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Myths of restorative features in the Japanese justice system and society: The role of apology, compensation and confession, and application of reintegrative shaming

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Abstract

Restorative justice (RJ) has experienced rapid growth. Along with its development, myths about RJ have emerged. Although several scholars have challenged these, two myths about restorative features in the Japanese justice system and society – (1) the role of apology, compensation and confession; and (2) the application of reintegrative shaming – arguably remain pervasive. In this paper, we aim to advance a critical analysis of these two ostensibly restorative features of the Japanese justice system and society. We argue that the reality may be more nuanced. We conclude by analysing why these myths have emerged and what functions they have performed.

Keywords

Restorative justice; Japan; criminal justice; apology; reintegrative shaming

Introduction

Since its emergence, the idea of restorative justice (RJ) has experienced rapid growth. Along with its development, myths about RJ have emerged. Several scholars have addressed these myths. One of the earliest and influential works is by Daly (2002), who addressed four common myths of RJ: (1) relationship between RJ and retributive justice; (2) relationship between RJ and indigenous practice; (3) RJ as a care response; and (4) transformative effect of RJ. Others, such as Tauri (2005), Blagg (1998) and Cunneen (1997), have critiqued the oft-claimed benefits of RJ for indigenous people. Sylvester (2003) and Richards (2009) have demythologised the taken-for-granted history and origins of RJ.

Following the global RJ movement, a pilot study was conducted in Japan during the mid-2000s to test the effectiveness of family group conferencing for juvenile offenders (Kikuchi, 2014; Takahashi, 2010). While this study showed participants' positive assessments of such conferencing, it has not become an official program, to our knowledge for reasons not clearly articulated in the literature. Yet, one of the possible reasons is that the Crime Victims Association in Japan strongly opposes the implementation of RJ, due to a lack of interest in restoration in relationships with offenders and its criticism of the RJ emphasis on forgiveness (Hirayama, 2007; Matsui, 2011).¹ As a consequence, no purist RJ program (i.e. face-to-face dialogue between victims and offenders, see Marshall, 1999) exists in Japan *within* its justice

¹ The mainstream victim movement in Japan, supported by scholars who advocate victim right and support such as Morosawa (1976, 2012), conservative politicians and judges, and justice agencies such as the Ministry of Justice and the National Police Agency, is arguably punitive and retributive. For example, it not only does not allow proposals to promote offender rehabilitation but also opposes RJ movement. However, it is important to mention that other victims, such as Katayama (2003, 2014), feel the potential of RJ as one of criminal resolutions for victim healing, though such an opinion is in the minority in Japan and less likely to be reflected in the actual policy.

system (Yoshida, 2003b); however, some non-profit organisations (NPO) are implementing it (Suzuki, 2017).

Despite the lack of an official RJ program, two ‘restorative’ features in the Japanese justice system and society have gained attention among scholars. First, Haley (1989) argued that the Japanese justice system is restorative because an apology, compensation and confession play important roles. Second, Braithwaite (1989) proposed that the reason Japan enjoys a low crime rate is because it practices reintegrative shaming, which is considered one of the main theories of RJ (Johnstone, 2013). Relying on these two scholars’ arguments, some scholars claimed that the Japanese justice system and society operate under a restorative and reintegrative approach (Dignan, 1992; Llewellyn & Howse, 1998).

Several researchers have partly challenged these myths of the Japanese justice system’s restorative features (Goold, 2004; Hamai & Ellis, 2006, 2008b; Hosoi & Nishimura, 1999; Johnson, 2002; Leonardsen, 2004; Miyazawa, 1997). Nevertheless, the myths arguably remain pervasive among scholars (Barnes, 2013; Stovel & Valiñas, 2010) including Haley (2011; 2012) and Braithwaite (2012, 2014), and in the RJ literature (e.g. for the role of apology, see Brook & Warshwsky-Brook, 2010; for the application of reintegrative shaming, see Condon, 2010; Five, Keenaghan, Canaba, Moran & Coen, 2013). In this paper, we aim to advance a critical analysis of the two ostensibly restorative features of the Japanese justice system and society: (1) the role of apology, confession and compensation; and (2) the application of reintegrative shaming. We argue that these do not necessarily reflect the reality. We conclude by analysing why these myths emerged and what functions they perform. Since there is an ongoing debate over what counts as RJ (c.f. Daly, 2016; Wood & Suzuki, 2016), it is beyond the scope of this paper to enter this debate. Therefore, following the maximalist definition of RJ as ‘every action that is primarily oriented toward doing justice

by repairing the harm that has been caused by crime' (Bazemore & Walgrave, 1999: 48), we use the term, restorative, in this broad sense.

Myth 1: The role of apology, compensation and confession

Haley (2011: 8) argued that 'the only integrated restorative approach to criminal justice that is fully incorporated within the structure of the criminal justice system by the law enforcement authorities themselves is Japan'. Haley (1989) claimed that this is the case because in addition to the 'first' track that is similar to other Western justice systems, Japan utilises the 'second' track, which takes a rehabilitative or reintegrative approach for offenders rather than formal and retributive punishment. In this second track, offenders' repentance 'remains the critical factor' for the decision-making process by justice professionals (Haley, 1982: 272).² According to Haley (1982), apology, confession and compensation play important roles here. Apology is encouraged from offenders. By doing so (often through offenders' lawyers and their family members), offenders can strengthen the sincerity of their remorse, allowing law enforcement authorities to seek a more lenient penalty, such as deferred prosecution, suspended sentences or reduced sentencing (Haley, 1998; Wagatsuma & Rosett, 1986). Moreover, not only is it encouraged implicitly by justice professionals, but also offenders (likewise often through their family members and lawyer) can even try to offer material or monetary compensation to victims. In return, they ask victims to send a letter to justice professionals stating that the offenders' apology is genuine, and demanding lenient punishment for the offenders (Haley, 1995). Offenders are also encouraged to confess their crimes during investigation and interrogation in order to show their repentance (Haley, 1982).

² The first track is the formal criminal justice procedure where law enforcement authorities, such as police and a prosecutor, play main roles as in the West; the second track is also a part of this formal process, but it becomes more informal in that offenders and victims can play more active roles and criminal cases can be resolved between them. According to Haley (1989: 195), 'there is no Western analogue' to this second track in Japan.

Sincere confession is one of the conditions in which law enforcement authorities display lenient attitudes towards the offenders (Bayley, 1991). Considering offenders' repentance expressed by apology, compensation and confession, and other factors such as the seriousness of the offence, Japanese law enforcement authorities decide on the 'best practice' for each offender, including whether the case should be dropped or processed and how it should proceed (Haley, 1996).

Haley (1992, 1996, 2012) thus argued that the Japanese justice system offers a restorative approach for offences by encouraging apology, compensation and confession. In this sense, the Japanese justice system may be close to what maximalist RJ advocates conceive as a 'fully-fledged' restorative system (Bazemore & Walgrave, 1999). In addition to receiving an apology (and compensation) as among the victims' needs (Strang, 2002), offenders can receive lenient punishment such as deferred prosecution, suspended sentences and reduced sentencing, leading to enhanced opportunities for their reintegration into the community (Haley, 1998).

However, the Japanese justice system may not necessarily be as restorative as Haley claimed. This is not because such an approach in the Japanese justice system is limited to minor offences for the purpose of reducing caseloads (Johnson, 2002). On the contrary, such an approach can also be used for serious crimes because it can still work to offer suspended sentences or to reduce sentence length. Also, for sexual assaults, victims' decisions remain a critical factor because some types of sexual assaults, such as indecent assault and rape by a single offender (except those causing injury or death), are offences subject to prosecution upon complaint (*Penal Code of Japan, Article 176-180*).³ Our doubt in the restorative features of the Japanese justice system is instead because the approach described by Haley

³ Removing such a condition is currently subject to legislative debate.

does not necessarily reflect the reality of the Japanese justice system. The rest of this section discusses why this is the case in terms of apology, compensation and confession respectively.

Sincerity of apology

An apology may not necessarily be offered by offenders, their family members and their lawyers for a restorative purpose. Offences in the second track can result in diversionary outcomes such as deferred prosecution, suspended sentences, and lenient penalties, such as reduced sentencing. The second track approach can thus benefit not only victims but also offenders. Therefore, as Hosoi and Nishimura (1999) argued, there is a possibility that some offenders may offer their apologies out of self-interest rather than out of sincerity; that is, they may do so to obtain victims' pardon and therefore receive a less harsh penalty. In addition, offenders' family members may try to offer an apology to victims on behalf of offenders, especially when offenders are detained, in order to obtain pardon from the victims and to assure victims that offenders will be monitored so as not to reoffend (Haley, 1989, 1992). However, this is not necessarily for the sake of victims; it may also prevent or reduce criticisms towards (and shame caused by) crime that can have a significant ripple effect on offenders' families and sometimes even relatives, due to the notion of collective responsibility. In Japan, families are expected to take responsibility for the offenders' actions. The backlash on family members and relatives is harsher the more serious the offence. In the worst case, one of the family members will commit suicide (Yoshida, 2003a). Furthermore, although victims play a role in the decision-making process, the final decision is still left to the justice professionals in most cases. Hence, there is also a possibility that offenders may offer an apology in order to convince law enforcement authorities that they should receive deferred prosecution, suspended sentences and reduced sentencing. Within the two-track system in the Japanese justice system, offenders may thus be more inclined to 'spontaneously' offer an apology for their own interests rather than for the victims. Such an

apology as a consequence of a calculated choice can undermine victims' perceptions of the sincerity of an offender's apology (Takahashi, 2005).

Since criminology (and victimology) in Japan is not as developed as in Western countries (Konishi, 2013; Yokoyama, 2013), there are few empirical studies on victims in particular. However, the first nationwide research on victims, and also, to our knowledge, the extant sole research on victims' perceptions of offenders' apologies in Japan, has demonstrated that victims had negative attitudes towards offenders' apologies (Miyazawa, Taguchi & Takahashi, 1996). In this study, to collect data on three groups of victims – (1) survivors who lost people close to them; (2) victims who were seriously wounded; and (3) victims who experienced property crimes – researchers collaborated with the Japanese National Police Agency. Based on the eligibility criteria discussed with researchers, the Japanese National Police Agency randomly chose eligible victims in each group across Japan who were registered with the victim support office in 1993. In all, 731 victims (273 in the survivor group, 231 in the wounded group and 227 in the property group) completed a questionnaire or participated in interviews with regard to their attitudes towards the offence and offenders. The findings showed that many victims who received offenders' apologies had doubts about the sincerity of those apologies (22.4% in the survivor victim group, 43.8% in the wounded victim group, and 33.3% in the property victim group) (Miyazawa, Taguchi & Takahashi, 1996). This study did not examine the reasons victims felt this way. Therefore, the victims' fairly low levels of the perceived sincerity of offenders' apologies might be partly because apologies were often given to victims not by offenders themselves in person, but by their families or lawyers (Hosoi & Nishimura, 1999). Yet, as we argued above, it is also possible that apologies offered out of offenders' self-interest were less likely to be perceived by victims as genuine. Therefore, as Hosoi and Nishimura (1999) argued, the restorative pattern exhibited by apology may work mostly for offenders, rather than victims.

Accomplishment and effects of compensation

Compensation may not always be paid nor necessarily be linked with victim restoration. In relation to the less-developed criminology and victimology in Japan (Konishi, 2013; Yokoyama, 2013), there are also few empirical studies on compensation. Yet, *Homusogokenkyujo* – a research institute of the Japanese Ministry of Justice – has conducted research to examine the extent to which compensation is paid to victims (Japanese Ministry of Justice, 1999). In this study, through District Public Prosecutor Offices across Japan, questionnaires were collected from 1,132 victims of the following groups of crime sentenced as guilty during 1997-1999: (1) homicide including violence causing death (n = 111); (2) traffic accident causing death (n = 131); (3) violence causing injury (n = 104); (4) traffic accident causing injury (n = 124); (5) theft (n = 142); (6) fraud including embezzlement (n = 127); (7) robbery (n = 123); (8) blackmail (n = 104); (9) rape (n = 81); and (10) indecent assault (n = 85). This research showed that compensation was not necessarily fully paid to most victims. The ratios of ‘full payment’ or ‘partial payment while the rest is planned’ were high among victims in the groups of ‘traffic accident causing death’ (70%) or ‘injury’ (60%) because of insurance payments. In contrast, those ratios for other victim groups were low (10-20% in the homicide group, 30-50% in the sexual assault groups, and 20-40% in the rest) (Japanese Ministry of Justice, 1999). This study did not clearly distinguish among the types of compensation – whether payment was suggested from the offenders’ side or whether payments were the result of civil litigation brought by the victims’ side. Hence, it is impossible to know how many offenders spontaneously promised to compensate but failed to do so. However, this study showed another important finding in the relationship between compensation and victim restoration through its examination of the extent to which victims’ emotional well-being was restored (Japanese Ministry of Justice, 1999). The finding highlighted that regardless of whether and to what extent compensation was paid or not, *at*

least half of the victims in all groups reported that they could not forgive offenders or were more resentful at them than before the compensation was paid (Japanese Ministry of Justice, 1999). This study therefore suggested that compensation did not necessarily contribute to victim restoration, because in many cases victims maintained their dissatisfaction with offenders even if they received compensation (Japanese Ministry of Justice, 1999).

Impact of coercion on confession

Confession is sometimes elicited in a non-restorative way. The Japanese justice system is known as ‘precise justice’ because its conviction rate reaches nearly 100 per cent (Ramseyer & Rasmusen, 2001). This may indicate the efficacy of the Japanese law enforcement authorities, particularly police and prosecutors, who have discretion regarding whether a case should be dropped or prosecuted.

However, there can be an alternative explanation to this: ‘hostage-taking justice’. To achieve such a remarkable conviction rate, justice professionals sometimes take a coercive and authoritative approach towards suspects because the *Code of Criminal Procedure* (Article 203, 205, 207, 208, 248) gives broad discretion to law enforcement authorities in questioning detaining and prosecuting the accused. If suspects do not spontaneously confess during the criminal investigation, they sometimes experience intensive questioning and interrogation from police during lengthy detentions (Leo, 2002; Miyazawa, 1992) in which their rights to counsel are diminished (Neumann, 1989; Suess, 1996). Similarly, prosecutors sometimes try to elicit confessions from suspects by using their authority, such as the discretion to defer prosecution (Johnson, 2002). Moreover, suspects are more likely to be detained in police detention cells (*ryuchijo*, also known as *daiyo-kangoku* – substitute prison) for the convenience of police interrogation rather than in *kouchisho* – legally designated pre-trial detention houses operated under the aegis of the Japanese Ministry of Justice (Castberg, 1997). Despite their gatekeeper roles and authority, judges rarely intervene in such ‘quasi-

illegal' situations (Hamai & Ellis, 2008a). Therefore, the Japanese justice system is nationally and internationally criticised (Clack, 2003; Ito, 2012). Such practices not only raise questions about the voluntariness and reliability of confessions (Castberg, 1997), but also can produce forced confessions, leading to wrongful convictions (Fukurai & Kurosawa, 2010). In fact, research suggests that this feature contributed to forced confessions and wrongful conviction in four death penalty cases (Foote, 1992b).

Summary

Thus, the role of apology, compensation and confession in the Japanese justice system may not necessarily be as restorative as claimed by Haley. The sincerity of apology is sometimes questionable because an apology may be offered merely for offenders to gain a less harsh penalty (Hosoi & Nishimura, 1999). Compensation may be neither forthcoming nor sufficient to restore victims (Japanese Ministry of Justice, 1999). Confessions can be elicited coercively, particularly if offenders do not willingly and spontaneously follow and comply with their expected roles (Foote, 1992a).⁴

Myth 2: The application of reintegrative shaming

When he put forward his influential theory of reintegrative shaming,⁵ Braithwaite (1989) chose Japanese society as an example to support it. According to him, reintegrative shaming, which respects offenders' human values while condemning the wrongdoing, can be more

⁴ To address the problem during interrogations, video recording of suspect interviews has been partially tested in practice (Wachi, Watanabe, Yokota, Otsuka & Lamb, 2016).

⁵ Braithwaite later developed his original theory into a theory of shame management that incorporates individual differences in response to shame (Ahmed, Harris, Braithwaite & Braithwaite, 2001). However, scholars continue to relate reintegrative shaming to Japan (Condon, 2010; Five, Keenaghan, Canaba, Moran & Coen, 2013; Kim & Gerber, 2010; Sakiyama, Lu & Liang, 2011). In this section, we therefore focus on his original theory of reintegrative shaming.

effective in dealing with crime than can stigmatising shaming, which labels offenders as deviants. Braithwaite argued that Japan enjoys a low crime rate because it practices reintegrative shaming (Braithwaite, 1989; Braithwaite & Mugford, 1994). Braithwaite (1989: 63) argued that in the Japanese shame culture ‘when an individual is shamed in Japan [due to offence], the shame is often borne by the collectivity to which the individual belongs as well – the family, the company, the school – particularly by the titular head of the collectivity’. According to Braithwaite, such collective shaming works as a deterrent because it can undermine existing relationships with significant others, such as family or friends. Further, drawing upon the work conducted by Bayley (1976), Braithwaite (1989: 79-80) claimed that the Japanese law enforcement authorities, such as police, prosecutors and judges, also ‘rely heavily on guilt-induction and shaming as alternatives to punishment’. Such practice, Braithwaite (1989: 79-80) argued, enables justice professionals to ‘put social control back into the hands of significant others, where it can be most effective’ in dealing with crime because it helps to ‘soften the discontinuity between the increasing trust into inner controls of family life and the shock of a reversion to external control in the wide world’. Finally, Braithwaite (2014: 73) also claimed that Japanese society as a whole is controversially reintegrative due to the influence of Confucianism, which emphasises the importance of harmony among people. He therefore argued that such a characteristic is ‘one account of Japan’s comparatively low level of violent crime’ (Braithwaite, 2012: 309).⁶As such, Braithwaite argued that Japan applies reintegrative shaming at individual, institutional and societal levels.

However, we may need to be careful in reaching such a conclusion. Miyazawa (1997) contested Braithwaite’s claims at each level. In the following, drawing upon Miyazawa’s

⁶ To be fair, Braithwaite (2012: 309) also noted that ‘there may be other reasons as well, as argued elsewhere’.

arguments we discuss the applicability of reintegrative shaming in Japan at three levels respectively.

Applicability of reintegrative shaming at the individual level

At the individual level, it is doubtful whether reintegrative shaming is a factor that prevents Japanese people from committing a crime. Miyazawa (1997) admitted that Japan does utilise informal social control in institutions and organisations such as schools and companies. However, he also argued that Japanese people may conform not because of reintegrative shaming, but ‘because they know that conformity will be highly rewarded while the consequences of non-conformity are enormously costly’ (Miyazawa, 1997: 200). In Japan, grouping in family, schools and companies is an important cultural aspect in the socialisation process. Membership offers a range of supports and benefits within groups backed by strong interdependency, as Braithwaite (1989) described. Yet, group members are simultaneously required to show a strong commitment to the group’s rules and norms (Komiya, 1999; Moriyama, 2006). As Braithwaite (1989) himself admitted, and others (Foote, 1992a; Leonardsen, 2004; Nelken, 2010) likewise indicated, the pressure to conform to the group’s norms and rules can sometimes be strong enough to cause discomfort. Further, if members do not follow the rules or norms of the group to which they belong, treatment of such members can be extremely harsh, such as making them outcasts (Miyazawa, 1997). Therefore, the fear of being expelled, rather than a reintegrative environment, may most strongly encourage Japanese people to comply with rules and regulations.

Applicability of reintegrative shaming at the institutional level

In relation to the institutional level, Sakiyama, Lu, and Liang (2011) explored the applicability of reintegrative shaming in the Japanese justice system. They analysed Japanese newspaper coverage of 158 juvenile delinquent cases during 2008 and 2009 (448 young offenders in total) in order to examine how the involvement of ‘significant others’ (e.g.

parent, school and community) as a proxy of reintegrative shaming influenced the case disposition. Their findings indicated that reintegrative shaming functioned for juvenile delinquency because the involvement of significant others was more likely to result in ‘less state intervention and more utilisation of informal social control’ (Sakiyama, Lu & Liang, 2011: 172). Therefore, while they admitted the limitations of their research, particularly in the use of involving significant others as a proxy of reintegrative shaming, they suggested that reintegrative shaming is partially effective in the Japanese (juvenile) justice system (Sakiyama, Lu & Liang, 2011).

However, a close look at practices of Japanese law enforcement authorities indicates that they may not necessarily practice reintegrative shaming. Based on his own ethnographic research on the Japanese police (Miyazawa, 1992) – and as we discussed above – Miyazawa (1997: 201) argued that Japanese police seem more interested in ‘finding evidence to justify longer detention and heavier penalties’ than ‘in reintegrating the suspect into society’. In fact, reflecting Miyazawa’s and others’ critiques, Braithwaite (2002a: 27, emphasis in the original) later changed his view and argued that ‘Japanese policing may be more reintegrative at the *koban* [neighbourhood police station] level, more stigmatising in the hands of detectives and prosecutors’. This is somewhat consistent with the research by Johnson (2002) who conducted a survey of Japanese prosecutors to collect their perceptions of their practice. The findings revealed that ‘invoking remorse in the offender’ – one of the important elements of reintegrative shaming – was considered important for prosecutors. However, the findings also revealed that another important element of reintegrative shaming, ‘invoking the public’s condemnation’, was not important to them (Johnson, 2002: 103-104). Therefore, while ‘guilt-induction is a central objective and common practice for prosecutors in Japan’, as Johnson (2002: 186) argued, shame-induction may not be.

Applicability of reintegrative shaming at the societal level

Japanese society as a whole may not be as reintegrative as described by Braithwaite. This is particularly evident in public opposition towards construction or renovation of rehabilitation centres to promote offender reintegration. To our knowledge, few studies have examined this topic; however, some newspaper articles have reported such attitudes.⁷ In 2007, the Japanese Ministry of Justice announced that it planned to construct a rehabilitation centre in Fukuoka (*Asahi Shimbun*, 9 May 2007, evening, Tokyo). However, residents in Fukuoka opposed such a construction plan due to its intended location next to an elementary school. Their opposition increased when residents learned that parolees who were drug addicts or involved in sex offences were eligible for the rehabilitation centre. While the Japanese Ministry of Justice subsequently announced that it had removed the eligibility of sex offenders, residents continued to show their opposition and submitted a request from 63,000 people to the then-Minister of Justice demanding abortion of the construction plan (*Asahi Shimbun*, 9 May 2007, evening, Tokyo). In addition, the relocation plan of one rehabilitation centre in Fukushima experienced opposition in 2015 from residents who lived where the centre was supposed to be relocated (*Asahi Shimbun*, 16 September 2015, morning, Fukushima). Several criminal justice facilities, such as prisons and juvenile offender classification offices, were already concentrated in this area. These residents therefore claimed that the relocation would further degrade their living environment and have harmful effects on safety and security in the community (*Asahi Shimbun*, 16 September 2015, morning, Fukushima). As Miyazawa (1997) argued, such opposition would be less likely to occur in a country that was truly characterised by reintegrative shaming.⁸

⁷ These newspaper articles (in Japanese) can be accessed at <http://database.Asahi.com/> (accessed 16 June 2016).

⁸ Another evidence for non-restorative attitudes in the Japanese public might be the small case number of RJ practices operated by a NPO. Perhaps the most famous RJ implementation in Japan is the one by one NPO,

With regard to the public attitudes towards offenders, recent punitive reforms in juvenile law and justice in Japan have raised more doubt about the applicability of reintegrative shaming at the societal level.⁹ Juvenile offenders in Japan are supposed to receive a more rehabilitative and reintegrative approach, compared to other types of offenders. Article 1 of the *Juvenile Act* in Japan clearly states that ‘the purpose of this Act is to subject delinquent Juveniles to protective measures to correct their personality traits and modify their environment, and to implement special measures for juvenile criminal cases, for the purpose of Juveniles’ sound development’ (Japanese Law Translation, 2010). Juvenile offenders should hence be treated accordingly. However, a small number of heinous juvenile crimes that have gained significant media’s attention have fuelled what Kawai (2004) called a ‘myth of collapse of secure society’ among Japanese citizens. While the crime situation, especially juvenile delinquency in Japan, is in reality not deteriorating (Foljanty-Jost &

Taiwa no Kai (<http://www.taiwanokai.org/index.html>, in Japanese). This NPO has been providing RJ services outside the formal criminal justice system for victims and offenders who demand an RJ process. However, while this NPO has been practising RJ for over a decade, the total case number that finally reached face-to-face dialogue between victims and offenders is still quite small (n = 31) thus far (Yamada, 2016). While this small case number can be attributed to a low level of awareness in the public, it can also mean that the Japanese public may not be as restorative as argued in the literature because they may be reluctant to participate in RJ given the fact that this NPO has been struggling to attract cases.

⁹ Hamai and Ellis (2006, 2008b) argued that since the public punitive attitude is now reflected in sentencing trends, it raises doubt about the applicability of reintegrative shaming in Japan. However, Herber (2014) argued the opposite in terms of punitiveness in sentencing, because there has been no significant change in the diversionary practices. As Hamai and Ellis (2006) admitted, punitiveness in sentencing can be affected by various factors including the practices of law enforcement authorities (at the *institutional* level) , such as how police deal with crimes and how prosecutors and judges handle criminal justice procedures. Since our focus here is to discuss the applicability of reintegrative shaming at the *societal* level, we do not go into the discussion about punitiveness in sentencing (for further discussions on this topic, see also Ishizuka 2014; Miyazawa 2008).

Metzler, 2003), Japanese citizens have begun to feel fearful of being victimised in their everyday lives (Hamai & Ellis, 2006; Moriyama, 2011), particularly by juveniles (Foljanty-Jost & Metzler, 2003). This widespread fear of (juvenile) crime among the public in Japan has also led them to lose confidence that the law enforcement authorities can protect them (Miyazawa, 2008). Such public fear of crime has led to reforms in the *Juvenile Act* (Fenwick, 2006; Kuzuno, 2005; Ryan, 2005; Schwarzenegger, 2003) because it was publicly criticised for its ‘ineffectiveness’ and ‘over-protection’ of young offenders (Fenwick, 2013). The reforms in the *Juvenile Act* can be considered punitive and retributive (Kuzuno, 2005; Ryan, 2005; Schwarzenegger, 2003; Takeuchi, 2015). For example, juveniles, especially those who commit serious crimes, can be tried in an adult court where they may face formal prosecution and a more retributive punishment. Further, the minimum age at which juveniles can be transferred to an adult court has been lowered from sixteen to fourteen. Also, serious crimes causing death of victims must now be transferred to the adult court; all the youth offence cases had formally been sent to the family courts where prosecutors have no discretion (Kuzuno, 2005; Ryan, 2005; Schwarzenegger, 2003; Takeuchi, 2015). This implies that the notion of *parens patriae*, long maintained in the Japanese youth justice, seems to be declining. This raises strong doubts about the presence in Japanese society of a rehabilitative and reintegrative attitude towards young offenders, which the *Juvenile Act* itself states is its aim.

Summary

Thus, these realities and trends counter the claim that the Japanese justice system fully utilises reintegrative shaming, as Braithwaite claimed. As Miyazawa (1997) argued, pressure of conformity and fear of exile may be more influential factors in crime control than is reintegrative shaming. Japanese law enforcement authorities may not necessarily practice

reintegrative shaming. In addition, opposition to strategies for offender reintegration and recent punitive trends and reforms raise further doubts about the validity of such a claim.

Concluding remarks

The claims by Haley (1989; 2011) and Braithwaite (1989, 2014) are based on the low crime rate in Japan. In criminological literature, Japan has often been described as a country with one of the lowest crime rates (Dammer, Fairchild & Albanese, 2006; Pakes, 2012). Japan is well known for this characteristic because it is an exception in terms of the relationship between crime rate and industrialisation. Unlike other developed countries, Japan has not experienced an increase in its crime rate despite rapid industrialisation and urbanisation in the post-war period (Clifford, 1976; Schneider, 1992). Hence, to explore the reasons why Japan has maintained its low crime rate, many scholars have engaged in comparative analyses (Adler, 1983; Parker, 1984; Schneider, 1992) and case studies (Ames, 1981; Bayley, 1991; Becker, 1988; Castberg, 1990; Johnson, 2002; Kawai & Kozeki, 2011; Leonardsen, 2004). Some of these researchers have suggested the efficacy of the Japanese justice system and related agencies (Castberg, 1990; Westermann & Burfeind, 1991), and in particular, the police (Ames, 1981; Bayley, 1991) and prosecutors (Johnson, 2002) are the reasons for this. Others have attributed it to a variety of socio-cultural factors in Japanese society. These are homogeneity; the strong informal social control constructed by family, school and companies; shared values of interdependence and harmony encouraged by collectivism and Confucianism, hierarchy and patriarchy; the low ratio of unemployment; and economic equality (Adler, 1983; Becker, 1983, 1988; Leonardsen, 2004; Parker, 1984; Schneider, 1992). Along with these studies' outcomes, the two ostensibly restorative features in the Japanese justice system and society – the role of apology (often coupled with confession and

compensation) and the application of reintegrative shaming – have been emerged. Japan has since appeared in the RJ literature as an example of a restorative system.

Yet, the argument about the restorative features in the Japanese justice system and society may be derived from what Goold (2004) and others, such as Nelken (1998; cited in Aldous and Leishman, 2000: 10) call ‘idealizing the other’. Scholars have provided cautions when conducting comparative criminology (Beirne, 1983; Karstedt, 2001; Leavitt, 1990; Nelken, 2010). Among them, when focusing on a positive aspect of another country or culture, we need to be careful not to fall into stereotyping, particularly orientalism in the Asian context (Cain, 2000; Medina, 2011; Sheptycki, 2008). As Goold (2004: 14) noted, ‘regardless of whether their primary aim has been to broaden their horizons or to bring some particular domestic issue into sharper focus’, researchers ‘have shown a marked tendency to assign certain countries well-defined roles when engaging in comparative analysis’. This may be the case for Japan in particular because due to its low crime rate, it often appears in the comparative criminology literature as a model country (Nelken, 2010). Therefore, the argument that the Japanese justice system and society is restorative might have emerged as a ‘simplified’ and ‘romanticised’ image (Goold, 2004; Sheptycki, 2008).

Several scholars have warned that the low crime rate in Japan does not mean that Japan’s approach is a panacea, because it has social problems as do other countries. Fujimoto and Park (1994) claimed that the level of public safety in Japan might be arguable because its total death rate from activities other than crime, such as traffic accidents, was not so different from that in other developed countries. By analysing the official data, Johnson (2006) noted that the total rate of homicide and suicide in Japan exceeds that in other countries because the suicide rate is high while the homicide rate is low. This is somewhat consistent with Leonardsen (2010) who recently reanalysed the crime situation in Japan. He argued that while Japan still maintains a low rate crime despite its increase since his previous study

(Leonardsen, 2004), Japan has suffered other social problems, such as suicide and social withdrawal (*hikikomori*) (Leonardsen, 2010).

Perhaps Daly (2002) and others who have addressed the RJ myths (Moyle & Tauri, 2016; Richards, 2014) are right that at the early stages of development, the myths about RJ might be necessary to disseminate the idea of RJ and to establish the legitimacy of RJ over the traditional criminal justice approaches. In a similar vein, the myths of restorative features in the Japanese justice system and society might also have contributed to the development of RJ because the low crime rate in Japan could have lent support to the claim that restorative approaches are 'better' than traditional justice approaches. The myths about the restorative features of the Japanese justice system and society might have been an ideal example to promote the legitimacy of RJ.

While claims about the restorative features of the Japanese justice system may not be entirely wrong, in this paper we have demonstrated that such claims do not necessarily reflect the reality in the Japanese justice system and society. Apology, compensation and confession in the Japanese justice system do not necessarily play their roles, as claimed by Haley (1989; 2011); apologies may stem from offenders' self-interest; compensation is not always paid as promised nor does it necessarily restore victims; and confession may be a consequence of implicit or explicit coercion from authority figures. Reintegrative shaming may not be necessarily practised, as claimed by Braithwaite (1989, 2014), because other cultural factors may encourage Japanese people to comply with rules and regulations. Japanese law enforcement authorities may not necessarily utilise reintegrative shaming, and opposition toward ex-offenders' reintegration and recent punitive and retributive trends do not fit to the description of Japan as a reintegrative society.

We need to caution, however, that our argument remains speculative without further empirical research on restorative features in the Japanese justice system and society. This is

because our arguments are largely based on a few empirical studies. Moreover, even the empirical studies on which we relied may be outdated due to reforms and changes in the Japanese justice system and society since these studies. Therefore, we need more research to advance our arguments. In this regard, the approach adopted by Huang and Chang (2013) might be one option. Drawing upon Marshall's (1999) diagram on the relationship between stakeholders of crime, and upon Braithwaite's (2002b) standards of RJ values and principles, they evaluated restorative features of the entire Taiwanese justice system (Huang & Chang, 2013). Also, as Miyazawa (1997) argued, an ethnographic study would be necessary to test the applicability of reintegrative shaming in Japan (c.f. Masters, 1997). This is because, as Komiya (1999) described, Japanese people may conceptualise shame differently from Western people. Unlike in the West, shame in Japan may not be 'a superficial concern for others, but a function of the inner mind'; hence, as discussed above, shame in Japan may appear 'as a result of going against the "belief" that one should conform to rules' (Komiya, 1999: 386). This subsequently raises doubt regarding the transferability of Japanese shaming into other cultures or societies, such as in the US (see also Djolinko 2003). It is our hope that this paper leads to further exploration of and debates about restorative features of the Japanese justice system and society.

Legislations

Code of Criminal Procedure

Juvenile Act

Penal Code of Japan

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