

Restorative Justice Practice in China?

——Status Quo, Challenge and Future of Victim-Offender Reconciliation in China

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Abstract

The Victim-Offender Reconciliation accessory to the procedure of public prosecution (Xingshi Hejie), practiced by basic public security organs, procuratorates and courts since the advent of this century, is a new mode compared to the mediation or conciliation in the procedure of private prosecution or civil litigation collateral to criminal proceeding. This mechanism connects the criminal justice with the people's mediation or other kinds of mediations and reconciliation by the parties themselves. Thus, non-official settlements can assist the criminal justice and influence the decisions of authoritative organs. It is beneficial to protect and restore the victims' interests, urge the offenders to recognize the social norms and respect others' rights, and restore the ruined human relationship. VOR has many basic features with restorative justice, so it could be regarded as a Chinese mode of global restorative justice movement. Although the VOR mechanism generally works well, it brings obvious challenges, lying basically in three aspects: (1) the legitimacy of the VOR; (2) the relationship to the basic concept of crime; and (3) effects to the social reality. In the future, this mechanism should be implemented as much as possible without undermining the role of criminal justice.

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Prelude

It is not a new phenomenon in China to use reconciliation and mediation to settle the disputes caused by crimes. 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 In the early days of the Chinese legal system, following the foundation of the People's Republic of China, the people's mediation commission (PMC), within the urban neighborhood committee or villagers' committee, was granted competency to mediate over civil cases and minor criminal cases. Since the restoration of the legal system in China in 1978, reconciliation and mediation have in some circumstances been used to resolve the problems arising from some offenses.

The people's mediation institution is typical in contemporary Chinese society in settling disputes among neighborhoods.² Although this mechanism might be regarded as the formal inheritance of ancient China's civil mediation, it is very different from its proto-type, essentially because it has been endowed with the ideology of a new society.³ The *Provisional Regulations on the Organization of People's Mediation Committees*, adopted by the Government Administration Council (the predecessor of the State Council) on Feb. 25, 1954, provided that the PMC's function was to mediate common civil cases and minor criminal cases (Article 3). Thus, before June 17, 1989 when the current regulation was enacted, PMC had the competency to handle minor criminal cases that occurred in its neighborhood. In contrast, the current regulation provides that PMC can only deal with civil disputes through mediation (Article 5). However, since the advent of the new century, the idea that PMC can assist in resolving disputes arising from criminal offenses has gained in popularity, and such practices have already been adopted in Shanghai⁴, Jiangsu⁵ and

¹ Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 Cal. L. Rev., at 1201-1226; See Hu Xunsheng, Xia Xinhua, *Study on The Mediation Tradition in China*, Henan Politics and Law Public Administration College Journal, 2004(4), at 61.

² The *Regulation on the Organization of People's Mediation Commissions*, as adopted by the State Council on May 5, 1989, affirms the legal status of PMC: It is the basic mass organization in charge of mediating disputes among civilians within the urban neighborhood committee or villagers' committee, and is directed by the basic-level government and basic court (Paragraph 1 of Article 2); its function is to mediate civil disputes and thus to publicize laws, regulations and policy; and to educate the public to obey the laws and disciplines; and to respect social morality. (Paragraph 1 of Article 5) .

³ See Justice Robert F. Utter, *Dispute Resolution in China*, 62 Wash. L. Rev. at 393 (According to Utter, Chinese mediation today applies Communist ideology within the web of relationships surrounding the individual, while the traditional mediation system was the product of Confucian ideology and traditional institutions). Also see Fu Hualing, *Understanding People's Mediation in Post-Mao China*, FN12 (According to Fu, people's mediation differs from its traditional form in its nature, source of authority, purpose, method and consequence).

⁴ On July 30, 2002, the Yangpu District Bureau of Justice and Public Security Bureau in Shanghai City jointly issued "*The Implementation Advice on Joint-Mediation of Injury Disputes among Civilians (for trial implementation)*". According to this advice, after the public security organ accepts an injury case on the basis of a trivial imbroglio or a dispute between neighbors, if the parties are likely to opt for settlement via mediation, then the local police station can entrust the PMC in the subdistrict or town to mediate the case; if the mediation is successful, PMC will provide the mediation agreement, and the public security organ will stop treating it as a criminal or public security case. In April of 2005, the Yangpu District Bureau of Justice and the Procuratorate in Shanghai City jointly issued "*Some Provisions on Entrusting PMCs to Mediate in the Process of Handling Minor Criminal Cases (for trial implementation)*". According to this document, at the review and prosecution stage, the

some other provinces.

In rural areas of China, many minor criminal cases, such as those involving minor injuries or intentional destruction or damage to property, are privately settled between the victims and offenders although these resolutions are not actually allowed under the law.⁶ Within some ethnic minority clans in southwest China, many disputes which should be handled as criminal cases by the criminal justice process are settled by internal mediation.⁷ With the pervasion of national criminal justice practice, private reconciliation and internal mediation by ethnic clans are gradually shrinking. However, these methods may continue to be practiced for a long time.

Both the mediation as presided over by the local mass organization, along with the private settlement between the victim and offender, are performed beyond the purview of the criminal justice system. Within the criminal legal system, there was some mechanism of mediation or reconciliation for criminal cases. During the period

procuratorate can entrust the PMC to mediate the local minor criminal cases, if the parties are willing; if an agreement is reached, the procuratorate can then decide not to initiate prosecution. In November of 2005, the Yangpu District Public Security Bureau, Procuratorate, Court and Bureau of Justice jointly issued “*The Regulation on Authorizing PMCs to Mediate Minor Injury Cases in the Criminal Process (for trial implementation)*”. It provides that at any stage during the acceptance, filing, examination/prosecution, or trial stages of the criminal process, the related organ can entrust the PMC to mediate the cases; if the parties have agreed on the civil part of the compensation, then the criminal cases may be dismissed or not filed, or no prosecution may be initiated, or the defendant may be exempted from punishment. See, Huang Jingping, et al, *Current Situation and Prospect of VOR in Criminal Process*, in Huang Jingping and Zhen Zhen ed, *Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society*, printed by the Research Center for Criminal Jurisprudence of Renmin University, July 23, 2006, 50-51.

⁵ For example, the Nantong City in Jiangsu Province united the PMCs of the districts, towns and subdistricts, and then established a corresponding standing institute. Similarly, the mediation of social disputes is called “Great Mediation” (Da Tiaojie). In Chongchuan District, a center for mediating social disputes has been established. The district procuratorate issued a document with this center detailing *Provisional Measures on Bringing Civil Compensation Disputes Caused by Minor Offense into “Great Mediation” Mechanism*. Although this document focused on civil compensation, the result of mediation can directly influence the result of the related criminal case. At the first time, this procuratorate entrusted the center with 14 cases. After the mediations, the procuratorate supplied suggestions for lighter or mitigated punishments to the court of five cases, made decisions not to initiate prosecutions in another five, remanded to the public security organ four cases to dismiss, and made a decision not to arrest the suspect due to the absence of necessity in one case in which the victim’ relative requested mercy, and in which the center supplied a written suggestion. Only one case failed to settle because the parties could not make an agreement on the sum of compensation. The practice of Nantong City was praised by the Central Politico-Legal Committee. See, Li Xi, *On the Role and Function of Procuratorate in Dissolving the Social Disputes*, in Huang Jingping and Zhen Zhen ed, *Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society*, at 105-107.

⁶ See Zhang Rong, Xu Weihua, *Problem of Settling the Criminal Cases Privately in Rural Areas Should Not Be neglected*, Legal Daily, March 29, 2001 (In some villages and small towns, 70% of cases of personal injury, theft and bigamy were settled privately). Song ZhenYuan, *Probe into the Phenomenon of Settling Criminal Cases Privately in Rural Areas*, Ideal Society (Xiao Kang), 2004(1), 69 (An Investigation by the Chuangji law firm in Shandong province in 2003 showed that cases settled privately within the villages accounted for 25% of all criminal cases in rural areas). Wang Yuxiao, *The Troublesome Problem of Settling Criminal Cases Privately in Rural Areas*, ShanXi Daily, Apr. 20, 2001, 8 (In parts of Shanxi province, criminal cases that transpired in rural areas, which were then settled privately before being brought into the criminal justice process, account for 13% of all criminal cases).

⁷ Wu Dahua, *The Origin and Development of, Value and Inheritance of Ethnic Customary Law: The Examples of Miao and Dongs*, Ethno-National Study, 2005(6), at 11, 13.

of Sino-Japan War, such mechanism was used in the areas controlled by the Chinese Communist Party.⁸ After the establishment of new regime, such practice can be seen in the criminal justice in earlier period. *The Reply on Whether the Written Mediation or Judgment Shall Be Issued on Minor Injury Cases Handled by Other Means* (Fa Yan No. 11, 1965)⁹, adopted by the Supreme People's Court on May 5, 1965, provided that "it is unnecessary to issue a written mediation for a civil suit that is collateral to criminal proceedings or to a criminal written judgment on minor injury cases where settlement is made by making the offender compensate the victim's medical expenses. If the parties have already made the agreement on how much the offender will pay the victim, then the offender is exempted from criminal punishment." This provision showed that mediation could be used to settle some criminal cases in the criminal trial process. Since the restoration of the legal system in 1978, mediation can now be used to settle cases within the procedure of private prosecution and incidental civil action.

The court can conduct mediation within the procedure of private prosecution, and the reconciliation between the parties may lead to the termination of prosecution. Article 127 of the 1979 criminal procedure law (CPL)¹⁰ provides, "A people's court may mediate in a case of private prosecution; the private prosecutor may arrange a settlement with the defendant or withdraw his prosecution before a judgment is pronounced." Article 172 of the 1996 criminal procedure law retains this provision, and restricts the scope of application of mediation and conciliation to cases that are to be handled only upon complaint, and for which the victims have evidence to prove that those are minor criminal cases. But certain cases under private prosecution cannot be mediated, "cases for which the victims have evidence to prove that the defendants should be investigated for criminal responsibility according to law because their acts have infringed upon the victims' personal or property rights, whereas, the public security organs or the People's Procuratorates did not investigate the criminal responsibility of the accused." Civil suits collateral to criminal proceedings can be settled by mediation (Chapter VII of Part 1 of the Criminal Procedure Law).¹¹ Mediation can only be used during the civil part of the trial for cases of public

⁸ The Mediation Regulations on Civil and Criminal Cases in the Border Area among Shanxi, Gansu and Ningxia, promulgated in 1943, once provided, "all civil disputes shall be mediated; criminal cases, except the serious 23 crimes enumerated, may be mediated". In the fourth meeting of the commission of the border area government among Shanxi, Gansu and Ningxia in 1944, Li Boqu concluded, "civil cases shall be commonly mediated, and except the crimes of traitor and anti-revolution, most of criminal cases may also be applied with mediation. The Judicial Summary of the Border Area among Shanxi, Gansu and Ningxia (1944) mentioned that in the mediation on criminal cases, "according to the principle of being voluntary, the parties can stop debates and the procedure can be terminated; the victim can get substantial benefits, while the offender can be exempted from criminal punishment so that his living stuff will not be interrupted. As a result, the social peace has been improved." See He Bing, *The Methodology on the Resolution to the Disputes in Modern Society*, Beijing: Law Press, 2003, 19-20.

⁹ Reply (Pi Fu) is a kind of judicial interpretation.

¹⁰ This law was the first criminal procedure law, adopted at the second session of the Fifth National People's Congress on July 1, 1979, and revised in accordance with the *Decision on Revising the Criminal Procedure Law of the People's Republic of China*, as adopted at the fourth session of the Eighth National People's Congress on March 17, 1996. The revised law is generally called the 1996 Criminal Procedure Law or the current criminal procedure law.

¹¹ By its nature, incidental civil action is a special kind of civil litigation, thus, the basic principles of civil procedure shall be applied in it, including the principle of mediation.

prosecution. However, settlement in cases of civil liability, particularly the terms for the sum and payment period for the compensation, will affect the conviction and sentencing to some extent because these can be connected to the defendant's attitude towards admission of guilt and repentance. It is regarded as a discretionary circumstance of sentencing whether the defendant pays the costs of the victim actively; if he voluntarily chooses to pay enough to the victim in time, the judge or the collegial panel may consider applying a lighter punishment or in the cases of minor offenses, an exemption from punishment.

According to the criminal procedure law, the public security organs have not been granted competency to mediate these cases, however, practically speaking, in some circumstances, they may use it to settle minor criminal cases. Generally they file and investigate the cases which are under their jurisdiction and may constitute crimes, while they are likely to settle minor criminal cases, such as minor injuries or traffic accidents, with more flexible methods so that their caseloads can be reduced. Even if such cases were transferred to the procuratorate to initiate public prosecutions, these cases would always result in very light sentence, probation or exemption from criminal punishment.¹² The procuratorate has no competency to mediate in the criminal process, too. However, since the advent of the 21st century, some local procuratorates have started using victim-offender reconciliation (VOR) to handle criminal cases. Such practices are appreciated, and have gradually gained in popularity.

The VOR (Xingshi Hejie)¹³ studied in this paper, is the reconciliation between victim and offender (either the criminal suspect or defendant) which is accessory to the criminal procedure of public prosecution¹⁴, conducted or affirmed by the public security organ, the procuratorate or the court. Although it is not a new phenomenon to use mediation or reconciliation to settle criminal cases in China, using VOR is a new phenomenon in the procedural side of public prosecution. To use reconciliation to settle the cases of public prosecution does challenge our ideas on criminal justice and jurisprudence, and also causes anxiety and criticism. The invention of such a mechanism was concurrent with the introduction of the restorative justice practiced in Western countries, so the relationship between these two elements should be analyzed.

¹² Similar situations appear in the practice of the management of public security. According to the Law of People's Republic of China on Punishments in Public Order and Security Administration (adopted on Aug. 28, 2005), the public security organs have the power of punishment with respect to public security. Such punishments include warning, fine, administrative detention and revoking the license issued by the public security organs. Many acts of violation against other person's right can be punished by the public security organs. For example, the battery and light injury cases, in which the offender's acts don't constitute crimes, can be managed by the public security organs, and the punishments are always administrative detention. In many circumstances, if an offender can pay compensation to the victims, and the latter forgives him, the public security organ is likely to punish him with lenience.

¹³ If translated directly, Xingshi Hejie means "criminal reconciliation" or "criminal settlement"; a more suitable translation may be the "victim-offender reconciliation accessory to the criminal procedure of public prosecution."

¹⁴ Here, the procedure of public prosecution, in contrast to the procedure of private prosecution, means the one from the phase of filing the case by the public security organ to the judgment being effective.

Section I of this paper introduces the status quo of VOR in China. Section II analyzes its social background and reasons. Section III analyzes the relationship between the VOR in China and restorative justice. Section IV focuses on the challenges which the VOR has brought to the current criminal law theory. The last section briefly predicts the future of VOR in China.

I. Status Quo of the VOR Accessory to the Procedure of Public Prosecution in China

In the dictionary of restorative justice, victim-offender mediation (VOM) and victim-offender reconciliation (VOR) can be used interchangeably¹⁵, while in the Chinese legal system, the mediation (Tiaojie) is different from the conciliation (Hejie). In mediation, there must be an independent mediator to preside over the agreement of the parties. Sometimes the mediator may supply the proposal over which the parties negotiate. Reconciliation (Hejie), in the context of Chinese [law], emphasizes the agreement between the two parties. An independent third party is unnecessary or does not take a key role in this process. Certainly, in general, the agreement is legally effective only after the affirmation or approval by related authority.¹⁶

According to the current law and common jurisprudence, cases of public prosecution cannot be handled by mediation. The criminal procedural law does not give the authority to the public security organs, the procuratorates or the courts to conduct mediation in such cases, and thus they have no legal basis to settle such cases by mediation. It becomes quite obvious, therefore, that the term, “mediation in a case of public prosecution,” should be avoided, and that “reconciliation accessory to criminal procedure” is more suitable in this context, even though in many of these reconciliations, there is a third party who acts as de facto mediator.

Nowadays, a few procuratorates and public securities organs have begun to adopt VOR as a supplementary measure to settle criminal cases, though there is some variation in its execution. The design of the VOR emphasizes the negotiation and consultation between the offender (i.e. the criminal suspect or defendant in the procedure) and the victim and her relatives, with the aim of reaching an agreement. Because they have no authority to mediate criminal cases, these local public security bureaus and district or county procuratorates actually encourage the parties to reconcile themselves or they entrust the PMCs or other mediation organizations to settle the disputes. The Haidian district procuratorate in Beijing adopts the mode of

¹⁵ This description can be seen on the Wikipedia article: Victim-Offender Mediation, or VOM (also called victim-offender dialogue, victim-offender conferencing, victim-offender reconciliation, or restorative justice dialogue), is usually a face-to-face meeting, in the presence of a trained mediator, between the victim of a crime and the person who committed that crime. http://en.wikipedia.org/wiki/Restorative_Justice. However, the terms of mediation and conciliation are parallel in the Paragraph 1of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

¹⁶ See Chen Guangzhong, Ge Lin, *First Probe on Criminal Reconciliation, in China Law Science*, 2006(5), 4.

making parties reconcile by themselves, and afterwards examine the genuineness of the agreement; if they reconcile voluntarily and genuinely, the procuratorate will affirm the agreement and decide not to initiate public prosecution, or to remand the case to the public security bureau.¹⁷ The Yangpu district public security bureau, and the procuratorate and the court in Shanghai have the PMC conduct the mediations on specific cases. If the mediation is successful, the public security bureau will not file the case or dismiss the case, or the procuratorate will decide not to prosecute the offender, or the court will exempt the defendant from criminal punishment according to which stage of the procedure the case had progressed.¹⁸ The regulation stipulated by the Hunan provincial procuratorate provides that the following reconciliation agreements can be affirmed: (1) an agreement achieved by the parties themselves; (2) an agreement made by the parties with the support of their near relatives, the agent ad litem and/or the defender; (3) a reconciliation agreement via mediation conducted by PMC or other basic organization; (4) an agreement via mediation conducted by the representatives of the parties' units; and (5) an agreement via mediation conducted by any other organs or units within their authority.¹⁹ However, even though the public security organs and procuratorates have not the competency to mediate, their role in the achievement of the reconciliation agreement cannot be neglected or overlooked, and in fact, their personnel in charge of the case are likely to influence the process of reconciliation.²⁰ Few basic procuratorates have clearly declared that their personnel can preside in the reconciliation process.²¹ So the modes of the VOR can be put into three categories according to whether there is an independent mediator and who the mediator is during the process: (1) a mediation conducted by PMC; (2) a reconciliation between the victim and offender by themselves; and (3) a de facto mediation presided by the public security organ, procuratorate and court.²²

The criminal cases which can be settled through VOR are mainly minor injuries²³, especially those that occur between relatives or among neighbors. The

¹⁷ See, Huang Jingping, et al, *Current Situation and Prospect of VOR in Criminal Process*, in Huang Jingping and Zhen Zhen ed, Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society, 52-53.

¹⁸ Ibid.

¹⁹ Liu Ke, *Minor Criminal Cases Can Be Settled Privately*, Hunan Economics Newspaper (Hunan Jingji Bao), Nov.23, 2006, 3.

²⁰ In such kind of VOR, the functions of the procuratorate are: (1) to connect the parties and get their true will, and then convey such information between them; (2) to supply a place for carrying out the reconciliation and act as a witness. But the procuratorate or the prosecutor can not make any signature or affix a seal on the written agreement. See Programme group of Dongcheng District Procuratorate in Beijing City, *Empirical Analysis on the VOR Accessory to the Procedure of Public Prosecution Used by Procuratorates in Beijing City*, in Huang Jingping and Zhen Zhen ed, Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society, 385.

²¹ The Chaoyang District Procuratorate in Beijing adopted this model. Its internal implementation regulation on the process of handling minor injury cases provides that if the criminal suspect and the victim have entrusted their lawyers, then the lawyers can negotiate; if one of parties has not entrusted a lawyer, the procuratorate shall preside over the negotiation.

²² Chen Ruihua, *Model of Private Cooperation in the Criminal Procedure- the Rise of Criminal Settlement in China*, in China Law Science, 2006(5), 16.

²³ The Supreme Court, the Supreme Procuratorate, the Department of Public Security and the Department of

Haidian District Procuratorate in Beijing also utilizes VOR to deal with cases of thefts committed by juveniles and undergraduates.²⁴ The Yuhua District Procuratorate in Shijiazhuang has used VOR to deal with cases of traffic accidents, embezzlement by an employee of a company and fraud.²⁵ On Nov. 3, 2006, the Hunan Provincial Procuratorate began promulgating the *Regulation on Applying the VOR by Procuratorates to Handle Criminal Cases* (for trial implementation), which provides that such cases are mainly minor criminal cases and those committed by juveniles under specific conditions as follows: (1) the suspect or defendant is a natural person²⁶; (2) the basic facts are clear and the basic evidence is reliable and sufficient; (3) the act of the suspect violated the criminal law; (4) the suspect shows true repentance and has no dissenting opinion on the major facts.²⁷

Generally, the process of VOR has seven phases pursuant to the current practice: (1) filing of a request on VOR and its acceptance; (2) preparation; (3) statement; (4) consultation and dialogue; (5) agreement; (6) examination; and (7) performance.²⁸ In 2002, the Chaoyang District Procuratorate in Beijing issued the *Detailed Rules on the Process for Minor Injury Cases (trial implementation)*, an internal regulation which provides that the prosecutor can submit a report to the prosecutorial committee on the final examination of the case suggesting that it should not initiate prosecution. The prosecutorial committee then can make the decision not to prosecute the suspect, on the condition that the criminal suspect admits his or her guilt, and the victim (a) voluntarily submits to negotiations to agree on compensation, and (b) requests that the procuratorate not continue prosecution. In addition both victim and defendant must sign a written document, and the suspect must have already submitted the compensation fee to the procuratorate. After the procuratorate decides not to initiate the prosecution, and if no petition or complaint arises within the time limit, then the procuratorate will give the fee to the victim and have it put on record.²⁹

Justice stipulated the comprehensive standards on how to determine a minor injury. According to Article 234 of the Criminal Law of China, anyone who intentionally inflicts a minor injury upon another person shall be sentenced to a fixed-term imprisonment of not more than three years, a criminal detention or public surveillance.

²⁴ See, Huang Jingping, et al, *Current Situation and Prospect of VOR in Criminal Process*, in Huang Jingping and Zhen Zhen ed, Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society, 52-53.

²⁵ Fu Wenkui, Wang Yuanhao, *On the Experience and Problems of the Practice of VOR*, in Huang Jingping and Zhen Zhen ed, Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society, 404.

²⁶ According to the Criminal Law of China, units, such as companies, enterprises, institutions, State organs or organizations can be the subjects of specific crimes (Article 30). Thus, according to the regulation, the cases done by a unit cannot be handled with VOR.

²⁷ Liu Ke, *Minor Criminal Cases Can Be Settled Privately*, Hunan Economics Newspaper (Hunan Jingji Bao), Nov.23, 2006, 3. On Dec. 6, 2006, the Kaifu District Procuratorate in Changsha, Hunan Province, made the decision not to initiate prosecution of an offender who had negligently caused a traffic accident after the parties reconciled.

²⁸ See, Huang Jingping, et al, *Current Situation and Prospect of VOR in Criminal Process*, in Huang Jingping and Zhen Zhen ed, Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society, 52-53.

²⁹ See, Legal Daily, Jan. 17, 2006.

The process of VOR as handled by the public security organs is very similar to the one noted above. The Haidian district sub-bureau in Beijing has established two internal regulations: the *Related Regulation on Handling the Cases of Injury and Battery Seriously*, and the *Principles and Issues Which Should Be Noticed in Handling Light and Minor Injuries*. Both of the regulations involve the process of VOR on minor injury cases. During the filing stage, the sub-bureau accepts the case if after a preliminary forensic examination the wound is deemed a minor injury, and the offender and victim have not agreed on any compensation; if the parties have already reconciled, the sub-bureau will generally not file or investigate the case. Those minor injury cases that have been filed can be settled by VOR if the parties are willing to do so, and the circumstance under which the victim is threatened or pressured should be avoided. It entrusts a PMC to mediate the dispute and let the parties reconcile. If they reconcile successfully and agree upon compensation, the public security organ will dismiss the criminal case.³⁰

After the reconciliation agreement is reached and the criminal suspect or defendant genuinely repents and affirmatively compensates his victim, if it is unnecessary to punish the defendant, then the public security organ, the procuratorate or the court can decide to terminate the proceedings. If the case is at the investigative stage, the public security organ can dismiss the case (Article 130 of Criminal Procedure Law); if it is at the examination and prosecution stage, the procuratorate can decide not to initiate a public prosecution (Article 142 of CPL), or it can remand the case to the public security organ to dismiss the case; if the case has reached trial, the court may decide to exempt the defendant from any criminal punishment (Article 37 of criminal law)³¹. The *Advice on Issues of Application of Law in the Current Handling of Minor Injury Criminal Cases*, jointly issued by the Zhejiang provincial higher people's court, provincial procuratorate and the provincial public security department in May of 2004, provides that during the investigation or examination process of a minor injury criminal case, the public security organ can dismiss the case, or the procuratorate can decide not to initiate prosecution, if the following conditions have been verified: (1) the parties have voluntarily reached an agreement on the compensation and signed a written document; (2) after the reconciliation, the victim requests or agrees by a written form not to investigate or prosecute the offender any more; (3) the offender shows true repentance and his danger to others no longer exists or seems so slight that further punishment is unnecessary.³² The Anhui provincial public security bureau, together with the provincial higher court and procuratorate,

³⁰ Yang Yuqi, *On the Experience and Problems of the Mediation of Minor Injury*, in Huang Jingping and Zhen Zhen ed, *Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society*, 198-199.

³¹ It provides, "If the circumstances of a person's crime are minor and do not require criminal punishment, he may be exempted from it; however, he may, depending on the different circumstances of the case, be reprimanded or ordered to make a statement of repentance, offer an apology or pay compensation for the losses, or be subjected to administrative penalty of administrative sanctions by the competent department."

³² Xu Wenhong et al, *On the VOR in Criminal Justice and Community Correction*, in Liaoning Public Security and Judicial Administrative Cadres College Journal, 2006(4), 42.

formulated the *Advice on Some Issues of Handling Intentional Injury Cases (Minor Injury)* in 2005, which contained similar provisions to that of the Zhejiang provincial public security and judicial organs.³³ But, if the offender is a recidivist or if his crime was serious, he must still be prosecuted even after parties have reached a reconciliation agreement. The procuratorate may suggest to the court that it should sentence the defendant with lenience, although it has no de jure authority to influence the court, the court always adopts such a suggestion.

Such VOR practice has had a history of several years, but it has taken a distinctive role in dealing with minor injury cases. From 2001 to 2002, 40% of minor injury cases in Weihai had been terminated after reconciliation. From January of 2003 to June of 2004, the Gao district public security sub-bureau in Weihai accepted 89 minor injury cases, 43 of which were dismissed after the parties reconciled among themselves. Meanwhile, the Huancui district public security sub-bureau accepted 165 minor injury cases, 34 of which were dismissed after the reconciliation.³⁴ From Jul. 1, 2003 to Dec. 31, 2005, the prosecution offices of the seven procuratorates in Beijing accepted 27,427 cases, including 4,607 minor injury cases making up 16.8 % of all cases. In all minor injury cases, 667 cases were wound up by the procuratorates after reconciliations had been achieved, 534 cases were remanded to the public security organs for dismissal, and in 129 cases, it was decided that prosecution would not be initiated; only 4 cases were prosecuted to the court.³⁵ By October of 2006, minor injury cases in which the public security organs in Beijing had arranged for parties to settle, and which were then dismissed accounted for 35% of all cases; more than 1/5 of minor injury cases were terminated by the procuratorates after the parties had made reconciliation agreements.³⁶

The effects of the VOR practice seem positive and optimistic. On the one hand, the offender may not be sentenced to imprisonment, or be punished with lenience when his crime is serious; on the other hand, the victim is likely to accept the result because this amount is always higher than the one that would have been required by a court judgment under the law. The caseloads of the public security organs and the procuratorates can then be reduced by some amount, and the time spent in handling the cases can be shortened. Taking the practice of the Chaoyang district procuratorate

³³ It provides that in an investigation or examination of a case of intentional (minor) injury, the public security bureau may dismiss the case, or the procuratorate may remand the case to the public security bureau, or to decide directly not to initiate a prosecution, so long as the following circumstance can be satisfied: (1) the case is caused by a civil dispute; (2) the parties reconcile and voluntarily submit to a written agreement on the compensation and its execution, and the victim request or agree by a written form not to conduct further investigations nor to initiate further prosecution of the offender; (3) the offender shows true repentance and who no longer poses a dangers to others.

³⁴ Tang Feng, *On the VOR Accessory to the Procedure of Public Prosecution- Taking the Minor Injury Cases as the Point*, <http://www.sinolaw.net.cn/news/xrcq/yczpzx/2004828212414.htm>.

³⁵ Wan Xingya, Li Li, *The VOR in Criminal Justice: Private Settlement Being Accepted Gradually*, in *China Youth Daily*, July 25, 2006, 4.

³⁶ Sun Chunying, Deng Kezhu, *Beijing Strengthens the Mediation on Minor Injury Cases*, in *Legal Daily*, Nov. 29, 2006, 2.

as an example, the average time period to handle a case has decreased from more than 100 days to 90 days after it began to apply this mechanism to handle the minor injury cases. The average compensation fee is 19867 RMB, apparently higher than the average sum of the judgment by the court which is just 6372RMB. The aperiodic reviews on some cases showed that the percentage of satisfaction was 100%.³⁷ Another advantage of VOR is that it can reduce the percentage of the arrestees before trial. An investigation, carried out by the Dongcheng district procuratorate in Beijing City on 112 minor injury cases settled through VOR in 2005, showed that only 29 criminal suspects in these cases were arrested, taking the number of 22.1%, while 53.9% of all suspects of minor injury cases investigated from Jul. 1, 2003 to Dec. 31, 2005 were arrested.³⁸

The VOR accessory to the procedure of public prosecution is a new mode compared to other kinds of mediation or reconciliation. Such mechanism combines the criminal justice with the people's mediation or other kinds of mediations and reconciliation by the parties themselves. Therefore, the non-official settlement can assist the criminal justice and influence the decision of authoritative organs. In a strict sense, its formation began during the turn of the last century, concurrently with the introduction of restorative justice theory from the West.

II. Formation of the VOR Accessory to the Procedure of Public Prosecution in China

It has only been since the beginning of this century that the VOR accessory to the public prosecution has been used regularly as an actual institution. Which public security organ or procuratorate was the first to use the term of "Xingshi Hejie" and adopt it as a system, the author was not able to obtain any accurate information on this question until now. It seems that the first discussion on this issue occurred in 2000,³⁹ and that the first formal internal regulation, *The Detailed Rules on the Process for Minor Injury Cases (trial implementation)*, was stipulated by the Chaoyang District Procuratorate in Beijing in 2002.

One of the major motivating factors in the basic public security and judicial organs to use VOR to settle the minor criminal cases was to improve the efficiency in

³⁷ Li Song et al, *Promoting the VOR, Percentage of Satisfaction Is 100%*, in *Legal Daily*, Jan. 17, 2006, 5. However, another research, carried out by Dongcheng District Procuratorate gave a different conclusion. It showed that average time spent on the minor injury cases dealt with VOR is 41 days, and only 51.8% of such cases were settled within a month. If compared with the time spent on the cases dealt with the summary procedure which is averagely 4 days, the sufficiency dropped a lot. See Programme group of Dongcheng District Procuratorate in Beijing City, *Empirical Analysis on the VOR Accessory to the Procedure of Public Prosecution Used by Procuratorates in Beijing City*, in Huang Jingping and Zhen Zhen ed, *Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society*, 383. But if compared with the time spent in common procedure, the mechanism with the use of VOR seems more sufficient.

³⁸ Programme group of Dongcheng District Procuratorate in Beijing City, *Empirical Analysis on the VOR Accessory to the Procedure of Public Prosecution Used by Procuratorates in Beijing City*, 383.

³⁹ Liu Ke, *Minor Criminal Cases can be settled privately*, *Hunan Economics Newspaper (Hunan Jingji Bao)*, Nov.23, 2006, 3.

handling case-loads, thereby allowing them to put more resources and energy on grave and complex cases. Although there is no complete cost analysis on every stage of the criminal procedure, it is obvious that both the time can be saved and caseloads can be reduced if the cases are settled at the investigative or examination stage.⁴⁰ In these years, the amount of criminal cases in China has steadily increased⁴¹. This in turn has put a great deal of pressure on personnel whose salaries have increased relatively slowly. At the same time, the perfecting of the criminal procedure regulations and the rule of evidence make them to spend more time and energy on managing cases. Thus, it is reasonable for them to look for more efficient way to cope with such challenge, and the VOR can satisfy this need.

Maximizing the interests of the victims is the major justification of the VOR. Pursuant to Article 77 of the Criminal Procedure Law, if a victim has suffered material losses as a result of a defendant's criminal act, she shall have the right to file an incidental civil action during the course of the criminal proceedings. According to this provision, if the victim seeks compensation for mental injury, the court will not accept the case.⁴² Similarly, the victim and her relatives have no substantial right to ask the offender to repent or apologize. "Material losses" are construed as the direct economic losses caused by the criminal act, including medical expenses, funereal fees, etc; the so-called "indirect losses," such as lost wages or employment, are not under the scope of the compensation. In most circumstances, the compensations decided by the courts do not satisfy the needs of the victims. Even more unfortunately, in many situations, the judgments on the compensation cannot be enforced easily or in time. Statistics by an intermediate court in Beijing showed that the percentage of victims who obtained compensation through incidental civil actions was very low. In total, victims in these incidental civil cases applied for 19.18 million RMB, but of which only 1.23 million RMB was actually executed.⁴³ Statistics on the executive section of the Dongguan

⁴⁰ See Huang Jingping, et al, *Current Situation and Prospect of VOR in Criminal Process*, in Huang Jingping and Zhen Zhen ed, *Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society*, 53.

⁴¹ From 1998 to 2002, 3,601,357 criminal suspects were arrested with the approvals of all levels of procuratorates in China, and 3,666,142 defendants were prosecuted, increasing at the respective rates of 24.5% and 30.6% as compared to the period of 1993-1997 (Report of the Supreme People's Procuratorate, March 11, 2003). In 2003, 764,476 persons were arrested with the approvals of procuratorates, and 819,216 persons were prosecuted (Report of the Supreme People's Procuratorate, March 10, 2004). In 2004, 811,102 persons were arrested with the approvals of procuratorates, and 867,186 persons were prosecuted, increasing at the respective rates of 8.3% and 9.3% as compared with the amounts of 2003 (Report of the Supreme People's Procuratorate, March 9, 2005). In 2005, 860,372 persons were arrested with the approvals of procuratorates, and 950,804 persons were prosecuted, increasing at the respective rates of 6.1% and 9.6% compared with the amounts of 2004 (Report of the Supreme People's Procuratorate, March 11, 2006).

⁴² The Supreme People's Court, *Reply on Whether the People's Courts Accept Civil Actions of the Victims for Mental Damage* (Fa Shi, 2002, No.17).

⁴³ Yuan Jing, *Dilemma and Route of VOR in Criminal Justice in China-Focusing on the VOR at the Stage of Trial*, in Huang Jingping and Zhen Zhen ed, *Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society*, 333. In a minor injury case that happened between neighbors, the defendant paid 36,000 RMB to the victim, including medical expenses, nursing charge and lost wages, far higher than the amount which the victim would have won if he had filed an incidental action. See Wu Xiaofeng, *VOR in Criminal Justice Met Difficult Problems*, *Legal Daily*, Jul, 26, 2006.

intermediate court in Guangdong province showed that in 2005, victims had applied in total for an execution of over 8 million RMB, but of which only 0.247 million RMB was actually executed, while in 2006, the percentage of actual execution was 0.5%.⁴⁴ In VOR, the defendant is more likely to pay damages in order to get a more lenient result. Compared with the process of filing an incidental civil action, the victim's monetary interests are always realized more smoothly and fully in VOR.⁴⁵ In this way, the victim will not pursue other legal remedies or appeal to higher authorities for help. In Beijing, after VOR has been carried out, if the parties have reached a reconciliation agreement thus terminating the case, then no victim will initiate a further private prosecution or appeal to a higher authority.⁴⁶

Another key reason for the acceptance of VOR is that it is a positive mechanism in resolving social conflicts. In recent years, there have been a large number of appeals to higher authorities on all varieties of civil disputes (including minor criminal cases).⁴⁷ Why have the minor injury cases been mainly selected to be applied with the VOR? Besides the fact that the natural characteristics of such cases fit well with VOR, a more important reason is that a high rate of minor injury offences could easily lead to social conflicts even when individual cases on their own appear inconsequential.⁴⁸ In one traffic accident case, although the victim was found primarily responsible, his relatives asked the court to make a judgment in his favor by threatening to appeal to higher authorities because they wanted to obtain the compensation in time.⁴⁹ Sometimes, the victims and their relatives wanted to transfer the liabilities of the offenders to the government or judicial organs, so such cases proved very difficult to settle. In the face of these difficulties, the VOR mechanism is a good choice to mitigate social conflicts. It is also one of the major reasons why the

⁴⁴ See, Zheng Siqi et al, *Dongguan Court Explained the Reason of Paying Money for Lenient Punishment: Hopeless Compensation Urges the Victim and Offender to Reconcile*, www.csonline.com.cn/news/1/1/200702/05/t20070205_148959.htm.

⁴⁵ In a minor injury case happened between the neighbors, the defendant paid 36000 RMB to the victim, including the medical expenses, the nursing charge and the charge of the loss of working time, far higher than the amount which the victim would obtain if he filed an incidental action. See Wu Xiaofeng, *VOR in Criminal Justice Met Difficult Problems*, *Legal Daily*, Jul. 26, 2006.

⁴⁶ Sun Chunying, Deng Kezhu, *Beijing Strengthens the Mediation on Minor Injury Cases*, in *Legal Daily*, Nov. 29, 2006, 2.

⁴⁷ See, Lixi, *On the Role and Function of Procuratorates in Resolving the Social Conflicts*, in Huang Jingping and Zhen Zhen ed, *Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society*, 105.

⁴⁸ Li Yubei, *To Restrict the VOR on the Minor Injury Cases at the Stage of the Investigation by the Public Security Organ*, in *China Prosecutor*, 2006 (5), 11 (During the "Great Receiving Appeals Campaign" organized by the nationwide public security organs, minor injury cases accounted for a certain percentage of all appeals. Although each minor case was not serious, it was also difficult to handle, and the offenders often fled after committing the offense. Because of the limitation of resources available to public security organs, personnel are always against dealing with such cases, and either delayed in collecting evidence or did an incomplete job on evidence such that many minor cases were unable to be transferred to the procuratorates for prosecution. If such a case cannot be terminated or dismissed, the victim, or sometimes the offender's relatives, will appeal to the higher authorities for help.)

⁴⁹ Su Shiwen et al, *On the Reconciliation of Minor Crimes In the View of Social Effects*, in Huang Jingping and Zhen Zhen ed, *Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society*, 160.

people's mediation institution has revived after years of depression.⁵⁰

It is not the best way of settling the social disputes to deal with the minor injury cases along the regular criminal process. Just like Nils Christie once said, "Criminal conflicts have either become other people's property"- primarily the property of lawyers- or it has been in other people's interests to define conflicts away, and "it is the Crown that comes into the spotlight, not the victim."⁵¹ The victim and her relatives hope her interests can be recovered and her rights respected. However, even though the current criminal procedure law grants the victim the status as a party, her voice is always very weak during the criminal proceedings. The policemen and the prosecutors with their heavy caseloads have little patience to hear the victim's endless grudges and condemnations. During the trial, the charge of the prosecutor and the defense of the defendant may make the victim recall her miserable experience. If the compensation can not meet her actual need, she will pursue further legal remedy or appeal to higher authorities to put pressure on the court or local government. In settling the disputes by VOR, the victim can be satisfied both mentally and economically so that she will willingly accept such a result.

The regular criminal justice model may lead to even more dispute and discontent. In many criminal cases occurring in neighborhood, the victims are always partially at fault. Thus, the offender of such a case will be reluctant to accept the conviction because he may think it is unfair to him. Under such circumstances, he may appeal or pursue other legal remedies, and his relatives may turn to higher authorities for help. Once a sentence is rendered, the offender may be unwilling to pay additional damages because he feels he has already been punished. Although the judgment may order the offender to pay in full immediately, he may attempt to evade paying the fine by offering excuses, such as financial hardship or familial responsibilities. In VOR, the offender may receive some incentive to pay the compensation in exchange for a more beneficial result. This way, he will accept this result and not seek other resolutions.

The Non-Confinement theory influences the formation of VOR. Although such theory was introduced into China only a short time ago, it has been accepted widely among the academia, and has met with a positive attitude from the government. Besides considerations on costs, a more persuasive reason for Non-Confinement

⁵⁰ *The Advice on the Improvement of People's Mediation in New Era*, issued by the Supreme People's Court and the Department of Justice, mentioned, "with the establishment and development of the socialist market economic system and the adjustment of all kinds of relationships of interests, many new social conflicts and disputes have appeared, their subjects and contents becoming increasingly diversified and complicated. If many such disputes cannot be settled in time, they may evolve into massive incidents, and even lead to criminal cases, so as to seriously interfere with the social stability and the lasting development of economy. All levels of people's courts, administrative organs of justice and PMCs shall think highly of the people's mediation work, ... and treat it as the first line of defense to settle disputes among civilians, and to be more solid and dependable according to the new situation." Also see, Aaron Halegua, *Reforming the People's Mediation System in Urban China*, 35 HKLJ 715-749.

⁵¹ Nils Christie, *Conflicts as property*, in Declan Roche ed: *Restorative Justice*, Hants: Dartmouth Publishing Company, 2003, 43.

theory is that it is not worth to imprison minor criminal offenders. With the loss of reputation, social status, a job and even family, the offender will surely meet many obstacles when he returns to society. The VOR process could give the defendant an opportunity to introspect his own fault, with the high compensation acting just like a strict punishment. Because an admission of guilt and repentance are the basic conditions in carrying out VOR, the offender is urged to examine his own mistake and reaffirm his legal consciousness. Under such circumstances, considering his low personal dangerousness, it becomes unnecessary to put him in prison.

The widespread use and acceptance of the VOR in these two years can be attributed to two public policies. The first is promotion of the “socialist harmonious society” that started in late 2004. Many scholars trace this policy to the theory of “He” (Peace), one of the key tenets of Confucianism.⁵² Although there are different theories underlying the concept of the “harmonious society,” this policy receives strong support from criminal law scholars. The improvement of social harmony has been connected to developments in criminal justice. It may well be that VOR became a public topic as a result of the criminal justice system’s response to the “harmonious society” policy. Because VOR can be more effective for settling social disputes caused by minor offenses, it is supported from the top down. The second is the criminal policy of “Companion of Strictness and Lenience,” which began in early 2006. This policy can be connected to the theory of managing state affairs in ancient China.⁵³ The VOR can be seen as a manifestation of the lenient portion of the policy, viz. to be lenient in the handling of minor criminal cases.

In all, the formation of such VOR practice has its own social background and theoretical ground. It seems beneficial to all parties of the procedure of public prosecution. For it looks so similar to the practice of restorative justice in western countries, the relationship between them needs to be clarified.

III. VOR in China: A Chinese Mode of Restorative Justice?

It has only been a few years since VOR emerged as on the scene, and at the same time, the theory of restorative justice was introduced into China. Some Chinese academics consider it as a transplanted idea,⁵⁴ a shadow of the theory of restorative justice

⁵² E.g., Fan Chongyi, Chen Jingtian, *The Thought of Peace and Harmony and the Construction of the VOR in Criminal Justice*, in Huang Jingping and Zhen Zhen ed, Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society, 79-93.

⁵³ Confucius (551-479 B.C.) once praised Zi Chan, the prime minister of Zheng State during the Spring and Autumn Periods, that “lenience is supported by strictness and strictness is supported by lenience, so the government will be in balance.” See < Zuo Zhuan • The 20th year of Zhaogong >. Because the “Companion of Strictness and Lenience” policy is so similar to such ideas of ancient China, it can easily be regarded as a revival of the traditional theory of managing state affairs in ancient China.

⁵⁴ On Jul. 23-24, the Research Center for Criminal Jurisprudence of Renmin University of China held a conference on the VOR accessory to the procedure of public prosecution. In this conference, a few scholars considered that such kind of VOR is introduced from abroad. See Huang Jingping, et al, *Current Situation and Prospect of VOR in Criminal Process*, in Huang Jingping and Zhen Zhen ed, Papers Collection of the Conference on VOR in Criminal

practiced in western countries. But there has been no evidence which suggests that the practices of these basic public security organs and procuratorates have been influenced by the theory of restorative justice. However, it might be explained by the latter, and regarded as a Chinese mode of restorative justice.

China was still at the eve of the restoration of legal system when so-called restorative justice practice started in western countries. Such programs began with the landmark use of victim-offender mediation of a vandalism case in Kitchener of Canada in 1974.⁵⁵ During the 1990s and continuing in the 2000s, restorative justice has been one of the most rapidly proliferating criminal justice innovations.⁵⁶ This model has been accepted gradually by international community, and has become a key aspect of the victims' right movement.⁵⁷

It has also 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,⁵⁸ most of them published after 2004.⁵⁹ Simultaneously, some newspapers reports which quoted the points of some scholars have broadened its influence amongst the academia.⁶⁰ In April of 2002, a Chinese

Justice under the Context of Harmonious Society.

⁵⁵ http://en.wikipedia.org/wiki/Restorative_Justice; *see also*, <http://www.restorativejustice.org/intro/tutorial/processes/vom>.

⁵⁶ Barbara A. Hudson, *Understanding Justice- An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory*, Philadelphia: Open University Press, 2003, 75.

⁵⁷ United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) advocates in the seventh paragraph of its annex, "informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims". The Vienna Declaration on Crime and Justice: Meeting the Challenge of the Twenty-first Century, issued during the tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders on April 10-17, 2000, reclaims the promise of restorative approaches to justice that aim to reduce crime and promote the healing of economic and social development and of human security. Its paragraph 27 declares, "we decide to introduce, where appropriate, national, regional and international action plans to support of victims of crime, such as mechanisms for mediation and restorative justice, and we establish 2002 as a target date for States to review their relevant practices, to develop further victim support services and awareness campaigns on the rights of victims and to consider the establishment of funds for victims, in addition to developing and implementing witness protection policies." And its paragraph 28 advocates, "we encourage the development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all other people." The Economic and Social Council United Nations adopted the resolution of the Basic principles on the use of restorative justice programmes in criminal matters on July 24, 2002. Also see Jennifer Gerarda Brown, *The Use of mediations to Resolve Criminal Cases: A Procedural Critique*, 43 Emory L.J.1256; Joan W. Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 Hastings Const. L.Q. 720 (Restorative justice is the most hopeful, least cynical, and least co-opted aspect of the victims' right movement).

⁵⁸ The earlier papers are: Wu Zongxian, *Review on the Restorative Justice*, in Jiangsu Public Security Junior College Journal, 2002(3); Zhang Qingfang, *On the Restorative Justice*, in Chen Xingliang ed, *Criminal Law Review*(12), Beijing: Law Press, 2003; Song Yinghui, Xushenjian, *On the Procedure of Restorative Justice Model*, in *Modern Law Science*, 2004(3). *See also*, Liu Renwen, *The Primary Step of Criminal Policy*, Beijing: China People's Public Security University Press, 2003, at 381-385.

⁵⁹ Inquiring on the biggest periodical website, www.cnki.net, on Jan.20, 2007, there are 70 papers relating to this topic, of which 65 were published since 2004.

⁶⁰ For example, *Probing the Value of the Juvenile Justice*, in *People's Court News*, Sep. 30, 2002 (Guo Jian'an's points); Liu Renwen, *Restorative Justice: Face-to-Face to Resolve the Conflicts*, in *Prosecution Daily*, Jul. 23,

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 Programmes in Criminal Matters*.⁶¹ It was in early 2004 that the first conference on restorative justice on the Chinese mainland was held by Nanjing University.⁶² With the introduction of the restorative justice theory, the practice of victim-offender reconciliation in the West has been recognized gradually by the Chinese academia.⁶³ So considering the time of introduction of the theory of restorative justice practiced in western countries, it can not be the theoretical basis of the VOR in China.

However, the VOR has many similar specific characteristics with restorative justice, so it could be regarded as a Chinese mode of global restorative justice movement. John Braithwaite once said, "All cultures have restorative justice traditions defined in these terms, particularly in their families, schools, and churches, just as they all have retributive traditions".⁶⁴ He recognizes that there is already some restorative justice practice whose theory can be traced back to Confucius, "arguably the most influential thinker on restorative justice the world has known."⁶⁵ Pursuant to his point, the civil mediation and official mediation conducted by Yamun (the name of the governments of ancient China) can be included in the scope of restorative justice, because such mechanisms incorporate the four basic features of restorative justice: Encounter, Amendment, Reintegration and Inclusion.⁶⁶ Similarly, it includes the practices of mediation carried out in the areas administered by Communist Party before the foundation of P.R.C., and the people's mediation during the period of 1954-1989.

Some Chinese scholars have different perspectives. A few scholars believe the

2003; *Strengthen the Research on Juvenile Offenses Protect the Healthy Grow-up of Youth*, in Legal Daily, Oct. 28, 2004.

⁶¹ Li Zhongcheng, *On Several Issues on the Programmes of Restorative Justice*, Chinese Lawyer, 2002 (3), 55.

⁶² Di Xiaohua, Sun Jibin, *Summary of the Sixth Fei Yimin Law Forum*, Legal Daily, Feb. 5, 2004. In that conference, Daniel Van Ness, the director of the American Center for Restorative Justice gave a speech.

⁶³ The earlier papers are: Liu Lingmei, *Review on the Theory and Practice of VOR in Western Countries*, in Modern Law Scienc, 2001 (1); Ma Jinghua, *The Theoretical Basis of VOR and Its Systematic Design in China*, in Law Science, 2003 (4); Xiang Chaoyang, Ma Jinghua, *The Value of VOR and Its Construction in China*, in China Law Science, 2003 (6).

⁶⁴ John Braithwaite: *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 Crime & Just, 6.

⁶⁵ Ibid, 12. Braithwaite and other researchers considers that Bang Jiao is "the most important contemporary restorative justice institution in China." Bang means help, Jiao means education and admonition. The practice of Bang Jiao began in 1980s. Its aim is to help the juveniles who have commits some illegal or minor criminal acts but are unnecessary to be punished by criminal penalty or reeducation- through-labor, and persons released from prisons and educate them to make them obey the laws and social norms. Nowadays, it is also used for drug addicts. Such practice is not compulsory, and is carried out by a group which usually consists of the personnel of their unit and subdistrict, teachers and some retirees.

⁶⁶ <http://www.Restorativejustice.org/intro>. (Encounter: Create opportunities for victims, offenders and community members who want to do so to meet to discuss the crime and its aftermath; Amends: Expect offenders to take steps to repair the harm they have caused; Reintegration: Seek to restore victims and offenders to whole, contributing members of society; Inclusion: Provide opportunities for parties with a stake in a specific crime to participate in its resolution.

VOR was imported from Western countries.⁶⁷ Professor Guo Jian'an describes the history of criminal law as having undergone three stages: before the middle ages, capital and corporal punishments were the primary penalty; from the 16th century to the 1970s, imprisonment was the primary penalty; after the 1970s nonconfinement became the primary punishment. He believes restorative justice, which includes mediation, reconciliation and compensation, will be the fourth stage.⁶⁸ Does this mean that China is now at the second or third stage, and is but a mere follower?

Zehr said there is no such thing as "pure" restorative or retributive justice; rather, there is a continuum between the two.⁶⁹ Even in a so-called punishment-centered criminal justice system, some institution with the traits of restorative justice may exist within or complementarily to the legal system, as was the practice in ancient China. It may be doubtful whether the restorative justice will be prominent in the legal system in the future, but in the current retributive criminal justice system, the practices corresponding to the ideas of restorative justice can be accepted -or tolerated- by the public and authoritative organs.

The conclusion to whether the VOR in China is an indigenous style of restorative justice is dependent on the definition of the restorative justice. Professor Chen Ruihua considers the VOR in China and restorative justice to be two different models that happen to share some similar features.⁷⁰ But he did not elaborate on what he believed the differences to be. Russ Immarigeon offers the following definition: "restorative justice is a process that brings victims and offenders together to face each other, to inform each other about their crimes and victimization, to learn about each others' backgrounds, and to collectively reach an agreement on a 'penalty' or 'sanction.'" ⁷¹ The VOR in China can be included in the scope of restorative justice pursuant to this definition. However, this conclusion may be weak when compared to Howard Zehr's view. He said, "crime is a violation of people and relationships; it creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions that will promote repair, reconciliation, and reassurance."⁷² According to this definition, there is a question of whether the concept of "crime" should be revised in the context of the VOR.

Looking at the definition, suggestions for restorative process and restorative

⁶⁷ Yang Xingpei, On the Fate of the VOR in Criminal Justice in China, in Law Magazine, 2006(10), 2.; Zhen Zhen, Chen Jing, *Analysis on the Feasibility of VOR in Criminal Justice*, in People's Prosecution, 2006 (13).

⁶⁸ *Probing the Value of the Juvenile Justice*, in People's Court News, Sep. 30, 2002

⁶⁹ See, Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution*, 3 Appalachian J.L.5.

⁷⁰ Chen Ruihua, *The model of Private Cooperation in the Criminal Procedure- the Rise of Criminal Settlement in China*, in China Procedure, 2006(5), 16.

⁷¹ Russ Immarigeon, *The Impact of Restorative Justice Sanctions on the Lives and Well-Being of Crime Victims: A Review of the International Literature*, in Gordon Bazemore and Lode Walgrave ed: *Restorative Juvenile Justice: Repairing the Harm of Youth Crime*, Monsey: NY: Criminal Justice Press, 1999, 306.

⁷² Howard Zehr, *A New Focus for Crime and Justice*, Scottsdale, Pennsylvania; Waterloo, Ontario: Herald Press, 1990, 181.

justice program described in the *Basic Principles on the Use of Restorative Justice Program in Criminal Matters* (hereinafter Basic Principles, the VOR in China has the basic features of restorative justice. “Restorative process” is defined as “any process by which the victim, offender and, where appropriate, any other individuals or community members affected by a crime, actively work together to resolve matters arising from the crime, generally with the help of a facilitator” (paragraph 2 of *Basic Principles*). In the VOR in China, the criminal suspect or defendant and the victim are the primary parties of the reconciliation, and sometimes, their relatives also participate. In many situations, a PMC member acts as an active mediator. For the PMC is an internal section of the urban neighborhood committee or villagers’ committee, its presence can be regarded, to some extent, as community participation.⁷³ Of course, compared to the restorative programs practiced in other countries, the participation of community in the process of VOR in China is insufficient, and in some VOR programs conducted by the prosecutor or by the parties themselves, such participation could not be seen.

“Restorative processes should be used only where there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the offender. The victim and the offender should be able to withdraw such consent at any time during the process” (Paragraph 7 of Basic Principles). According to the current practice in China, the true repentance of offender and voluntary attendance of the two parties are the prerequisites of the VOR. Only if the criminal suspect or defendant shows repentance and the victim agrees to mediate with him, can the public security organ or the procuratorate pass the case to the PMC or another organization to mediate, or let the two parties reach an agreement by themselves. The *Regulation on Applying the VOR to Handle Criminal Cases* (trial implementation), promulgated by the Hunan provincial procuratorate, defined the VOR as a process for achieving agreement, in which a criminal suspect or defendant makes a statement of repentance, offers an apology and pays for the victims’ losses, and the victim requests or agrees to allow the judicial organ to treat the criminal suspect or defendant more leniently.⁷⁴

“The victim and the offender should normally agree on the basic facts of a case as the basis for their participating in a restorative process” (Paragraph 8 of *Basic Principles*). Although the aforementioned regulations do not have a similar provision, acknowledgement of basic facts is the premise for true repentance on the defendant’s part. In the process of VOR, the criminal suspect or defendant must confirm the facts and admit to his guilt. However, some scholars argue that it is unnecessary to

⁷³ The Urban Neighborhood Committees and the Villagers’ Committees are self-managed, self-educated and self-served basic mass organizations of self-government Article 2 of the Law of the People’s Republic of China on the Organization of Urban Neighborhood Committees, and Article 2 of the Law of the People’s Republic of China on the Organization of Villagers’ Committee. The People’s Mediation Committee (PMC) is a mass organization for mediation within the Urban Neighborhood Committee or the Villagers’ Committee (Article 2 of the Regulations on the Organization of People’s Mediation Commission).

⁷⁴ Liu Ke, *Minor Criminal Cases can be settled privately*, Hunan Economics Newspaper (Hunan Jingji Bao), Nov.23, 2006, 3.

ascertain the facts in a VOR.⁷⁵ Such opinions may undermine the basic foundation of the reconciliation agreement, if so, there would leave a certain risk for reconciliation agreement in future.

“Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process”(Paragraph 9 of Basic Principles). In the VOR, the victim’ status is equal to that of the criminal suspect or defendant. Undeniably, in most circumstances, the criminal suspect or defendant suffers greater pressure because he will face further investigation or prosecution if a reconciliation agreement is not achieved. But the bargaining power of the two parties are somewhat equalized because they both have the opportunity to decide whether and how to attain the final agreement.

Therefore, the basic features of the VOR in China are parallel to the definition and suggestions for restorative process provided in the *Basic Principles*. The guiding principles and values of restorative justice, as suggested in the *Restorative Justice Online Notebook*,⁷⁶ are: (1) crime is an offense against human relationships; (2) victims and the community are central to justice processes; (3) the first priority of justice processes is to assist victims; (4) the second priority is to restore the community, to the degree possible; (5) the offender has personal responsibility to victims and to the community for crimes committed; (6) stakeholders share responsibilities for restorative justice through partnerships for action; (7) the offender will develop improved competency and understanding as a result of the restorative justice experience. The VOR in China shares many of these principles and values, including the positive restoration of the victim’s interests, the sharing of responsibility for the restorative justice between the parties, and the improvement of the offender.

The practices in China, however, still have some defects, particularly in relation to community participation. In reconciliations presided over by PMC, the role of PMC’s member is more of a mediator than a representative of the community. The participation of community is absent in the modes of the mediation conducted by the public security organ or the procuratorate and the reconciliation by the parties themselves. The key reason underlying insufficient community participation is the ambiguity of the community’s role in relation to criminal justice and the poor coordination between the public security and judicial organs and the community. Some local procuratorates try to connect the VOR with the community correction to afford them an opportunity to positively assist criminal justice.⁷⁷

⁷⁵ Liu Pinxin , *Is It A Premise of VOR in Criminal Justice to Ascertain the Truth*, www.jcrb.com/nl/jcrb1006/ca531231.htm.

⁷⁶ <http://www.ojp.usdoj.gov/nij/rest-just/ch1/nicprnpl.htm>. These principles/ values were created for the National Institute of Corrections Nationwide Videoconference held on December 12, 1996.

⁷⁷ The Yuhuatai district procuratorate has already some experience in this field. Xiaofeng, *VOR in Criminal Justice Met Difficult Problems*, Legal Daily, Jul.26, 2006. A programme which the Supreme Procuratorate entrusted the Liaoning provincial procuratorate, also suggested that the VOR shall be connected with the community correction,

Considering its basic features, the VOR in China can be deemed a part of the global restorative movement. Ideas of restorative justice are reflected in the VOR: to protect and restore the victims' interests, to urge the offenders to recognize the social norms and respect others' rights and interests, and to restore the damaged human relationships. The functions of the VOR in China, like restorative justice, are to actively and reliably settle social disputes arising from crimes, and to effectively and smoothly restore social stability and order. The VOR has only had a short history and is still in the process of formation, so its development will benefit from the practices of other countries. Just like Professor Chen Guangzhong said, "the tide of international restorative justice has met with the traditional idea of conciliation in China now, and both of them focus on the protection of victims and restoration of human relationship and social order after disputes appear, so the theory and beneficial practical experience of restorative justice in western countries can be used as reference during the establishment of VOR in criminal justice in China, but the original difference can not be neglected."⁷⁸

IV. Challenge of the VOR to the Current Criminal Law theory

Restorative justice brings new hope for addressing the defects of the conventional criminal justice system, but it has its disadvantages. Compared to the pessimistic accounts summarized by Braithwaite⁷⁹, some similar problems also exist, more or less, in VOR practice in China. For example, the process of VOR may be controlled by the

and advocated that basic administrative organs of justice should take more active role in resolving social disputes, arrangement, assisting and educating the emancipists. Xu Wenhong et al, *On the VOR in Criminal Justice and Community Correction*, in Liaoning Public Security and Judicial Administrative Cadres College Journal, 2006(4), 42. The practice of community correction in China has been influenced by the theory originated in western countries. It is applied for the reformation of probationers, parolees and the persons sentenced with public surveillance. The local public security station, basic mass organization, school and community are jointly responsible for such jobs. In these days, such practice is used for the juveniles who commit crimes but the procuratorates suspended the public prosecution against; if they appear very good in such practice, the procuratorates will decide not initiate public prosecutions.

⁷⁸ See Chen Guangzhong, Ge Lin, *First Probe on Criminal Reconciliation*, in China Law Science, 2006(5), 4.

⁷⁹ The pessimistic accounts enumerated are: (1) restorative justice practices might provide no benefits whatever to over 90 percent of victims; (2) restorative justice practices have no significant impact on the crime rate; (3) restorative justice practices can increase victim fears of revictimization; (4) restorative justice practices can make victims little more than props for attempts to rehabilitate offenders; (5) restorative justice practice can be a "shaming machine" that worsens the stigmatization of offenders; (6) restorative justice practices rely on a kind of community that is culturally inappropriate to industrialized societies; (7) restorative justice practices can oppress offenders with a tyranny of the majority, even a tyranny of the lynch mob; (8) restorative justice practice can widen nets of social control; (9) restorative justice practices fail to redress structural problems inherent in liberalism like unemployment and poverty; (10) restorative justice practices can disadvantage women, children, and oppressed racial minorities; (11) restorative justice practices are prone to capture by the dominant group in the restorative process; (12) restorative justice processes can extend unaccountable police power, even compromise the separation of powers among legislative, executive and judicial branches of government; (13) restorative justice practices can trample rights because of impoverished articulation of procedural safeguards. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 Crime & Just. 79-102.

dominant party. In the VOR practice of Haidian district procuratorate in Beijing, it has been found the compensation sums in several injury cases, in which the victims' eardrums were damaged, were very different, and the highest was 60000RMB, while the lowest was 3000 RMB. After considering their employment, education or other factors, some offenders and their families accepted unreasonable compensation agreements involuntarily.⁸⁰ The procedure of VOR needs to be improved, and many related issues as follows have no authoritative answers till now: When the VOR can be used? For the parties, is it a right to apply for the VOR? When is the reconciliation agreement effective?⁸¹ Such problems should be addressed as the VOR mechanism is further developed. In particular, the system should guarantee a balancing of the parties' interests.

Although the VOR mechanism generally works well and the social effects sounds positive, it brings obvious challenges, lying basically in three aspects: (1) the relationship to the current legal system, i.e. the legitimacy of the VOR; (2) the relationship to the basic criminal jurisprudence, i.e. whether it means to give up the basic concept of crime; and (3) the relationship to the social reality, i.e. whether its effects as whole can be positive for a long time, in other words, whether it may bring more disadvantageous results in future.

There exist two specific questions surrounding the legitimacy of the VOR in relation to the current legal system. The first is about the authority to mediate. The law does not give the public security organs, the procuratorates or the courts with the authority to mediate cases of public prosecution. However, some public security organs and procuratorates (e.g, Chaoyang district procuratorate in Beijing) allow their personnel to act as factual mediators during VOR. The second is about the method of termination of the procedure after a reconciliation has been affirmed. The current disposals of the procuratorates are either to decide not to initiate public prosecutions, or to remand the cases to the public security organs for dismissal. The former mode is appropriate because such a decision is within the procuratorates' competency, according to Article 142 of the *Criminal Procedures Law*. This provision grants the procuratorates discretionary power to decide not to initiate public prosecution if they find that the circumstances of the case fulfill the condition in Article 37 of the *Criminal Law*. Frankly, the second mode lacks legal grounding. According to the Article 140 of the *Criminal Procedures Law*,⁸² the only justification for remanding a case to the public security organ is to conduct supplementary investigation. In the case of VOR, however, the public security organs are asked to dismiss the case. This

⁸⁰ See Huang Jingping, et al, *Current Situation and Prospect of VOR in Criminal Process*, in Huang Jingping and Zhen Zhen ed, *Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society*, 58.

⁸¹ See Programme group of Dongcheng District Procuratorate in Beijing City, *Empirical Analysis on the VOR Accessory to the Procedure of Public Prosecution Used by Procuratorates in Beijing City*, 387.

⁸² This article provides, "in examining a case that requires supplementary investigation, the People's Procuratorate may remand the case to a public security organ for supplementary investigation or conduct the investigation itself."

suggests a sidestepping of the law.⁸³

These two issues of legitimacy are not difficult to resolve. For the first issue, there would not be the critic any more if the reconciliation is presided by PMC. PMC with the legal competency can be a good coordinator with the criminal justice organs, and by this way more participation of community can be improved. For the second issue, termination of criminal proceedings should only occur when the procuratorates decide not to initiate public prosecutions. If only this method can be used to terminate the case, there will be another problem that more cases will be wound up with decision not to initiate public prosecutions. However, such problem is just an anxiety for abuse of the discretion of the procuratorates, and is not an issue of application of law. More troubling than these two issues is how to clarify the relationship between such a mechanism and basic criminal jurisprudence.

Some scholars disapprove of the VOR because it does not conform to basic criminal jurisprudence. Dr. Li Xiang considered that such a mechanism undermines the basic understanding of crime and the doctrine of its nature; to punish crimes and protect the people is the aim of the criminal law, which has already covered the interests of individuals and is not just to protect the victim only.⁸⁴ Dr. Li Hongjiang has four primary criticisms against such VOR: (1) the punitive function of criminal punishment is derogated; (2) the deterrent function of criminal punishment is derogated; (3) public interests are neglected; and (4) the principle of equality is violated.⁸⁵ Ms. Yu Meng considers the VOR mechanism has the following legal defects: (1) the principle of legality is violated (e.g. taking a punishment beyond the criminal law to address criminal responsibility); (2) the principle of equality is violated; (3) the general deterrence of criminal penalty is weakened; and (4) the VOR accessory may lead to actual unfairness.⁸⁶ These arguments are all related to the basic theory and principles of criminal justice.

Analyzing VOR practice suggests that such mechanism is not contrary to the understanding of crime. In current criminal jurisprudence in China, the concept of crime derives from Marx' doctrine that crime is the struggle of isolated individuals against the ruling relationship.⁸⁷ According to this idea, the relationship caused by a crime fits in the model of "Offender vs. Nation." This model is very different from that of restorative justice, which is a model of "Offender vs. Victim and Community"

⁸³ The reason for the existence of such a model is to prevent the basic procuratorates from abusing such discretionary power, so the procedure and percentage of decisions not to initiate public prosecutions have been regulated and restricted.

⁸⁴ Li Xiang, *On the VOR's Contradiction to the Substantive Law*, in Huang Jingping and Zhen Zhen ed, Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society, 243.

⁸⁵ Li Hongjiang, *VOR in Criminal Justice Should Be Delayed*, in China Prosecutor, 2006 (5), 13.

⁸⁶ Yu Meng, *Comparison on VOR Practices in China and Foreign Countries and the Analysis on the Prospect*, in Huang Jingping and Zhen Zhen ed, Papers Collection of the Conference on VOR in Criminal Justice under the Context of Harmonious Society, 303-304. However, she does not disagree on the institutionalization of the VOR accessory to the procedure of public prosecution.

⁸⁷ Collected Edition of Marx and Engels (Volume 3), Beijing: People's Press, 1960, at 379.

or “Offender vs. Victim.”⁸⁸ Both models have some deficiency in their understanding of what a crime is: in the model of “Offender vs. Nation”, the nation’s shadow is pervasive everywhere, while it seems very illusory because any specific crime destroys some specific social relationship, or does harm or pose a danger to some legal interest (Rechtsgut); in the model of “Offender vs. Victim and Community,” the concept of crime does not capture all forms of offense, such as ones that do not have specific victims (e.g. bribery). As Paul H. Robinson said, “The harm of most criminal offences spreads to persons beyond the immediate ‘official victim.’ Indeed, criminal law is unique in embodying norms against violation of societal, rather than personal, interests. All crimes have society as their victim, not merely a single person.”⁸⁹

Even pursuant to current criminal jurisprudence, the VOR is not contrary to the concept of crime. In VOR, a reconciliation agreement between the victim and the criminal suspect or defendant is but a prerequisite to the termination of the procedure; the power to make the final decision is still in the grasp of authoritative organs. The public prosecutions still embody the model of “Offender vs. Nation”; as such, the nation’s representatives do not transfer the power of punishment to the victim. When the case is dismissed, or the offender is not to be prosecuted or punished, there seems a nation’s will, not the victim’s decision. The model of “Offender vs. Nation,” therefore, is not broken in the context of the VOR.

The VOR practice does not violate the principle of legality (Article 3 of *Criminal Law*). A high amount of compensation may be seen as punishment, but it is not a criminal penalty; the defendant, therefore, does not bear criminal responsibility by the way. Of course, if such practice is connected with community correction, whether community service is criminal punishment beyond the criminal law is doubtful. However, such doubt is not relevant to the VOR itself. Whoever commits a crime shall bear criminal responsibility, but rendering criminal punishment is just one of the methods of taking criminal responsibility. If the dangerousness of the offender is low, exempting him from criminal sanction is an acceptable method of imposing responsibility. So the VOR does not conflict with the principle of legality.

The VOR practice does not violate the principle of equality (Article 4 of *Criminal Law*). The principle of equality emphasizes inevitability, which means that anyone who violates the criminal law shall be evaluated by it and be punished pursuant to it, and no one has the privilege of transending the law. However, this does not mean that all offenders must be convicted and sentenced, regardless of the circumstances and the offender’s personality. The principle of equality is not mutually exclusive with the principle of individualization of punishment. Although the actus

⁸⁸ Randy Barnett said, “Where we once saw an offense against society we now see an offense against an individual victim. In a way, it is a common sense view of crime. The armed robber did not rob society; he robbed the victim. His debt therefore, is not to society; it is to the victim.” See Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. Disp. Resol. 349.

⁸⁹ Paul H. Robinson, *The Virtues of Restorative Processes, The Vices of “Restorative Justice”*, 2003 Utah L. Rev. 383

reus and the result are similar, the court shall consider the offender's personal circumstances in deciding whether and how to punish him. It also embodies the principle of individualization of punishment in the VOR practice, although in the stage of investigation or prosecution.

Whether the VOR weakens general deterrence is a practical issue. Restorative justice practices are generally good for specific deterrence, but "the benign nature of this general deterrence will be seen by most critics as the greatest weakness of restorative justice."⁹⁰ For the VOR in China, Current practices seem to be effective for specific deterrence, too. Primary concern regarding general deterrence is merely the worry that others may commit crimes with the expectation that they can atone for their crimes by paying money. However, just like a fine has the function of general deterrence, monetary compensation can also have a similar impact. Moreover, most minor injury cases occur casually, so even serious punishment may not have the effect of general deterrence, let alone a light punishment. Of course, the general deterrence effect of the VOR should be determined by empirical research. Nevertheless, the mechanism prevents revenge by the victim or her relatives, so its deterrence effects can, in some ways, be deemed more effective.

More arguable issues arising from such mechanism are in its practice. They can be enumerated as follows: (1) Will the VOR become a tool for the victim and her relatives to ask for more unreasonable compensation? (2) Will it become a tool for the criminal suspect or defendant to atone his crime with money? (3) Will it be abused and become a swamp of corruption? It is too early to give appropriate answers to these issues now. Actually, any institution's existence must be restricted with the relevant regulations to ensure their effective and proper operation. The balance among institutions must be considered, or troublesome issues will invariably arise.

V. Conclusion: Future of the VOR in China

The VOR in China is currently in its infant stage. A national regulation should be issued to normalize the practice of basic public security and judicial organs, while theoretical and practical issues should continue to be discussed and debated. Zahr said that most proponents of restorative justice view it as an alternative to retributive punishment.⁹¹ Braithwaite stressed, "Restorative justice is one promising alternative for a future in which punishment is marginalized."⁹² This suggests that restorative

⁹⁰ John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 *Crime & Just.* 61.

⁹¹ Barbara A. Hudson, *Understanding Justice- An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory*, Philadelphia: Open University Press, 2003, 88.

⁹² John Braithwaite, *A Future where Punishment is Marginalized: Realistic or Utopian?* 46 *UCLA L. Rev.* 1727, 1746; *See also*, John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 *Crime & Just.* 4 (Claiming that restorative justice is most commonly defined by what it is an alternative namely the punishment-centered justice model). *See* Stephanos Bibas, Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 *Yale L.J.* 121.

justice will be a substitute for the conventional criminal justice system, rather than a mere supplement.⁹³ However, the VOR and other restorative justice institutions in China, such as Bang Jiao and community correction, have no ambition to take the place of the punitive criminal justice system; they will be just supplementary or accessory mechanisms to the criminal legal system. How to properly punish defendants must be considered seriously, but how to push aside the criminal penalty is a remote topic.

Making the VOR a supplement to the current criminal justice system is to neutralize its rigidity in order to realize the interests of victims more effectively and create more opportunities for the offenders. The criminal justice system, with its function of maintaining the social order, cannot be substituted by other mechanisms of social adjustment. Any method of reconciliation isolated from the criminal justice cannot be supported. A study showed that in some rural areas of Shandong Province, the percentage of re-victimization was as high as 40% after the parties conducted private reconciliations.⁹⁴ If such situations are explicitly or implicitly allowed, the public security organs will not control and prevent such potentially serious crimes. The reconciliation agreement can be a substantial ground for the lenient decisions by authoritative organs, but the VOR must be connected to the criminal justice.

The people's mediation commission shall be more positive in the practice of VOR in cooperation with public security and judicial organs. Since the enactment of *Regulations on the Organization of People's Mediation Commissions*, the PMC no longer has the authority to mediate the criminal cases, so the nature of mediations on the cases which the public security or judicial organs entrust is civil. The results of mediations conducted by the PMC are only supplementary and persuasive, not binding. Although PMC is a mass organization, it in fact has a strong official character because it is led by the courts and local administrative organs of justice. In order to restore the interests of the victims more completely, and encourage the offenders to admit their guilt and repent, the "bureaucratic image" of PMC must be changed and community participation must be improved.

In the current practice, the VOR is generally applied to minor injury and other minor criminal case. Can it be applied to more serious cases such as homicide, rape and serious injury cases? This issue needs to be discussed further. The use of VOR in minor cases is accepted by most people because such cases do not greatly impact them or cause any serious unease. If it is used in serious violent criminal cases, maybe most people will protest because they may feel upset and feel that their need for

⁹³ Paul H. Robinson, *The Virtues of Restorative Processes, The Vices of "Restorative Justice"*, 2003 Utah L. Rev. 377. (But the literature by the leaders of the restorative justice movement make clear that they conceive of restorative processes not simply as a potentially useful piece of, or complement to the criminal justice system, but as a substitute for it)

⁹⁴ Wang Tao, *The Phenomenon of Private Settlement Rises in the Remote Mountainous Areas*, in People's Daily, Jun. 22, 2003; Zhuang Kuitai, *The Phenomenon of Private Settlement in Rural Areas Can't Be neglected*, in *Shansong Science and Technology Newspaper*, Dec.25, 2006, 5.

retribution is left unaddressed. However, because the aim of VOR is to restore the interests of the victims and urge the offenders to repent, it can theoretically be used for such serious crimes. Certainly, in such cases, the defendants cannot be completely exempted from criminal punishment, and he may receive a more lenient sentence.⁹⁵ Can the VOR be used to deal with the cases which the public interests have been violated, such as embezzlement? The answer may be a quick “no”, but if the criminal can return the property completely and show repentance to the unit in which he has been an official, shall the punishment not be lenient?

Because VOR is still in its beginning stage, there may be more problems that are not presently known. It is important to maintain the balance between the regular criminal justice system, and VOR and other practice conforming to restorative justice model. The VOR should be implemented as fully as possible without undermining the role of the criminal justice system. As Paul H. Robinson said, “Use restorative processes as much as possible, as either complementary to the criminal justice system or as a dispositional process within it.”⁹⁶

The VOR accessory to the procedure of public prosecution is an active and constructive response of the criminal justice system to the current social situation. Such a response will make the development of China’s legal system more aligned with the social realities of the country. China shares many common or similar values with other countries, both developed and developing, while the differences between China and other countries stemming from its history cannot be denied. It is a good method is to set up a bridge over the difference, just as the Confucius once advocated the idea of “harmony with difference”. The VOR practice is actually to resolve the conflicts and match up the difference caused by crimes with the attitude of harmony, isn’t it?!

⁹⁵ In late 2006, the Dongguan Intermediate Court handled a case of robbery with causing the victim to death. During the trial, the defendant showed true repentance and paid voluntarily 50,000 RMB to the victim’ family. With the forgiveness of the victim’s family, the court convicted and sentenced him to death with suspension. This case was criticized by many people for in giving the rich person more advantageous opportunities than the poor. The explanation from this court was that its aim was just to resolve the civil dispute, and such a method can be beneficial for the victim and her family to get the compensation. However the compensation is just one of the circumstances which can affect the sentence. See, Zheng Siqi et al, *Dongguan Court Explained the Reason of Paying Money for Lenient Punishment: Hopeless Compensation Urges the Victim and Offender to Reconcile*, www.csonline.com.cn/news/1/1/200702/05/t20070205_148959.htm.

⁹⁶ Paul H. Robinson, *The Virtues of Restorative Processes, The Vices of “Restorative Justice”*, 2003 Utah L. Rev., 388.