

## MEDIATED JUSTICE IN CRIMINAL LAW: PERSPECTIVES FROM ASIA

Mediation has its roots in traditional forms of dispute resolution established since ancient times in certain cultures. In recent times, mediation has been sought as a credible mechanism to resolve criminal matters and has been posited as a sustainable means through which justice is achieved – this is especially the case in victim-offender mediation. However, there are countervailing propositions that criminal matters should be dealt with through the traditional criminal justice system and not left to the parties to “settle” amongst themselves. The question remains if mediated outcomes for criminal matters are incompatible with the objectives of a functional criminal justice system. This article reviews how criminal matters are resolved through mediation in various jurisdictions in Asia and draws lessons as to its benefits and challenges. This article considers whether justice is meted out through mediation and whether, moving forward, this should be the predominant way in which criminal matters are resolved in Asian societies.

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### I. Introduction

1 While justice has often been seen to be carried out in criminal matters through the traditional criminal justice systems, does this truly mean justice for everyone involved? Although justice may be meted out through criminal procedure, in the conviction and sentencing of an accused, there may be concerns about whether the victim regards justice as being done from their perspective. As such, it is worth exploring other means of dispute resolution mechanisms, such as mediation, which may bring about justice especially in relation to victims of crimes. This article explores how criminal matters are dealt with in criminal mediation, specifically in victim-offender mediation, which is to be seen through the lens of restorative justice. This will be explored by comparing the experiences of various jurisdictions in Asia before considering the challenges of resolving criminal matters through mediation, as well as whether justice is achieved in this way, in the context of Asian societies.

## II. Restorative justice and victim-offender mediation

### A. Restorative justice

2 Restorative justice generally refers to an approach to criminal legal systems that emerges as an alternative to so-called conventional justice.<sup>1</sup> It should be stated at the outset that there is no single and consensual definition for restorative justice.<sup>2</sup> There is, however, a common idea that restorative justice takes place within the criminal justice system and has the purpose to strive for redressing the damage caused by crimes.<sup>3</sup> Practically, this translates to a process which aims to bring together those affected by a crime, such as the offender, the victim and the community.<sup>4</sup> It aims to restore social peace, allowing both victim and offender to hopefully overcome the criminal experience.<sup>5</sup> On one hand, this means that the victim needs to tell their story, to express the consequences caused by the crime, in addition to outlining other needs, eg, financial needs.<sup>6</sup> On the other hand and in line with the theory of reintegrative shaming,<sup>7</sup> the shame experienced by the offender (by being exposed to their acts) and extension of their consequences is an important tool to help them reintegrate into society, and hopefully not repeat the offending behaviour.<sup>8</sup>

3 Allowing victims to voice out what they have gone through, during and after the offence, as well as letting offenders understand the harm caused and express remorse for their actions, is fundamental to restorative justice.<sup>9</sup>

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- 1 Ana M Nascimento, Joana Andrade & Andreia de Castro Rodrigues, “The Psychological Impact of Restorative Justice Practices on Victims of Crimes – A Systematic Review” (2023) 24(3) *Trauma, Violence & Abuse* 1929; United Nations Economic and Social Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ECOSOC Res 2002/12.
  - 2 Ana M Nascimento, Joana Andrade & Andreia de Castro Rodrigues, “The Psychological Impact of Restorative Justice Practices on Victims of Crimes – A Systematic Review” (2023) 24(3) *Trauma, Violence & Abuse* 1929; United Nations Economic and Social Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ECOSOC Res 2002/12.
  - 3 John Braithwaite, “Setting Standards for Restorative Justice” (2002) 42(3) *British Journal of Criminology* 563.
  - 4 John Braithwaite, “Restorative Justice: Assessing Optimistic and Pessimistic Accounts” (1999) 25 *Crime and Justice* 1; Teresa Robalo & Razwana Begum, “Cyber Victimization, Restorative Justice and Victim-Offender Panels” (2023) 18 *Asian J Criminol* 61.
  - 5 Teresa Robalo & Razwana Begum, “Cyber Victimization, Restorative Justice and Victim-Offender Panels” (2023) 18 *Asian J Criminol* 61.
  - 6 Teresa Robalo & Razwana Begum, “Cyber Victimization, Restorative Justice and Victim-Offender Panels” (2023) 18 *Asian J Criminol* 61.
  - 7 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989).
  - 8 Teresa Robalo & Razwana Begum, “Cyber Victimization, Restorative Justice and Victim-Offender Panels” (2023) 18 *Asian J Criminol* 61.
  - 9 Teresa Robalo & Razwana Begum, “Cyber Victimization, Restorative Justice and Victim-Offender Panels” (2023) 18 *Asian J Criminol* 61; Russell Brewer *et al*, *Cybercrime Prevention: Theory and Applications* (Palgrave Macmillan, 2019) at pp 109–122.

4 Restorative justice aims to deal with the absence of more inclusive strategies in meeting the needs of victims as a matter goes through the criminal justice system, and subsequently minimise their psychological damage due to being left out.<sup>10</sup> Victims of crime may face insensitive treatment by traditional criminal justice systems, often feeling excluded from the process that their case undergoes.<sup>11</sup> Often, victims do not receive any restitution and rarely hear genuine expressions of remorse from the offenders when the case is dealt with through conventional justice.<sup>12</sup>

5 Restorative justice views the outcome of a crime with a keen focus on the victim, the offender and the community.<sup>13</sup> It is traditional relationship-based justice model, which is victim-oriented and contrasts with traditional, conventional criminal proceedings.<sup>14</sup> Its objective is to find ways to repair the harm caused by certain offences<sup>15</sup> and is found in community justice-based justice models implemented by indigenous communities, typically in Canada, North America, Australia and New Zealand.<sup>16</sup> However, the concept is not novel and has its roots in societies across the globe, as this article will demonstrate. Community-based problem solving has its roots in Asian societies that have existed for a long time, eg, China.

## B. Development of restorative justice

6 Spurred by the dissatisfaction of victims through these gaps in justice, contemporary developments of restorative approaches took off in criminal justice systems<sup>17</sup> whilst being encouraged by the United Nations

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- 10 Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford University Press, 2002); Jo-Anne Wemmers & Katie Cyr, "Can Mediation Be Therapeutic for Crime Victims? An Evaluation of Victims' Experiences in Mediation with Young Offenders" (2005) 47(3) *Canadian Journal of Criminology and Criminal Justice* 527; Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, 3rd Ed, 2005).
- 11 Jung Jin Choi & Margaret Severson, "What! What Kind of Apology Is This?: The Nature of Apology in Victim Offender Mediation" (2009) 31(7) *Children and Youth Services Review* 813.
- 12 Jung Jin Choi & Margaret Severson, "What! What Kind of Apology Is This?: The Nature of Apology in Victim Offender Mediation" (2009) 31(7) *Children and Youth Services Review* 813; Ana M Nascimento, Joana Andrade & Andreia de Castro Rodrigues, "The Psychological Impact of Restorative Justice Practices on Victims of Crimes – A Systematic Review" (2023) 24(3) *Trauma, Violence & Abuse* 1929.
- 13 Michael Wenzel *et al*, "Retributive and Restorative Justice" (2008) 32(5) *Law and Human Behavior* 375.
- 14 Teresa Robalo & Razwana Begum, "Cyber Victimization, Restorative Justice and Victim-Offender Panels" (2023) 18 *Asian J Criminol* 61; Russell Brewer *et al*, *Cybercrime Prevention: Theory and Applications* (Palgrave Macmillan, 2019) at pp 109–122.
- 15 Teresa Robalo & Razwana Begum, "Cyber Victimization, Restorative Justice and Victim-Offender Panels" (2023) 18 *Asian J Criminol* 61.
- 16 Teresa Robalo & Razwana Begum, "Cyber Victimization, Restorative Justice and Victim-Offender Panels" (2023) 18 *Asian J Criminol* 61.
- 17 Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, 3rd Ed, 2005).

Office on Drugs and Crime<sup>18</sup> for the adoption of restorative justice amongst its State Members. The intention for this adoption was to promote a more flexible, comprehensive and humanistic perspective of the legal system and to facilitate the restoration and recovery processes of victims, offenders and communities.<sup>19</sup>

7 The popularity of restorative justice can be attributed to several factors.<sup>20</sup> First, the focus on victims is helpful because they are seldom at the centre of the criminal justice system.<sup>21</sup> Second, restorative justice reduces the rate of reoffending or recidivism.<sup>22</sup> This is attributable to restorative justice requiring the involvement of all stakeholders, including the offender and the larger community.<sup>23</sup> The participation of the offender in the resolution process increases their understanding of the offence and the impact on the victim.<sup>24</sup> Community involvement strengthens the offender's willingness to change, and this occurs either through shaming of the behaviour or through support and encouragement from the community.<sup>25</sup>

8 Despite its popularity, it is important to note that the values, principles and characteristics of restorative justice are still evolving.<sup>26</sup> This is in addition to its basic principles of responsibility, respect, restoration and reparation.<sup>27</sup>

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18 United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (United Nations, 2006).

19 Ana M Nascimento, Joana Andrade & Andreia de Castro Rodrigues, "The Psychological Impact of Restorative Justice Practices on Victims of Crimes – A Systematic Review" (2023) 24(3) *Trauma, Violence & Abuse* 1929.

20 Teresa Robalo & Razwana Begum, "Cyber Victimization, Restorative Justice and Victim-Offender Panels" (2023) 18 *Asian J Criminol* 61.

21 Don Weatherburn & Megan Macadam, "A Review of Restorative Justice Responses to Offending" (2013) 1 *Evidence Base* 1.

22 James Bonta, Suzanne Wallace-Capretta & Jennifer Rooney, "Restorative Justice: An Evaluation of the Restorative Justice Project" (1998) *Solicitor General Canada* 1; Cecilia Klingele, "Measuring Change: From Rates of Recidivism to Markers of Desistance" (2019) 109(4) *The Journal of Criminal Law and Criminology* 769.

23 Teresa Robalo & Razwana Begum, "Cyber Victimization, Restorative Justice and Victim-Offender Panels" (2023) 18 *Asian J Criminol* 61.

24 Teresa Robalo & Razwana Begum, "Cyber Victimization, Restorative Justice and Victim-Offender Panels" (2023) 18 *Asian J Criminol* 61.

25 Teresa Robalo & Razwana Begum, "Cyber Victimization, Restorative Justice and Victim-Offender Panels" (2023) 18 *Asian J Criminol* 61; John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989).

26 Mutaz Qafisheh, "Restorative Justice in the Islamic Penal Law: A Contribution to the Global System" (2012) 7(1) *International Journal of Criminal Justice Sciences* 487.

27 Razwana Begum, "The Potential of Restorative Justice in Strengthening Corporate Governance Framework" [2017] *The Internet Journal of Restorative Justice* 2056.

### C. *Victim-offender mediation*

9 Restorative justice models traditionally refer to victim-offender mediation, family group conferencing and circle sentencing.<sup>28</sup> This article focuses on the first model, where in general, skilled and competent mediators facilitate a meeting (or meetings) between the victim and the offender to begin the process of healing for the victim and possibly to give closure to all involved.

## III. China

### A. *Social harmony*

10 Chinese society has long been deeply influenced by the philosophical influence of Confucianism.<sup>29</sup> The significance of Confucius's teachings is seen in how traditional Chinese culture and discourse espouses harmony over litigation,<sup>30</sup> especially since lawsuits can be deemed to be most disruptive to harmonious relationships in a society.<sup>31</sup> Indeed the Chinese can be said to value dispute dissolution rather than dispute resolution.<sup>32</sup> Another key social value Chinese society holds dear is that of "yielding",<sup>33</sup> which relates to the positive act of forsaking something to acquire something else when one is in a dispute.<sup>34</sup> The value suggests that we each can look within ourselves and acknowledge that we may not be completely faultless.<sup>35</sup> This desire for yielding is the prime motivating factor behind the need for compromises, which in turn shapes the process of mediation.<sup>36</sup>

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28 Russell Brewer *et al*, *Cybercrime Prevention: Theory and Applications* (Palgrave Macmillan, 2019) at pp 109–12.

29 Shuai Wei, "Gendered Justice in China: Victim–Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

30 Jerome Alan Cohen, "Chinese Mediation on the Eve of Modernization" (1966) 54(3) *California Law Review* 1201.

31 Yuning Wu, "People's Mediation in China" in *The Routledge Handbook of Chinese Criminology* (Liqun Cao, Ivan Y Sun & Bill Heberton eds) (Routledge, 2013) at pp 116–129.

32 Goh Bee Chen, *Law Without Lawyers, Justice Without Courts: On Traditional Chinese Mediation* (Routledge, 2016).

33 Shuai Wei, "Gendered Justice in China: Victim–Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

34 Shuai Wei, "Gendered Justice in China: Victim–Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

35 Shuai Wei, "Gendered Justice in China: Victim–Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

36 Shuai Wei, "Gendered Justice in China: Victim–Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346; Derk Bodde & Clarence Morris, *Law in Imperial*  
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## B. *Development of mediation in China*

11 China's economy has developed rapidly in the four decades since it implemented its reform and opening-up policy in 1978, resulting in significant income inequality amongst its people.<sup>37</sup> Consequently, this has led to political corruption and official misconduct within the justice system,<sup>38</sup> which has led to an increase in disputes both against citizens and the State. Interestingly, disputants preferred to address their concerns by way of administrative remedy, either through local government or semi-government agencies.<sup>39</sup> In 2006, the Communist Party of China, the governing body of China, introduced the political objective of building a "harmonious society",<sup>40</sup> ostensibly with the objective of achieving social stability.<sup>41</sup> The Supreme People's Court then issued a judicial opinion in 2010 to encourage lower courts and judges to employ the *Ma Xiwu* way of judging or adjudication method,<sup>42</sup> which focuses on mediation, as a preferred approach to resolve disputes. The adoption of mediation has been argued to being in line with Confucian ethics of societal balance and harmony within the legal system.<sup>43</sup>

## C. *Mediation in criminal proceedings*

12 Victim-offender mediation was originally designed for cases where offenders have committed minor criminal acts but demonstrated remorse during the investigation and prosecution processes,<sup>44</sup> and appears to have been first used by a Beijing district court in 2002 in cases of assault and

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*China: Exemplified by 190 Ch'ing Dynasty Cases: With Historical, Social and Juridical Commentaries* (Harvard University Press, 1967).

- 37 Shuijie Yao, "Economic Growth, Income Inequality and Poverty in China Under Economic Reforms" (1999) 35(6) *The Journal of Development Studies* 104.
- 38 John W Lewis & Xue Litai, "Social Change and Political Reform in China: Meeting the Challenge of Success" (2003) 176 *The China Quarterly* 926; Moulin Xiong & Shuai Wei, "Unequal Treatment in Pretrial Detention in China" (2017) 57(6) *The British Journal of Criminology* 1398.
- 39 Shanhe Jiang & Yuning Wu, "Chinese People's Intended and Actual Use of the Court to Resolve Grievance/Dispute" (2015) 49 *Social Science Research* 42.
- 40 Shuai Wei, "Gendered Justice in China: Victim-Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.
- 41 Ling Li, "The Chinese Communist Party and People's Courts: Judicial Dependence in China" in *Critical Readings on Communist Party of China* (Kjeld Erik Brodsgaard ed) (Brill, 2017) at pp 1320-1368.
- 42 Xiaoping Cong, "'Ma Xiwu's Way of Judging': Villages, the Masses and Legal Construction in Revolutionary China in the 1940s" (2014) 72 *The China Journal* 29.
- 43 Robert Weatherley & Helen Pittam, "Money for Life: The Legal Debate in China About Criminal Reconciliation in Death Penalty Cases" (2015) 39(2) *Asian Perspective* 277.
- 44 Shuai Wei, "Gendered Justice in China: Victim-Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

minor injury.<sup>45</sup> Several years later, such mediation became a widely accepted practice within the police, the procuratorate and the courts.<sup>46</sup> In 2012, the Criminal Procedure Law formally stipulated that criminal acts such as common assault, theft, deception and illegal trafficking were to be handled through victim-offender mediation.<sup>47</sup> This scope has since been further expanded to include cases of assault, including those resulting in serious injury, serious crimes that attract sentences of imprisonment between three to seven years and even crimes of negligent homicide.<sup>48</sup> The top three crimes subject to victim-offender mediation in China are that of assault, theft and reckless driving.<sup>49</sup>

#### D. Reducing petitions

13 A key merit for using victim-offender mediation in the Chinese criminal justice system relates to how mediated cases are less likely to be petitioned to higher levels of the judicial system.<sup>50</sup> Through mediation, offenders work out how to best compensate victims, heal the harm caused and restore the community to the state it was at before the commission of the crime, where possible. While not all harm can be undone through compensation, financial compensation is considered a sign of sincere apology and repentance, which is an act of goodwill to mend the broken relationship and a means of restitution for the wrongful act.<sup>51</sup> According to Art 9 of the 2017 Sentencing Guidelines,<sup>52</sup> offenders will receive up to a 30% deduction in their sentence if they had actively compensated the victim

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45 Shuai Wei, "Gendered Justice in China: Victim-Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346; Yan Xiang, "Criminal Mediation in Mainland China: A Leap from Judicial Endeavor to Legal Norm" (2013) 8(4) *Asian Journal of Criminology* 247.

46 Shuai Wei, "Gendered Justice in China: Victim-Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

47 Shuai Wei, "Gendered Justice in China: Victim-Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

48 Shuai Wei, "Gendered Justice in China: Victim-Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

49 Z X Lu, J Ke & M Y Ou, "The Current Status of Victim-Offender Mediation and its Path Forward: An Empirical Study Based on the Implementation of New Criminal Procedure Law" (2017) 11 *Journal of Law Application* 76; Yuan Xiaoyu, *Restorative Justice in China: Comparing Theory and Practice* (Springer, 2017).

50 Benjamin L Liebman, "A Populist Threat to China's Courts?" in *Chinese Justice: Civil Dispute Resolution in Contemporary China* (Margaret Y K Woo & Mary E Gallagher eds) (Cambridge University Press, 2011) at pp 269-271.

51 Z X Lu, J Ke & M Y Ou, "The Current Status of Victim-Offender Mediation and its Path Forward: An Empirical Study Based on the Implementation of New Criminal Procedure Law" (2017) 11 *Journal of Law Application* 76.

52 Shuai Wei, "Gendered Justice in China: Victim-Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

but failed to obtain the latter's forgiveness, and a 40% deduction where compensation was made and the victim had forgiven the offender.<sup>53</sup> Judges are also able to grant a 20% deduction where the victim has forgiven the offender without compensation, demonstrating how the offender's attitude and compensation in mediation has frequently impacted judicial decisions.<sup>54</sup>

### **E. Potential avoidance of liability**

14 Victim-offender mediation has been criticised due to its lack of formal procedure and oversight.<sup>55</sup> Further, there is concern that the integrity of criminal justice system may be undermined because the offender is allowed to avoid criminal responsibility through financial settlement, even if it is unintended.<sup>56</sup> In Hunan, for instance, high compensation is common, with it being ten times the statutory amount.<sup>57</sup> This results in affluent offenders being able to escape legal punishment while less financially-able offenders choose between paying to reduce the duration of their imprisonment or serving the sentence in full. However, this author believes that perhaps a middle ground can be reached on this issue – as will be discussed later.

### **F. Function of judges**

15 A feature of Chinese judicial mediation is that judges conduct mediation as part of their work, which in turn gives them greater authority and power to intervene as opposed to a non-judicial officer.<sup>58</sup> As a result, a failed mediation is almost always followed by adjudication by the same judge, which gives greater weight to suggestions made by the judge during mediation, and places parties under increased scrutiny and pressure to adhere or risk sanctions thereafter.<sup>59</sup> This helps to demystify how success rates for mediations hover between 85%–95% generally.<sup>60</sup> In one study, it

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53 Shuai Wei, "Gendered Justice in China: Victim–Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

54 Shuai Wei, "Gendered Justice in China: Victim–Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

55 Jiang Su, "From 'Harsh Justice' To 'Balancing Leniency with Severity'" (2017) 5(1) *Peking University Law Journal* 139.

56 Yuan Xiaoyu, *Restorative Justice in China: Comparing Theory and Practice* (Springer, 2017).

57 Yan Xiang, "Criminal Mediation in Mainland China: A Leap from Judicial Endeavor to Legal Norm" (2013) 8(4) *Asian Journal of Criminology* 247.

58 Shuai Wei, "Gendered Justice in China: Victim–Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

59 Philip C C Huang, "Court Mediation in China, Past and Present" (2006) 32(2) *Modern China* 275; Ng Kwai Hang & Xin He, "Internal Contradictions of Judicial Mediation in China" (2014) 39(2) *Law & Social Inquiry* 285.

60 Shuai Wei, "Gendered Justice in China: Victim–Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.  
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was found that almost all traffic accident cases were resolved within a half-day mediation session whilst fraud offences were the toughest to handle.<sup>61</sup>

16 Judges can use their role to great effect even where compensation may not be suitable. Where offenders are sincerely remorseful but too financially destitute to compensate victims, judges have asked families of victims to accept monthly letters from offenders, to follow their progress in prison.<sup>62</sup> If this is ineffective, judges may ask relatives of offenders to provide help to the families of victims.<sup>63</sup> These various approaches demonstrate how judges can utilise their discretion in finding a consensus between victim and offender through the application of Confucian values and the notion of “yielding”. Ultimately, the goal is to enact restorative justice in the mediation by manifesting it in terms of an apology, forgiveness and compensation, where possible.<sup>64</sup>

17 However, placing the burden on judges also leads to a concern that mediation may considerably increase the workload of judges, given that the average time spent on each mediation was around two hours, excluding the time spent on preparation and writing the final agreement.<sup>65</sup> However, for complex cases with multiple victims and offenders, judges may require several rounds of mediations to reach a consensus between the parties, with each session taking up to three hours to complete.<sup>66</sup>

18 This is a serious concern given that efficacy is a hallmark of justice, and judges must therefore be efficient in mediating matters to achieve settlement.<sup>67</sup> Unfortunately, in some situations judges are overwhelmed and do not have time to even listen to the basic facts of a matter during

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*Comparative Criminology* 346.

61 Shuai Wei, “Gendered Justice in China: Victim–Offender Mediation as the ‘Different Voice’ of Female Judges” (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

62 Shuai Wei, “Gendered Justice in China: Victim–Offender Mediation as the ‘Different Voice’ of Female Judges” (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

63 Shuai Wei, “Gendered Justice in China: Victim–Offender Mediation as the ‘Different Voice’ of Female Judges” (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

64 Shuai Wei, “Gendered Justice in China: Victim–Offender Mediation as the ‘Different Voice’ of Female Judges” (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

65 Y H Song *et al.*, “An Empirical Study to Victim–Offender Mediation of Prosecuted Lawsuits” (2009) 3 *Chinese Journal of Law* 3.

66 Y H Song *et al.*, “An Empirical Study to Victim–Offender Mediation of Prosecuted Lawsuits” (2009) 3 *Chinese Journal of Law* 3; Shuai Wei, “Gendered Justice in China: Victim–Offender Mediation as the ‘Different Voice’ of Female Judges” (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

67 Shuai Wei, “Gendered Justice in China: Victim–Offender Mediation as the ‘Different Voice’ of Female Judges” (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

mediation.<sup>68</sup> Indeed, some judges have even stated that they could not find any reason to mediate because their existing work was already stressful.<sup>69</sup>

### G. *An issue of gender?*

19 One study has suggested that female judges in China are generally more successful than their male counterparts in achieving settlement through mediation, resulting in more victims receiving apologies and compensation from offenders.<sup>70</sup> When conducting victim-offender mediation, female judges often propose a compensation sum that is two or three times the statutory standard, in order to encourage parties to quickly agree to a resolution.<sup>71</sup> Female judges also request that offenders pay the medical expenses of the victims first, especially in traffic accident offences where the family members of victims are particularly concerned about medical costs.<sup>72</sup> Once medical expenses are dealt with, additional costs such as living expenses will be considered.<sup>73</sup> These two expenses are dealt with first because judges decide on the offenders' sincerity based on how they approach such payments.

20 More research needs to be conducted in this area to glean more concrete evidence which attributes success in victim-offender mediation to gender. What is clear is that victim-offender mediation is meant to offer victims an opportunity to play an active role in the resolution of a crime by which they suffered harm. It is meant to alleviate their harm and suffering by empowering the victim to influence and determine, to some extent, the offender's fate.<sup>74</sup> Regardless of gender, in this construct, a judge who focuses on the key values and purpose of restorative justice will likely allow for the victim to take centre stage, have the offender take ownership and

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68 Yuan Xiaoyu, *Restorative Justice in China: Comparing Theory and Practice* (Springer, 2017).

69 Y H Song *et al.*, "An Empirical Study to Victim-Offender Mediation of Prosecuted Lawsuits" (2009) 3 *Chinese Journal of Law* 3; Shuai Wei, "Gendered Justice in China: Victim-Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

70 Shuai Wei, "Gendered Justice in China: Victim-Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

71 Shuai Wei, "Gendered Justice in China: Victim-Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

72 Shuai Wei, "Gendered Justice in China: Victim-Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

73 Shuai Wei, "Gendered Justice in China: Victim-Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

74 Shuai Wei, "Gendered Justice in China: Victim-Offender Mediation as the 'Different Voice' of Female Judges" (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

responsibility over their actions, repair the harm caused by their criminal behaviour and heal or at the very least meet the interests of victims.<sup>75</sup>

#### IV. Taiwan

##### A. Town mediation

21 Taiwan has a long history of mediation, with the influence of Confucianism demonstrated by the societal desire to have harmonious relationships and resolve disputes through conciliation where possible.<sup>76</sup> For present purposes, this article will discuss town mediation, an interesting concept stemming from ancient Taiwanese and Chinese traditions.<sup>77</sup>

22 Under the Township and County-Administered City Mediation Act,<sup>78</sup> townships can establish mediation committees (consisting of a minimum of seven, and a maximum of 15 mediators), allowing people to resolve civil disputes and minor criminal cases.<sup>79</sup> The members of the committees are nominated by the mayor of the township “from men of eminent fairness ... who have legal knowledge or other expertise and good reputation.”<sup>80</sup> Mediators are volunteers and receive minimal remuneration.<sup>81</sup> Mediators are responsible for conducting the mediation and are required to do so in a peaceful and sincere manner, providing reasonable advice to the participants and suggesting a fair solution in order to achieve a result acceptable to the parties.<sup>82</sup>

23 Unlike court-annexed mediation, town mediation is entirely voluntary and for criminal matters, mediation can be initiated only if the victim approves the complaint.<sup>83</sup> Referring matters to mediation appears simple, with the applicant applying in writing or in an oral statement to the mediation committee<sup>84</sup> and the expenses incurred by the mediation process being borne by the towns out of their own budget,<sup>85</sup> such that parties are

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75 Shuai Wei, “Gendered Justice in China: Victim–Offender Mediation as the ‘Different Voice’ of Female Judges” (2021) 65(4) *International Journal of Offender Therapy and Comparative Criminology* 346.

76 Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7; Burton Watson, *The Analects of Confucius* (Columbia University Press, 2007).

77 Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7.

78 Township and County-Administered City Mediation Act (Taiwan).

79 Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7.

80 Township and County-Administered City Mediation Act (Taiwan) Art 3; Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7.

81 Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7.

82 Township and County-Administered City Mediation Act (Taiwan) Art 22; Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7.

83 Township and County-Administered City Mediation Act (Taiwan) Art 11; Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7.

84 Township and County-Administered City Mediation Act (Taiwan) Art 10.

85 Township and County-Administered City Mediation Act (Taiwan) Art 34.

not charged any additional fees.<sup>86</sup> For criminal matters, the mediation committee of the domicile or residence of the opposing party shall have the jurisdiction of the mediation, or where the offence is committed, the mediation committee of townships or county-administered cities shall have the jurisdiction of the mediation.<sup>87</sup> There is flexibility in organising the mediation, allowing for one to three person(s) to join the mediation and support the parties<sup>88</sup> and the mediation to be held in the city hall or any other suitable place.<sup>89</sup>

24 Where the mediation process is successful, the mediation committee has several responsibilities including recording the facts, issues and the arguments of the mediation, the content of the mediation agreement and the details of the successful mediation and informing the township of the mediation agreement within three days of its completion<sup>90</sup> and delivering the mediated agreement, evidence and relevant materials to the court within its jurisdiction for further review.<sup>91</sup> Notably, after the mediation agreement has been approved by the court, no party may file a lawsuit, complaint or seek private prosecution of the matter.<sup>92</sup> For criminal mediation, the mediation agreement serves as the grounds for the enforcement of any monetary payment or other remedies.<sup>93</sup> This gives finality and closure to the victims.

25 Further, if a criminal matter is successfully mediated during the investigation or before the conclusion of the matter in the court of first instance, and the victim had indicated the desire to withdraw the complaint, the matter will be deemed to have been withdrawn.<sup>94</sup> Conversely, if the matter is not successfully mediated, the matter will then be referred for prosecution accordingly.<sup>95</sup>

26 Despite its promise, there are potential issues with neutrality and impartiality in the practice of mediation, which may have some bearing on its effectiveness in criminal matters.<sup>96</sup>

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86 Township and County-Administered City Mediation Act (Taiwan) Art 23; Gabor Hera, "Town Mediation in Taiwan" (2020) 38 *Conflict Resolution Quarterly* 7.

87 Township and County-Administered City Mediation Act (Taiwan) Art 13.

88 Township and County-Administered City Mediation Act (Taiwan) Art 17.

89 Township and County-Administered City Mediation Act (Taiwan) Art 19.

90 Township and County-Administered City Mediation Act (Taiwan) Art 25.

91 Township and County-Administered City Mediation Act (Taiwan) Art 26.

92 Township and County-Administered City Mediation Act (Taiwan) Art 27.

93 Township and County-Administered City Mediation Act (Taiwan) Art 27.

94 Township and County-Administered City Mediation Act (Taiwan) Art 28.

95 Township and County-Administered City Mediation Act (Taiwan) Art 28.

96 Gabor Hera, "Town Mediation in Taiwan" (2020) 38 *Conflict Resolution Quarterly* 7.

## B. *Neutrality*

27 The mediation system in Taiwan has been regarded as inadequate from a restorative justice perspective,<sup>97</sup> partly due to reports of mediators having made suggestions, commenting and forcing disputants to reach agreements in mediation.<sup>98</sup> Mediators in Taiwan and China have also been noted to often give recommendations and persuade, or even pressure, parties to accept them.<sup>99</sup> This also seems to be the case for town mediators, who have been seen as typically not neutral and who usually try to convince disputants.<sup>100</sup> This can be linked to historical antecedents where traditionally, mediation agreements often did not represent the interests of parties because they were pressured to settle their disputes.<sup>101</sup> Even under Japanese rule, the mediator (in administrative mediation) explicitly used coercion to force parties to accede to his official authority and “agree” with his decision.<sup>102</sup> As such, lack of neutrality seems to have endured in Taiwanese mediation over the centuries.<sup>103</sup>

## C. *Impartiality*

28 Another concern relates to the impartiality of the mediator. Town mediators are explicitly informed that they must recuse themselves from mediation procedures in which they or a member of their household has an interest in the subject matter of the mediation.<sup>104</sup> However, this can prove to be challenging, given that the community-based nature of disputes would usually mean that the mediators are well-known local people, often involved in various personal and professional relationships with the disputants.<sup>105</sup> This may result in a problematic situation for criminal mediation especially, given that the victim is seeking healing and closure from the process and yet may encounter a mediator who may be biased or have a stake in the mediation and its outcome. This concern with partiality was a likely reason

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97 Hsiao-fen Huang & Lennon Y C Chang, “Evaluating Restorative Justice Programs in Taiwan” (2013) 8(4) *Asian Journal of Criminology* 287.

98 Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7.

99 Meng-Chi Lien, “Mediators in Criminal Matters” in *Retaliation, Mediation and Punishment* (Andreas Armbrorst & David Jensen eds) (Max Planck Institute for Foreign and International Criminal Law, 2009) at pp 43–49; Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7 at 15.

100 Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7 at 15.

101 Jyh-pin Fa, “A Comparative Study of Judicial Review Under Nationalist Chinese and American Constitutional Law” (1980) 4(33) *Occasional Papers/Reprints Series in Contemporary Asian Studies* 1.

102 Taisheng Wang, *Legal Reform in Taiwan Under Japanese Colonial Rule, 1895–1945: The Reception of Western Law* (University of Washington Press, 2000).

103 Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7 at 16.

104 Township and County-Administered City Mediation Act (Taiwan) Art 16.

105 Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7 at 16.

for the loss of trust in town mediation at the end of the 1990s,<sup>106</sup> where there were concerns over the selection process of town mediators in relation to their character and knowledge.<sup>107</sup> Thankfully, there have been improvements and strong judicial supervision is implemented in the selection process to reduce potential conflicts of interest.<sup>108</sup>

#### **D. Lessons to be drawn**

29 Overall, restoration and harmony are the main goals of the mediation process (including town mediation) in Taiwan.<sup>109</sup> This is seen especially from the criminal mediation process, where ideally, the victim and the offender can resolve the offence and subsequent fallout. This is consistent with the earlier understanding that victims are meant to be the focus of victim-offender mediation. It has been noted that maintaining harmonious social order is more important than protecting individual rights in Taiwan,<sup>110</sup> and that an apology from the offender and forgiveness by the victim are cornerstones of peaceful settlement and serve to restore social harmony.<sup>111</sup>

30 However, this author agrees with the perspective that overemphasis on the concept of social harmony places stress on the parties, especially in criminal mediations.<sup>112</sup> The parties may feel undue pressure to accept a mediated agreement to avoid heavy social scrutiny and disapproval of the ongoing conflict.<sup>113</sup> Arguably, a victim who does not feel that the offender is truly remorseful and seeking to make amends would feel that the values of restorative justice<sup>114</sup> are not being met, and understandably be hard-pressed to close the matter due to the lack of healing and closure.

31 Used effectively, town mediation can be extremely efficient, with agreements being reached and even approved by the relevant court

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106 Gabor Hera, "Town Mediation in Taiwan" (2020) 38 *Conflict Resolution Quarterly* 7 at 17.

107 Kuan-Ling Shen, "Mediation in Taiwan: Present Situation and Future Developments" in *New Developments in Civil and Commercial Mediation* (Carlos Esplugues & Louis Marquis eds) (Springer Nature, 2015) at pp 711–736.

108 Gabor Hera, "Town Mediation in Taiwan" (2020) 38 *Conflict Resolution Quarterly* 7 at 17.

109 Hsiao-fen Huang & Lennon Y C Chang, "Evaluating Restorative Justice Programs in Taiwan" (2013) 8(4) *Asian Journal of Criminology* 287.

110 Riccardo Berti, *Victim-Offender Reconciliation in the People's Republic of China and Taiwan* (Palgrave Macmillan, 2016).

111 Riccardo Berti, *Victim-Offender Reconciliation in the People's Republic of China and Taiwan* (Palgrave Macmillan, 2016).

112 Gabor Hera, "Town Mediation in Taiwan" (2020) 38 *Conflict Resolution Quarterly* 7 at 18.

113 Riccardo Berti, *Victim-Offender Reconciliation in the People's Republic of China and Taiwan* (Palgrave Macmillan, 2016).

114 Razwana Begum, "The Potential of Restorative Justice in Strengthening Corporate Governance Framework" [2017] *The Internet Journal of Restorative Justice* 2056.

within weeks.<sup>115</sup> This allows victims of crimes to have a cost-effective, informal and safe environment to meet the offender and resolve their conflict.<sup>116</sup> Importantly, this allows victims the opportunity to ventilate and express their emotions, which is something that is not ordinarily acknowledged during conventional legal proceedings.<sup>117</sup> Importantly, it also allows the victim to seek monetary compensation or other remedies from the offender in resolving the matter,<sup>118</sup> remedies which may not be forthcoming in conventional criminal proceedings. These forms of compensation can go a long way in helping the victim and their family to recover from the harm caused to them.

32 Hearteningly, there are different ways where offenders have expressed their remorse for the wrong done to the victim, *eg*, by writing “sorry” on a piece of paper a thousand times which is given to the victim, or even buying food for the whole family or village in a show of contrition.<sup>119</sup> This is in line with the tenets of restorative justice and victim-offender mediation, which is to help everyone heal and try to move forward with acknowledgment of the harm done. For a community to begin healing, these small weaves of contrition and forgiveness go a long way in mending the damaged social fabric of the community.

33 Overall, it has been found that 51% of people who have taken part in town mediation considered the process helpful and only 13.6% would not return to town mediation in the event of a future conflict.<sup>120</sup> Town mediation and mediators play a crucial role in helping the parties reach peaceful solutions and this importance is magnified in the context of victim-offender mediation, where the preservation, restoration and reparation of relationships are key to victims.<sup>121</sup>

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115 Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7 at 20.

116 Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7 at 20.

117 Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7 at 20.

118 Township and County-Administered City Mediation Act (Taiwan) Art 27.

119 Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7 at 20.

120 Kong-Pin Chen, Kuo-Chang Huang & Chang-Ching Lin, “The Research Design and Methodology of the 2011 Civil Justice Survey in Taiwan”, paper presented at the 2012 Law & Society Annual Conference, Honolulu, Hawaii; Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7 at 20.

121 Gabor Hera, “Town Mediation in Taiwan” (2020) 38 *Conflict Resolution Quarterly* 7 at 20.

## V. Japan

### A. No official restorative justice program

34 It has been proposed that the Japanese justice system is restorative because apology, compensation and confession play important roles.<sup>122</sup> Further, an influential theory is that Japan enjoys a low crime rate because it practices reintegrative shaming,<sup>123</sup> which is considered one of the main theories of restorative justice.<sup>124</sup> As such, it has been claimed that the Japanese justice system and society operates under a restorative and reintegrative approach.<sup>125</sup> Despite this, it is perhaps surprising to note that there is no formal, purist restorative justice program, eg, face-to-face dialogue<sup>126</sup> in victim-offender mediation in Japan within its justice system,<sup>127</sup> even though some non-profit organisations implement such an approach.<sup>128</sup>

35 A possible reason for the lack of a formal program could be that the Crime Victims Association in Japan strongly opposes the implementation of restorative justice due to a lack of interest in relationships and its criticism of the emphasis on forgiveness.<sup>129</sup> Despite the fact that victim-offender mediation does not take place officially as part of the Japanese criminal justice process, there are important considerations that we can glean from the Japanese experience.

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122 John O Haley, "Confession, Repentance and Absolution" in *Mediation and Criminal Justice: Victims, Offenders and Community* (Martin Wright & Burt Galaway eds) (Sage Publications, 1989) at pp 195–211; Masahiro Suzuki & Akinori Otani, "Myths of Restorative Features in the Japanese Justice System and Society: The Role of Apology, Confession and Compensation, and Application of Reintegrative Shaming" (2017) 5 *Restorative Justice* 158.

123 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989).

124 Gerry Johnstone, "The Teachings of Restorative Justice" in *Reconstructing Restorative Justice Philosophy* (Theo Gavrielides & Vasso Artinopoulou eds) (Ashgate Publishing Limited, 2013) at pp 47–66.

125 Jim Dignan, "Repairing the Damage: Can Reparation Be Made to Work in the Service of Diversion" (1992) 32(4) *British Journal of Criminology* 453; Jennifer Llewellyn & Robert Howse, *Restorative Justice: A Conceptual Framework* (Law Commission of Canada, 1998).

126 Tony F Marshall, *Restorative Justice: An Overview* (Home Office, 1999).

127 Toshio Yoshida, "The Future of the Japanese Criminal Justice System" in *Repositioning Restorative Justice* (Lode Walgrave ed) (Willan Publishing, 2003) at pp 328–338; Masahiro Suzuki & Akinori Otani, "Myths of Restorative Features in the Japanese Justice System and Society: The Role of Apology, Confession and Compensation, and Application of Reintegrative Shaming" (2017) 5 *Restorative Justice* 158.

128 Masahiro Suzuki, "Critical Analysis of Restorative Juvenile Justice: Case Study on Australia" (2017) 54(2) *Tsumi to Batsu* 76.

129 Masahiro Suzuki & Akinori Otani, "Myths of Restorative Features in the Japanese Justice System and Society: The Role of Apology, Confession and Compensation, and Application of Reintegrative Shaming" (2017) 5 *Restorative Justice* 158; M Hirayama, "The Relationship Between 'Victim Participation in Criminal Trials' and Restorative Justice" (2007) 14(1) *Hakuoh Hogaku* 294; Shigenori Matsui, "Justice for the Accused or Justice for Victims? The Protection of Victims' Rights in Japan" (2011) 13(1) *Asian-Pacific Law & Policy Journal* 54.

## B. *Apologies may not be sincere*

36 Japan utilises two tracks in its justice system, the first which is similar to that of other Western justice systems and the second which takes a rehabilitative or reintegrative approach for offenders rather than formal and retributive punishment.<sup>130</sup> Part of this “second track” approach encourages apologies from offenders, which allows offenders to strengthen the sincerity of their remorse and authorities to seek a more lenient penalty, eg, suspended sentences or reduced sentencing.<sup>131</sup> The apology is meant to demonstrate remorse and help victims to heal from the harm caused.

37 However, an apology may not necessarily be offered by offenders for a restorative purpose.<sup>132</sup> Offenders may apologise out of self-interest rather than sincerity, to obtain the victim’s forgiveness and therefore receive a more lenient penalty.<sup>133</sup> By extension, an offender’s family may offer apologies on behalf of the offender<sup>134</sup> but for the purpose of preventing or reducing criticism and shame caused by the crime, due to the notion of collective responsibility.<sup>135</sup> This is because families in Japan are expected to take responsibility for the actions of their members and the backlash is harsher if the offence is more serious.<sup>136</sup> As such, apologies may be offered as a consequence of a calculated decision to absolve guilt or repercussions rather than to assuage the victim’s need to be healed.<sup>137</sup>

38 In the first nationwide research study on victims’ perceptions of offenders’ apologies in Japan, victims generally had negative attitudes

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130 Masahiro Suzuki & Akinori Otani, “Myths of Restorative Features in the Japanese Justice System and Society: The Role of Apology, Confession and Compensation, and Application of Reintegrative Shaming” (2017) 5 *Restorative Justice* 158; John O Haley, “Confession, Repentance and Absolution” in *Mediation and Criminal Justice: Victims, Offenders and Community* (Martin Wright & Burt Galaway eds) (Sage Publications, 1989) at pp 195–211.

131 John Owen Haley, *The Spirit of Japanese Law* (University of Georgia Press, 1998); Hiroshi Wagatsuma & Arthur Rosett, “The Implications of Apology: Law and Culture in Japan and the United States” (1986) 20(4) *Law & Society Review* 461.

132 Masahiro Suzuki & Akinori Otani, “Myths of Restorative Features in the Japanese Justice System and Society: The Role of Apology, Confession and Compensation, and Application of Reintegrative Shaming” (2017) 5 *Restorative Justice* 158.

133 Yoko Hosoi & Haruo Nishimura, “The Role of Apology in the Japanese Criminal Justice System” (1999), paper presented at the Restoration for Victims of Crime Conference: Contemporary Challenges, Melbourne, Australia.

134 John O Haley, “Confession, Repentance and Absolution” in *Mediation and Criminal Justice: Victims, Offenders and Community* (Martin Wright & Burt Galaway eds) (Sage Publications, 1989) at pp 195–211.

135 Masahiro Suzuki & Akinori Otani, “Myths of Restorative Features in the Japanese Justice System and Society: The Role of Apology, Confession and Compensation, and Application of Reintegrative Shaming” (2017) 5 *Restorative Justice* 158.

136 Masahiro Suzuki & Akinori Otani, “Myths of Restorative Features in the Japanese Justice System and Society: The Role of Apology, Confession and Compensation, and Application of Reintegrative Shaming” (2017) 5 *Restorative Justice* 158.

137 Yoshiko Takahashi, “Toward a Balancing Approach: The Use of Apology in Japanese Society” (2005) 12(1) *International Review of Victimology* 23.

towards said apologies.<sup>138</sup> Three groups of victims were studied: (a) survivors who lost people close to them; (b) victims who were seriously wounded; and (c) survivors who experienced property crimes.<sup>139</sup> The findings revealed that many victims who received offenders' apologies had doubts about the sincerity of those apologies (22.4% of the survivor victim group, 43.8% of the wounded victim group and 33.3% of the property victim group).<sup>140</sup> While the study did not examine the reasons why victims felt this way, the fairly low levels of perceived sincerity of offenders' apologies might be partly due to apologies being delivered by the offenders' families or lawyers.<sup>141</sup> As such, the restorative pattern exhibited by apology may work mostly for offenders rather than victims<sup>142</sup> and even if they were delivered in person by the offender, they may be out of self-interest to obtain a lighter sentence rather than sincerity in helping victims heal.<sup>143</sup>

### C. *Compensation does not mean restoration*

39 Whilst compensation is a common way to help victims heal and obtain closure in restorative justice, it may not always lead to restoration.<sup>144</sup> In research conducted to examine the extent to which compensation is paid to victims,<sup>145</sup> questionnaires were collected from 1,132 victims of crimes where sentences of "guilty" were pronounced from 1997–1999.<sup>146</sup> The research found that compensation was not always fully paid to most

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138 Masahiro Suzuki & Akinori Otani, "Myths of Restorative Features in the Japanese Justice System and Society: The Role of Apology, Confession and Compensation, and Application of Reintegrative Shaming" (2017) 5 *Restorative Justice* 158; *Crime Victim Rights* (M Miyazawa, M Taguchi & N Takahashi eds) (Seibundo, 1996).

139 Masahiro Suzuki & Akinori Otani, "Myths of Restorative Features in the Japanese Justice System and Society: The Role of Apology, Confession and Compensation, and Application of Reintegrative Shaming" (2017) 5 *Restorative Justice* 158; *Crime Victim Rights* (M Miyazawa, M Taguchi & N Takahashi eds) (Seibundo, 1996).

140 Masahiro Suzuki & Akinori Otani, "Myths of Restorative Features in the Japanese Justice System and Society: The Role of Apology, Confession and Compensation, and Application of Reintegrative Shaming" (2017) 5 *Restorative Justice* 158; *Crime Victim Rights* (M Miyazawa, M Taguchi & N Takahashi eds) (Seibundo, 1996).

141 Yoko Hosoi & Haruo Nishimura, "The Role of Apology in the Japanese Criminal Justice System" (1999), paper presented at the Restoration for Victims of Crime Conference: Contemporary Challenges, Melbourne, Australia.

142 Yoko Hosoi & Haruo Nishimura, "The Role of Apology in the Japanese Criminal Justice System" (1999), paper presented at the Restoration for Victims of Crime Conference: Contemporary Challenges, Melbourne, Australia.

143 Masahiro Suzuki & Akinori Otani, "Myths of Restorative Features in the Japanese Justice System and Society: The Role of Apology, Confession and Compensation, and Application of Reintegrative Shaming" (2017) 5 *Restorative Justice* 158.

144 Masahiro Suzuki & Akinori Otani, "Myths of Restorative Features in the Japanese Justice System and Society: The Role of Apology, Confession and Compensation, and Application of Reintegrative Shaming" (2017) 5 *Restorative Justice* 158.

145 Masahiro Suzuki & Akinori Otani, "Myths of Restorative Features in the Japanese Justice System and Society: The Role of Apology, Confession and Compensation, and Application of Reintegrative Shaming" (2017) 5 *Restorative Justice* 158; *White Paper on Crime* (Japanese Ministry of Justice, 1999).

146 *White Paper on Crime* (Japanese Ministry of Justice, 1999).

victims, with the ratio for “full payment” or “partial payment while the rest is planned” being high among victims in the groups of “traffic accident causing death” (70%) or “injury” (60%) because of insurance payments.<sup>147</sup> In contrast, ratios for other victim groups such as homicide (10%–20%) and sexual assault (30%–50%) were low.<sup>148</sup> While the study did not distinguish if payment was suggested from the offenders or were the result of civil litigation brought by the victims, the study demonstrated 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 towards them than before the compensation was paid.<sup>149</sup>

## VI. Contemplations on victim-offender mediation

### A. Overall positive impact on victim

40 The survey of the three jurisdictions and their approaches towards (or lack thereof formally) restorative justice through victim-offender mediation or criminal mediation demonstrate that the process can be highly impactful for victims in processing what has happened to them. Through their voluntary participation in the mediation, victims assert control and ownership over what happened to them and feel heard by the offender and the mediator, leading to their validation.<sup>150</sup> The question then turns to how these concepts manifest in the minds of the victims.

41 Psychological studies have also shown that there is a consistent and significant decrease in post-traumatic stress symptoms after victims’ participation in victim-offender mediation.<sup>151</sup> Except for levels of anxiety, this decrease was more expressive in levels of distress and fear in victims that suffered the same type of crime, and who undergo restorative processes (eg, victim-offender mediation) as compared to conventional

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147 *White Paper on Crime* (Japanese Ministry of Justice, 1999); Masahiro Suzuki & Akinori Otani, “Myths of Restorative Features in the Japanese Justice System and Society: The Role of Apology, Confession and Compensation, and Application of Reintegrative Shaming” (2017) 5 *Restorative Justice* 158.

148 Masahiro Suzuki & Akinori Otani, “Myths of Restorative Features in the Japanese Justice System and Society: The Role of Apology, Confession and Compensation, and Application of Reintegrative Shaming” (2017) 5 *Restorative Justice* 158.

149 Masahiro Suzuki & Akinori Otani, “Myths of Restorative Features in the Japanese Justice System and Society: The Role of Apology, Confession and Compensation, and Application of Reintegrative Shaming” (2017) 5 *Restorative Justice* 158.

150 Heather Strang *et al.*, “Victim Evaluations of Face-to-Face Restorative Justice Conferences: A Quasiexperimental Analysis” (2006) 62(2) *Journal of Social Issues* 281; Mark S Umbreit, Robert B Coates & Boris Kalanj, *Victim Meets Offender: The Impact of Restorative Justice and Mediation* (Criminal Justice Press, 1994) at pp 53–64.

151 Ana M Nascimento, Joana Andrade & Andreia de Castro Rodrigues, “The Psychological Impact of Restorative Justice Practices on Victims of Crimes – A Systematic Review” (2023) 24(3) *Trauma, Violence & Abuse* 1929 at 1940.

legal processes.<sup>152</sup> Victims also displayed a decreased desire to seek revenge<sup>153</sup> which highlighted changes in the perception they have towards their offenders, including having more positive attitudes towards them.<sup>154</sup> Victims who participated in direct restorative mediations also show a more positive perception about the offender, compared to victims who refused to participate or who participated in indirect mediations.<sup>155</sup> Further, by taking part in victim-offender mediation, victims feel less helpless over what has happened<sup>156</sup> and instead have an increased perception of security<sup>157</sup> and self-esteem.<sup>158</sup> Victims also developed a renewed sense of control and empowerment during the restorative process of mediation.<sup>159</sup>

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- 152 Ana M Nascimento, Joana Andrade & Andreia de Castro Rodrigues, “The Psychological Impact of Restorative Justice Practices on Victims of Crimes – A Systematic Review” (2023) 24(3) *Trauma, Violence & Abuse* 1929 at 1940.
- 153 Lawrence W Sherman *et al*, “Effects of Face-to-Face Restorative Justice on Victims of Crime in Four Randomized, Controlled Trials” (2005) 1(3) *Journal of Experimental Criminology* 367.
- 154 Ana M Nascimento, Joana Andrade & Andreia de Castro Rodrigues, “The Psychological Impact of Restorative Justice Practices on Victims of Crimes – A Systematic Review” (2023) 24(3) *Trauma, Violence & Abuse* 1929 at 1940; Jac Armstrong, “Factors Contributing to Victims’ Satisfaction with Restorative Justice Practice: A Qualitative Examination” (2012) 10(2) *British Journal of Community Justice* 39; Jaimie P Beven *et al*, “Restoration or Renovation? Evaluating Restorative Justice Outcomes” (2005) 12(1) *Psychiatry, Psychology and Law* 194; Yossawan Boriboonthana & Sangduen Sangbuangamlum, “Effectiveness of the Restorative Justice Process on Crime Victims and Adult Offenders in Thailand” (2013) 8(4) *Asian Journal of Criminology* 277; Maritha Jacobsson, Lottie Wahlin & Tommy Andersson, “Victim-offender Mediation in Sweden: Is the Victim Better Off?” (2012) 18(3) *International Review of Victimology* 229; Barton Poulson & Kathy Elton, “Participants’ Attitudes in the Utah Juvenile Victim-Offender Mediation Program” (2002) 53(1) *Juvenile and Family Court Journal* 37; Heather Strang *et al*, “Victim Evaluations of Face-to-Face Restorative Justice Conferences: A Quasiexperimental Analysis” (2006) 62(2) *Journal of Social Issues* 281; Mark S Umbreit & Marilyn Armour, “Family Survivors of Homicide Meet the Offender: The Impact of Restorative Dialogue” (2010) 19 *The Journal of Community Corrections* 25; Mark Walters, ‘I Thought “He’s a Monster” ... [but] He Was Just ... Normal’: Examining the Therapeutic Benefits of Restorative Justice for Homicide” (2015) 55(6) *British Journal of Criminology* 1207.
- 155 Daniela Bolívar, “For Whom is Restorative Justice? A Mixed Method Study on Victims and (Non-) Participation” (2013) 1(2) *Restorative Justice* 190.
- 156 Susan L Miller & LeeAnn Iovanni, “Using Restorative Justice for Gendered Violence: Success with a Postconviction Model” (2013) 8(4) *Feminist Criminology* 247; Josep Tamarit & Eulalia Luque, “Can Restorative Justice Satisfy Victims’ Needs? Evaluation of the Catalan Victim-Offender Mediation Programme” (2016) 4(1) *Restorative Justice* 68; Tinneke Van Camp & Jo-Anne Wemmers, “Victim Satisfaction with Restorative Justice: More Than Simply Procedural Justice” (2013) 19(2) *International Review of Victimology* 117.
- 157 Jaimie P Beven *et al*, “Restoration or Renovation? Evaluating Restorative Justice Outcomes” (2005) 12(1) *Psychiatry, Psychology and Law* 194.
- 158 Maritha Jacobsson, Lottie Wahlin & Tommy Andersson, “Victim-Offender Mediation in Sweden: Is the Victim Better Off?” (2012) 18(3) *International Review of Victimology* 229.
- 159 Jane Bolitho, “Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice” (2015) 3(2) *Restorative Justice* 256; Dermot Lavin & Claire Carroll, “Restorative Justice in Practice: A Case Study” (2014) 11(1) *Irish Probation Journal* 245; Christa Pelikan, “On the Efficacy of Victim-Offender-Mediation in Cases of Partnership  
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42 Very importantly, victims report that participation in victim-offender mediation gave them a sense of emotional closure, based on relief and emotional conditions to continue their lives.<sup>160</sup> The sense of closure has been shown to be a prevalent result over time.<sup>161</sup>

### **B. Mediation as justice**

43 Mediation is one of the best ways to increase access to justice<sup>162</sup> and complements the traditional underpinnings of the rule of law by addressing the needs, rights and interests of the disputing parties.<sup>163</sup> Through victim-offender mediation, the adherence to rule of law allows it to be compatible with the objectives of a functional criminal justice system.

44 With the help of a competent mediator, the victim and offender can feel that their points of view are heard and can resolve their disputes in a way which is fair to them. This would be a “just” outcome particularly for the victim.<sup>164</sup>

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Violence in Austria, or: Men Don't Get Better, but Women Get Stronger: Is It Still True?" (2010) 16(1) *European Journal on Criminal Policy and Research* 49.

- 160 Ana M Nascimento, Joana Andrade & Andreia de Castro Rodrigues, “The Psychological Impact of Restorative Justice Practices on Victims of Crimes – A Systematic Review” (2023) 24(3) *Trauma, Violence & Abuse* 1929 at 1941; Elizabeth Beck, Terri Lewinson & Nancy P Kropf, “Restorative Justice with Older Adults: Mediating Trauma and Conflict in Later Life” (2015) 21(3) *Traumatology* 219; Daniela Bolívar, “For Whom is Restorative Justice? A Mixed Method Study on Victims and (Non-) Participation” (2013) 1(2) *Restorative Justice* 190; Avery Calhoun, “The Impact of Restorative and Conventional Responses to Harm on Victims: A Comparative Study” (2013) 11(1) *British Journal of Community Justice* 63; Mark Halsey, Andrew Goldsmith & David Bamford, “Achieving Restorative Justice: Assessing Contrition and Forgiveness in the Adult Conference Process” (2015) 48(4) *Australian & New Zealand Journal of Criminology* 483; Hema Hargovan, “Doing Justice Differently: Is Restorative Justice Appropriate for Domestic Violence?” (2010) 2 *African Journal of Criminology & Victimology* 25–1; Patrick Murhula & Aden Tolla, “The Effectiveness of Restorative Justice Practices on Victims of Crime: Evidence from South Africa” (2020) 9(3) *International Journal for Crime, Justice, and Social Democracy* 1; Barton Poulson & Kathy Elton, “Participants’ Attitudes in the Utah Juvenile Victim-Offender Mediation Program” (2002) 53(1) *Juvenile and Family Court Journal* 37; Mark S Umbreit *et al*, “Victims of Severe Violence in Mediated Dialogue with Offender: The Impact of the First Multi-site Study in the US” (2006) 13(1) *International Review of Victimology* 27; Tinneke Van Camp & Jo-Anne Wemmers, “Victim Satisfaction with Restorative Justice: More Than Simply Procedural Justice” (2013) 19(2) *International Review of Victimology* 117.
- 161 Jane Bolitho, “Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice” (2015) 3(2) *Restorative Justice* 256.
- 162 Chief Justice Sundaresh Menon, Supreme Court of Singapore, address at the Joint Launch of the State Courts Centre for Dispute Resolution and “Mediation in Singapore: A Practical Guide” (4 March 2015) at para 5.
- 163 The Honourable the Chief Justice Sundaresh Menon, “Mediation and the Rule of Law” [2017] *Asian Journal on Mediation* 1 at para 15; Melvin Loh, “The Power of Stories: Advocating for Therapeutic Justice Through Mediation” [2023] *Asian Journal on Mediation* 35 at para 21.
- 164 Melvin Loh, “Hello Neighbour: A Look at Community Mediation” [2022] *Asian Journal of Mediation* 59 at para 32; Melvin Loh, “The Power of Stories: Advocating  
(cont'd on the next page)

45 Mediation offers the opportunity to achieve “justice from below” based on the parties’ interests and values, as opposed to the litigation process that imposes “justice from above”.<sup>165</sup> Mediators can help foster a safe and secure environment in mediation, where parties feel that their needs are being heard and that they are not pressured or forced to give in and compromise when they do not want or are not ready to. With the guidance of a trained and experienced mediator who is sensitive to the concerns of the parties, this would likely lead to lasting and meaningful resolutions for the victim and offender as they take ownership and feel is just.<sup>166</sup>

46 An argument may be made that victim-offender mediation allows the affluent to avoid punishment as raised above, but this author believes there are alternatives. Apart from financial compensation, non-pecuniary reparations such as acts of service (eg, repainting properties that have been vandalised or even having the offender work with relevant charities that help those harmed by crimes he had committed) may be another way to allow for restoration. For more serious offences, victim-offender mediation can be complementary to the punishment of the offender, allowing for legal punishment and for restoration to occur between the parties. It does not have to be a zero-sum game in creating social good.

### C. *The need for competent mediators*

47 Due to the nature of victim-offender mediation, it is important that competent mediators are appointed to facilitate the process. This is apparent from the experiences in China, where judges are uniquely suited by virtue of their office to persuasively (sometimes forcefully) move the mediation along to settlement, as well as the example of how town mediation in Taiwan was problematic in the 1990s when ill-suited and poorly-trained mediators were appointed. Further, if judges were to bear the entire load of mediating criminal matters, it may lead to situations as observed in China where judges simply do not have time.<sup>167</sup> As such, it is vital that mediators need to be suitably trained, equipped with necessary soft skills to demonstrate empathy, sensitivity and deft competence of the criminal subject matter and offence, whilst being held to high quality standards in conducting

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for Therapeutic Justice Through Mediation” [2023] *Asian Journal on Mediation* 35 at para 22.

165 Jonathan M Hyman & Lela P Love, “If Portia Were a Mediator: An Inquiry into Justice in Mediation” (2003) 9 *Yale Clinical Law Review* 157; Melvin Loh, “The Power of Stories: Advocating for Therapeutic Justice Through Mediation” [2023] *Asian Journal on Mediation* 35 at para 22.

166 Melvin Loh, “Hello Neighbour: A Look at Community Mediation” [2022] *Asian Journal of Mediation* 59 at para 33; Melvin Loh, “The Power of Stories: Advocating for Therapeutic Justice Through Mediation” [2023] *Asian Journal on Mediation* 35 at para 22.

167 Yuan Xiaoyu, *Restorative Justice in China: Comparing Theory and Practice* (Springer, 2017).

victim-offender mediation.<sup>168</sup> These skilled mediators will then be able to complement judges in conducting mediations, assuming that that is what the criminal justice system requires.

48 Carried out responsibly, the practice of restorative justice should require the victim and the offender to acknowledge the harm done, recognise the fault and have suitable reparation made whether through apology, financial compensation, or a combination of both means in most cases. However, as the experience in Japan has demonstrated, an apology or compensation may not lead to restoration where it is insincere or forced. Mediators should be trained to be sensitive to such situations and be mindful not to add on to the hurt and harm suffered by the victims in doggedly pursuing a settlement if, eg, the parties do not mean it or are not ready to give or accept an apology or compensation.

## VII. Final thoughts

49 The key value of victim-offender mediation lies in the humanisation of the process and the consequent change of perception of the offender, which transforms the “criminal” into a person who committed a crime and contextualises the incident.<sup>169</sup> While each society is different and has its own heritage, culture and criminal justice system, done well, the victim-offender mediation process is restorative and brings closure to both victim and offender, while being compatible with the conventional justice system. Prevention, protection and deterrence through incarceration and other forms of criminal punishment may be effective in enforcing the social norm that the public should not engage in crime or face legal consequences, but as the exposition above demonstrates, it may sometimes leave the victim behind. Victim-offender mediation can give a sense of justice to the victims and their families, allowing them to take ownership of the terms of their ordeal and seek the necessary closure and justice they require.

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168 J J Choi, Gordon Bazemore & Michael J Gilbert, “Review of Research on Victims’ Experiences in Restorative Justice: Implications for Youth Justice” (2012) 34(1) *Children and Youth Services Review* 35.

169 John Braithwaite, “Setting Standards for Restorative Justice” (2002) 42(3) *British Journal of Criminology* 563.