

THE ROLE OF APOLOGY IN THE JAPANESE CRIMINAL JUSTICE SYSTEM

Yoko Hosoi
Professor, Toyo University

Haruo Nishimura
Professor, Kokushikan University

*Paper presented at the Restoration for Victims of Crime Conference
convened by the Australian Institute of Criminology in conjunction with
Victims Referral and Assistance Service
and held in Melbourne, September 1999*

1. Delay in establishing policy to deal with victims of crime in Japan

In the last few years, insight into the problems faced by crime victims has evolved dramatically in Japan. Since the Crime Victims Benefit Payment Law (Law No.36) was enacted in 1980, 15 years passed without any further development for the concern and support of victims either within the government or the society, despite the establishment in 1992 of the Japanese Society of Victimology. Why was this? We believe that the “apology-forgiveness” culture which exists in Japan contributed to delaying our recognition and concerns for the victim in the criminal justice system. Our “apology-forgiveness” culture dimmed our sensitivity and insights for crime victims. People in general as well as authorities in the criminal justice system believed without question that the “apology-forgiveness” culture satisfied the needs of victims and their families. However, two incidents led to an increased awareness of the situation regarding victims’ rights albeit some 20 years behind other industrialized countries. One is an actual crime case, the other is based on a research study.

In 1995, the serious mass murder by sarin gas case occurred in the Tokyo subway system. The religious sect “Aum Shinrikyo” had meticulously planned this crime which resulted in 11 dead and thousands injured. Ironically we learned a lot from this case; we recognized that we exposed ourselves to danger in our everyday lives; that once we became crime victims we could not help but endure our bad fortune; that crime victims are in great need of psychological care, and so on.

Unexpectedly, at the same time as this case, the Study on Victims of Crime (Miyazawa, et al. eds. 1996) was published. This was the first systematic research in this field made in Japan (both authors participated in the work as research members). According to the research conducted, it was discovered that most crime victims felt dissatisfied both with the authorities (police^a prosecution and court) and offenders. They felt isolated from the system and they were given too little information about how the offenders were processed legally in the system.

In 1996 the National Police Agency published the “Outline of the Measures taken by the Police for Crime Victims” which was distributed to the police in all 47 Prefectures in Japan. At almost the same time, private victim support centers or networks supported by local police were established in rapid succession in various parts of the country. By May 1999 there were at least 16 such groups throughout Japan. The Ministry of Justice (the Public Prosecutors Office) and The Japanese Bar Association started their own measures for providing relief to victims. Furthermore, the Japanese Criminal Victim Support Network published the Victims Charter. This Charter confirms seven rights of victims.

2. The “apology-forgiveness” culture in everyday lives

We Japanese are very familiar with the conversation as:

A-san : I am sorry!

B-san: Don’t mind, it’s all right.

When something wrongdoing as to hurt or trouble others occurs, we tend to apologize, even if we do not acknowledge any fault or any responsibility for the act. We do this because we have been expected to do so from childhood as an ordinary behavior pattern. Usually the injured party would forgive us. The behavioral pattern of “apology-forgiveness” seems to be an

ingrained cultural heritage (*habitus*), which serves to make a harmonious, peace-oriented society. Many foreign scholars have already pointed out in their writings that we Japanese have long emphasized the principle of *wa* as the main ethos of our society (Haley, 1997. Wagatsuma-Rosett, 1986. Bayley, 1991). How to keep the *wa* ?

Generally apology is defined as confession, expression of remorse for injury, and acceptance of responsibility for wrongdoing even if one has no fault in causing the injury. To apologize denotes a change in attitude when the party making the apology expresses remorse for past injury and makes the commitment that future behavior will not be hostile. Therefore, the apology has two sides, one looking back remorsefully on the hurtful deed and the other looking forward, hopefully to a better future. The party receiving the apology would think the same as the one making the apology to have a good relationship with him/her in the future, so that the offended party would eventually forgive the hurtful act. It is the circular ethos of *wa*.

Although it is true that Japanese society is maintaining *wa* by relying on the circle of “apology-forgiveness”, we have to keep in mind that the circle is not free of problems. One is in terms of the formality of the circle separated from each person as wrongdoer or victim; the other is of the relationship between the organization and the individual. These two problems seem to bring up very important issues when we connect this circle with the Japanese criminal justice system in dealing with crime victims. We would like to point out the formality of “apology-forgiveness” isolated from sincere feeling and heart to show the remorse and sympathy at the personal level. When the culture of “apology-forgiveness” is believed in and expected to restore the lost peace too much, it results in working automatically and superficially without accompanying the humane interaction between perpetrator and victim. Take one typical case as an example by using Lebra’s citation (Lebra, 1995.22-23) and Haley’s interpretation for the case (Haley, 1998.105):

The boy was a troublemaker in school who intimidated his classmates and extorted money from them. His father, who was a former school principal, went to see the son’s homeroom teacher in response to the latter’s request. When he was told of his son’s robbery, “he apologized with a deep bow, saying, ‘I am very sorry.’ Watching his father thus apologizing on his behalf, the offender was moved to tears. This was a turning point for him that changed his way of life completely.” The message is that the father’s surrogate apology aroused empathetic guilt in the culpable son, which turned out to be a breakthrough for the son much more effective than direct scolding and punishment.

Though this case shows that success resulted through the father’s apology substituting for his son’s wrongdoing, we can assume the alternative result in the same situation because we are likely to face the case where the son may not have the opportunity to recognize his guilt and take responsibility for the act. The parents, managers of organizations or other superiors are apt to take the formality of apology-forgiveness promptly toward the victim or the persons involved to restore the previous good relationship at their own levels. Of course it is important in keeping the society safe and harmonious, but sometimes it makes the son or subordinates at the individual level or self-consciousness stage irresponsible for his/their own behaviors. What is necessary here is that the parents or senior officials at the workplace have double responsibility, one for the society (*seken*, a word describing the society or social fabric; used customarily among traditional Japanese who emphasize a network of interpersonal relationship) or other organization as outer apology, the other for the son or subordinates/employees to reflect on their behavior so as not to repeat the offense again.

As for the symbolic way for subordinates to recover the trust of their superiors after hurting or damaging the organization either directly or indirectly, in Japan the custom exists that a person who breaks a rule or adversely affects the organization as a result of his/her misbehavior should express regret by writing “a letter of apology” (*shimatsusho*). *Shimatsusho* is a written statement of apology, in which a wrongdoer mentions his/her fault, regrets deeply, pledges oneself never to repeat the misbehavior, and requests to be dealt with in a lenient manner. Sometimes the wrongdoer offers some money or other articles as a symbol of heart-felt regret. *Shimatsusho* style is more informal in nature than *Jidan* (explained in detail later), and is often used for settlement of accidents or the conflict within organizations such as school, company or government. The wrongdoer is ordinarily requested to write and submit a *Shimatsusho* to the boss or teachers in order to avoid recourse to formal legal proceedings. *Jidan* is a contract between the victim and the offender, while *Shimatsusho* is an expression of the wrongdoer’s good faith for the organization and an offer to the third parties.

As becomes evident, our traditional behavior pattern of apology-forgiveness works heartily between wrongdoer and victim face to face on the one hand, but on the other hand the symbolic ceremony using a substitute or *Shimatsusho* sometimes obscures the sensitivity to the guilt of the wrongdoer as well as the pain of the injured party.

3. A problem in the “apology-forgiveness” culture in the criminal justice system as seen from the victim’s perspective

According to Haley, the restorative approach has become the predominant pattern in Japan because police, prosecutors and judges recognize its success in correcting offenders and satisfying victim as well as the needs of the public (Haley, 1997:114). What is the restorative approach? How can we gather evidence that the restorative approach leads to success? We strongly question his assertion. Here we should reconsider his interpretation of the Japanese criminal justice system.

As Haley mentions, it is true that those accused of certain (minor) offenses who confess and display remorse stand a reasonable chance of being released without further official action (Haley, 1997:106). But we have to keep in mind that in the system they are based on the cool rational choice to get diversion by discretion of the authorities. Therefore, it is doubtful whether their remorse and apology to the victims truly come from their heart. It is because the offender is told to express remorse not to the victim but to the authorities. Also offender is expected to accept the civil law negotiation with the victim (*jidan*) which has been reached with the help of a private attorney for getting lenient sanctions. These series of apologies (confession to police, remorse at prosecution, apology at court) are mostly intended for the offender to reduce harsh sanctions and not for the benefit of the victim. Of course, we cannot guarantee that this tripartite action on the part of the authorities to extract an apology would result in reinforcing the shame and guilt in the perpetrator and to the restoration of good name and self esteem. But how does the offender regard the victim?

Jidan is an informal settlement reached out of court over a victim’s claims for damages, material or emotional, in either civil or penal cases. *Jidan* is usually accomplished with the victim’s temporary acceptance for the offender’s expression of apology and offer of material reparations. The penal procedure should be continued even if *Jidan* comes into effect in a penal case. A payment could be provisionally made even if *Jidan* is not affected. *Jidan* is informal in nature but formal in the sense that depending on the circumstances it brings about a suspension of an indictment or lenient sentencing to the defendant.

Although as Haley points out the Japanese criminal justice system is deemed to be oriented to restorative justice. The restorative pattern works only for perpetrator as to the authorities, or state (Japan) not directed to the victim. According to the research study which we conducted concerning the victim's mental condition and attitude, most victims feel very dissatisfied both with the personal apology and material restitution by the perpetrator since most of the restitution and apology are done through a substitute, the professional attorney (see Table 2).

Japanese criminal offenders are said to be more ready to admit their guilt and throw themselves on the mercy of an offended authority. In dealing with those who have perpetrated a crime, the cultural assumption of social harmony would lead Japanese to accept the external act of apology at face value and not to disturb the superficial concord by challenging the sincerity of the person making the apology. The act of apologizing can be significant for its own sake as an acknowledgment of the authority of the hierarchical structure upon which social harmony is based.

4. A second problem concerning the rights of victims in the Juvenile Law ----as made apparent through the Kobe serial killing case

As mentioned above, the Japanese criminal justice system has neglected crime victims in comparison with offenders. As the system of "apology-forgiveness" has taken the unique form of apology from the "offender to authorities" not "offender to victim", this appears to be an effort on the part of authorities to mitigate the offender's sanction. Concerning Juvenile Law, especially as regards the victim, we have to point out another critical flaw. Here, we would like to examine this issue through the actual case which occurred in Kobe in 1997 (it is known as the "Kobe serial killing case committed by a 14 year old school boy"; hereinafter referred to as the "Kobe case").

In the 3 months between March and June in 1997, one schoolboy aged 14 years living in the central part of Kobe city, assaulted four schoolgirls and one schoolboy living in the same community. Among the five victims one girl (10 years old) died in hospital a week after being assaulted with a baseball bat, one boy (also 10 years old) was killed and his head was separated from his body with a knife near a playground. Two days later, the decapitated head was placed on the gatepost of the junior high school that the offender attended. The offender was arrested around 1 month after the head was found. At that time, information about the victim was made public through the media again and again. This information included his name, his picture, his mental deficiency, family background, etc. On the contrary, the offender was formally protected and public disclosure was disallowed because of the Juvenile Law.

According to Juvenile Law, the purpose of this is to protect and nurture young offenders. Therefore, judges are obliged to return young offenders back to community. In this case, from the beginning, there was severe criticism of the Law not only from criminologists and other professionals, but also from citizens of all groups and ages (many of these were published in the reader's column of all the major newspapers). Much of the criticism concerned the lenient punishment and the imbalance of justice between offender and victim.

As for the Law, it placed much emphasis on educational treatment rather than retributive punishment, though it is the core of the Law, therefore it led to a hot debate thus dividing the public into two groups. Under the present Law, even if a juvenile under age 20 commits murder, he is to be placed in a training facility for less than 3 years. However, as the "Kobe

case” was considered exceptional, the 14-year-old boy was sent to a medical treatment center in Fuchu near Tokyo where he would stay up to 26 years of age depending on his recovery. It is true that the present Law was enacted in 1949 soon after the end of World War II. Though there is a conservative and strong movement to change the Law to adjust to the present situation and to lower the age responsible for penal punishment toward less than 16 years of age, at the same time there is another movement mainly supported by liberal scholars and The Japanese Bar Association to preserve the idea or principle of the Juvenile Law.

The second point against the Law is the concern about injustice or inequity between victim and juvenile offender. In addition to the criminal law, the Juvenile Law overprotects the rights of juvenile offenders in several ways. On many points, victim’s rights are relatively neglected and ignored much more so than in adult cases. The “Kobe case” was conspicuous in that it clearly illustrated the problems associated with the rights of victims in the criminal justice system. First, there is the issue of disclosure of the name and photo of offender and victim. According to the Law, the name and photo of a juvenile offender are to be kept secret to prevent obstacles to his/ her re-socialization. On the contrary, the Law, even if the victim is also a juvenile, does not protect the privacy of the victim. In the “Kobe case”, not only the name and photo of the victim, but very private information such as his mental condition and his father’s occupation and educational career was made public by the mass media again and again. In that situation, one famous weekly magazine disclosed the juvenile offender’s name and photo and, in effect, broke the Law by stating: “people in general have the right to know the serious crime as a whole, a wild beast has no human rights to be protected by the Law,”. Only after two days of its publication, this magazine was voluntarily pulled from the shelves by the bookstores’ union. This fever to challenge the National Law seemed to be a form of retributive justice by the people (a form of public lynching). It seems that there is some connection with the attitude of Japanese in favor of capital punishment. In our research of victims of serious crimes, we detect a similar phenomenon. This is to say that the crime victim wants the offender to be dealt with much severe punishment with retribution in mind (see Table 2).

5. Discussion

We presented the theoretical discussion concerning the situation of victims as regards the “apology-forgiveness” culture in Japan. In the future we are planning on doing comparative research with several Australian scholars to confirm the points drawn from this discussion. That is, we could indicate some issues as the hypothesis for our future cooperative research.

- (1) Looking at the 21st century criminal justice system throughout the world, especially in the highly matured welfare society, we can expect the paradigm shift of justice model from retributive to restorative. In view of this trend how do we interpret the disparity or contrast between the traditional Japanese “apology-forgiveness” culture and the retributive feelings of Japanese people toward serious criminals?
- (2) It is frequently mentioned that in the Japanese criminal justice system the police, prosecution and court are administered based upon the model of “just deserts”, while the probation, training facilities and prisons are run by the ideal of rehabilitation. This would indicate that the Japanese criminal justice system is very far from meting out the restorative justice. Seen this way, confession, remorse and apology in the Japanese system seem to be pretentious. How can the spirit of restorative justice change the Japanese system?

- (3) Even if in the present criminal justice system the specific restorative approach, based on the three methods of diversion with police, prosecutors and court, is dominant, it is nonetheless offender-oriented and offenders are always expected to indicate their feelings of acknowledgement of guilt, remorse and apology to the authorities. Victims are not involved in the criminal justice process. How do we make the victim in the criminal justice process a visible figure?
- (4) The only exception of the victim as a visible figure in the present criminal system is the situation when the parole board has to decide whether a convict should be paroled. The board discusses with the probation officer who has had contact with the victim and decides whether the parole is appropriate or not. Though it relies on the probation officer to ascertain that both the victim and offender can start anew in the community, we have some obligation or task to promote this system.
- (5) According to the research on victims conducted by us (see Tables 2 and 3), most victims have ambivalent attitudes toward offenders. This is to say, that although they expect that the offender should be dealt with in a strict and severe manner (on retributive orientation), they also expect them to start their own lives anew but beyond the victims' sights (on self-help orientation). Either way, it suggests separation from the victim. How do we construct the bridge of interaction between victim and offender to enable his or her own empowerment?
- (6) Although the number of juvenile offenders has risen drastically during the 90s, the idea or principle of the Juvenile Law should be maintained in the future. At present the correctional education focusing on *redemption* in the juvenile training facility is carried out under corrections officers' initiative and there is no opportunity for juvenile offenders to meet with their victims. What alternative programs focusing on *redemption* can be prepared for them here?
- (7) In Japan we have had a volunteer probation officer system in effect for over 50 years. This program mainly aims to facilitate the offender's rejoining the community with the assistance of a public probation officer. However, victims also require the help of people in the community to recover from any pain and suffering which have been inflicted on them. In the future, what should be the role of volunteer probation officers in the community to effectively mediate both for offender and victim?
- (8) At the academic Japanese Society of Victimology, the principles behind restorative justice are not very popular. But the mediation model that has been carried out by various European countries has been introduced several times in recent years compared with that of the community based restorative justice model carried out in Australia, New Zealand and the USA. Because the mediation model seems to be similar to *Jidan* in the Japanese civil law.

References

- Bayley, D.H. 1991. *Forces of Order: Police Behavior in Japan and the United States*. Berkeley: UC Press.
- Braithwaite, J. and Pettit, P. 1990. *Not Just Deserts*. Oxford: Clarendon Press.
- Fattah, E. and Peters, T. (eds.) 1998. *Support for Crime Victims in a Comparative Perspective*. Leuven: Leuven University Press.
- Haley, J.P. 1997. "Apology and Pardon: Learning from Japan" in Etzioni, A. (ed.) *Civic Repentance*. Roman & Littlefield.
- Hase, Mamoru. 1998. *Jun* (in Japanese). Tokyo: Shinchosha.
- Hosoi, Yoko, 1992. "Cultural Factors of Crime Control", presented at the seminar of Prevention in the Urban Community. April 13-17: the International Society for Criminology. Tokyo.
- Itaya, Rikako. 1998. *Confidential* (in Japanese). Tokyo: Kadokawa Shoten.
- Komiya, Nobuo, 1999. "A Cultural Study of the Low Crime Rate in Japan. *British Journal of Criminology*. Vol.39, No.3 369-390.
- Krauss, E.S. and Rohlen, T.P. Steinhoff, P.G. *Conflict in Japan*. 1984. Honolulu: University of Hawaii Press.
- Lebra, Takie Sugiyama. 1995. "Apology and Self: The Japanese Case" (paper presented for panel on "Compensation, Apology and Retribution in Contemporary Pacific Society," ASAO Meeting, Kona, HI).
- Miyazawa, K. et al. (eds.) 1996• *DA Study on Victims of Crime* (in Japanese). Tokyo: Seibundo.
- Morosawa, H., Tomita, N. and Tatsuno, B. 1999. *A Way to Recover from Trauma* (in Japanese). Tokyo: Kodansha
- Morosawa, H. 1998. *An Interdisciplinary Study of Victim and Victimization* (in Japanese). Tokyo: Seibundo.
- Moriyama, T. and Nishimura, H. 1999. *Invitation to Criminology* (in Japanese). Tokyo: Nihon Hyoronsha.
- Nishi Nihon Shimbun Shakaibu. 1999. *Consideration of Human Rights of Crime Victim* (in Japanese). Fukuoka: Nishi Nihon Shimbunsha.
- Tokoro, K. 1999. "Redemption and Juveniles"(in Japanese) *Keisei*. Vol.10 Nov.5: 28-36. Tokyo: The Japanese Correctional Association.
- Wagatsuma, H. and Rosett, A. 1986. "The Implications of Apology: Law and Culture in Japan and the United States", *Law and Society Review*. Vol.20, Nov.4, 461-498.
- Yamashita, K. 1998. *To Ayaka---Thanks to You for Giving Me the Will to Live* (in Japanese). Tokyo: Kawade Shobo.

Appendix

Miyazawa, Koichi et al. (eds.). 1996. *A Study on Victims of Crime* (in Japanese). Tokyo: Seibundo.

Using data of the first nationwide comprehensive research administered in Japan in 1993 focusing on the emotional problems of victims, their needs and their psychological support, this book was completed in 1996. It was 15 years after the implementation of the Crime Victims Benefit Payment Law. It may be said that theory, principles and practice of restorative justice were rarely known at that time.

Our random selection was made for three groups of victims. That is, 273 survivors who lost their partner or close relative and who receive benefit payments, 231 seriously wounded person, 227 persons suffering from property crimes and one group of professionals including 137 police officers, 38 prosecutors, 53 judges and 72 lawyers. Each member of these groups was given a questionnaire and a selected few were interviewed. It seems for us that the questionnaire does not cover the scope of the restorative approach, but several questions were related with the theory of restorative justice.

We present some of the results of the questionnaire in the following tables to understand the cultural background of restorative practices:

Table 1. Demography by types of victims

	Survivor	Wounded	Property
% Female	56.7	33.9	39.5
% Less than 39 year of age	16.1	39.6	14.0
% Less than ¥2 millions in annual income	33.3	18.5	7.7

Table 2. Victim's Relations with Offender

	Survivor	Wounded	Property
Attitudes toward Offender at Present¹⁾			
Retributive reaction at first	65.4	9.5	16.8
Too lenient punishment to accept	93.3	36.6	*
Hoping to stay away from offender	91.4	75.4	85.2
Forgive offender for his/her wrongdoing	10.3	17.0	*
Hoping offender gets back on right track	57.3	68.3	94.4
What Has Made You Bothered or Annoyed²⁾			
Emotional problems such as sleeplessness, Depression and apathy	75.4	48.1	*
<i>Jidan</i> ³⁾ or Restitution	25.0	28.7	*
Submission of statement that I don't care a bit for punishment to offender	6.3	8.8	*
Offender's insisting of victim's fault	6.3	3.3	*
Media news of my case	31.3	16.6	*
Interaction after Victimization			
Apology from offender or his/her substitutes	24.8	43.3	27.4
Genuine apology (% indecision about genuine or pretentious)	22.4 (65.5)	43.8 (41.6)	33.3 (46.3)
Talking over <i>Jidan</i> or Restitution	23.9	47.3	43.5
Person who suggested <i>Jidan</i>, or restitution			
Victim or substitutes	48.9	19.6	12.5
Offender or substitutes	27.7	67.4	52.8
Police officer, prosecutor, et al	23.4	13.0	34.7
Dissatisfaction of <i>Jidan</i> or Restitution	67.5	38.2	*

NOTES: * No question is asked 1) The sum of percents of "Agree" and "If anything, agree". 2) Multiple choices.
3) *Jidan* is the informal settlement out of court over a victim's claim for damages in either a civil or penal case. *Jidan* is usually accomplished with the victim's temporary acceptance of the offender's expression of apology and offer of some money. The penal procedure should be continued even if *Jidan* comes into effect in a penal case. A payment could be provisionally made even if *Jidan* is not affected. *Jidan* is said to bring about lenient sentencing to the defendant.

Table 3. Perception of *Jidan* or Restitution

	Survivor	Wounded	Property
What Should Be Done to Offender ⁴⁾			
Imposition of penal punishment in court	*	*	46.0
Payment as a result of direct talk between victim and offender	*	*	26.0
Expression of apology as result of direct talks between victim and offender	*	*	11.6
Payment as a result of talk by proxy	*	*	25.1
Expression of apology in court	*	*	13.0
Becoming voluntarily convinced of offender's fault	*	*	31.2
Meaning of <i>Jidan</i> or Restitution ⁵⁾			
Making up for economic loss of victim	*	*	39.0
Making offender express apology to victim	*	*	36.6
Making offender show his/her good faith	*	*	43.7
Transmitting victim's rage	*	*	21.1
Constructing a peaceful relation with offender	*	*	4.7

NOTE: 4), 5) Multiple choices which a respondent prefers

*No question is asked.

Discussion:

Table 2: Somewhat lower percentage for “Too lenient punishment” in the “Wounded” group implies a possibility of restorative practice, but high percentage for “Staying away from” in all the three groups will prevent this practice. The restorative approach for the “Survivor” group seems very difficult because of the higher percentage for “Retributive reaction”. But note that slightly more than half of the survivors wish for the offender to “Get back on the right track.” to the offender. The percentage for “Forgive offender” was relatively low. This low response contrasts strikingly with higher percentage for “Get back on the right track.” It suggests that the victims in the “Wounded” group might take a seat in a circle with offenders upon facilitator's effective instruction.

Jidan is the traditional Japanese system of informal settlement out of court. The percentages for “Apology” were 24.8, 43.3, 27.4 in the “Survivor”, “Wounded” and “Property” groups respectively, and those for “Talking over” 23.9, 47.3, 43.5. Whether or not these figures indicate a high popularity of *Jidan* or restitution in penal cases among the Japanese can be argued. This is not to say that “Apology” proves worthy of victims' trust and that respondents were satisfied with the results of *Jidan*. This is especially true in the “Survivor” group. There is a distinction of response patterns among the three types of groups depending on who suggested *Jidan* or restitution.

Table 3.

This table shows an analysis of the “Property” group on *Jidan* or restitution. As far as the treatment of offenders, victims prefer penal punishment, but all of them do not necessarily reject the restorative approach. We used two questions differently, that is, “Express apology” and “Show good faith”. These two wordings are very popular in Japanese everyday life. There seems to be a difference in the connotation between apology and good faith.