

## Article

# Conflict as Chaos/Complexity and Restorative Justice in Japanese Context

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## 1 Introduction

In recent years many scholars have begun to have interests in restorative justice in Japan. Both theoretical and practical situations in foreign countries have been introduced in reviews, journals and newspapers. In this context, restorative justice was chosen as the theme of symposium at the annual meetings of Japanese Association of Sociological Criminology in 2000 and Japanese Association of Criminal Law in 2001, and was discussed. Before, during and after these symposiums there have been some disputes on the ideas of restorative justice and on the possibility of introducing restorative justice into Japanese criminal justice system. In addition recently ideas and measures of restorative justice have begun to be partly experimented in practice.

In this article, considering situations of restorative justice theory and practice around the world, both theoretical and practical problems in Japanese context are critically considered.

## 2 Domestication, Governmentalization and Structuring: Criticisms from Postmodern Perspective

### 2.1 Domestication of Violence

Based on an analysis of 30 community mediation sessions,

Cobb (1997) tracks the emergence and domestication of violence stories in the session themselves. This “domestication” of violence is defined as a movement from “rights” to “needs” in the discourse of the session. Drawing on Foucault, this domestication process is described as a function of the “microphysics of power” and the rules of transformation is tracked through which violence is subducted into the discourse of mediation itself. She argues that the mediation process contribute to erase any morality that competes with the morality of mediation and, in the process, disappears violence.

As the findings from her study, Cobb suggests that though violence frequently appears in community mediation sessions, it is domesticated with significant regularity. Accounts of pain and suffering are transformed into accounts of pragmatic needs. Social obligations become extinct as individuals’ “responsibilities” reign. Order is restored, not by redressing violence but by discursive rules that tame it. The category “victim” dissolves, as pain is dehistoricized. Insinuating the discourse of needs, the mediation process favors technocratic solutions and reformulates moral dilemmas into pragmatic problems. In so doing, mediators reframe conflicting and competing moralities into the morality of mediation itself, and the discourse of rights is progressively exchanged by the discourse of needs.

At last she insists that, to challenge the domestication of violence effectively, we must step outside the frames provided by the discourse on violence (serious/nonserious, mental/physical violence) , and examine the alchemy through which pain is made ordinary, “disappeared” into reconciliation and amnesty, in our homes, in our institutions, in mediation and law.

## 2.2 Governmentalization of State Dispute Resolution

According to Pavlich (1996), on the one hand, proponents of “alternatives” to law see community mediation programs as a triumph of empowered individuals and communities over the

state. On the other hand, early critics view such programs as an expansion and intensification of state control. Opposing both views, he focuses on the political logic of community mediation practices. Drawing on Foucault, he explores mediation as a governmentalization of state dispute resolution which marshals both techniques of discipline and self in an attempt to produce peaceful individual selves. As conclusion, he warns that the search for fixed notions of individual, self, or even community empowerment may entrench, rather than resist, current forms of regulation in dispute resolution arenas.

He traced community mediation as a form of governmental power whose political rationality involves deploying techniques of discipline and self in an attempt to reconcile disputing individual selves, and so to preserve notions of a peaceful community. In focusing on techniques of self, he locates community mediation as a type of secular confession that encourages disputants to seek reformed, nondisputing self-identities. The (neo-)liberal state is preserved through a series of governmental practices that for centuries have been colonizing our being, the individuals that we are, and the ideal selves to which we aspire. Our pleasure, our pains, our lives, are “ours” only in a very peculiar sense.

The unpredictability of governmental regulation, he continues, suggests a certain indeterminacy from which it is possible to contemplate an authentically “alternative” politics of disputes. The search for “empowered” individuals within “communities” is unlikely to offer an alternative to the power relations of existing dispute resolution arenas. So long as community mediation is enlisted in the service of individual dispute settlement, the self-identities it tries to fashion are likely to perpetuate — rather than eradicate — the liberal, governmental power formations that nurture particular conflicts in the first place. To the extent that community mediation aims at dispute settlement in the interests of an unspecified “community order,” its orientation

will always lean toward “restoration” rather than fundamental change.

At last he insists that the quest for “empowered” justice beyond (neo-)liberal patterns of dispute resolution would certainly entail a direct engagement with governmental political rationalities (such as community mediation) that have governmentalized state power. Engagement that transgresses the limits of the present, that glimpses an alternative to current dispute resolution practices, would surely have to redress governmental techniques of discipline and self in community mediation, as well as its search for a “community order.”

### 2.3 Language of Restoration as Structuring Victim-Offender Mediation and its Transformation

Relying on the interpretive tools of the postmodern sciences, Arrigo and Schehr (1998) examine the language of restoration as structuring victim-offender mediation (VOM) sessions. Their investigation is underpinned by integrated, selected contributions from psychoanalytic semiotics and chaos theory. They demonstrate how VOM discourse advertently or inadvertently marginalizes juveniles. They argue that the goals of restorative justice are not presently realized. They conclude by provisionally describing how a more humane dialogue can be achieved through language, advancing the transformative themes of restoration and reconciliation.

Applicating chaos theory and Lacan’s four discourses to the practice of VOM and restorative justice, they suggest several points. First, VOM represents the discourse of the master, and, through limit attractors, legitimates the prevailing justice system’s values by framing crime and criminals in stereotypical ways. Second, only circumscribed regard is given to experiences of pain, suffering, loss, and victimization through the coordinates of meaning representing the language of victim-offender mediation. For victims, VOM represents an opportunity to locate familiar

but finite themes of reconciliation within and throughout the discourse of the master. Victims insert themselves and are situated in a field of knowledge that largely embodies its own (restorative justice) interests.

Third, VOM perpetuates a construction of the “typical adolescent criminal” through its unstated assumption, and promotes even greater labeling of offenders as inarticulate, stupid, and dangerous. Then the adolescent delinquent communicates through the discourse of the hysteric. Though the language of VOM does not express and cannot embody the juvenile’s underlying alienation as a divided subject, to avoid a complete descent into psychic despair and meaninglessness, the youth briefly and illusively embodies the master signifiers of VOM. As depicted by the torus attractor, the hysteric struggles to offer, throughout this process, a certain tolerable range of interpretations for the events in question.

Fourth, they mention that an opportunity to be truly heard is missing within and throughout the dialogical exchange, and contend that the discourse of the analyst is capable of effecting transformative possibilities for juveniles during the reconciliation session. By affirming their unique experiences, juveniles announce new forms of knowledge. The discourse of the analyst yields a certain degree of predictable unpredictability. The effects of this discourse can be mapped out so as to develop more effective VOM programs and policies directed at juvenile offenders.

In sum, they conclude, one way in which a VOM program can continue to meet the challenges posed by a postmodern analysis of restorative justice is to remain open to the multiple and discordant ways in which offenders and victims seek to resolve their disputes. Everyone needs to be restored; juveniles are no exception.

### 3 Deconstruction, Multiplicity and Contingency:

## Criticisms from Chaos/Complexity Perspective

### 3.1 New Social Rites in Penal System?

Varona (1996) analyzes the emergence of a new penal paradigm, the paradigm of restorative justice, and tries to reconstruct this new paradigm. According to her analysis, the Western construction of a restorative discourse about a new paradigm of criminal justice has been influenced by different movements, such as alternatives, abolitionism, informalism and victims' movements. Governments have instrumentalized the claims and academic discourses in many countries.

The concept of restorative justice is liquid, elastic, indefinite. In practice, the notion is a conflictive construction. In theory, new or reinterpreted positive law opens limited innovative possibilities of mediation. The construction of these possibilities is offered as an enlargement of citizens' rights, but it can be actually an enlargement of certain groups' power.

She points out the possibility of human rights or social needs transformation (or instrumentalization) from a social movement into an official policy with similar or completely different aims. In this regard, they aim at understanding how the ideas mobilized by social groups are related to wider social and economical changes.

According to her observation, strong criticism followed the quick emergence of restorative justice: "Thus many critical theorists ... take informal justice institution as the subordinate normative order and see these as serving the ideological function of blurring the power of the state so that the latter appears to be a benign part of the social fabric. They have shown that this ideological subordination is accomplished by the cooptation and exploitation of the human desire for informal and localized community justice, and that the episodic tendency toward informal decentralised state control serves a dual legitimating and net-widening function for the state.

Thus, she insists, restorative justice is a social construction of knowledge/power, to be questioned and deconstructed.

### 3.2 Multiple Phases of Restorative Justice

According to Roach (2000), we should reflect on the contingent reasons why restorative justice is on the rise and the dangers that may come from its widespread acceptance. Restorative justice allows the state to privatize some core functions and rely on community groups to deliver justice. Privatization is not necessarily bad if the community groups are better at implementing restorative justice than criminal justice professionals and if the state remains accountable for the results. Criminal justice professionals have expressed considerable enthusiasm for restorative justice and their involvement may be necessary if restorative justice is to be used as an alternative to imprisonment for serious crimes. Such involvement, however, raises the risk that restorative justice will become more state-centered as it is professionalized. It also increases the risk of net widening that may expose those who commit less serious crimes to coercive tools of existing system including conditional sentences. The exact contours of restorative justice will depend on the mix of public and private modes of delivery.

He also mentions that the popularity of restorative justice is also related to the fact that it employs contradictory rhetorics that on the one hand sound tough in stressing accountability for crime and on the other hand sound soft in stressing healing for offenders, victims, and the community. As it increasingly becomes part of public discourse about crime, criminologists should study the evolution of public rhetoric about restorative justice and whether it leans towards retribution or rehabilitation. Much may depend on how restorative justice is accepted by social movements concerned with the position of crime victims and women. In order to win support from these movements, restorative justice may move towards stressing more punitive

consequences for offenders. At the same time, there are minority forces within both movements who are disenchanted with punitive politics and who may be truer allies in the movement to restorative justice. The popularity of restorative justice will significantly decrease if either the victims' or women's movements take a hard line position against it. If both movements oppose it, the future of restorative justice is not bright.

The role of community groups in developing and delivering restorative justice will depend on stable funding and how they react to the inevitable interaction with the state if they are to deliver restorative justice. Without nourishment from crime victims, women, aboriginal peoples, and community groups, the fate of restorative justice will depend largely on its acceptance by criminal justice professionals. The professionalization of restorative justice carries its own dangers including the risk of net widening and of discounting the harm and coercion that restorative justice potentially could impose on offenders and victims.

### 3.3 Conflict Mediation as Contingency

Schehr and Milovanovic (1999) contend that conventional methods of conflict resolution will continue to prove to be only partially effective in calming disquiet and new directions must be sought. There are five primary reasons for the shortcomings: the privileging of hierarchical representations, the supposition of order, the celebration of the ideal speech situation and consensus dynamics, the continuous encroachment of legal discourse at the expense of alternative discourses, and the lack of connected strategies between the macro and micro domains.

They suggest three alternative perspectives from a postmodern paradigm that reconceptualize domestic and international conflict mediation, as well as restorative justice program. Chaos theory, catastrophe theory, and psychoanalytic semiotics are included in new useful integrations. Each attempts to overcome the five limitations of conventional mediation programs. Together, they add



insights for conceptualizing and developing social justice.

Adopting a chaos approach to conflict recognizes the normality of instability — what chaos theorists refer to as “far from equilibrium conditions” — and views flux, social disorganization, heterogeneity, diversity, and spontaneity as the expected manifestation of any complex system of interacting agents. By emphasizing far-from-equilibrium conditions, chaos theorists are able to articulate a model of conflict resolution that is much more dynamic and capable of capturing the volatile nature of complex, dynamic social systems. Conceptualization of dissipative structures and its application to the social science area serves as a seminal theoretical advance. Dissipative structures are the antithesis of functionalist theorising since they are only relatively stable and are always interacting with their environment, producing perpetual change. Practical application is to privilege those “marginalized, disenfranchised, disempowered, and otherwise excluded voices,” in efforts to advance any de-escalation of otherwise spiraling conflict. Chaos theory suggests that small changes in initial conditions may have profound consequences at the macrostructural level.

The process of conflict mediation is itself transformative. They identify three interacting, identificatory axes (representing respectively, the symbolic/real order, the symbolic order, and the imaginary order of Lacan) that are constitutive of various complex, dynamic mental states in a mediation encounter. As interaction unfold, various coordinates, appearing as “attractors” (or attractor basin) among these three interacting axes, will momentarily appear. The new demand will be on how to conceptualize the mediator more along the line of a “border intellectual” who is but a catalyst in the development of various identifications. This will lead to insights on how empowerment may take place, on the emergence of new master signifiers (the basis of alternative narrative constructions), and on how replacement discourses may gain more stable forms.

Concerning catastrophe theory and the third way, they insist, the role of a peace rethoric in de-escalating interpersonal and other conflicts can be understood by conceptualizing conflict, its de-escalation, and restorative justice dynamics in terms of initial linear developments that often undergo some nonlinear (catastrophic) changes. Catastrophe theory offers generic models of how a catastrophe may appear and of how “pockets” can emerge that present alternative ways of contemplation and being.

#### 4 Restorative Justice in Japanese Context

##### 4.1 Misunderstanding about Japanese Criminal Justice System

There seems to be a widespread misunderstanding that restorative justice has been under way in Japan. But maybe most Japanese scholars and practitioners don't agree with this view. This misunderstanding is caused by a false recognition which is typically expressed by the following description by Haley (1996).

According to his analysis, Japanese officials and culture reinforce values of confession, repentance, forgiveness, and leniency. When Japanese offenders confess, offenders or their families typically approach victims to make redress and seek forgiveness, and victims typically accept the offerings of redress and offer pardon, which is often communicated formally to prosecutors and courts. Japanese criminal justice officials are primarily concerned with controlling criminal behavior through the processes of confession, repentance and forgiveness, built on community mechanisms of social control. In the presence of confession and forgiveness, some prosecutors tend to divert most cases, and those that reach court are treated with leniency.

He mentions as lessons learned that an added benefit of the Japanese approach is that the emphasis on victim reparation and

restoration reduces societal demands for revenge and retribution and, thus, facilitates efforts by law enforcement authorities to provide effective means for correcting offender. As societal demands for punishment and retribution are reduced, the authorities are able to respond with greater leniency. Japanese are considerably more likely to prefer a response to criminal behavior that tends to restore relationships.

His conclusion is that the lessons of the Japanese experience are being learned. An increasing number of experimental programs, based on a restorative approach, are demonstrating the efficacy of the Japanese approach in very different cultural and institutional contexts. What we have to learn from Japan is simpler and more basic: that restorative approaches are successful in correcting offenders, empowering and healing victims, and restoring the community. The Japanese experience thus provides insights for other industrial societies seeking to establish a more humane and just system of criminal justice, one free from the human and economic costs of overcrowded prisons, increasing crime, and victim alienation. The lesson learned from Japan is that restorative justice works.

Against this and concerning restorative justice in Japanese context, Nishimura and Hosoi analyzes apology, forgiveness and Japanese criminal justice. They mention that most of western scholars think that restorative justice has traditionally penetrated through Japanese criminal justice system because crime rate in Japan has been extremely low in comparison with those of other western countries. But they insists that the actual situation is different from their recognition.

Their conclusions are as follows:

- 1) "Parens patriae filled with leniency" in Japanese criminal justice system is extremely different from something regarded as restorative justice although it has some effects on rehabilitation of criminals.
- 2) Japanese life style of apology and forgiveness as traditional

culture is not so kind to victims as that western scholars have imagined, rather spoils victims in the form of being concealed by pretended rituals. Apology and forgiveness are stripped of all its contents, and fall short of victims.

3) Apology and forgiveness, in their original meanings, have been thought to be carried out through direct and unreserved dialogue between offender and victim, with the modernization of society, their meanings have been gradually declined. On the other hand, in the criminal justice system, interactive action of apology and forgiveness has become to have been exchanged between state and offender. Today direct dialogues between offender and victim can't be seen both in the daily life and in the court, and the culture of apology and forgiveness have changed into formality without the essence.

In addition, they mention difficulties of introducing restorative justice as follows:

4) Although factors of restorative justice are partly put into punitive justice, or the ideal of restorative justice program is maintained, if they are placed only in the marginal part of present justice system, they decrease possibilities and fascinations of restorative justice, and can't have a strong influence on the trends of punitive justice.

5) If victim's rights are asserted in present punitive justice, though defects of traditional justice system which overemphasizes suspects and defendants are partly corrected, the justice, which heals victim and offender and at which restorative justice aims, won't be realized.

#### 4.2 Authoritative Criminal Justice System

Indeed Haley's analysis catches some characteristics of Japanese criminal justice situation in part, but it seems superficial because it sees only phenomena and overlooks their hidden side or background. As Nishimura and Hosoi (2000) mention, the context in which criminal justice has been developed has to

be analysed.

Japanese criminal justice system has lots of problems. Low crime rate and public order (or safe society) are maintained at the sacrifice of persons concerned, especially rights of both victims and offenders. In the following, using results of above mentioned analyses, lots of problems will be extracted and problematic situations will be depicted.

First Japanese criminal justice officials have a wide range of discretion, and this makes them extremely authoritative. For example, on the one hand, policemen do their best to get a confession from suspect, sometimes forcefully and illegally, in order to gather enough proof of guilty and raise the rate of indictment and conviction. On the other hand, if a suspect express his/her repentance and is obedient to policemen, public prosecutors and judges, he/she is leniently processed in each stage. So leniency is accompanied by authoritative coerciveness and obedience in Japanese criminal justice.

Second, in most cases, offenders make reparation in order to give a good impression to criminal justice officials, and in so doing get leniency. In addition, also in most cases, this is carried on between a lawyer of offender and victim's family. There is no direct dialogue between offender and victim. Then the reason why victim's family give forgiveness is that most Japanese don't like to be involved in disputes and matters of criminal justice. This means that even if offenders get forgiveness, it is not true but reluctant forgiveness by victim's families.

Third, it is said that Japanese society is characterised by the culture of shaming. The stronger shaming is, the more stigmatization has its effects. In Japanese society, most people are not so lenient that they extremely exclude offenders from their communities. In addition, people sometimes cast a cold gaze even at a victim because they think that a victim is responsible for his/her victimization, especially in case of rape. Some Japanese are not so kind to victims. So in Japanese society, restoration of

offender, victim and community is difficult to attain.

Fourth, a victim support is not enough developed in Japan. At last in 1980 people began to shed light on crime victims. With the enforcement of the Crime Victim Benefit Law in 1981, only a part of them can get small benefits, which are considered a gift of money. In 2000, though the Crime Victim Protection Law was enforced, measures for crime victims are constituted not as rights of victim but as favor of officials. As police has initiative in victim supports, according to my research, it aims to raise the rate of arrest rather than interests of victims.

Considering these problems and situations, Japanese criminal justice system is so authoritative that we can't find the working space of restorative justice in its true meanings. If one tries to introduce a restorative justice to Japanese justice system, it must be a very hard work. Even if it is possible, it is inevitable to be coopted: the essence of restorative justice is extracted and transformed. It will be the transformed restorative justice based on authoritative criminal justice system.

#### 4.3 Problems of Restorative Justice and Possibility in Japan

In October 2000, a symposium titled "Kankei-Shuufuku-teki Shihou no Sho-Mondai to Nihon ni okeru Kanousei" (Problems of Restorative Justice and Possibility in Japan) was held at the annual conference of Japanese Association of Sociological Criminology. According to the proceedings, its background and aim are follows:

With murder and injury cases targetted at citizens and committed by phantom killers (man who wantonly knifes a passer-by) and the incident of sarin-scattering in the subway as a turning point, recently, also in Japan, the general public feel concern about problems of crime victim. On the one hand, at the level of law, in May 2000, a new law was legislated and a partial amendment of law was made for protection of crime victims in the criminal procedures. On the other hand, at the administrative

level, the liaison conference of government agencies concerned with crime victim policy, which consists of Ministry of Justice, National Police Agency, Ministry of Welfare, etc., was established in order to build up a closer connection, and has developed various measures.

These are, however, measures within the limits of the present criminal justice system, so limits and problems are indicated. At this moment, having its inception in problems of crime victim, the restorative justice attracts a great deal of attention as one of measures dealing with various problems from which modern criminal justice system is suffering. The aim of this symposium was, concerning the integration of criminal justice and restorative justice at the both theoretical and practical levels, to search for its possibility from each standpoint of scholar and practitioner.

At last, prospects of restorative justice in Japan in the future are indicated as follows:

While restorative justice has large hidden potential, it also has lots of problems to be solved concerning fundamental human rights. In order to judge whether restorative justice will become a hopeful principle which transcends the modern Enlightenment thought, we need lots of arguments, accumulation of steady practices, and investigations of actual conditions.

From this statement, it is obvious that only recently Japanese scholars and practitioners begin to have interests in restorative justice. At present, we are groping for introducing and experimenting restorative justice measures. The most important, and at the same time the most difficult tasks, in my view, are how to create a restorative justice which is appropriate for Japanese context and how to construct a relationship between criminal justice and restorative justice.

In addition, the reason why restorative justice has recently occupied the interest of both scholars and practitioners in Japan must be cleared. In order to elucidate this question, it is useful

to overview the recent situation of crimes and measures taken against them. In Japan, in recent years, heinous crimes committed by juveniles have intermitently occurred and the myth of safety society has been broken. This means that, on the one hand, people in general began to feel unsafe and throw doubts on the effectiveness of criminal justice system. In short the Japanese criminal justice system has fallen into unprecedented crisis of legitimacy.

At this moment, in order to escape from this crisis, two fronts strategies have been developed by criminal justice: one is infliction of harsher punishment on juvenile delinquents and offenders and the other is reinforcement of crime victim policy. These two fronts strategies have been developed hand in hand. The aim of these strategies is to restore not only a trust in criminal justice system but also an authority of criminal justice system. In other word, restorative justice may have been used to get the rationale of justification for Japanese criminal justice system. In this meaning, people in general and their feelings (fear of crime, collapse of safety society myth) are colonialized by the state and the criminal justice system.

## 5 Concluding Remarks

We have to investigate what kind of justice system will be reconstructed and how renewed justice (system) will be reconstructed. In Japanese context which has a tradition of strong bureaucracy and exclusion of citizens from criminal justice administration, in my view, at present, it is extremely difficult to establish community-based restorative justice.

Until recent years, most of affairs, even affairs in life world, have been operated by the state and its officials, so people in general haven't been accustomed with subjective participation or have been manipulated to hesitate at participating in the admin-



istration of criminal justice. In this meaning, we haven't been mature citizens and haven't had a mature civil society. In this situation, at the most, some factors of restorative justice can be incorporated into the criminal justice system. But through such a system, problems are perceived in superficial spheres, conflicts are limited to particular forms, and the way of restoration is confined to the solution based on prejudice. This means that problems and conflicts are solved not for parties and community but for the state and the criminal justice system.

At last, the safety of Japanese society has been maintained through alienation of citizens. In a certain meaning, the ideal of restorative justice may function as concealing the state of affairs in which exclusion advances under the pretension of inclusion. What should we do to overcome this problematic situation? As first step, we must change our paradigm of recognition in order to grasp problems and conflicts as it are. Problems and conflicts must be recognized as chaos/complexity.

### 【Notes】

- 1) This article is based on the paper titled "Conflicts as Chaos/Complexity and Restorative Justice in Japanese Context" and presented at Fifth International Conference organized by International Network for Research on Restorative Justice for Juveniles, Leuven, Belgium, 16-19 September 2001.
- 2) This is a part of research results on "complexity criminology" with Grant-in-Aid for Scientific Research by the Ministry of Education, Science, Sport and Culture, Japan.

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*United Nations - at the seat of the Fondazione Courmayeur Mont Blanc by the Centro Nazionale di Prevenzione e Difesa Sociale*, A/CONF. 187/NGO. 1, pp.55-95.

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