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Rethinking Criminology Through Radical Diversity in Asian Reconciliation

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Abstract Five cases of radical diversity in Asian reconciliation are used to suggest hypotheses for the kind of Asian relational theory building suggested in the contribution of Liu (2014) to this special issue:

1. Polynesian shame
2. Confucius and East Asian restorative justice
3. Indonesian and Timorese cultures of compliance with reconciliation agreements
4. Restorative justice hybridity in Pakistan and Afghanistan
5. Victim-initiated justice in Nepal

Keywords Reconciliation · Restorative justice · Asian criminology

The Cases, The Hypotheses

Five cases and insights of radical diversity in reconciliation from all corners of Asia are considered. The first is about shame in Polynesia, the second about Confucian philosophy in East Asia and restorative justice. The third considers Southeast Asian cultures of compliance with reconciliation agreements. The fourth is restorative justice hybridity in Pakistan and Afghanistan, the fifth is victim-initiated justice and reconciliation in Nepal. These provide lenses through which we can see a need to revise explanatory theories of crime from those dished up by western criminal law and criminology. They also suggest changes to normative theories of rights in criminal justice that deserve consideration.

Asia and the Pacific embrace the regions of greatest cultural and linguistic diversity in the world. Asia's most important contribution to global criminology is therefore in opening its eyes to completely new ways of seeing, as opposed to adjusting, testing, or revising western theories in light of eastern experience. Restorative justice innovation provides good examples of how Asian philosophy and practice can enrich western criminal justice in ways that enhance crime control and respect for rights in the west.

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It is the right time in the development of criminology in Asia to move away from an international division of scholarly labor whereby influential theories are developed in the west, while Asia's role is to apply or test those theories in Asian contexts or adapt them to Asian realities. It is time for a new era of criminological theory that was given birth in Asia by Asian scholars.

The five insights also reveal how deep contextual effectiveness in justice is. Effectiveness is not just culturally contextual. The Nepal and Pakistan examples will show how quite immediate historical circumstances shape contextual effects. This is not to deny that criminological theory can make some useful general claims. It is just to say that most of the time, their claims will be wrong when put in a particular context. It is a useful general claim for restorative justice theory to make that human beings have multiple selves; therefore, a justice process is needed that brings our most socially responsible self to the fore. But embedded in the universal claim about multiple selves is a limitation on any general theory that involves assumptions about the self, for example, of a rational self in deterrence theory. This illustrates both the value of general theory and the importance of using it with humility and contextual wisdom.

The hypotheses suggested by these case studies are of course not more than suggestive. The hope is that they may be useful for constructing the kind of relational theory of crime control advocated by Liu (2014) in this issue:

1. Not only temper justice individualism with relationalism, especially with the love of families, but also temper collectivism with individualism
2. Couple the power of formal law with the power of informal shame and remorse
3. Rely on regulation through the positive virtue of the good example of the virtuous person. This is more important than the negative force of punishment
4. Do not be afraid to buttress state legitimacy for justice processes with legitimacy and compliance that come from spiritual sources, at least for those who care deeply about those spiritual sources.
5. Refuse to be a justice purist. Improve the hybridity of learnings from west and east, the state and the local, from the formally legal and the traditional. Encourage state power that enables civil society to be its check and balance. Encourage civil society power that enables the state to be its check and balance. Justice institutions can be messy rather than tidy.
6. Empower victims. Preserve local traditions such as those in Nepal that deliver radical forms of victim empowerment.
7. Consider a right of victims to forgive as a revision to international human rights law, at least in contexts where victims wish to choose forgiveness rather than punishment. This right would be based on a new openness of Geneva to a Sharia law interpretation of forgiveness.

Polynesian Shame

ma te whakama e patu!
Leave him alone he is punished by shame.
(New Zealand Maori saying)

Not only particularly in Asia and the Pacific but also in the west, we can discern a restorative quality to socialization in those families that succeed in raising law-abiding children. Essentially, the child development literature shows that both laissez-faire parenting that fails to confront and disapprove of children's misconduct and punitively authoritarian parenting both produce a lot of delinquents; delinquency is less likely when parents confront wrongdoing with moral reasoning (see Braithwaite 1989 for a discussion of this evidence). One implication for restorative justice advocates of this substantial body of empirical evidence is that the justice system will do better when it facilitates moral reasoning by families over what to do about a crime as an alternative to punishment by the state.

Restorative justice conferences work by inviting victims and supporters (usually family supporters) of the victim to meet with the offender together with the people who care most about the offender and most enjoy the offender's respect (usually including both the nuclear and extended family, but not limited to them). This group discusses the consequences of the crime, drawing out the feelings of those who have been harmed. Then, they discuss how that harm might be repaired and any steps that should be taken to prevent reoffending.

The restorative justice evidence is that it is not the shame of police or judges or newspapers that is most able to get through to us; it is the shame in the eyes of those we respect and trust, particularly those we love most deeply (Ahmed et al. 2001). These are not new ideas. They have existed for hundreds of years in Polynesian philosophies of justice. The Maori thought about *whanau* (extended family) conferences is they repeatedly use the words shame (*whakama*) and healing in equivalent ways to remorse and reintegration. In Maori thinking, it is the shame of letting one's extended family down that is a particularly important type of shame to discuss. The advantage of this sort of shame over the individual guilt one is expected to experience as one stands alone in the dock of western justice is that it is readily transcended when family members extend forgiveness to the offender. From a Polynesian perspective, it is barbaric to have an offender stand alone in the dock. She must be surrounded by her loved ones who share the shame with her. One reason that it is barbaric to expect offenders to stand alone and experience an individualized sense of guilt for what they have done is that this kind of guilt can be very damaging for people. It can eat away at them. As people deal with the inevitable shame of arrest by the police, they can learn from the Polynesian path to reintegration by forgiveness from our loved ones who share the shame with us and then learn how to share healthy shame acknowledgment that it is easily transcended; reintegration is accomplished simply by rituals of forgiveness by the family for its member. Normatively, the Polynesian case opens a challenge to western rights discourse as a discourse of individual rights. Collective rights are pivotal in indigenous justice far beyond Polynesia, especially to land, but also to own conflicts (Christie 1977); conflicts are owned by the indigenous collective rather than by the state.

Confucius and East Asian Restorative Justice

The second insight is from arguably the most foundational philosopher of restorative justice, not only in East Asia but also globally, Confucius. It is that one should be reluctant to directly shame people. Instead, we should be the change we want to see

in the world, as Gandhi is often quoted as having advised, though he may never have said it. Or as Polynesian people put it, the presence of an elder in a restorative justice circle with exceptional *mana* can transform the spiritual character of a restorative encounter.[1]

One of Confucius's best known views is that "If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment but have no sense of shame." (Confucius 1974, p. 16). In opposition to his contemporaries, he was against capital punishment (Confucius 1974, pp. 92–3, 98). Reciprocity, mutuality, and harmony were central to his ways of seeing: [XXIII] Tsze-kung asked, saying, "Is there one word which may serve as a rule of practice for all one's life?" The Master said, "is not RECIPROCITY such a word? What you do not want done to yourself, do not do to others." (Confucius 1974, p. 123). My Korean PhD student Seung-Hun Hong is currently working on the power of indirect reciprocity as a key to regulatory effectiveness. Confucius's quest can be read in part as a search for practices of good government that enable people to understand the effects their actions have on one another and that naturally expose the virtue of the virtuous so that others will follow them. Virtue is inculcated by quiet good example rather than by denunciation. [XXIV] Tsze-kung said, "has the superior man his hatreds also?" The Master said, "he has his hatreds. He hates those who proclaim the evil of others." (Confucius 1974, p. 143). Obversely, it is wise "To find enjoyment in speaking of the goodness of others" (Confucius 1974, p. 130). For Confucius, then, shame rather than punishment is the key to social control, but shame is not something we do to wrongdoers so much as something wrongdoers discover through the respectful treatment they receive from virtuous people who manifest in the fiber of their being the example of a transparently superior way of living.

From the perspective of a European republican philosophy (Braithwaite and Pettit 1990; Pettit 1997, 2012), there is not only much of value to draw on in Confucian thought but also much that might be dangerous. Confucian communitarianism was patriarchal and hierarchical. Perhaps a settled sense of deference was not so dangerous in a stable world where family, village, and a unitary state were the only institutions that mattered. But in a more complex world where there are many levels of government, up to the IMF and World Trade Organization, many crosscutting institutions of civil society to which we belong, a world in which we and our parents are geographically mobile, we need strong, independent individuals as well as strong families and communities. Individuation is vital as a practice of socialization if individuals are to be strong enough to resist tyranny as they move from one site of domination to another in a complex world. Moreover, if we do not move away from the notion of society as a holistic unity to the notion of the separation of powers and an important place for the rule of law, a republican constitutional order, the lesson of the history of the past century is that we will get tyranny.

Yet, we can read the great sweep of Chinese history as a dialectic of learning and unlearning this lesson. I refer in particular to the great historical struggle between the Legalists and the Confucians and to the dialectic between both legalism and Confucianism, the dialectic of freedom in Taoism, to the disastrous abandonment of the rule of law in the Cultural Revolution, and the partial return to it since (Gernet 1982; Huang 1988).

The study of Chinese history may hold one key to a macro-sociology of restorative justice. In the dialectic of Chinese history between the domination of Confucian and Legalist ideas, a

[1] *Mana* is a word in at least two dozen indigenous languages across the world. As with the comparable word, *Ubuntu*, in multiple African languages, it has somewhat different meanings in different languages, but all relate to relational gifts that promote healing and kindness among people.

high watermark of Legalist influence was the Ch'in dynasty. What brought about the fall of the Ch'in empire in 211 BC…

> was not the alienation and hatred of the scholar class, nor the bitter enmity of the surviving remnants of the aristocracy, but the growing popular discontent and mounting outrage over the cruelty of the system of punishments and the intolerable burden of taxes and levies imposed for the massive public works that the emperor commanded. Crime increased as did the number of those condemned, tortured, mutilated, and exiled to labor gangs. As long as the emperor was alive, fear of his powerful and demoniacal personality held the empire together; after his death all the restraints broke, and the empire exploded in rebellion (Michael 1986, p. 66).

Indonesian and Timorese Cultures of Compliance with Reconciliation Agreements

The third insight is about the greater power of restorative justice to achieve compliance with agreements in the circle compared with the power of courts to enforce their orders. Implementation of agreements was 33 % higher in the meta-analysis of Latimer et al. (2001) for cases that went to restorative justice compared to controls. We should not be surprised that a court order is less likely to be complied with than an agreement consensually signed by an offender, his mother, his girlfriend, and his victim! Family and close friends are more powerful regulators of our behavior than police and courts.

Not only are family members more effective enforcers of restorative agreements than police enforcing contempt of court. In traditional justice in some parts of Southeast Asia, compliance with agreements is enforced by dead ancestors who monitor these things and can bring terrible misfortune to those who dishonor family commitments. I have seen this in my peacebuilding work in Bougainville and in Eastern Indonesia. When a peace agreement is reached between two villages or other groups that have been at war with each other, an agreement is often sealed with rituals that invite the ancestors to punish any person who breaks the agreement. In these belief systems, the ancestors may cause the spoiler of a peace agreement to die or to have their crops fail. There are residues of this kind of belief in western criminal trials with swearing on the Bible by witnesses and by state officials when power is conferred upon them.

Timor-Leste's truth and reconciliation commission conducted many traditional village-level reconciliations that led to local agreements. They would open with the reading of a letter from the prosecutor-general to lend the legitimacy of the state. Then, dead ancestors would be ritually invited to preside over the proceeding, lending legitimacy from both the spiritual realm and the state realm. At the end of the reconciliation process, participants swore oaths to comply with agreements before the ancestors. Breach of these oaths (*juramento*) may result in 'punitive acts by the ancestors, such as loss of crops or the death of a family member' (Graydon 2005:34; Hohe 2003; Hohe and Nixon 2003). In a society like Timor-Leste where the promises of state punitive enforcement of the law are rarely delivered, the promise of punishment from above when oaths to renounce violence are breached is of considerable value in violence prevention. People certainly believe it is. In Timor-Leste, it is a flawed justice practice to have foreign lawyers design a 'modern' justice system to displace custom. Locals shun that modern justice in droves because it has less legitimacy than the traditional *lisan* justice legitimated by the ancestors. That is a

lesson from reconciliation and law reform in Timor-Leste. Use the legitimacy of state power in legal processes for sure, but help them to work better still by harnessing the power of families and even the spiritual legitimacy of dead ancestors (Braithwaite et al. 2012: chapters 10,13).

Restorative Justice Hybridity in Pakistan and Afghanistan

The Taliban came to power in Kandahar in 1995 by promising and delivering law and order to a region of Afghanistan where women were being raped by marauding gangs, where farmers could not travel the roads taking their produce to markets without being shaken down by armed gangs. The Taliban shut down those roadblocks and stopped the rape. At first, but not later, their Sharia rule of law was popular with ordinary people. David Kilkullen has described the Taliban as an 'armed rule of law movement'(see generally Kilcullen 2011).

Some Maoist groups in regions of India and Nepal also gained a foothold as armed rule of law movements giving the oppressed indigenous or lower caste people who had long been oppressed by rural landlords some semblance of a rule of law. Other radical Islamist groups beyond the Afghan Taliban in Bangladesh and Pakistan also gained footholds as armed rule of law movements in areas suffering from anarchic conditions. In the northwest of Pakistan, the Pakistan Taliban was like the Afghan Taliban in instituting Taliban courts to compete with state courts that were not delivering speedy justice, but were delivering a corrupt form of justice. Part of their strategy was also to kill *maliks* who were leaders of traditional justice processes called *jirgas* that competed with Taliban justice (Wardak and Braithwaite 2013; Braithwaite and Gohar 2014). They have killed more than 700 of them so far in northwest Pakistan. In Afghanistan, the survey data is clear that Taliban justice is more popular with ordinary people than the justice of President Kazai's state courts, but that the restorative justice of *jirgas* is more popular than both (Asia Foundation 2007, 2009, 2010, 2011).

Ali Gohar and I have been in discussion since I first went to the northwest of Pakistan in 2003 about what became a project to respond by taking some *jirga* traditions inside the safety of police station walls, where it is difficult for suicide bombers to punish those who participate. The police in effect provided state protection to a form of customary justice. It was different from customary justice, however, in that a police officer was always present. That police officer had a role as a check and balance on the abuse of rights, especially women's rights, that is common in customary Pashtun justice in both Pakistan and Afghanistan. Hybridity between state and non-state justice was designed to cover the human rights weaknesses of one with the strengths of the other. The police station reconciliation committees illustrate the potential of state-non-state justice linkage, albeit with many problems along the way. It can also mean more resilient state justice and more resilient traditional justice that are mutually enabling and both more able to compete with the courts of the insurgency. Ali Gohar and I also argue that the hybrid justice of Pakistan's police station reconciliation committees demonstrably reduce cycles of vengeance killings (which help drive spirals toward civil war).

Pashtun culture is a revenge culture. Ancient Pashtun proverbs include:

A Pukhtoon never forsakes revenge.
A stone of Pukhtoon (enmity) does not rot in water.
If a Pukhtoon takes his revenge after a hundred years, it is still too soon.

But like many cultures that are unusually strong on revenge, they are also unusually good at rituals of forgiveness that can end cycles of revenge. Braithwaite and Gohar (2014) describe a number of cases where cycles of revenge that were killing many people and destabilizing a fragile region were ended through an agreement at a police station reconciliation committee.

Hence, this fourth insight is also about hybridity. It is about the imperative for traditional culture to adjust in hybrid ways to modernity. It is about a hybrid where traditional *jirga* justice that is threatened by Taliban suicide bombers can have enhanced effectiveness in preventing cycles of revenge killings and in protecting rights when the *jirga* is taken behind the walls of police stations. Forgiveness is widespread and has preventive power in these police station reconciliation processes. We might advance from these Sharia justice that influences a right of victims to forgive that can trump state punishment policies. In many of the cases we studied, murderers were released from prison as part of a peace agreement in which they received forgiveness from their victims. Our argument is that empowering victims with a right to forgive of this kind is important to the prevention of further murder and even to preventing a region from unraveling into a widening civil war.

Victim-initiated Justice in Nepal

My next justice innovation from Asia is different from the last in that it is one where the police chief in Rolpa district of Nepal told me that his police never attend. It shares in common with the Pakistan police station reconciliation committees the fact that in the western rural hills of Nepal, it is frequently used to deal with murders. This Nepali tradition is the *Kachahari*, which means street forum. An interesting thing about it is that it involves expression of victims' sorrow. *Kachahari* can be initiated by any citizen who will usually stand under a tree which is a well-known meeting place or some other central space in a village or town which is a traditional meeting place. A citizen who believes he is a victim of some injustice can just stand at that particular place and start speaking about his grievance. Community members will then gather. This will eventually attract the wisest community elders. So, the initial process is about an opportunity for anyone to articulate sorrow over some injustice and explain it in public. The next stage is the respected elders who attend and listen will then take over investigation of the matter.

They bring other respected persons into the investigation. They ask where is your evidence? They facilitate community contestation of the evidence. Then, they convene another hearing with open participation in public and a decision will be made under the guidance of the respected elders. Victim control of the option of open public contestation makes it difficult for powerful indigenous elders to protect their own relatives or people who pay them bribes.

An alternative path is that the complainant or victim can go straight to the elder with a written complaint rather than standing in the public place to explain her grievance. This is justice that is radically speedy and radically empowering of victims. One thing that impressed me about it in Rolpa district, which is a district that suffered the worst ravages from Nepal's civil war and that today suffers a very high suicide rate as a consequence,[2] is that the *Kachahari* can give a last desperate alternative to a victim that is an alternative to suicide.

So, my fifth insight is about the virtue of victims being able to initiate a response of communal support and investigation at the moment of their greatest anguish by triggering a justice process at the time and place of the victim's choosing. The story of the Nepal peace process is unfortunately one of repeated failure so far to achieve national truth, justice, and reconciliation. Yet in Rolpa, I also found a lot of victim

[2] Female suicide associated with domestic violence is especially high in Rolpa district.

self-help in achieving reconciliation, for example, between a Maoist who was tortured and a police officer who did the torture. This was 'underground restorative justice,' actively disapproved by the state but interpersonal reconciliation drawing on *Kachahari* traditions that make up for the utter failure of national transitional justice institutions to date.

Conclusion

So, replace with 'one might take the following to be' lessons from these five brief explorations of Asian and Pacific justice diversity:

1. Not only temper justice individualism with relationalism, especially with the love of families, but also temper collectivism with individualism
2. Couple the power of formal law with the power of informal shame and remorse
3. Rely on regulation through the positive virtue of the good example of the virtuous person. This is more important than the negative force of punishment
4. Do not be afraid to buttress state legitimacy for justice processes with legitimacy and compliance that come from spiritual sources, at least for those who care deeply about those spiritual sources
5. Refuse to be a justice purist. Improve the hybridity of learnings from west and east, the state and the local, and from the formally legal and the traditional. Encourage state power that enables civil society to be its check and balance. Encourage civil society power that enables the state to be its check and balance. Justice institutions can be messy rather than tidy
6. Empower victims. Preserve local traditions such as those in Nepal that deliver radical forms of victim empowerment
7. Consider a right of victims to forgive as a revision to international human rights law, at least in contexts where victims wish to choose forgiveness rather than punishment. This right would be based on a new openness of Geneva to a Sharia law interpretation of forgiveness.

Some of these insights might be relevant to understanding why most Asian societies have been more successful in preventing crime than the societies that have been the most influential sources of modern criminological theory.

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