A Referential Study on the Localization Construction of Restorative Justice for Minors

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Abstract

At present, the phenomenon of juvenile delinquency has become a serious social problem, especially in recent years, the juvenile crime rate is high, and has a tendency of more violence and younger age. But at present, juvenile justice in our country is still on the margin of domestic whole criminal justice system. In order to deal with the above problems, it is very important for our country to choose an appropriate path of juvenile justice. Choosing a forward-looking and appropriate juvenile justice model conforming to the social needs must be based on a clear understanding of the status of juvenile justice in China. Therefore, this paper first make an introduction of the current situation and dilemmas of juvenile criminal justice system in China, and then explore the meaning and significant of restorative justice system for juvenile delinquency. Furthermore, Analyzing the practice and dilemmas of restorative justice in China so that to improve the development and perfection of this system.

Keywords

the phenomenon of juvenile delinquency, criminal justice system, appropriate path of juvenile justice.

1. The Current Situation and Dilemmas of Juvenile Criminal Justice System in China

Juveniles are the future of the country and society. Juvenile delinquency situation and its response effect are the measuring standard of social order. Since the establishment of the first juvenile court of our country in Changing District, Shanghai, in 1984, the juvenile justice system in our country has started to burgeon and juvenile justice begins to enter into the field of legal research in our country. The newly revised Criminal Procedure Law in 2012 added a special chapter on "criminal procedure for juveniles" and achieved a qualitative leap in protecting the rights of minors. In recent years, the number of juvenile offenders sentenced by courts has also continued to decline, but this is not enough to prove that the problem of juveniles in China has been fundamentally improved. The protection of juveniles also faces many problems and new challenges. First, the number of the left-behind children and migrant workers' children have been growing annually with the acceleration of urbanization. The lack of adequate custody and care for these children has led them to become a high-risk group, who are likely to commits crimes or suffers violations; Second, Juvenile delinquency tends to be younger and more violent. One important reason is that the effect of early intervention is not obvious; Thirdly, the frequency of bullying and violence on the campus have seriously impacted the bottom line of society tolerance. However, faced with such a serious situation, the juvenile criminal justice system and the relevant research have been marginalized for a long time. What's worst, as more and more media unilaterally expose the juvenile delinquency, many people thought that 'bear children' are not worthy of being protected, some people even thought that legislators should promote measures to "get tough" on juvenile crime. However, nowadays juvenile criminal justice is still on the margin of domestic whole criminal justice system. Also, the juvenile justice

system faces many difficulties: Firstly, as a whole, the current juvenile justice system is still subordinate to adult justice system. The subordination is mainly reflected in three aspects: first, no separate juvenile law has been enacted; second, organizations and personnel was subject to adult justice; third, the attachment of its judicial proceedings; Secondly, there is a contradiction between the existing judicial mode and the special nature of juveniles: the existing judicial model in our country is an adult judicial model, retributive justice is still relatively prominent. But, compared to adult, Juvenile offenders are likely to have reduced blameworthiness due to their limited maturity. That is, first, they may not fully appreciate the consequences of the harm they cause, second, they may not have had an opportunity to fully appreciate the societal norm they have violated, and lastly, they may be too young for us to expect them to have developed the impulse control that we would expect of an adult in responding to difficult situations or temptations or provocative conduct. Because of these particularity of the minors, there should be a qualitative difference in working objects, judicial concepts, legal policies and, legal systems from adult cases. The existing model is not conducive to help the children return to the society.

2. Restorative Juvenile Justice—Proposing a New Route

2.1. The Proposal of Restorative Justice

The extraterritorial juvenile justice has vacillated back and forth during the past century between a welfare and a retributive model. The former focuses on the protection of juveniles and tries best to avoid the punishment. It neglects the responsibility of juveniles, which is not conducive to true repentance and self-change. It also overlooks the rights and needs of victims. The latter punishes and prevents juvenile delinquency through the deterrent effect of penalties, however, which easily leads to the label effect on teenagers and hinders the re-socialization of juveniles. After encountering a series of bottlenecks, many extraterritorial countries try to find a new way to overcome the defects of traditional juvenile justice, which is adopting the restorative juvenile criminal justice to dispose juvenile criminal cases. Restorative justice is one kind of judicial system with highly inclusiveness and openness, which aims at restoring the social relations that have been damaged by criminal acts, admits the subjects including offenders and victims to participating, emphasizes the interests of both sides and the community needs by means of communication and negotiation to reach the trail result. In fact, the process of restorative juvenile criminal justice is the product of integrating restorative justice into the processes of juvenile criminal justice, which compromises retributive juvenile justice and welfare juvenile justice.

Restorative justice is a community-based response to crime, and an alternative to conventional punitive institutional approaches. A restorative justice framework has been widely introduced in many jurisdictions in the world as an alternative way of treating youth offending. The typical Western restorative justice is a response to the problems of youth justice system, in which the conventional forms of punishment are often unable to meet the needs of. By contrast, restorative justice allows the victim, the offender and the community to decide how to deal with the offence. Typical restorative justice programs tend to give victims and offenders an opportunity to talk about the consequences of an injustice, and about what is to be done to 'repair' things, and by doing so to contribute to 'growth' and healing. The values of restorative justice are about healing rather than hurting. Restorative justice recognizes the role of social bonds in controlling, preventing and responding to juvenile crime, the primary objectives of restorative justice include (1) to attend fully to victim's needs; (2) to prevent reoffending by reintegrating offenders; (3) to enable offenders to assume active responsibility for their action; (4) to create a working community that supports the rehabilitation of offenders; and (5) to provide a means of avoiding the escalation of criminal justice measures. The modern format of

restorative justice developed in the West in the 1990s.In 1989, New Zealand redesigned its juvenile justice system to require programs like mediation and family group conferencing.Restorative justice is also gaining popularity in the United States. Then, Restorative justice theories have come to influence juvenile justice systems in areas such as Australia, Canada, Israel, South Africa, and much of Western Europe.

2.2. The Significance of Restorative Juvenile Justice

The juvenile justice system in our country has not yet established a stable model and choosing an appropriate path will be more easily promoted. Compared with the extraterritorial restorative juvenile criminal procedure, China juvenile criminal justice procedure is put forward and trailed later. The introduction of restorative justice in the field of adult criminal justice is highly questioned, instead, the purpose of restorative justice is exactly the same as that of juvenile criminal justice, so it is easier to be accepted by people.

The various juvenile protection measures in restorative juvenile justice help to strengthen the protection of the rights and interests of the delinquent juvenile. The judicial process and trail results in restorative juvenile justice are all conducive to restore social relations damaged by criminal acts. Then, the diversion measures of this system will be beneficial to save the judicial resources. Therefore, it is necessary to adopt restorative justice model in China. Firstly, it relates to social stability and the long-term development of the country. In recent years, about 40,000 minors have entered the criminal procedure every year. Cases involving minors always cause a lasting and intense public concern, mainly because children' growth is always related to the core benefits of the family. At present, most minors are the only children in their family, if he or she falls into judicial adjudication, the entire family will be in pain; Secondly, the pressure and challenge caused by the limited judicial resources on the judicial system are also one of the driving forces behind restorative juvenile justice. Using partial restorative diversion measures will reduce the number of juvenile criminal cases handled by district courts. Thirdly, it will be conducive to the long-term development of the country. Juvenile is the future of the country and the nation, if the juvenile is physically and mentally healthy, the future of the nation will be healthy. If the juvenile abide by the law and regulations, in the future, the entire country will be in order. So if the juvenile will be protected, the future of the nation will be protected.

3. The Restorative Justice in China

China was still at the eve of the restoration judicial. It has only been since the advent of the century that the theory of restorative justice as practiced in the West was imported into China with the publication of dozens of introductory papers, most of which were published after 2004. Meanwhile, some scholars have broadened its influence among the academia. In 2002, a Chinese delegation attended the eleventh meeting of the United Nations' Commission on Crime Prevention and Criminal Justice and participated in the discussion on the draft resolution of the Basic Principles on the Use of Restorative Justice Programs in Criminal Matters. It was in early 2004 that the first conference on restorative justice on the Chinese mainland was held by Nanjing University.

3.1. The Practice of Restorative Justice in China

It is not a new phenomenon in China to use reconciliation and mediation to settle the disputes caused by offenses. The root of such practices can be traced to the legal system of ancient China with its characteristically comprehensive handling of civil and criminal issues. [1] But it's not the same as foreign ideas. In fact, the concept of restorative justice fist be introduced in china in 2000. [2] Subsequently, the judicial organs of all parts of China started to explore the restorative justice. Since 2004, we have achieved remarkable results. At least ten provinces in China, including Beijing, Shanghai, Shandong, Jiangsu, Chongqing, Hunan and Guangdong, have carried

out the pilot work of restorative justice, and juvenile justice is the main and key field of these pilot work.

In terms of form, the local juvenile justice rules can be divided into four types:

The first is to formulate juvenile judicial concrete system, such as "community system" and "suspended prosecution". The phenomenon of this type is more common in the areas where juvenile justice reform is carried out. The second is to formulated operational guidelines. Such as The people's Procuratorate of Gulou District of Nanjing city has enacted the *Trial Measures of the conference on* reconciliation *of juvenile criminal cases*, The people's Court of Canglang District of Suzhou City enacted *the restorative judicial operation rules*. The third is to Promote a new idea , such as The procuratorial organ of Yantai City issued *the outline of the implementation of the peaceful judicial procedure*. The last one is enact rules, which is issued by several organs. For example, the peoples Court of Gulou District jointly the people's Procuratorate of Gulou District and the Judicial Bureau of Gulou District to signed the regulation *the application of restorative justice in minor criminal cases*.

Base on the practice experience, there are mainly in the following several models:

Conciliation meeting. If a person who has reached the age of 14 but not the age of 18 commits a crime, and the offence is minor and no serious harm has been caused. After collecting opinions of the juvenile criminal offender and victims, the procuratorate or a public security may organized a meeting and reached an understanding agreement on the spot, and a public security authority may provide a leniency suggestion to the people's procuratorate. A people's procuratorate may provide a leniency suggestion to the people's court;. For example, Huishan District Procuratorate of Wuxi City enacted *Restorative judicial operation rules*. This practice was eventually adopted in the revised criminal procedure law of 2012—*Procedures for Public Prosecution Cases Where Parties Have Reached Settlement*. It is not specially set for minors, but in the specific practice, minors are relatively concentrated on the application of criminal settlement. [3]

Conditional non-prosecution. In 2007, the people's Procuratorate of Zaozhuang City, held a hearing on the case of minor injury caused by Li Mou, a senior high school student. On the basis of investigating the facts of the case, the case undertaker put forward handling opinions on the nature of the case, the criminal situation and application laws and other issue. Listening opinion from his legal representative's, public security and victim ,finally the people's Procuratorate decide not to initiate a prosecution. This practice was eventually adopted in the revised criminal procedure law of 2012-a juvenile criminal suspect who is not prosecuted under conditions. The specific provisions are juvenile who commit a crime may be sentenced to fixed-term imprisonment of one year or a lighter punishment, if the prosecution conditions are met but the juvenile suspect has shown repentance, a people's procuratorate may make a conditional non-prosecution decision. Before making a conditional non-prosecution decision, the people's procuratorate shall hear the opinions of the public security authority and the victim. At present, many procuratorial organs are actively implementing the system.

Round table trial. It is a kind of trial mode in which the round table is used to replace the traditional court setting mode, so that all participants can sit together with minors to deal with disputes.

Pre-court social investigation system. The specific method is that before the opening of the court session, the investigator of Social Investigator will investigate the personality characteristics, family situation, social interaction, growth experience, and the performance of the accused before and after the crime, and form a written report which will be read out by the social investigator in the court Trial.

Court education system. In the court trial, according to the type of juvenile defendant's crime and his motivation, etc., the public prosecutor, the defender, the legal agent and the educational unit are organized to carry out the court education in a targeted way.

Community correction. It is regarded as a form of restorative justice in the implementation stage. From the perspective of restorative justice, community correction can be either the result of restorative agreement or the remedy of the social relationship damaged by the criminal act of the wrong juvenile. Community correction is not only conducive to the recovery of the relationship between juvenile delinquency and the victim, but also conducive to the recovery of the relationship between juvenile delinquency and the community. Through *the amendment* (VIII) of the criminal law and the criminal law of 2012, the community correction of our country is entering the stage of legalization from the stage of exploration.

Non-imprisonment evaluation. At present, the proportion of juveniles sentenced to imprisonment is still high in China, so reducing the rate of imprisonment has become the target of juvenile trials in some local courts. Legal conditions and supervision conditions are the two factors to be considered in the sentence of non-imprisonment. The former is reflected in the case itself, while the latter needs to be based on a risk assessment. It is necessary to carry out the risk assessment on whether to sentence non imprisonment. Finally, according to the situation of risk assessment, it is decided whether to apply the non-imprisonment punishment to the juvenile. The assessment of non-imprisonment punishment enables those juvenile offenders who can still live in their families and communities, not to cut off the connection with their families , which is conducive to the recovery of social relations and promote the reintegration of into the society.

3.2. The Reason for Choosing Restorative Justice

3.2.1. Restorative Justice Corresponds to Traditional Judicial Idea

The establishment of a new judicial concept and system must consider the compatibility with the existing cultural tradition and the concept of rule of law.

"Even in some Western countries, laws or practices that are common, if they are not in harmony with local traditional practices, It will require more enforcement to enforce them. This illustrates the importance of establishing an effective and efficient socialist rule of law in our country, based on utilizing local traditions and practices.[4]

Although restorative justice is a judicial model originated from the West, however, looking at the judicial tradition in our country's history, we can find that there are many concepts and systems that are consistent with restorative justice, which provides a rich soil for the construction of restorative juvenile justice in our country.

For example, harmonious culture, restorative justice provides a model for the settlement of outof-court disputes. There is no shortage of consensus on the suppression of "litigation" and the Confucian "no litigation". For juvenile delinquency, Confucian culture advocates a special concept of tolerance that is very different from that of adults—emphasizes that the state and society have an inescapable responsibility for the healthy growth of young people, and gives more caring thought to the youth.

3.2.2. Restorative Justice Corresponds to Criminal Policy

The criminal policy of leniency is also one of the motivations for the emergence and development of restorative juvenile justice. Advocating the restoration of social relations, the protection of juvenile delinquency, and the promotion of juvenile reintegration into society undoubtedly reflect the lenient side of the criminal policy. In the reform and experiment of juvenile justice in various places, the implementation of the criminal policy of leniency and strictness is an important "flag" of these reforms and experiments. Although many juvenile justice reform measures with restorative justice elements do not have a clear legal basis, the

implementation of the lenient criminal policy still provides a basis for these juvenile justice reform measures. The combination of social policy of building a harmonious society and the implementation of the criminal policy of leniency and strictness actually provides different aspects of the impetus for the emergence and development of restorative juvenile justice in China. In the various stages and processes of investigation, prosecution, trial and correction, these reform measures have indeed reflected the role of leniency for juveniles who have committed crimes, the implementation of procedural diversions, the restoration of social relations and the promotion of social reunification, The achievement also provides kind of corroboration for the restorative juvenile justice to implement the criminal policy of leniency at the practical level.

3.2.3. Restorative Justice Corresponds to Social Policy

While building a harmonious society is the main social policy of our country at present, the emergence and development of restorative juvenile justice is in line with the needs of this social policy. Good procedure and judicial system are the strong guarantee of harmonious society. Because the juvenile is the future of the country and the nation, the juvenile abide the law, then the future of the whole nation will be in order, the juvenile is protected, then the future of the nation is protected. Therefore, the value orientation of the juvenile justice system also reflects the future trend of a society. Nowadays social contradictions increased a lot, the juvenile justice system is focused on punishment, or protection and recovery. From the point of view of building a harmonious society, of course, the latter is more conducive to the resolution of various social contradictions, more conducive to the protection of the future of the nation. It is in this context that restorative juvenile justice has emerged in China and has become a focus of reform in which judicial organs everywhere strive to resolve contradictions, protect juveniles and promote harmony.

3.3. The Dilemma of Restorative Justice in China

Despite these developments, many Chinese are still unfamiliar with the concept of restorative justice. Currently, there still exist gaps in our knowledge about the nature, extent, processes and outcomes of restorative justice practices in our country. compared with foreign countries, our research on restorative justice and recognition is still at an early stage. There are some problems in our country's restorative justice

3.3.1. High Imprisonment Rate of Minors

According to the document issued in 2014 *Analysis of Juvenile Delinquency Trailed by People's Court of The People's Republic of China*, in recent years, the proportion of minor's probation in China is about 40% and most minors were sentenced to not more than three years in prison, only a few minors were imposed heavy sentence. Although the rate of non-custodial penalty for juvenile delinquency has risen, in the light punishment appropriate for non-custodial penalty, the actual applicable proportion is not high. There are a large number of minors involved in criminal offenses, only with low social harmfulness. Under such circumstances, the use of non-custodial sentences is enough to enable juveniles to recognize the harmfulness of their criminal acts and not to commit crimes again. There is no need to impose more severe imprisonment sanctions on them. Putting those minors into prison will lead to high rates of recidivism, and failure to rehabilitate youth offenders. Hence, in many instances, the cost to society under our current juvenile justice is higher. What we should do is to provides treatment to the offender and seeks to modify his/her behavior.

3.3.2. Neglect of Victims' Rights

In recent years, the number of juvenile criminal victims has risen sharply in china, especially the sexual assault victim, due to their limited maturity. According to the survey conducted by the foundation Girls' Protecting: on average, 1.21 cases of sexual assault of children were

reported each day, which has increased nearly 30% over the same period of last year. According to the estimations of World Health Organization (WHO), 26.6% Chinese adolescents under the age of 18 have been physically abused, and 19.6% have been mentally abused. [5] Some extreme cases even made people shudder. These violations will be left juvenile criminal victims serious physical, material and spiritual damages for a long time and even permanently. The restorative justice focuses heavily on the victims, providing restitution to the victim; giving victims a direct involvement in the disposition process, thereby providing an emotional sense of restoration and justice done; and putting a human face on the offender, thereby reducing the victim's generalized fear of victimization. Hence, Attention to the rescue and protection of juvenile criminal victims is a powerful promoter for the development of restorative justice.

3.3.3. Lack of Community' Function

Firstly, at present, the concept of community in our country has not yet been implemented and the complete community system has not been established. Therefore, many services relying on the community construction are difficult to carry out. Secondly, professional social workers play a crucial role in the implementation of the restorative justice program. However, China has not yet fully popularized the system of social workers. The development of the social worker system in our country is very unbalanced. Only the eastern and central regions with relatively high economic levels have the conditions to hire and maintain a professional social workforce. Thirdly, compared with foreign countries, which rely on specialized organizations to lead the restorative justice, our country, due to the lack of professional service agencies, mainly relies on the judiciary to carry out and implement it. Lastly, restorative justice should run through the whole process of criminal proceedings, but at present the implementation stage of our country involves really less.

3.3.4. The Problems of Restorative Justice Measures in China's Youth Justice Practices

Considering of the advantages of the restorative justice system for minors, China conducted a series of explorations on the restorative justice of minors, many traditional community-based youth justice schemes, along with the newly created disposals, have all claimed to be examples of restorative justice---both those similar to the Western notion of restorative justice and those recognized as restorative justice merely in China, which mainly include conditional non-prosecution, social investigation and reporting system, community correction, the presence of appropriate adults, criminal reconciliation system, round table trial and so on. Although Restorative justice brings new hope for addressing the defects of the conventional criminal justice system, it still has its disadvantages.

(1) VOR - A Typical Restorative Justice Programme in China

Victim-Offender Reconciliation (known as "criminal reconciliation") perhaps is the only programme practised in China that virtually resembles the Western notion of restorative justice. The revised Chinese Criminal Procedure Law that came into force i 2012 has added special provisions for VOR. This programme have some defects: First, the scope is too narrow, our country's the legislation of juvenile delinquency and adult crime in China still has not an obvious borderline. Second, multiple factors lead to the low proportion of criminal reconciliation. On the one hand, due to the high cost of the procedure, the undertaker of the case does not have strong awareness of reconciliation. On the other hand, it is difficult to reach a settlement, because of right abusing by some parties, for example, there are cases, where the victim makes an unreasonable request or the defendant takes a very hostile attitude. Thirdly, the methods of reconciliation are single, the standards are not clear, and some reconciliation dissimilated into compensation procedures, especially alternative procedures are compensation from parents will make it very difficult for minors to receive education truly. Lastly, the system of criminal reconciliation has not yet formed a complete system, the followup corrective measures are not closely linked.

(2) Chinese Practice: Restorative Justice or Other Alternatives to Conventional Justice

There are doubts about the true nature of restorative justice practice in China. Some Chinese scholars argue that the existing practice are only restorative justice in name rather than in essence. These arguments are not totally unreasonable because it is true that a key element of the Western notion of restorative justice - victim satisfaction - is often missing in Chinese practices. I am doubt about whether the recent measures in Chinese youth justice practices are restorative justice or they are only alternatives to China's normal retributive justice, or is making such distinction really necessary?

(3) Failing to be Carried out at Each Stage of Criminal Procedure

Restorative justice should have a broader vision in juvenile criminal justice, including investigation, prosecution, trial and execution. There are few practices and researches involving in the execution, especially in the community correction. We do not have concrete measures and guidance to help juvenile offenders to correct their deficiencies and give them enough treatment.

4. Conclusion

Restorative justice for minors has been practiced in our country for more than ten years, and compared with the rich and extensive practice of extra-territorially, the operation of restorative justice for minors in our country is really out of their power. The fundamental reason is that our country only grasps the "shape" of restorative justice for minors, not "essence". The essence of juvenile restorative justice is more concerned about the importance of face-to-face communication between the minor perpetrator and the victim, so that the victim enjoys his rights and the perpetrator bears his responsibility, which requires the victim to express his voice as an independent party. Therefore, our country must clarify the status of the victim in restorative justice. And the minor perpetrator must take their responsibility. So it can not only be light treatment, but should let the perpetrator to cultivate a sense of responsibility, to prevent their re-offending at the same time, to help them return to society. At the same time, the implementation of restorative justice for minors must rely on powerful community to achieve results. Community concept took strong root in people's hearts. We should step up our efforts in this area.

As mentioned earlier, juvenile justice has experienced two classic models, a welfare and a retributive model. With the development of society, juvenile justice has emerged in the restorative model. The welfare model and the retributive model have their advantages and disadvantages. The restorative juvenile justice model emphasizes the restoration of social relations, on the basis of equal consultation between the juvenile delinquency and the victim, and the participation of multiple parties and the encouragement of the juvenile to take responsibility, while emphasizing the priority protection of the juvenile delinquency. Restorative juvenile justice is a forward-looking judicial model that promoting the return of juveniles to the community rather than excluding them. Trying to reduce the label of juvenile delinquency and repair damaged social relations, thus taking into account the interests of juveniles, victims, communities, societies and the State. As one scholar put it: "Restorative justice is important to the criminal justice of minors, but for adults." [6] "For most of the juvenile criminal suspects and defendants in our country, the procedural design under the concept of restorative justice seems to be a better choice. "It should be noted, however, that restorative juvenile justice is not a unique option for the juvenile justice system, but rather a complementary for juvenile justice models. An appropriate option is to establish the juvenile justice model with the "two-track system" of criminal and restorative models. Through the procedural diversion mechanism, on the basis of the voluntary principle, the juvenile delinquency cases meet certain conditions into the treatment of the restorative juvenile justice

model; Either cases in which the parties are unwilling to adopt a restorative model, or cases in which the restorative model has not been successful, are incorporated into or reverted to the criminal model. No matter which model, the juvenile should be given a certain degree of welfare protection.

In addition, because the current trial of restorative juvenile justice in our country is actually scattered and piecemeal, even in some places with great progress and better results. Whether from the legislative level or the content of the system, due to the limitations of authority, can not form an orderly system of restorative juvenile criminal justice system. From the long-term development of juvenile justice system, the institutionalization of restorative juvenile justice is beneficial to juvenile, society and the state.

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