reach an agreement with their victims or if they are forgiven by their victims. In order to get a lighter penalty, criminals may accept requests proposed by their victims thereby earning forgiveness. Moreover, when victims agree to mediation, it also shows that they are willing to forgive the criminal under certain conditions. Provided requests by victims are not unreasonable, a successful mediation usually occurs.

However, the same situation does not apply in civil cases. When both parties stand at the same negotiating level there may be no serious consequence to either should the mediation not be successful. Only if any agreement is reasonable and accepted by both parties will the mediation be settled.

In Taiwan, some people are 'imposing criminal penalties in order to create negotiation chips in civil disputes（以刑逼民）'. The existence of a mediation mechanism can prevent this type of fake criminal case going to the court (Shi, 2004). Nonetheless, it might not really reach the aim of restorative justice. As offenders are afraid of the serious consequences which may follow if they did not reach an agreement with their victim, they might agree to any request by the other party and close a case without demonstrating any sincere apology or contrition.

In summary, the Taiwanese mediation system is able to offer a meeting mechanism for gathering victims and offenders together in order to arrive at a settlement for victim compensation. However, in practice it applies only to civil cases and criminal cases which are chargeable only upon complaint by victims. Even with the 2005 amendments which expanded the application of mediation to criminal cases with supplementary civil action,

the Taiwanese justice system is still a long way from applying mediation to all criminal cases. Moreover, as some agreements are made under pressure of criminal penalties rather than accepting the agreement by free will, it might overlook other restorative justice components, such as the acknowledgement of responsibility, reintegration of offenders, and the concern about resolving underlying problems.

2. Deferred prosecution

Deferred prosecution, sometimes called conditional suspension of prosecution (Tsai, 2010), is a policy introduced in response to the Resolution of 1999 National Judicial reform Conference with the goal of rehabilitating offenders and making some effort toward victim engagement. It was given legal basis in Articles 253-1 to 253-3 of the Code of Criminal Procedure in 2003. According to the amendment rationale, the legislative aims of these Articles are: (1) creating affirmative remedies, (2) saving judicial resources, and (3) rehabilitating misdemeanour offenders in a friendly context.

The legal practitioner, here represented by the prosecutor, is entitled to exercise his/ her discretion in deferring prosecution for an accused who commits an offence other than an offence punishable with the death penalty, life imprisonment, or with a minimum period of imprisonment of not less than three years (Article 253-1). Taking into consideration elements listed in Article 57 of the Criminal Code, the prosecutor may make a ruling to defer a prosecution for a period not exceeding three years but being greater than one year (Article 253-1). The deferral period dates from the time the accused enters a guilty plea for the charged offences and expresses consent to any prosecutorial impositions imposed as conditions to the deferred prosecution decision.

In accordance with Article 253-2 of the Code of Criminal Procedure, conditions which may be imposed include: (1) apologising to victims; (2) making a written statement of repentance; (3) paying the victim an appropriate sum as compensation for property or non-property damages; (4) paying a certain sum to a governmental account or to a designated non-profit or local self-governing organisation; (5) performing forty to two hundred and forty hours of community service to a designated non-profit, local self-governing organisation, or the community; (6) completing a drug addiction treatment programme, psychotherapy and counselling, or other appropriate treatments; (7) complying with a necessary order for the protection of the victim's safety; and (8) complying with a necessary order to prevent recommission of the offence. Before making an order for the defendant to comply or to perform acts specified in items three through six, prosecutors shall seek the consent of the defendant.

However, under an ex officio order, or based on an application by a complainant, a prosecutor may set aside an order for deferred prosecution and the prosecutor may then continue or initiate a prosecution, if the defendant has (1) intentionally committed an offence punishable with a period of imprisonment during the period of the deferred prosecution and a prosecution is initiated by a prosecutor; (2) committed another offence intentionally before the deferred prosecution and was sentenced to a period of imprisonment during the period of the deferred prosecution; or (3) failed to comply with or perform any impositions specified

in the items listed above (Article 253-3). If the ruling of a deferred prosecution has not been set aside and the period of the deferral has expired, the case will be deemed as non-prosecuted and the defendant will not be prosecuted again for the same offence.

Table 2 Criminal cases closed by district courts and deferred-prosecution rate

	Total cases closed	Prosecution	Non-prosecution	Deferred-prosecution	Deferred-prosecution rate%
2002	293,206	125289	102,998	3,221	0.010985
2003	287,477	113,004	99,129	13,269	0.046157
2004	299,935	118,851	90,334	21,999	0.073346
2005	340,196	134,624	95,897	24,626	0.072388
2006	373,398	158,889	108,068	27,898	0.074714
2007	402,115	188,422	113,248	29,467	0.07328
2008	413,125	199,374	114,651	32,162	0.077851
2009	406,896	187,179	119,495	33,894	0.083299

Resources: Ministry of Justice, retrieve from 05 January 2010 from http://www.moj.gov.tw/ct.asp?xItem=126021&CtNode=27442&mp=001

As can be seen in Table 2, the use of deferred prosecutions is on the increase. Not only is the number of deferred prosecutions in 2009 (33,894 cases) ten times greater than the number in 2002 (3,221 cases), the deferred prosecution rate is also on the increase. In 2002, only 1% of total cases closed were deferred prosecutions but this rate increased to 8.3% in 2009.

When commenting on the effectiveness of deferred prosecutions, Shi (2004) argued that, with the imposition of conditions, especially apologies to victims, writing statements of repentance, paying compensation, and performing community service, deferred prosecutions not only helped the restoration of the relationship between victims and criminals, they also helped to restore criminals to the community and assisted them with their rehabilitation. Nonetheless, Sheu et al. (2006) found that communication between victims and offenders had no significant influence on restoring the relationship between them. This may be attributed to the fact that deferred prosecution cases are limited to certain types of crimes in Taiwan, especially non-victimisation crimes such as drink-driving. They suggested that deferred prosecution could be used more often and could apply to more types of criminal cases.

3. Restorative justice pilot

In 2009, the Plan for Promoting Justice, Constructing Communication, and Restore the Harm Caused by Crime（法務部推動修復式正義—建構對話機制、修復犯罪傷害計畫）, was ratified by the Ministry of Justice in Taiwan. In this plan, a restorative justice pilot based on Victim Offender Mediation was promoted.

The restorative justice pilot is the only programme in Taiwan which explicitly attempts to implement restorative justice principles. It is based on the conference model, intending to engage all stakeholders, victims, offenders, and other relevant parties. According to the Plan for Practicing Restorative Justice Pilot, the restorative justice pilot aims to:

1. Assist an adequate communication among victims, offenders, and families and communities from both sides, giving all stakeholders opportunities to express and clarify, listen to others' feeling and seeking answers by proposing questions;
2. Let offenders recognise their wrongdoing, and offer their sincere apologies to victims, to a victims' family and to society, and to take responsibility for compensation;
3. Restore victims through conferencing; helping them to express what they have suffered and their feeling, thereby reducing any negative feelings and reducing the impact of any damage that the crime has brought to them;
4. Restore offenders by improving their relationship with their victims and with the community in order to reduce recidivism;
5. Help victims, offenders and other stakeholders to reach a compromise by providing a secure, non-offensive and non-antagonistic conferencing place.

According to principles espoused in the Plan for Practicing Restorative Justice Pilot, suitable cases are those cases selected by the type of crime, the result of the crime and the characters of both parties. The Plan initially suggests giving priority to minor crimes and juvenile crime, with this range encompassing all types of crime as the Plan matures. However, cases that are not recognised as a priority can also be selected after being evaluated as suitable. That is, all types of crime can theoretically be included in the restorative justice pilot, despite the initial suggestion of priority.

Furthermore, unlike the mediation mechanisms and deferred prosecutions which may only apply to cases before and during a trial, the restorative justice pilot applies to criminals in all stages of the criminal justice procedure, including investigation, prosecution, probation, and rehabilitation. An agreement made through the pilot will become a reference point for law enforcement agencies when making decisions at different stages of a criminal matter, such as on deferred prosecution, measurement of penalties, or determining the period of probation. As mentioned previously, eight district prosecutor's offices participated in this pilot. With the clear objective of restorative justice, the pilot was established with restorative justice training for all relevant practitioners, with specifications for standard operating procedures for case referrals and closure, with a trained facilitator for administering conferences, and with preparatory work before convening any conference.

Nonetheless, the scope of cases dealt with under the pilot differs from district to district, ranging from traffic accidents, family cases, minor offences, to more serious offences. For example, the programme practiced by the Ban-chiao district prosecutor's office focuses only on cases listed in Article 376 of the Code of Criminal Procedure which cannot be appealed to

the Supreme Court, such as those which can only be punished by a period of imprisonment not greater than three years. However, the Kaohsiung district prosecutor's office focuses only on domestic violence cases and on car accidents. Worth noting, the Taichung district prosecutor's office not only focuses on minor crimes, it also targets those who have committed serious crimes such as homicide and crimes involving serious injuries. However, the pilot applies only to those serious criminals who are already serving a jail term.

Apart from overseeing the actual pilot, the Ministry of Justice also holds campaigns and sponsors the promotion of the idea of restorative justice as part of the Plan for Promoting Justice, Constructing Communication, and Restore the Harm Caused by Crime. For example, seminars and conferences on restorative justice are organised, special courses are integrated into school education programmes, and cooperation with media outlets to broadcast drama and movies that promote the idea of restorative justice are all fostered.

The outcome of the pilot will be evaluated one year after its being put into practice. This evaluation will be an important indication for the Ministry of Justice when deciding whether or not to keep promoting the principles of restorative justice in Taiwan. As the pilots were not put into practice until 2010, there has still been no formal evaluation of the outcome of its practices. However, it will be interesting to observe whether the evaluation finds that offenders involved in the pilot have been sincere in their apologies to victims or whether they merely apologised in order to gain a reduction of any penalty or to shorten their probation period.

Conclusion

This paper has introduced current restorative justice practices in Taiwan, including mediation, deferred prosecution and the restorative justice pilot. Through the introduction of these programmes, progress in promoting a restorative justice model into Taiwan's criminal justice system can be observed. If initial evaluations prove successful, it has the potential to be applied to a greater variety of crimes and at different stages within the judicial process. Table 3 summarises and compares the three programmes operating in Taiwan, including mediation, deferred prosecution and the restorative justice pilot. The restorative justice approach is being widely applied and it has become an important criminal justice policy feature in Taiwan.

As table 3 shows, the mediation mechanism can only be applied by litigants either before entering into a prosecution or no later than when a decision by a prosecutor or judge has been made at a first trial. This applies to civil cases (including criminal cases with supplementary civil action) and criminal cases which are accepted by complaint only.

Table 3: A comparison of restorative justice programmes in Taiwan

Programme	Applicants	Stage	Type of Cases
Mediation System	1.Ligitants; or 2. Prosecutor or judge	Before entering prosecution or no later than the verdict of first trial being made	1. Civil cases; 2. Criminal cases which are chargeable only upon complaint by victims; or 3. Criminal cases with supplementary civil action.
Deferred prosecution	prosecutor	Prosecution and after offenders make their guilty plea	Offences other than those punishable by the death penalty, life imprisonment, or with a minimum punishment of imprisonment of not less than three years
Restorative justice pilot	1.Ligitants; 2. Prosecutors, judges, and prison officers; 3. Probationer, Aftercare Association, and Association for Victims Support	Investigation, prosecution, during the trial, in prison, on probation, and during rehabilitation etc.	Ranging from traffic accidents, family cases, minor offences, to more serious offences

Deferred prosecution can be seen as a major step toward restorative justice. Unlike mediation which applies only to criminal cases which have been accepted by complaint only, deferred prosecution applies to all types of criminal cases other than those where the offence is punishable by the death penalty, life imprisonment, or with a minimum period of imprisonment of not less than three years. After offenders enter a guilty plea and agree to any impositions required, prosecutors can make a ruling of deferred prosecution for a period of between one and three years. However, currently deferred prosecution, according to the latest research and official statistics, is applied mostly to non-victim offenses such as drink-driving. There are suggestions that deferred prosecution should be applied to more types of criminal cases in future.

The restorative justice pilot is the only practice that explicitly attempts to implement restorative justice principles. Although there are only eight district prosecutor's offices which have joined the pilot, there is a wide variety of implementation for restorative justice practices at different stages within the judicial process, from the investigation stage up until

criminal rehabilitation. The range of applicable cases has also been expanded with formal priority guidelines no longer being a limiting factor. It is encouraging to see that some district prosecutor's offices are applying the pilot to serious crime offenders and it will be interesting to see if the practice works well in Taiwan.

To conclude, Taiwan is on a path towards using a restorative justice approach, rather than its previous retributive justice approach, when dealing with crime issues. However, current application seems to be limited to minor crimes rather than more serious offences. Because of its relative newness there has been limited research done into the evaluation of these restorative justice approaches and their value for restoring victims, offenders and communities. There is still much more work to be done in promoting restorative justice in Taiwan but it can be confidently predicted that, in the near future, a restorative justice approach will be used more regularly and will be applied to a wider range of serious crimes.

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