The Law and Culture of the Apology in Korean Dispute Settlement (With Japan and the United States in Mind)

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The comparative commentary regarding the role of the apology in dispute settlement has in large part revolved around the U.S.-Japan axis. Beginning with the pioneering work of Professors Hiroshi Wagatsuma and Arthur Rosett, commentators have argued that cultural norms explain the Japanese tendency to apologize when one's actions have
resulted in the significant injury of another and the U.S. inclination to refrain from apologizing or to deny responsibility in the very same situation.\(^2\) The legal system in each country jibes with the respective societal inclination or disinclination to apologize. Recognizing that the apology is an “important ingredient in resolving conflict,”\(^3\) Japanese legal institutions have reinforced the societal use of the apology\(^4\) and integrated it into their justice system.\(^5\) The culture of Japan is such that all of society, including the bench and bar, expects and demands an apology from a party causing harm or injury to another. There is no such expectation stateside. The societal inclination not to apologize in the U.S. setting is matched (and perhaps shaped) by a legal culture that advises clients not to issue an apology for fear that it may be used against the apologizer\(^6\) as an admission of legal liability.\(^7\) In the United States, the apology takes a much “lower legal priority”\(^8\); the “legal doctrine based on apology” is simply “underdeveloped”\(^9\); and the disconnect between the apology and the legal system continues.

Perhaps Japan is frequently selected as the country of contrast to the United States\(^10\) because it is a “radically different culture,”\(^11\) a society with persons of a different race and ethnicity and one with different values, norms, and attitudes. Although Japan’s neighbors in East Asia could also fit this description, the apology commentary addressing Korea\(^12\) and


\(^3\) Wagatsuma & Rosett, supra note 1, at 493.


\(^6\) Another commentator has used the terms “apologizer” and “apologizee” in the apology discourse. Levi, supra note 2, at 163.


\(^8\) Wagatsuma & Rosett, supra note 1, at 493.

\(^9\) Id. at 494.

\(^10\) Indeed, in the law dispute resolution commentary, discussion of the apology in the U.S. setting includes the reflexive attachment that the U.S. practice is in sharp contrast to that of Japan. E.g., Cohen, Advising Clients, supra note 2, at 1012–13; Cohen, Legislating Apology, supra note 2, at 850; Levi, supra note 2, at 164.


\(^12\) The limited commentary addressing the apology in Korea includes Yong-Chul Im & Soon-Mi Kim, Sah-jweh heng-we-eui sah-hwe-hwa-yong-rohn-juhk il-go-chal: hahn, il, joong dae-hakh-seng-eul joong-sim-eu-roh [Research on Sociological Effect of Apology: Focus on
China is far more limited. Yet the apology is no stranger to Korean society. A politician demanding an apology from another is a staple of Korean domestic politics. When two middle school girls were crushed to death by a U.S. armored vehicle in a training exercise near Seoul in 2002, the Korean people’s demand for an apology would not be satisfied until the President of the United States apologized directly. In September


13. Of interest in the Chinese understanding of the apology is the widely reported incident on April 1, 2001, involving a U.S. military reconnaissance aircraft and a Chinese fighter. The two aircraft collided over the Hainan Sea; the Chinese aircraft was presumed to have crashed with its pilot dead; the U.S. aircraft was forced to enter Chinese airspace and land in China. China demanded an apology from the United States. U.S. diplomats expressed regret but did not apologize. The incident led to some commentary on the Chinese understanding of the apology. E.g., Peter Hays Gries & Kaiping Peng, Culture Clash? Apologies East and West, 11 J. CONTEMP. CHINA 173, 173 (2002) (arguing that “both cultural differences and cultural commonalities played a significant role” in apology diplomacy over the aircraft incident); O’Hara & Yarn, supra note 7, at 1138 n.56 (explaining four levels of apology in China); Hang Zhang, Culture and Apology: The Hainan Island Incident, 20 WORLD ENGLISHES 383 (2001); Margaret K. Lewis, Note, An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident, 77 N.Y.U. L. REV. 1404 (2002). For a discussion of the emphasis on “face” in the Chinese understanding of the apology, see Peter Hays Gries, China’s New Nationalism: Pride, Politics & Diplomacy 86–115 (2004).

14. This could merely be the result of a void in the commentary that is still developing; interest in Korea and U.S.-Korea relations not yet matching that of Japan and U.S.-Japan relations; or the occasional popular tendency to group East Asian countries together extending into academic discussion. E.g., Harry C. Triandis, Individualism & Collectivism 155 (1995) (“East Asian collectivists use apologies as a social lubricant.”).

15. All references to Korea herein are to the Republic of Korea, popularly known as South Korea.


17. The deaths were widely reported and the incident became a charged affair in U.S.-Korea relations. A U.S. military court court-martialed and acquitted the two servicemen involved in the incident, a decision many Koreans bitterly criticized. The media reported that a number of U.S. military officers and diplomats issued multiple apologies to the families of the girls and to the people of Korea, including the commanding army general in Korea, a deputy
2005, the newly inaugurated Chief Justice of the Korean Supreme Court acknowledged that the judiciary had failed in the past to be independent from authoritarian regimes and expressed deep regret for "causing anxiety and damage to the public."\textsuperscript{18} One newspaper reported the event as the judiciary's first formal, official apology for previous errors.\textsuperscript{19} Of course, any discussion of the apology in Korea must include mention of Korea's continuing demand for an apology from Japan relating to the military occupation of the Korean peninsula for the first half of the twentieth century.\textsuperscript{20} Although the apology in the political arena is not the focus of this


19. Gwang-Suhb Jung, Sah-bub-booh gwag-guh-sah gip-ee bahn-sung [Judiciary's Deep Reflection of the Past], Hankyoreh, Sept. 27, 2005, at 1; see Challenge for Chief Justice, Korea Herald, Sept. 29, 2005, at 18 ("[W]e agree to the need for the judiciary to probe past cases, make due apologies, and avow a new start . . . ").

20. For a discussion, see Alexis Dudden, The Politics of Apology Between Japan and Korea, in TRUTH CLAIMS: REPRESENTATION AND HUMAN RIGHTS 73 (Mark Bradley & Patrice Petro eds., 2002). It appears there is some disagreement on whether Japan has sufficiently apologized to Korea. For a Korean perspective, see 67% of S. Koreans Say Japan Did Not Apologize for War, Japan Econ. Wire, Jan. 2, 1995, LEXIS, News Library, JEN File (reporting a survey indicating that two out of three Koreans do not believe Japan has apologized for its victimization of Korea during the occupation years, 1910–1945). For a view from across the sea, see LDP Policy Chieftain Needs a Diplomacy Lesson, Asahi Shimbun (Japan), June 4, 2003, available at 2003 WLNR 9101860 ("Some Japanese react angrily, saying, 'How many times must we have to apologize for historical issues?'"); Makoto Kito, Vast Psychological Gulf Keeps Japan, S. Korea Apart, Yomiuri Shimbun, Dec. 18, 1995, available at 1995 WLNR 1244355 ("A series of comments by Japanese Cabinet ministers, who were trying to justify the nation's war conduct, intensified the impression held by South Koreans that the Japanese feel no sincere remorse for the past. This provoked irritation in Japan, which asks how many times it must apologize before it is forgiven."). More recently, on August 15, 2005, the 60th anniversary of Japan's defeat in World War II, Japanese Prime Minister Junichiro Koizumi reportedly apologized for his state's past militarism. (In Korea, August 15 is a national holiday, gwang-bohk-juhl, marking the anniversary of Korea's liberation from Japanese rule.) Koizumi stated, "Our country has caused tremendous damage and pain to the peoples of many countries, especially Asian countries, through colonial rule and invasion. Humbly acknowledging such facts of history, I once again reflect most deeply and offer apologies from my heart." Noritmusu Onishi, Koizumi Apologizes for War: Embraces China and South Korea, N.Y. Times, Aug. 16, 2005, at A4. Yet such words were received only skeptically in Korea. Id.
Article, the above examples contribute to the Korean understanding of the apology in situations where a member of the society suffers harm or injury as a result of the actions of another.

An initial reaction might be that Korea’s approach to the apology in dispute settlement is much like the Japanese approach, considering the influence of Confucian norms and values with respect to harmony and conciliation in both countries. Yet there are also differences between the two societies, and there is danger in equating the two with respect to the perception and practical use of the apology. Korea has its own culture, history, and language, all distinguishable from those of Japan. Perhaps the basic difference between Japan and Korea is most vividly illustrated by the continuing, though improving, social and political tension between the two states.

This Article addresses the apology in civil dispute settlement in Korea, Japan’s neighbor across the East Sea, using the U.S.-Japan comparative discussion as a helpful frame of reference. Part I provides the necessary background on the meaning of the apology and the leading commentary along the U.S.-Japan axis, beginning with the work of Wagatsuma and Rosett. Culture appears in this discussion in two regards. First, a question arises as to whether the very meaning of the apology as noted in the commentary reflects the U.S. cultural orientation, or instead has universal application. Second, some argue that cultural norms explain the differences between the U.S. and Japanese use of the apology. With this foundation in place, the discussion turns to Korea. Part II begins with a brief description of the relevant social and political developments in contemporary Korea, and then, using the specific cultural indicators that shape the apology in Japan, examines the Korean tendency to apologize. The discussion notes that although the indicators suggest that Korea might have an approach quite similar or equal to that seen in Japan, events and trends in contemporary Korea suggest that it is too early to draw such a conclusion. Part III delves further into the Korean apology and Korean law, as well as the relationship between the two. This Part begins with an introduction to what an apology means in Korea, how it is delivered, and the legal culture’s reaction to it. The discussion then addresses the specific issue of the legality of a court-ordered apology in Korea, using the U.S. and Japanese positions as comparative points of reference, and invites discussion on how each jurisdiction’s approach might reflect its larger societal culture.

21. See infra text accompanying notes 120–132.
22. See Norimitsu Onishi, Japan and South Korea Brace for a Tense Meeting, N.Y. TIMES, June 20, 2005, at A6 (reporting on “months of strained relations over disputed territory and Japan’s militaristic past”).
23. To all but Koreans, this body of water is known as the Sea of Japan.
In brief, the collective sources indicate that the societal and legal setting in Korea appears at first glance to be quite similar to that in Japan, and indeed, in some respects the use of the apology in dispute settlement in Korea is like the Japanese approach. Yet in other respects, there are indications the Korean approach is leaning to its U.S. counterpart. This Article provides an introduction to the Korean perception of the apology, its role in the resolution of civil disputes, and the legal system’s use of it in the settlement of claims.

I. APOLOGY AND THE U.S.-JAPAN AXIS

A. Apology: The Background

The subject of the apology has received the attention of commentators in a variety of disciplines, including psychology, sociology, linguistics, and anthropology, as well as law. From these various contributions has emerged a growing bibliography that assists in the understanding of the essential characteristics of the apology and its relation to dispute resolution. The advanced state of the bibliography now includes analysis of the various definitions of the apology phrase. A recent survey of key works notes four elements in the common definitions of the term: “identification of the wrongful act, remorse, promise to forbear, and offer to repair.” An apology with all of these


26. E.g., Hamilton & Sanders, supra note 7 (a sociology-law team); Hamilton & Hagiwara, supra note 25 (a sociology-psychology team).


29. O’Hara & Yarn, supra note 7, at 1133. Other commentators’ reviews of the leading definitions yield similar elements. E.g., Cohen, Advising Clients, supra note 2, at 1014–15.
components is considered a "full" or "real" apology. In addition to the formalistic, elemental definitions are the pithy, shorthand descriptions of apology. For example, an apology is simply an offender being sorry and saying so or admitting that he did something wrong. Beyond the definitional elements, essential components, or irreducible minimums, there are also presentational requirements, which some commentators appear to presume and others state explicitly. For example, an apology must be voluntary, appropriately timed, and

\[ \text{("(i) admitting one's fault, (ii) expressing regret for the injurious action, and (iii) expressing sympathy for the other's injury.".)} \]

For their part, Wagatsuma and Rosett state that an apology must include acknowledgment that (1) the hurtful act happened, caused injury, and was wrongful; 2. the apologizer was at fault and regrets participating in the act; 3. the apologizer will compensate the injured party; 4. the act will not happen again; and 5. the apologizer intends to work for good relations in the future." Wagatsuma & Rosett, supra note 1, at 469–70.

The literature now includes descriptions of classes of apologies that do not meet the requirements of the "full" or "real" apology, including the "conditional apology," "safe and partial apology," see infra text accompanying notes 61–62, as well as the "explanation apology," "tactical apology," "formalistic apology," and "happy-ending apology." Levi, supra note 2.

30. Statements purporting to be apologies that lack one or more of the requisite elements, far from facilitating resolution of conflict, can lead to exacerbation and negative consequences. Susan Alter, Apologising for Serious Wrongdoing: Social, Psychological and Legal Considerations 15 (Law Comm'n. of Can., 1999), available at http://www.lcc.gc.ca/research_project/lica/pubs/apology/lhc-en.asp; Aaron Lazare, Go Ahead, Say You're Sorry, PSYCHOL. TODAY, Jan. 1995, at 40, 42. Two examples, taken from the world of politics, are President Nixon's statement in his resignation speech—"I regret deeply any injuries that may have been done in the course of events that led to this decision," Theodore H. White, Breach of Faith: The Fall of Richard Nixon 350 (1975); and Senator Packwood's statement in response to accusations of sexual harassment of several women—"I'm apologizing for the conduct that it was alleged that I did." Lazare, supra, at 76. Commentators have identified the statements of Nixon and Packwood as glaring failures in apology attempts. Id. at 40, 76 ("botched"; "stunning portraits of failed apologies"); O'Hara & Yarn, supra note 7, at 1133 ("two historically prominent but ineffective public apology attempts"); Lee Taft, Apology Subverted: The Commodification of Apology, 109 YALE L.J. 1135, 1141 (2000) ("Senator Robert Packwood's failed apology eclipsed even Nixon's.").


32. See Stephen B. Goldberg, Eric D. Green, & Frank E.A. Sander, Saying You're Sorry, 3 NEGOTIATION J. 221, 221 (1987); see also Lazare, supra note 30, at 76 ("To apologize, you have to acknowledge that you made a mistake."); Hamilton & Hagiwara, supra note 25, at 164–65 ("To apologize is to admit that harm was done."). Secretary of State Colin Powell made this point in explaining why the United States did not apologize for the incident over the Hainan Sea involving the collision between U.S. and Chinese military jets: "[The United States had] nothing to apologise for . . . . To apologise would have suggested that we had done something wrong and were accepting responsibility for having done something wrong, and we did not do anything wrong, and therefore it was not possible to apologise." Damian Whitworth & Oliver August, China and US Claim Spy Plane Victory, TIMES (UK), Apr. 12, 2001, available at 2001 WLNR 3179591.

33. See Cohen, Advising Clients, supra note 2, at 1018.

34. See Alter, supra note 30, at 2; Lazare, supra note 30, at 78; Levi, supra note 2, at 166; Goldberg, Green & Sander, supra note 32, at 223. Timing usually means that the apology should come shortly after the offending act. If an apology is made after repeated refusals or ignoring the demand, "the apology is likely to appear forced." Levi, supra note 2, at 166. An
sincere, among other characteristics. Yet a successful apology is not a function of a defined formula. An apology is a “complicated . . . act” and a “nuanced” and “amorphous” phenomenon. It deals in intangibles and involves a dynamic unique to the participants; the end result must provide “emotional satisfaction to both parties.” For example, non-verbal cues like body language and facial expression can show sorrow, remorse, and sincerity. Context is also important.

In addition to the extensive literature on the meaning of the apology, there is growing legal commentary addressing its role in facilitating

apology made after the desired time frame might confuse the apologizer, raise suspicions, and result in a negative reception. Lazare argues that although an apology should be made right away for minor offenses, this is not always the case for all offenses. For serious offenses:

such as a betrayal of trust or public humiliation, an immediate apology misses the mark. It demeans the event. Hours, days, weeks, or even months may go by before both parties can integrate the meaning of the event and its impact on the relationship. The care and thought that goes into such apologies dignifies the exchange.

Lazare, supra note 30, at 78.

35. See Alter, supra note 30, at 2; Cohen, Advising Clients, supra note 2, at 1017. The complexity of the sincerity requirement includes the situation where the apologizer makes a gut wrenching apology with full contrition and remorse (from her viewpoint), but the apologisee perceives the apology as insincere. See id. at 1052 (noting that an offender’s “deep expression of remorse” may be “a cavalier statement” to the injured). Or the apologizer apologizes, not taking the exercise seriously, but the apologizee perceives a sincere apology. Then there is the line attributed to George Burns, “if you can fake sincerity, you can fake anything.” Cohen, Legislating Apology, supra note 2, at 849.

36. It is the person whose conduct caused the injury, not a third party, who must apologize to the injured. In addition, the apologizer must identify herself. See U-2 Pilot Apologises, Advertiser (Australia), Jan. 28, 2003, at 21 (reporting on an unidentified U.S. pilot, who ejected safely from aircraft, and his statement of apology—“I am deeply sorry for injuries, damage or suffering caused by this accident for anyone on the ground.”).

37. Taft, supra note 30, at 1138.

38. O’Hara & Yarn, supra note 7, at 1139. Or as Jonathan Cohen writes, “nuance is critical in apology. A slight difference in shading—whether in word, presentation, or timing—can produce a vast difference in perception. Something as ‘trivial’ as speed can determine an apology’s impact: An apology muttered quickly can sound far less sincere than one stated deliberately.” Cohen, Advising Clients, supra note 2, at 1051.

39. O’Hara & Yarn, supra note 7, at 1131

40. See Levi, supra note 2, at 168 (“apology deals in intangibles rather than dollars and cents”).

41. Lazare, supra note 30, at 43.

42. See O’Hara & Yarn, supra note 7, at 1140.

43. See id. at 1139.

44. The focus here is on the meaning of an apology as offered by commentators. A U.S. court weighed in on the very question in a case where the court determined whether a letter sent between the parties was an apology. See Mangini v. Astrella, No 1019, 2005 Phila. Ct. C.P. LEXIS 167 (2005). In Mangini, the parties had entered into a settlement agreement, which included a provision that the defendant counsel “will write a letter of apology to Mr. Mangini on behalf of my client, Ms. Astrella.” Id. at 5. The plaintiff argued that the letter he received from the defendant’s counsel was unsatisfactory, and therefore, the defendant had not complied with the terms of the settlement agreement. The letter in question read:
the resolution of a dispute involving legal claims and liabilities. An in-
jured party who receives an apology may more easily agree to a
settlement or withdraw her claim altogether.\textsuperscript{45} An apology offers non-
financial compensation for the injured party, which in some cases is
more important than monetary reparation.\textsuperscript{46} The apology also has emo-
tional aspects: it serves a healing function\textsuperscript{47} and allows for restoration of
the self-concept,\textsuperscript{48} "equality of regard,"\textsuperscript{49} and dignity.\textsuperscript{50}

Any examination of the apology—including its meaning, purpose,
delivery, and relation to dispute resolution—invariably requires an ex-
amination of culture, since culture and cultural differences do shape and
affect the apology.\textsuperscript{51} A law and sociology team of authors goes so far as

I am writing this letter on behalf of my client, Carmella Astrella. Please accept this
letter as expressing Ms. Astrella's sincere regret with respect to the events which
transpired which led to your filing of the Complaint in this matter.

I wish you the best of luck in the future and I thank you for your courtesies.

\textit{Id.} at 7. The court held that "the plain language of the 'apology letter' satisfies the reasonable
definition of 'apology'. If the Plaintiff had required a specific form or more specificity as to
the apology that should have been noted at the outset . . . ." \textit{Id.} at 9. The decision may be one
of the few in which a court has determined what is or is not an apology. What was said to be a
satisfactory apology in \textit{Mangini} appears to fall short of the requisite elements in the common
definition of an apology seen in the commentary.

\textit{45. See} Cohen, \textit{Legislating Apology, supra} note 2, at 820; O'Hara & Yarn, \textit{supra} note 7,
at 1122, 1124; Peter H. Rehm & Denise R. Beatty, \textit{Legal Consequences of Apologizing, J.
Disp. Resol.} 115, 117 (1996) ("an apology, properly given and accepted, diffuses anger and
helps avoid litigation"). An important work by Professor Jennifer Robbennolt concluded that
an apology does indeed affect the chances for settlement, but that the type of apology given is
critical. Her study observed that a full apology, one in which the apologizer accepts responsi-

\textit{46. See} Levi, \textit{supra} note 2 at 166 ("Apology . . . has a chance to directly address psy-
chic, if not physical, injury. A meaningful apology may thus satisfy a plaintiff where monetary
damages would fail."); O'Hara & Yarn, \textit{supra} note 7, at 1125; \textit{see also} Alter, \textit{supra} note 30,
at 5–6.

\textit{47. See} Alter, \textit{supra} note 30, at 2, 5–6; Lazare, \textit{supra} note 30, at 40, 42; Taft, \textit{supra}
note 30, at 1136–38, 1156. Of course, for some wrongs, no apology will be enough to resolve the
dispute. Levi, \textit{supra} note 2, at 167; O'Hara & Yarn, \textit{supra} note 7, at 1132 n.36, 1139; Wa-
gatsuma & Rosett, \textit{supra} note 1, at 461.

\textit{48. See} Lazare, \textit{supra} note 30, at 43, 78.

\textit{49. Taft, supra} note 30, at 1137.

\textit{50. See} Alter, \textit{supra} note 30, at 4.

\textit{51. See} Levi, \textit{supra} note 2, at 164 ("effectiveness of . . . apology depends on the par-

\textit{ticipants’ common culture and values"); Cohen, \textit{Advising Clients, supra} note 2, at 1013 &
n.10; Cohen, \textit{Legislating Apology, supra} note 2, at 850–51. O'Hara and Yarn express much
less enthusiasm for the proposition that culture and apology are interconnected. O'Hara &
Yarn, \textit{supra} note 7, at 1128–29 & n.29. In their text, the authors do not "take a position one
way or another on the magnitude or importance of cultural differences in the context of apol-
ogy except to assert that reconciliatory behaviors, of which apology and forgiveness are
to state that the "[a]pology, and the role it plays in dispute resolution, is better understood as part of a society’s culture." How cultural norms in Japan, the United States, and Korea affect the frequency of use of the apology is discussed in some detail below. Yet culture is already present in the above discussion relating to the basics of the apology. In particular, the descriptions of the definitional and presentational requirements of the apology evoke parallels to the low-/high-context dichotomy in communication. By introduction, the low- versus high-context dichotomy relates to the amount of information contained in the transmitted message as opposed to the context (or setting) of the communication event. According to Professor Edward T. Hall, in low-context communications most of the information is in the transmitted message, with minimal "preprogrammed" information in the receiver and the setting; high-context communications are the reverse. "[I]n a low-context culture ... information is abundant; procedures are explicitly explained, and expectations are discussed" with a literal, direct style of communication. In contrast, in high-context cultures, there is an expectation of shared knowledge, the information is implicit, and the communication is less direct. In the normal discourse, the low-/high-context dichotomy is often used to distinguish between communication styles in different countries. For example, the United States is considered a low-context culture, while Japan is decidedly more high-context. Yet the above discussion regarding the meaning of the apology raises the question of

expressions, are present in all human cultures." Id. at 1129 n.29; see id. at 1146 ("[a]pologetic and remedial behavior, although variable in their specifics, are found in most if not all cultures."). They also note that: "[n]uances and the expression of an interpretation of apologetic discourse may vary with culture," id. at 1140; and "[c]ulture may play an important role" in explaining differences in apology and forgiveness between men and women. Id. at 1145–46. In addition, "[o]f course, the expressions may vary substantially across cultures." Id. at 1129 n.29.

52. Hamilton & Sanders, supra note 7, at 46.

53. Edward T. Hall, Beyond Culture 79 (1976) [hereinafter Hall 1976]. This is the original work to which most commentators cite. A more recent edition is also available. Edward T. Hall, Beyond Culture 101 (2d ed. 1989) [hereinafter Hall 1989]. Hall collaborated on another work that includes many related themes. Edward T. Hall & Mildred Reed Hall, Understanding Cultural Differences (1990).


56. Id.

57. Hall & Hall, supra note 53, at 6–7. Societies with long social histories, shared experiences, and free from foreign intervention tend to be high-context cultures. Both Korea and Japan would fit this description.
whether the apology act can also be considered under the low-/high-context analysis.  

At first glance, the apology might be seen as a low-context activity. The definitional elements of the apology (identification of the wrongful act, remorse, promise to forbear, and offer to repair) appear to require low-context communication—that is, specific items that must be included in the transmitted message. Thus, in order for the apologizer to satisfy the elements of a full apology, he must transmit, and the apologizee must receive, certain expression and content: “I am sorry [remorse] that I hit you with my bicycle [identification of the wrongful act]. I would like to help with your medical bills [offer to repair]. I will be more careful next time [promise to forbear].”

An apologizer’s transmitted message that omits any of the above definitional elements falls short of an effective apology. In the low-context U.S. culture, the words, “I am sorry that I hurt you . . . .” might begin a real apology, but such statements as, “I am sorry if you are hurt,” or, “I am sorry that you are hurt,” without more, fail. A recipient of the message, “I am sorry if you are hurt,” is likely to find the “if” term troubling.9 Such a phrase is a “conditional” apology.60 Likewise, the “I am sorry that you are hurt” statement is often described as a “partial” apology,61 since it expresses sympathy but does not satisfy the other requisite elements.62

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59. Or more colloquially: “if? So you don’t know if I’m hurt or not?” See John Leo, I’m Terribly Sorry. Really, U.S. NEWS & WORLD REPORT, May 10, 2004, at 13 (“Secretary of Education Rod Paige said to the National Education Association, ‘If you took offense at anything I said, please accept my apology.’ If? He had said the NEA is a terrorist organization.”).

60. Daniel W. Shuman, The Role of Apology in Tort Law, JUDICATURE, Jan./Feb. 2000, at 180, 188 (“[A] conditional apology is no apology at all.”)

61. E.g., Cohen, Advising Clients, supra note 2, at 1030; Cohen, Legislating Apology, supra note 2, at 841.

62. Given the indications that a partial apology assists in the out-of-court settlement of disputes, Jonathan Cohen advocates a legal system that would encourage parties to express such apologies without fear that they would be used as evidence of an admission of liability. See Cohen, Legislating Apology, supra note 2. Cohen notes that an apology can be “value creating.” Cohen, Advising Clients, supra note 2, at 1015, 1016. Some apology purists object. Chief among them is Lee Taft, who decries the “commodification” of the apology. See Taft, supra note 30. Emphasizing the healing function of the apology as its primary purpose, Taft urges that when one apologizes, she must bear all the consequences. Id. at 1156; see also Lazare, supra note 30, at 43 (“A good apology . . . has to make you suffer. You have to express
Given the necessary components of the apology, one may wonder whether its common definition is geared to the low-context culture. But as O'Hara and Yarn note, context is "extremely important" because "an abbreviated expression of apology can carry with it the implied presence of unspoken elements." This suggests that not all of the elements of the apology need to be expressed in the transmitted message. If context indeed is important in the apology setting, the apology might be one activity in the low-context U.S. culture that entails both low- and high-context communication.

The matter of the relationship between context communication and the apology deserves more attention. Perhaps the cultural distinction of low-/high-context has less impact on the apology than other cultural factors. Or perhaps an apology is one type of communication act where high-context cultures can demand information in transmitted messages genuine, soul-searching regret. ... Unless you communicate guilt, anxiety, and shame, people are going to question the depth of your remorse.

Indeed, it should be noted that the leading definitions of apology are taken from U.S. academic commentary. There is no indication therein that the definitions advanced have universal application, or are tailored to a particular culture or cultures. One question is whether the definitional requirements of the apology reflect the cultural orientation of the U.S. commentators.

O'Hara & Yarn, supra note 7, at 1139 (emphasis added). The authors also add, "but other times it cannot." Id.

Yet for this to take place, that is, for the apology to be delivered and accepted through preprogrammed information, both the apologizer and apologizee would have to be from the same high-context culture. Without the commonality of culture, there could be disastrous consequences, including attributions of refusal to apologize and refusal to accept.

Conversely, in Japan, generally known as a high-context culture, written letters of apologies, or shimatsusho, "a common and significant aspect of Japanese apology," indicate low-context content, that is, specific definitional elements expressed in the transmitted message. Wagatsuma & Rosett, supra note 1, at 488. Wagatsuma and Rosett provide the following example of shimatsusho by a high school student who took an unauthorized motorcycle ride:

On December 24, 1977, at 1:30 PM, I was found by a police officer while riding on a motorcycle without a driver's license on P Street of Block D of City Z. I was warned by the officer. I regret deeply what I have done and I pledge myself never again to ride a motorcycle without obtaining a driver's license. Please deal with me leniently this time.

Id. at 490. They also quote from a Japanese legal text that recommends the following shimatsusho in the hypothetical situation of a careless company employee:

I seriously regret that I have carelessly lost the company's check for 300,000 Yen on such and such a day and caused my company serious trouble. Fortunately the check has been recovered, but I am willing to pay for the expenses that might have been incurred in the process of its recovery. I pledge myself never again to make such a careless mistake and I would ask your generous forgiveness.

Id. (quoting JIYU KOKUMIN SHA 375 (1961)). It is important to note that the shimatsusho is a written apology, and written transmissions are inherently more low-context than verbal exchanges. Wagatsuma and Rosett do not offer sample contents of verbal apologies in Japanese, save for a brief phrase, sumimasen. See infra text accompanying notes 171-173.
and low-context cultures can demand preprogrammed information in the setting and the recipient. (But if that is so, the next question is to what extent.) Or perhaps the apology act by its very nature depends so greatly on the dynamic between the particular apologizer and apologizee and the actions leading up to the apology setting that neat descriptions regarding context are impossible.

The above examination of the apology under the low-/high-context lens raises the question of whether the definitional elements and the presentational requirements of the apology are universal, culturally dependent, or a combination of the two. The same query of universality or cultural construction applies to other aspects of the apology, including its purpose, frequency of use, and relation to the legal system. With this introduction of the apology and its relationship with culture in place, the next section discusses the apology in the U.S. and Japanese cultures.

B. Apology: The U.S.-Japan Axis

When one is wronged by another, there is a human preference for an apology. As alluded to above, differences in cultural norms may explain why the apology resolves disputes more frequently in some national jurisdictions than in others. The oft-cited article by Wagatsuma and Rosett is still the leading work on this subject. This team of Japanese anthropology and U.S. law commentators explains that the deeply ingrained cultural regard for group harmony and hierarchy in Japanese society shapes Japan’s use of the apology. When one’s actions have resulted in another’s injury, efforts are made toward accommodation and compromise, and an apology is necessary to restore the “positive relationship” between the parties and acknowledge “the authority of the hierarchical structure upon which social harmony is based.” Wagatsuma and Rosett note that group harmony and hierarchy are of far less importance in the United States, where the emphasis instead is on individual autonomy. Thus, injury to another is less likely to result in an apology and more likely to produce denial, justification, or “the
vigorous assertion of narrowly defined personal interests that will appear in polar conflict with the rights of others."\(^7\)

Wagatsuma and Rosett’s article continues to have influence in cultural and comparative discussion of the apology, even as the authors acknowledge that the evidence on which they relied was “incomplete and anecdotal.”\(^7\) Ample commentary from a range of disciplines has largely supported Wagatsuma and Rosett’s premises and ultimate conclusion, namely that cultural norms explain the “real differences in the incidence of apologetic behavior by Japanese and Americans faced with a serious claim that they have injured another.”\(^7\) For example, Professors V. Lee Hamilton and Joseph Sanders\(^7\) closely echo Wagatsuma and Rosett’s observation of the Japanese emphasis on the group dynamic. Hamilton and Sanders explain that Japanese society typically reflects a social network combining hierarchy and solidarity,\(^7\) with individuals existing “in a network of interlocked others.”\(^8\) When disruptions or disputes arise, an apology is necessary “to reinforce social harmony and order in groups.”\(^9\)

Social science literature often characterizes the difference between societal orientations to the group and to the individual (as discussed by Wagatsuma and Rosett, and Hamilton and Sanders) as the collectivism/individualism dichotomy.\(^10\) Professor Harry C. Triandis describes the dichotomy as a construct to explain behaviors in different national societies.\(^11\) Intercultural expert Geert Hofstede identifies collectivism/individualism as one of multiple cultural dimensions along which national societies differ to varying degrees.\(^12\) A beginning definition of collectivism is

\begin{itemize}
  \item A social pattern consisting of closely linked individuals who see themselves as parts of one or more collectives (family, co-workers, tribe, nation); are primarily motivated by the norms of, and duties imposed by, those collectives; are willing to give pri-
\end{itemize}

\(^7\) Id. at 493.
\(^7\) Id. at 464. Or as Professor Haley wrote, “we have only mined the surface lodes.” Haley, Implications of Apology, supra note 4, at 506.
\(^7\) Id. at 464. Or as Professor Haley wrote, “we have only mined the surface lodes.”
\(^8\) Id. at 23.
\(^9\) Id. at 23.
\(^10\) Id. at 46; see id. at 138.
\(^11\) Id.; see Dean C. Barnlund & Miho Yoshioka, 14 INT'L J. INTERCULTURAL RELATIONS 193, 204 (1990) (“Harmony appears to be the most important value governing interpersonal relations in Japan.”).
\(^12\) Wagatsuma and Rosett did not refer to this term in their text.
\(^13\) TRIANDIS, supra note 14, at 2.
ority to the goals of these collectives over their own personal goals; and emphasize their connectedness to members of these collectives.\(^{85}\)

In contrast, individualism is

a social pattern that consists of loosely linked individuals who view themselves as independent of collectives; are primarily motivated by their own preferences, needs, rights, and the contracts they have established with others; give priority to their personal goals over the goals of others; and emphasize rational analyses of the advantages and disadvantages to associating with others.\(^{86}\)

Hofstede’s characterization of collectivist and individualist cultures recalls Wagatsuma and Rosett’s descriptions of the apology in Japanese and U.S. societies, respectively. That is, the ultimate goals in collectivist societies are “harmony and consensus,” in contrast to the aim of “[s]elf-actualization by every individual” in individualist societies.\(^{87}\) In collectivist societies, norms maintain harmony and avoid direct confrontations; in individualist cultures, speaking one’s mind is the norm.\(^{88}\) (In addition, collectivist cultures tend to employ high-context communication; individualist cultures tend to be low-context.\(^{89}\)) In Hofstede’s survey and rankings of 50 countries and three regions,\(^{90}\) the United States emerged as the most individualist society, ranking first out of 53; Japan is significantly more collectivist, in a tie for 22.\(^{91}\) Similarly, Triandis’ text isolates Japan (as well as China) as a classic case of collectivist culture on one

\(^{85}\) Triandis, supra note 14, at 2.

\(^{86}\) Id. Similarly, Hofstede defines the terms in this way:

Individualism pertains to societies in which the ties between individuals are loose: everyone is expected to look after himself or herself and his or her immediate family. Collectivism as its opposite pertains to societies in which people from birth onwards are integrated into strong, cohesive ingroups, which throughout people’s lifetime continue to protect them in exchange for unquestioning loyalty.

\(^{87}\) Hofstede, supra note 84, at 51 (emphasis omitted).

\(^{88}\) Id. at 73, tbl. 3.4.

\(^{89}\) Id. at 67, tbl. 3.3; see Triandis, supra note 14, at 161.

\(^{90}\) Hofstede, supra note 84, at 67 tbl. 3.3.

\(^{91}\) Hofstede has been described as “the ‘father’ of cross-cultural data bases.” Charles M. Hampden-Turner & Fons Trompenaars, Building Cross-cultural Competence: How To Create Wealth From Conflicting Values x (2000).

\(^{91}\) Hofstede, supra note 84, at 53 tbl. 3.1. Of 53 states and regions studied, each state was given an “individualism index” score within a range of 0 for the most collectivist to 100 for the most individualist. The United States captured the most individualist rank with an index score of (91), edging out Australia (90), and Great Britain (89)—incidentally, all common law jurisdictions. Guatemala was the most collectivist, with an index score of 6. Id.
end and the United States as the model individualist culture on the other.\(^9^2\)

In sum, the Japanese emphasis on harmony, hierarchy, and solidarity of the group, as enunciated by Wagatsuma and Rosett and echoed by Hamilton and Sanders, finds support under a different label from Triandis (with Hofstede lending empirical support). An apology is expected and given in Japan in deference to harmony in the collectivity.\(^9^3\) In contrast, the U.S. emphasis on the individual and the self\(^9^4\) explains the inclination against an apology stateside.\(^9^5\) Reflecting the U.S. social and legal culture,\(^9^6\) when one’s action results in another’s injury, dialogue occurs not in the form of an apology to the injured but through allegation and denial by the parties or their counsel.\(^9^7\)

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92. TRIANDIS, supra note 14, at 89, 97. About apologies specifically, Triandis states: ‘East Asian collectivists use apologies as a social lubricant. Apologies are usually reciprocated, so that both parties ‘take the blame.’” Id. at 155.

93. The desire for harmony is for the in-group, in contrast to harmony with out-groups. Wagatsuma and Rosett distinguish between in-group solidarity and out-group hostility. Wagatsuma & Rosett, supra note 1, at 465. Similarly, Triandis notes that collectivists can act individualistically when dealing with out-groups. TRIANDIS, supra note 14, at xiv. Elaborating, “In collectivist cultures conflict is more likely to be intergroup, with ethnicity, language, religion, or race as the boundaries of conflicts. The conflict is between collectives . . .” Id. at 111.

94. Triandis sees in individualist societies an orientation toward achievement and extreme competitiveness. TRIANDIS, supra note 14, at 47, 180.

95. Commentators have weighed in on the U.S. disinclination to apologize and the cultural forces that shape it. Apologizing is: “antithetical to the ever-pervasive values of winning, success, and perfection,” Lazare, supra note 30, at 40; and a “sign of weakness,” id. at 78. (One is reminded of a line uttered by an icon in American film, John Wayne: “Never apologize and never explain—it’s a sign of weakness.” BARTLETT’S FAMILIAR QUOTATIONS 724 (16th ed. 1992) (attributed to Frank S. Nugent and Laurence Stallings for their screenplay She Wore a Yellow Ribbon.) Taft explains that “strong values of autonomy and independence . . . work against a tendency to apology,” adding that such values might be more American male values than American values. Taft, supra note 30, at 1142 & n.30. Another commentator adds that the “high value placed on self-esteem and self-determination may make admissions of failure more painful” and that “apologies, which seem to elevate the status of one partner and demean the other, may conflict with an assumption of equality,” Barnlund & Yoshioka, supra note 81, at 204 (“Self expression and spontaneity tend to be valued over the maintenance of social harmony.”).


A number of empirical studies supports Wagatsuma and Rosett’s view that the Japanese are more likely to apologize than Americans. One study concluded that collectivist Japanese prefer mitigating accounts such as apology and excuse, while individualist American subjects prefer more assertive or aggressive accounts like justification and denial. Another study concluded that Japanese subjects prefer more direct and extreme forms of apology, while Americans resort to less direct and less extreme versions. Building on the above summary of the apology and the contrasts between the Japanese and U.S. approaches, the next Part turns to the apology in the Korean setting.

II. KOREA

Toward an understanding of the apology in Korea, the task here is to determine whether the cultural traits that shape the frequent use of the apology in Japan are also present in its neighbor. Yet there is some danger in ascertaining a society’s cultural traits statically or in isolation, without a sense of its history. The study of any society is by its nature complex, and the task requires some understanding of the society’s context. An exhaustive description is not possible here, but this Part provides a brief summary of two competing aspects of the Korean setting that relate to the apology: first, the continuing presence of a traditional Confucian culture, and second, developments in recent years indicating a shift in social attitudes.

98. Hamilton & Hagiwara, *supra* note 25 (results based on survey questionnaires to 32 American and 25 Japanese students); Naomi Sugimoto, *A Japan-U.S. Comparison of Apology Styles*, *24 Comm. Research* 349 (1997) (results based on survey questionnaires to 200 U.S. and 181 Japanese students). With respect to the form of the apology expression (and returning to the theme of whether an apology must be expressed in low-context form or can be delivered in high-context), the Hamilton and Hagiwara study used the same phrasing for subjects of both countries, i.e., a plain, brief statement of “I’m so sorry.” Hamilton & Hagiwara, *supra* note 25, at 165, 171. The Sugimoto study found that similar “basic norms” of apology were present in both cultures, that is, “(a) statements of remorse, (b) reparation, (c) compensation, (d) promises not to repeat the same offense, and (e) requests for forgiveness.” Sugimoto, *supra*, at 359.

99. The term “accounts” is used in social psychology and relates generally to the attribution of responsibility. The classification of accounts includes denial, justification, consensus, excuse, and apology. See Hamilton & Hagiwara, *supra* note 25, at 157.


101. See Barnlund & Yoshioka, *supra* note 81 (results of survey of 40 U.S. and Japanese students in “semistructured interviews”). The study also noted that Japanese tend to apologize without explaining their actions, adapting more to the status of the apologizee, while Americans offered explanations to justify their actions and adapted less to the status of the apologizee. *Id.* at 193, 203–04.
A. Korea: The Traditional and Contemporary

Confucianism, originating in China, spread to other societies in the region, including Japan and Korea. Professor Sang Hyun Song has written:

Confucianism has been the most persistent, persuasive and influential teaching in East Asian history. More than any other thoughts, it has molded the minds and behavior of the people in China, Korea, and Japan for many centuries. Confucianism has provided these people with their ethical and moral norms as well as suggested methods of government, and the impact of this Confucian theory and its ideology upon their political and social life is still discernible today.

In Korea, the founders of the Chosun dynasty (1392–1910) adopted a brand of Confucianism, or neo-Confucianism, that “served as a blueprint for ordering and integrating Korea’s political and social life.” Some commentators have observed that over time, Korea became more Confucian than the original model itself. According to one Confucian scholar, Korea is more Confucian than its regional neighbors in various respects, including “cultural orientation” and “social structure.”

Any discussion of Confucianism in Korea must address the question of its continuing presence in the contemporary setting. One author, while questioning the lasting effects of Confucianism on all aspects of Korean society, nevertheless acknowledges “the residual strength” of Confucianism in “interpersonal relations.” Another describes Confucian ethics in

Korea as "still prevailing"\textsuperscript{109} and "still pervasive."\textsuperscript{110} In a more recent work, Professor Chaihark Hahm writes that "Confucian culture provides the tools with which Koreans interpret and give order to the world around them."\textsuperscript{111} Yet these statements must also take into account the rapidly changing nature of social attitudes in Korea. Elaboration of this point also requires some understanding of the political and societal developments in Korea in the past five decades.

After liberation from Japanese colonial rule at the close of the Second World War in 1945, and withdrawal of the U.S. military government a few years later, Korea emerged as an independent sovereign. Shortly thereafter, a three-year war on the peninsula with communist North Korea devastated much of the country. The postwar years saw corruption and ineffective rule in the government as well as public protest. A military coup in 1961, led by army general Chung-Hee Park, began a reign of authoritarian rule by military generals for over a quarter of a century. After Park's assassination in October 1979 and months of political uncertainty and turmoil, army general Doo-Hwan Chun seized power the following year. His command of a brutal suppression of dissent in Gwangju on May 18, 1980, still haunts the Korean mindset.\textsuperscript{112} Pro-democracy demonstrations and protest against Chun intensified during his reign\textsuperscript{113} and ultimately ushered in the momentous democratization


Within this discussion, however, one is reminded of Professor Hahm's caution against speaking of Confucianism on overly general terms: "Even within one country, we must be mindful of the fact that Confucianism (at least certain aspects of Confucianism) is stronger or more respected in some regions than others. . . . Also, discussions of Confucianism must be issue-specific. The same Confucian influence can work in different ways depending on the concrete issues." Hahm, supra, at 268. Korean society might reflect some Confucian norms strictly and others less so.\textsuperscript{112} Koreans refer to this event in their contemporary history as oh-il-pahl, or 5-1-8. For texts devoted to the event, see LINDA S. LEWIS, LAYING CLAIM TO THE MEMORY OF MAY: A LOOK BACK AT THE 1980 KWANGJU UPRISING (2002); CONTENTIOUS KWANGJU: THE MAY 18 UPRISING IN KOREA’S PAST AND PRESENT (Gi-Wook Shin & Kyung Moon Hwang eds., 2003); THE KWANGJU UPRISING: EYEWITNESS PRESS ACCOUNTS OF KOREA’S TIANANMEN (Henry Scott-Stokes & Jai Eui Lee eds., 2000).\textsuperscript{113} For Chun’s apology to his countrymen for various abuses of power, see infra note 180.
reforms of 1987, "the year of the constitutional miracle," and the first popular presidential election in Korea. During this political and societal upheaval, Korea also underwent a transformation from a principally agrarian society to the eleventh largest economy in the world. This rapid economic growth improved the standard of living for many Koreans and spurred the emergence of a growing middle class. Korea's arrival on the world stage perhaps culminated in its hosting of the Summer Olympic Games in 1988. Some observers claim that all of this—the political, economic, and social developments—occurred while Korea adhered to Confucian ethics.

Along with profound reforms in its political institutions, government, and law, as well as remarkable economic growth, Korea also saw the beginning of changes in social attitudes and norms. A New York Times report in 2003 captured a Korea in transition and underscored the weight of its past and the directions of the present society: "Still anchored in Confucian values of family and patriarchy, South Korea is fast becoming an open, Westernized society—with the world's highest concentration of Internet broadband users, a pop culture that has recently been breaking taboos left and right, and living patterns increasingly focusing on individual satisfaction." Indeed, sociologists note that the changes in social attitudes and practices that have occurred in a matter of years in Korea took decades in Japan and Western countries. In the opening years of the new century, Korea appears to be a society in transformation.

115. See LETT, supra note 104.
117. Norimitsu Onishi, Divorce in South Korea: Striking a New Attitude, N.Y. TIMES, Sept. 21, 2003, at 19. The changing attitudes and practices relating to divorce provide one example. A decade ago, "few Koreans divorced... and deep social prejudice forced those who did to resign themselves to a life of solitude." Today, "a surging divorce rate... ranks among the world's highest." Id. Koreans are also marrying later, reflecting "rising individualism and shifting priorities from marriage to academic achievement and careers." Divorce Surges Among Older Couples, KOREA TIMES, June 22, 2005, available at 2005 WLNR 9888409.
118. Onishi, supra note 117, at 19.
119. Id.; see also Ok Kyung Yang, Family Structure and Relations, 62/63 SOC. INDICATORS RES. 121 (Apr. 2003) (discussing decreasing family size, decreasing marriage rate, increasing divorce rate, decreasing incidence of three-generation extended families, increasing single-person households, and "liberal and flexible family environment in everyday life," despite notions of hierarchical Confucian influence).
With this brief background on Korea’s past and present and with an eye to the future, the next section examines whether the cultural traits shaping the apology in Japan—particularly the emphasis on group harmony and hierarchy—are present in the Korean setting.

B. Harmony, Hierarchy, Collectivism, Shaming

1. Harmony

The emphasis on group harmony and hierarchy in contemporary Japan is a byproduct of Confucianism, which holds harmony and stability in interpersonal relations as one of its central characteristics. With societal harmony in mind, litigation was to be avoided; when a dispute inevitably arose, its resolution came through conciliation. Commentators suggest that the profound influence of Confucian norms has shaped the regard for harmony in contemporary Korean society as well.

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121. See A Source Book in Chinese Philosophy (Wing-Tsit Chan trans. and compl., 1963) (‘[Confucius’] primary concern was a good society based on good government and harmonious human relations.” For society in general, Confucius stressed “proper conduct or li.”); Carlos de Vera, Arbitrating Harmony: “Med-Arb” and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China, 18 COLUM. J. ASIAN L. 149, 163 (2004) (citing Urs Martin Lauchli, Cross-Cultural Negotiations, with A Special Focus on ADR with the Chinese, 26 WM. MITCHELL L. REV. 1045, 1058 (2000)) (“At the heart of Confucius’ teachings was the belief that harmony was to be achieved among persons.”). Confucius is credited with such statements as: “A gentleman is never contentious,” The Analects of Confucius 188 (William Edward Soothill trans., 2d ed. 1968) (hereinafter The Analects of Confucius), and “[r]epay an injury with straightness,” The Analects 129 (D.C. Lau trans., 1979).

122. Wang Wenying, The Role of Conciliation in Resolving Disputes: A P.R.C. Perspective, 20 OHIO ST. J. DISP. RESOL. 421, 421 n.3 (2005) (citing Liu Shuxian, Understanding Confucian Philosophy: Classical and Sun-Ming (1998)). The Master advised: “get the people to avoid litigation altogether”; “[w]hat is necessary . . . is to cause the people to have no litigation”; and “surely the great thing is to bring about that there be no going to law.” The Analects of Confucius, supra note 121, at 584, 585. Statements attributed to Confucius relating to the apology specifically remain elusive. Suggestive quotations include: “[w]hen in the wrong, do not hesitate to amend,” and “[s]ettle a dispute with half a sentence.” Id. at 453, 582.

123. See Wenying, supra note 122, at 421 n.3.

In Korea, the Confucian virtue of seeking harmony and avoiding litigation was traditionally followed with keen attention. As Professor Pyong-Choon Hahm wrote:

Koreans have abhorred the black-and-white designation of one party to a dispute as right and his opponent as wrong. Assigning all blame to one for the sake of rendering a judgment has been repugnant to the fundamental valuation of harmony, because such a judgment has retarded swift restoration of broken harmony. The ultimate ideal has been a complete absence of dispute and conflict. But if discord could not be avoided, society demanded the quickest restoration of broken concord.¹²⁵

A litigious man is a warlike man to the Koreans. He threatens harmony and peace. He is a man to be detested. If a man cannot achieve reconciliation through mediation and compromise, he cannot be considered an acceptable member of the collectivity.¹²⁶

The above statements, made in 1969, indicate a traditional Korean view, but may well be outdated for a significant portion of the Korean populace. Although some Koreans adhere to the traditional preference for non-legal settlement over court adjudication, there has been a “dramatic change in the attitudes of the Korean people toward litigation.”¹²⁷ Koreans are becoming more litigious, more willing to advance legal claims, and more willing to resort to the courts.¹²⁸ Whereas in the late 1960s, “[t]he vast majority of the population . . . ha[d] never been to a courthouse . . . [and] were proud of that fact,”¹²⁹ a survey taken in the 1990s shows that nearly 30 percent of respondents had “been to court for ‘legal problems’” and almost half “regard[ed] filing a suit for a

¹²⁶ Pyong-Choon Hahm, Religion and Law in Korea, in HAHM, KOREAN JURISPRUDENCE, POLITICS AND CULTURE, supra note 125, at 152, 177.
¹²⁹ Hahm, The Decision Process in Korea, supra note 125, at 22, reprinted in HAHM, KOREAN JURISPRUDENCE, POLITICS AND CULTURE, supra note 125, at 98.
money matter as a means of achieving justice or as a method of exercising their rights."

The commentary’s references to skyrocketing lawsuits in Korea and an emerging "litigious zeitgeist" are clear evidence of change and a departure from traditional norms. The trend seen in the past two decades squarely questions whether an aspect of Confucian ethics—the distaste for, and avoidance of, litigation—has eroded.

2. Hierarchy

In Confucian teachings, harmonious relations require an ordered, stable society and regard for hierarchical relationships. These teachings were also followed in Korea. In the Chosun dynasty, “cardinal rules in maintaining social order” required “[a]cknowledging the authority of the nation and family, and obedience of the common people to the king, children to parents, wives to husbands, and the young to the elderly.”

The Chosun dynasty took hierarchy to some extremes, particularly with its establishment of formal, legally separated classes within society.

130. Korean Legislation Research Inst., A Survey on the Korean People’s Attitude Towards Law, in KOREAN LAW IN THE GLOBAL ECONOMY 128, 146 (Sang-Hyun Song ed. and trans., 1996). A host of reasons are offered for the change in attitudes toward achieving results through the courts. In addition to the democratization movement that began with reforms in 1987, other factors include the industrialization, globalization, and profound economic growth Korea saw in the 1980s, which by their very nature exposed Koreans to international legal standards and judicial methods to resolve commercial disputes. Related to economic prosperity is the emergence of the Korean middle class, which enjoyed more material gains, and therefore, a desire to protect proprietary interests, by court adjudication if necessary. One may argue that such democratization reforms provided the impetus for a contemporary equality movement.


132. Youm, supra note 110, at 260.

133. “Confucius identified five cardinal relationships that needed to be honored to achieve a stable social order: father and son, ruler and subject, husband and wife, elder and younger brother, and friend and friend.” de Vera, supra note 121, at 163.


135. Beneath the king and the royal family, Korean society was formalized and stratified into discrete classes, with the yangban, representing the ruling class and the societal elite, at the very top, followed by, in descending order, joong-in (literally, “middle people”), sang-in (the commoner class), and chun-min (literally, the “low-born” or “inferior people”). See ANDREW C. NAHM, INTRODUCTION TO KOREAN HISTORY AND CULTURE 105–06 (1993); NAHM, KOREA, TRADITION & TRANSFORMATION, supra note 106, at 100–01 (1988); see also PYONG-CHOON HAHM, THE KOREAN POLITICAL TRADITION AND LAW 110 n.4 (1967); LETT, supra note 104, at 17–20; Pyong-Choon Hahm, The Traditional Patterns of Authoritative Symbols and the Judicial Process in Korea, in HAHM, KOREAN JURISPRUDENCE, POLITICS AND CULTURE, supra note 125, at 33 (adding another class of “outcasts” below chun-min); Byung
Although Korea abolished the class system toward the end of the dynasty years, and the Korean Constitution explicitly prohibits it, the residue of Confucian hierarchy persists in contemporary Korea. Korean society continues to be deeply, perhaps rigidly, hierarchical. In interpersonal relations within the family, in school, in the workplace, and in virtually any setting involving interaction with anyone other than mere passersby, Koreans have a keen awareness of their status relative to that of others.

The emphasis on hierarchical relations within Korean society might well explain the frequency of the apology in Korea relative to other societies. In a survey of multiple cultures, anthropologist Letitia Hickson concluded that the apology “is an important dispute management mechanism in societies . . . in which hierarchical relationships and a hierarchical ethos take precedence over egalitarian relationships.” She explains:

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136. This occurred in the social reforms of 1894, nearly two decades before Japanese colonial rule began. See *Carter J. Eckert et al., Korea Old and New: A History* 227 (1990).

137. *S. Korea Const.* art. 11(2) (“No privileged caste shall be recognized or ever established in any form.”).


139. E.g., id. Clifford notes:

Every aspect of Korean society is rigidly organized according to title, which often reflects seniority. Behavior toward seniors is extremely deferential, and requires special forms of speech, while that toward juniors can often be rough and crude. Even among twins, the younger one typically defers to the older one and uses an honorific form of speech.

*Id.* See also *Yoon, The Koreans, Their Culture and Personality, supra* note 134, at 18 (“Korean society is vertical; hierarchy is very strong.”).

140. See *MacDonald, supra* note 106, at 80; *Yoon, The Koreans, Their Culture and Personality, supra* note 134, at 18.

141. Hickson, *supra* note 28, at 285. Hickson explains that an apology is an “effective dispute management mechanism” because it offers the offender, by definition the lower-status individual in most cases, a means of acknowledging both the moral and the structural superiority of the higher-status individual, thus reversing the perceived wrong that is at the heart of the dispute. The moral superiority of this individual is acknowledged and reaffirmed by the offender’s confessing and expressing regret for the offending actions thereby acknowledging the wrongness of his/her position and the correctness of the offended’s position. . . . The structural superiority of the higher-status individual is acknowledged and reaffirmed by the offender’s requesting forgiveness thereby placing him/herself in the position of the petitioner who is at the mercy of the petitioner.

*Id.* at 286 (citations omitted).
In . . . hierarchical societies, the prominence of apology reflects . . . the tendency for disputes to be cast as challenges to one’s position in the status hierarchy, i.e., to one’s reputation, and hence for the goals of the offended individual to be the restoration of his/her reputation . . . or “good name” . . . Because the status of individuals in hierarchical societies . . . tends to be validated primarily by the respectful behavior of others (particularly their inferiors) and only secondarily, if at all, by their achievements or tangible assets, individuals are sensitive to behavior that is perceived as disrespectful and thus casts doubt on their claim to this status. Moreover, disputes between unequals, which compromise the bulk of disputes in hierarchical societies, whatever their mundane, or concrete, focus of disagreements are by definition challenges to the offended’s status because they involve the lower status individual’s refusal to submit to a superior.142

Although Hickson resorted to the hierarchical setting in Fiji as a frame of reference for the discussion, her reliance on the impact of hierarchy generally could have equal application in Korea. Given Korea’s hierarchical nature, it is not surprising that Hickson found the country to be one of a small number of societies in her sample that frequently used143 the apology as a dispute resolution mechanism.144 Importantly, Hickson conducted her study before 1987, when the dramatic democratization reforms and changes in social attitudes discussed above began.

Observations that contemporary Korea is a deeply hierarchical society must therefore be further examined. A hierarchical society could yield deep class consciousness with role expectations (which would encourage apologies), but the same class consciousness could also create a divisive setting145 with resentment from those in relatively lower classes (which might discourage apologies). Regarding the latter case, a Korea observer notes that the confrontation between social classes in Korea, along with conflict between the country’s provincial regions, has reached

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142. Id. at 286.
143. That is, the apology was seen “as a particularly effective or appropriate method of achieving reconciliation,” or there were indications that the apology occurred more often than “other means of reconciliation.” Id. at 287.
144. Id. at 288 tbl.1. Hickson’s survey included 56 societies, including Korea and Taiwan, but not Japan. For her study, Hickson defined apology “as the written or spoken expression of one’s regret, remorse, or sorrow for having wronged another individual.” Id. at 287.
“crisis” proportions. A more current study on the impact of hierarchy on the apology would be beneficial given recent social change.

3. Korea’s Collectivity

The cultural emphasis on the group and network of interlocked others is a characteristic of a collectivist orientation. As noted above, Hofstede’s country rankings place the United States as the most individualist and Japan as significantly more collective. Viewing the rankings from the most individualist countries at the top to the most collectivist at the bottom, Japan, whose collectivist orientation has received separate attention in other texts, remains in the top half of the list. In contrast, Korea is in the bottom one-third. According to Hofstede’s study then, Korea, even more than Japan, is a society where harmony and consensus are ultimate goals, maintaining harmony and avoiding direct confrontations is the governing norm, and the nature of communications is typically high-context. Perhaps not too much should be made of rankings and indices in one study. Nevertheless, other commentators, including Triandis, have commented on the collectivist

147. Hofstede, supra note 84, at 53, tbl.3.1.
148. Id.
149. Id. at 73, tbl.3.4.
150. Id. at 73, tbl.3.3.
151. Id. at 67, tbl. 3.3.
leanings in Korean culture. Yet, as with other indicators, one wonders, in light of changing social norms, if the collectivist characterization social scientists attribute to Korea is still current. Does the growing regard for "individual satisfaction" in Korean society reflect a trend toward a relatively more individualist outlook?

4. Shaming in Korea

In addition to cultural norms emphasizing orientation to the group, another societal trait that contributes to the frequent use of the apology in Japan is shaming. Although Wagatsuma and Rosett did not separately discuss the impact of shame, Japan is widely described as a shaming society. In her classic text on Japanese culture, Ruth Benedict notes that "[t]he primacy of shame [haji] in Japanese life means . . .

153. One consultant in human resources reports that collectivism in Korea explains why many Koreans consider the workplace their second family. Ames Gross, Human Resources Issues in the "Tigers" of Asia: Hong Kong, South Korea, Taiwan, and Singapore, 6 INT'L HUM RES. J. 18 (1997). In his text, Triandis refers to a 1994 study indicating the extent of the collectivist orientation in the Korean workplace:

47 percent of Korean firms send condolences to employees whose grandparents died. No less than 79 percent congratulate employees when their children marry. Even school admission of an employee's child is cause for congratulation (15 percent of the firms); 31 percent congratulate employees for the birthday of one of their parents-in-law. No less than 40 percent send condolences for the death of a parent-in-law.

Triandis, supra note 14, at 3.


156. The authors made only a brief reference. Wagatsuma & Rosett, supra note 1, at 493 (quoting DAVID BAYLEY, FORCES OF ORDER: POLICE BEHAVIOR IN JAPAN AND THE UNITED STATES 150 (1976)) ("An American accused by a policeman in [sic] very likely to respond 'Why me?' A Japanese more often says 'I'm sorry.' The American shows anger, the Japanese shame.").


that any man watches the judgment of the public upon his deeds,” and shame is “a thing bitterly felt.” Thus, if there is a societal expectation that one apologize after causing injury to another, one will do so, for “[a] failure to follow . . . explicit signposts of good behavior . . . is a shame.” Shame will result in judgment and loss of virtue.

Korea too has been described as a shaming culture. Professors Sungeun Yang and Paul C. Rosenblatt offer a focused examination of shame in Korean society. They note that shame is “valued and encouraged in Korean society” and is “of central importance in the functioning of individuals and families.” Perhaps indicating that a trait attributed to Japan applies in Korea more extremely, Yang and Rosenblatt state that Korea is a society “where people are supposed to feel shame very frequently.” In such a setting, shame is “a taken for granted part of life, like rush hour highway traffic.” They explain that one who has done something shameful has a strong duty to express regret, and suggest that those to whom the regret is expressed have a duty to acknowledge and accept it. It is not clear whether Yang and Rosenblatt’s observations on

159. Id. at 224.
160. Id. at 106.
161. Id. at 224.
164. Id. at 365.
165. Id. at 369.
166. Id. The traffic congestion in Seoul is legendary.
167. As an aside, President Moo-Hyun Roh’s eventual apology provides an introductory illustration of the use of the apology in Korea, in light of social and cultural norms. The National Assembly impeached Roh in March 2004 in a politically charged event. One of the grounds for impeachment was Roh’s violation of an election law that prohibited public officials from speaking in favor of a political party. Roh did not deny that his partisan comments in support of a party were a technical violation of the law. Opposition leaders demanded that he apologize, and, one may argue, the shaming culture required that he do so. Shaming, it is said, is a vehicle for restoring order when a wrong has been committed, even at the highest level of society. Roh’s steadfast refusal to apologize could be seen as contrary to the shaming protocol. The failure to express regret for the shameful act required drastic action, which led to the unprecedented impeachment. Newspaper reports suggested that Roh brought the impeachment onto himself by refusing to apologize. See, e.g., Joo Sang-min, Opposition Insists Enough Votes To Impeach, KOREA HERALD, Mar. 12, 2004; Andrew Ward, Roh Stance Increases Opposition Pressure, FIN. TIMES, Mar. 12, 2004, at 11; Michael A. Lev, S. Korea Leader’s Fate in Hands of Court That Can Annul Ouster, CHI. TRIB., Mar. 13, 2004, at C4. Roh was reinstated by the Constitutional Court, his powers were fully restored, and he was politically vindicated. But restoring the equilibrium also required that Roh apologize, even if belatedly, which he did. It must be emphasized that the case of the Roh apology was set in the
the expression of "regret" after committing a shameful act apply neatly to an apology, although the potential for overlap is obvious. Also uncertain is whether the impact of shame in Korean society as described by Yang and Rosenblatt remains steady or has changed in recent years.

5. Summary of Cultural Indicators

Due to Japan's emphasis on group harmony and hierarchy, which is fueled by its collectivist orientation, the Japanese frequently see the apology as necessary to redress the situation of another's injury. Japan's shaming society also demands the apology. With respect to the presence of these cultural traits in Korean society, two somewhat contrary observations can be made. First, there are indications that Korea meets and even surpasses the Japanese emphasis on harmony, hierarchy, and collectivism. Korea is a highly Confucian country, a society with deeply-rooted values of harmony and recognition of distinctions within the hierarchy. Moreover, Korea is as collectivist as Japan, if not more so. Korea too has a shaming culture, which can work to encourage apologies. These considerations alone would allow one to conclude that in Korea, like Japan, the apology is frequently used to facilitate the resolution of disputes; perhaps Korea could replace Japan in the apology literature as "the apologetic society par excellence." 168

This would be a hasty conclusion, however, in light of the second observation—that Korean society is undergoing significant change in attitudes and practices and may well be in "the throes of a social transformation." 169 With a trend indicating departure from at least one traditional Confucian norm (relating to the avoidance of litigation), it is not clear whether the cultural traits relating to harmony, hierarchy, collectivism, and shaming will work to encourage apologies, as in Japan, or whether their impact has significantly declined society-wide, resulting in less frequent apologies.

All of this calls for further examination of the current use of the apology toward dispute settlement in Korea. Given the nature of Korean society, the research should take into account differences in the use of the apology based on indicators that Koreans still employ to distinguish themselves, including regional origin, social status, and age. In anticipation of such studies, this Article provides, in addition to background on the

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168. TAVUCHIS, supra note 31, at 37.
169. Onishi, supra note 117.

arena of domestic politics, perhaps a rarefied area of Korean life that does not typify disputes between ordinary citizens. Although cultural norms may allow a subtle apology, made indirectly or with non-verbal communication, Roh did not have such a luxury. Opposition leaders demanded a full, formal apology for its shaming, and perhaps punitive, effect. Yet such an apology is not commonly seen in Korea. See Yang & Rosenblatt, supra note 163, at 370.
Korean cultural landscape and contemporary developments, an introduction to the apology in a practical setting. The next Part begins with the question of how one apologizes in Korea(n).

III. KOREAN APOLOGY, KOREAN LAW

This Part addresses the relationship between law and apology in Korea in three sections. The first section discusses how an apology is expressed in Korea and sheds light on the relevant terms in Korean and the methods of delivery. This section is more introductory than exhaustive. The second section addresses the treatment by Korean legal institutions—the practicing bar and the courts—of the apology in dispute settlement situations, bearing in mind the contrasts with the United States and Japan in the same area. The first two sections rely in part on a small sample survey of practitioners and judges that provides preliminary, anecdotal evidence. The third section focuses on the matter of the legality of a court-ordered apology and offers a comparative analysis using the Japanese and U.S. approaches as frames of reference.

A. Sah-gwah [Apology]

In all societies, the apology is in some part a function of communicative expression, a “speech-act set.” Yet understanding the apology in another culture is not merely an act of translation. The process of apologizing in Japan illustrates the complexity of the apology message. As Wagatsuma and Rosett explain, in Japan one may apologize after doing “substantial physical, economic, social, or psychic harm to another” by using the term sumimasen, but the very same term also applies to situations when an American would say “thank you.” The following

171. See Wagatsuma & Rosett, supra note 1, at 473.
172. Id. at 461–62.
173. Id. at 473. Even in this instance, the authors explain, “the core meaning of sumimasen is closer to ‘I am sorry,’ and its literal meaning is something like ‘it will never end,’ suggesting recognition of a limitless obligation.” Id. To elaborate:

Sumimasen is used when an individual receives a minor gift or favor ... to which the recipient may at least semiconsciously feel entitled because she is a social superior or because she was once a benefactor, or simply because it is such a small favor. It is less used to convey great gratitude than to express a mixture of gratitude and guilt about receiving a favor.

Id. at 474. Cultural norms “demand that an individual should feel guilty about receiving a favor or gift and therefore respond ‘I am sorry’ or ‘sumimasen’ rather than more directly expressing one’s appreciation with ‘thank you’ or ‘arigato.’” Id. at 474–75.
examination of the apology in the Korean context reveals its own complexities.

The Korean term for apology is *sah-gwah*. It is the general term Koreans use when an apology is seen as necessary—for example, when a school teacher orders a child to apologize to a classmate whom she has hurt, when a politician demands an apology from another, or when Koreans demanded that President Bush apologize for the deaths of school girls resulting from a U.S. military exercise. A more formal term for apology is *sah-jweh*. Although *sah-gwah* and *sah-jweh* refer to an apology or to the act of apologizing, they are not necessarily used by an apologizer to apologize, at least in everyday verbal dialogue. Similarly, in the United States, one need not necessarily utter “apology” or

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174. MINJUNG ESSENCE KOREAN-ENGLISH DICTIONARY 1073 (3d ed. 1998) (defining *sah-gwah* as “an apology . . . apologize”). Cross-cultural linguists will point out that the first character of *sah-gwah*, “sah,” is derived from the Chinese character meaning “confess faults;” the second character “gwah” is derived from the Chinese character meaning “pass, cross over.” BRUCE K. GRANT, A GUIDE TO KOREAN CHARACTERS: READING AND WRITING HANGUL AND HANJA 307, 250 (2d rev. ed. 1982). This could be read as reflecting a cultural view that to apologize means more than saying the right words, but implies a significant shift in mindset. The Korean term *sah-gwah* can also mean “an apple.” MINJUNG ESSENCE KOREAN-ENGLISH DICTIONARY, supra, at 1073. This coincidence led to an amusing (perhaps juvenile) culmination in a spat between politicians. Representatives of the Hahn-nah-rah party apparently demanded an apology from a politician whose disclosure led to a scandal relating to evasion of compulsory military service. In response, the politician sent a 5 kilogram box containing apples to the headquarters of the Hahn-nah-rah party. A sign attached to the box read, “You are eager to receive *sah-gwah*. So I give you *sah-gwah*. Please accept *sah-gwah*.” A party spokesman described the event as ridiculous and stated that if it occurred again, the recipients would consider the apples to be poisoned and take appropriate action. See Kim Dae Uhb-ssi myung-eui sah-gwa-sahng-jah Park Keun Heh deung-eh beh-dahl-dweh [Boxes of Apples Delivered in the Name of Kim Dae-Uhb to Leader of Hahn-nah-rah Party, Park Keun Heh], DIGITAL CHOSUN ILBO, May 19, 2005, available at http://english.chosun.com/w21data/html/news/200505/200505190175.html (last visited Sept. 25, 2005).

175. See supra note 16.


177. MINJUNG ESSENCE KOREAN-ENGLISH DICTIONARY, supra note 174, at 1098 (defining *sah-jweh* as “apology . . . apologize . . . beg. . . . pardon [forgiveness]; make an apology; express one’s regret . . . acknowledge one’s fault”). One professional English-Korean interpreter offered the following on the distinction between *sah-gwah* and *sah-jweh*: *sah-gwah* “is simply an apology, usually for some minor offence”; *sah-jweh* “means literally an apology for a sin” and is used for a “major offence,” such as “ruining somebody’s life, killing someone,” or the like. E-mail from Hyun K. Kim, Esq. to author (Aug. 2, 2005, 17:17 CST) (copy on file with author).

“apologize” to give a full apology, but may instead begin with “I am sorry . . . .” The Korean equivalent for saying “sorry” includes the root terms mi-ahn\(^{179}\) or jweh-song,\(^{180}\) with the latter term generally being more formal.\(^{181}\)

The Korean term for expressing regret is yoo-gahm.\(^{182}\) If the task is to canvas the terms and expressions used to indicate (what is thought of as) an apology, phrases with the root jahl-moht must also be included. In
The noun form, the term means “a fault; a mistake; an error; a slip; a blunder; a failure; a wrong; a blame”; in its verb form, jahl-moht means “do wrong; be in the wrong; make a mistake [an error]; blunder.” If the heart of the apology is admitting a mistake, or having done something wrong, the Korean jahl-moht captures in one phrase the essence of the apology. An admission of a mistake or wrongdoing might be implicit in an apology using the root terms mi-ahn or jweh-song, but jahl-moht is more direct and unambiguous.

A review of the terms in the Korean apology language is important, of course, but an understanding of local practice is also critical. Several of the author’s Korean acquaintances, professionals with significant experiences in both the United States and Korea, observe that Koreans do not usually apologize, at least not in the way that Americans do (when they do at all). A few note that even if one is sorry for causing injury or harm to another, he is likely to assume the injured party already knows he is sorry (mi-ahn or jweh-song) and offer, in a case involving an injury to the person, a thoughtful comment such as “Are you okay?” Although such a characterization derives from personal observations and experiences and not from empirical data, it underscores that understanding the Korean apology requires an appreciation of everyday practice and customs in addition to translation.

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183. MINJUNG’S ESSENCE KOREAN-ENGLISH DICTIONARY, supra note 174, at 1848.
184. See supra text accompanying note 32.
185. Nuances of expression in the Korean language also present challenges. To give one example, one may say “I am sorry” by saying, in the formal voice, “mi-ahn hahn-nee-dah.” But one may choose to say “mi-ahn-hah-geh-dweh-ut-sseum-nee-dah” (also in the formal tense). Both expressions include mi-ahn, and both are stated in the formal tense, but the former is a more causative statement, while the latter, ending with the “-hah-geh-dweh-ut-sseum-nee-dah” suffix, is more passive. See YONSEI UNIVERSITY KOREAN LANGUAGE SCHOOL, HAHN-GUK-UH 2 201 (1994). Translation into English is difficult and the results read somewhat awkwardly. The phrase “mi-ahn-hah-geh-dweh-ut-sseum-nee-dah” could be translated as “I came to be sorry,” “I have become sorry,” “It comes about that I am sorry,” “It turns out that I am sorry,” or “Things work out in such a way that I am sorry.” See id. The problem is that for the hearer, such a translation is likely to invoke questions of whether the statement is an apology.
186. Interestingly, one explained, “It’s just not in our culture”; another said, “We are living in a different cultural background from that of the U.S.” In this regard, one law professor in Korea explained to the author that Koreans do not normally apologize because apologizing is contrary to jah-john-shim, one’s self-respect.
187. Nor is translation always a simple task. The author requested professional English-Korean interpreters to translate the full apology used in Professor Robbennolt’s survey. The apology reads in relevant part: “I am so sorry that you were hurt. The accident was all my fault.” Robbennolt, supra note 45, at 484 n.112. One interpreter translated this phrase using the term jweh-song for “I am so sorry” and chek-im (meaning “responsibility; liability . . . answerability; accountability . . . ”, MINJUNG’S ESSENCE KOREAN-ENGLISH DICTIONARY, supra note 174, at 2084) for “all my fault.” Another interpreter preferred yoo-gahm and jahl-moht, respectively.
The limited commentary on the subject of the apology activity in Korea sheds some light on its role in the practical setting and tends to support the anecdotal observations noted above. Yang and Rosenblatt, whose work focused on shame, point out that a formal apology is rare in Korea. They explain that Koreans resort to various other ways to express regret for shameful acts, including indirect and nonverbal means, which are more likely to be acceptable in a high-context communication culture like Korea. Another commentator specifically emphasizes the importance of context communications in Korea, explaining:

We communicate through our eyes, which we call "NUNCHI."[190] In contrast with North American culture, we do not give credit to the direct expressions. This can be possible in a mono culture and language . . . . For more understanding in Korean culture, we rely on the context of our environment, and do not need to describe in detail. In contrast with Korean culture, people in low-context need to spell out in detail in order not to become obscure in the conversation.[191]

The above commentary suggests that when one apologizes in Korea, she will rarely state the multiple components of the common definition of apology explicitly,[192] rather, Koreans are more likely to apologize with words plus context. Research in the social sciences testing this hypothesis would be informative.

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188. Yang & Rosenblatt, supra note 163. The apology by former President Chun was rare indeed. See supra note 180. Another example of the rare formal apology was seen when Jeh-il Communications, an advertising agency, acknowledged secretly creating a rumor-based database on individual performers and entertainers. Representatives of the company ran a published apology in newspapers, stating, "We . . . offer our sincere apologies with our heads lowered to all the entertainers, reporters and others involved . . . ." Jeh-il-gee-hwek, supra note 178.

189. Yang & Rosenblatt, supra note 163. For example, Sometimes people can cushion themselves from the shame of being blamed by others. For example, when a person says, "I jiock-pal-you (I feel shame)," it usually is said with a small laugh or smile. It mitigates the tension or seriousness of the situation and implies asking forgiveness from others. Then people tend to forgive the person because the person has shown that he or she acknowledges acting in a way that was not okay.

Id. at 370.

190. The term nun-chi is defined as "tact; sense; social sense; perceptiveness; an eye for social situations." MINJUNG'S ESSENCE KOREAN-ENGLISH DICTIONARY, supra note 174, at 463.


192. If this is true, then a Korean person would not likely apologize by saying, as in the example given above, "I am sorry [remorse] that I hit you with my bicycle [identification of the wrongful act]. I would like to help with your medical bills [offer to repair]. I will be more careful next time [promise to forbear]."
Toward an understanding of the use of the apology in the resolution of a dispute involving legal claims and rights, this author conducted a survey of a small sample of legal professionals in Korea—nine attorneys and seven judges—with experience in representing clients in civil litigation or presiding over such cases, respectively. Participants answered questions relating to the expression of the apology and its role in dispute settlement and were encouraged to give specific examples. Given the sample size, the results are more suggestive than representative, more anecdotal than empirical. Nevertheless, the survey offers practical examples of how an apology is made in the settlement of legal claims. Importantly, one must bear in mind that the participants in the survey were not the private parties in dispute, but rather, the attorneys retained or the judges before whom the submitted cases were pending. In other words, when a party made an apology, the legal process had already begun.

Some responses from attorneys offered thoughts on the meaning of an apology and referred to one or more of the components seen in its common definition, including admission of fault, promise of forbearance, and offer of compensation. Other responses specifically stated that the apology must be sincere. With respect to the specific wording or expression of the apology, the sampling reveals that parties apologize (sah-gwah) with the terms mi-ahn, jahl-moht, yoo-gahm, or a combination of the three.

Participants were contacted by e-mail and provided a list of brief questions. Nearly half of the participants responded in English, the remainder in Korean. Follow-up correspondence occurred with some participants. All participants were assured confidentiality. All correspondence is on file with the author.

The reporting participants referred to the sah-gwah term to characterize what was expressed in a number of cases, but in only one case did a party actually say “I apologize” by using the sah-gwah form. In that case, which occurred in a rural part of Korea, an elderly man made a personal loan to someone several years his junior. The lender’s requests for repayment went unheeded, which led to a lawsuit. The lender was particularly upset that the borrower refused to acknowledge the existence of the loan and continued to ignore the lender’s requests for repayment. Before the court, the borrower acknowledged his mistake (jahl-moht) and apologized (sah-gwah-deu-ri-nim-nee-dah) using the formal voice with the honorific suffix. The borrower accepted the apology reluctantly and forgave the interest.

One judge reported a case involving an injury as a result of a snowboarding accident. The defendant stated that, after knowing all the circumstances, he was wrong (jahl-moht) and was sorry (mi-ahn).

In this case, the president of a company alleged that management of a competing company made false accusations of criminal conduct by his business. The parties entered into a settlement agreement, in which the defendant expressed regret (yoo-gahm) for the plaintiff’s losses. The plaintiff took the statement as an apology.

In another case, the phrase nwe-ooh-chi-dah was used, meaning “repent . . . regret; be sorry . . .; be penitent . . .; suffer remorse.” MINJUNG’S ESSENCE KOREAN-ENGLISH DICTIONARY, supra note 174, at 464. The case involved a wrongful discharge claim by an employee who was terminated after abusive language and behavior at the employer’s company.
B. Apology and the Legal Institutions

In the Korean jurisdiction, no law or court rule explicitly addresses the admissibility or consideration of an apology in the adjudication of a claim. On questions of evidence (as well as procedure), judges are governed by the Civil Procedure Act, which allows them great discretion in resolving questions of relevance and hearsay, among others. With no jury trials, the judge determines all questions of admissibility and sufficiency. As in Japan, Korean courts reflect a judge-oriented, inquisitive system, in contrast to the lawyer-oriented, adversarial system seen in the United States.

The judges’ survey responses are informative. One judge stated explicitly that Korean courts have long recognized the apology’s significant role in facilitating reconciliation and settlement and avoiding litigation. Others stated that courts do not use an apology to the disadvantage of the apologizing party. But this was not a unanimous view. A few judges, while acknowledging that an apology is not an admission of liability, also observed that it could still be used as evidence against the apologizer. For example, one judge stated that an out of court apology “is commonly admitted as evidence to presume a certain fault.”

Some of the attorneys in the survey reiterated the view that although an apology is not necessarily an admission of fault or liability, it could be considered as evidence unfavorable or adverse to the apologizer. Counsel who hold such concerns report that they have discouraged clients from apologizing to opposing parties. In contrast, other practitioners report that they have advised clients to apologize in certain situations. Their reasons for doing so reveal a wide range of motivations. Some attorneys explained that they advised an apology to restore “face,” reduce the other party’s anger, calm heated passions, and ease settlement negotiations; others found an apology helpful in persuading the opposing...
party to reduce the claim or to withdraw the lawsuit altogether (especially in defamation cases). For the former group, the apology might have been inspired by the traditional Confucian desire for harmony and conciliation. The responses of the latter set suggest that attorneys are aware of the apology as one of several tools available for promoting a more favorable result in litigation. Perhaps this development reflects the Korean awareness of the same "commodification" of the apology decried by one U.S. commentator.  

The sampling of responses from the Korean bench and bar described herein indicates that with respect to the apology in dispute settlement, Korea encounters aspects of both the Japanese and U.S. experience. As in Japan, some Korean judges recognize the apology as an important aspect of dispute resolution and do not legalistically use an apology against the apologizer as unfavorable evidence. Yet as in the United States, some counsel in Korea are fearful that a court may consider an apology as evidence of fault and discourage their clients from apologizing. For parties who have actually given an apology, the motivations for doing so reflect, on the one hand, regard for conciliation over litigation in the event of a dispute, and on the other, recognition of the apology as a strategic commodity in litigation.

C. The Court-Ordered Apology

The rather narrow and rarefied field of international "apology law" must include the subject of the court-ordered apology. Preliminarily, there is serious doubt as to whether an apology made pursuant to an order of a legal authority is a true apology at all, since it is not voluntarily made. In the practical setting, such an apology would result in the apologizer saying she has done something wrong when she does not believe she has done so, or saying that she is sorry when she is not. Simply put, the problem is whether an ordered apology could be a sincere one. As noted above, sincerity is a core presentational requirement for an effective apology. Yet perhaps the sincerity requirement is more important in the U.S. setting, or the importance and meaning of sincerity are culturally constructed. Wagatsuma and Rosett note that "what is considered a sincere apology is not the same in the two societies."

203. Taft, supra note 30. One practitioner even suggested a phrasing of an apology that will not have legal consequences: "I regret [yoo-gahm] that we have arrived at this situation," similar to the American, "I'm sorry that this happened."

204. “[T]he more an apology is coerced, the less meaning it carries, for the less sincere is the regret it expresses.” Cohen, Advising Clients, supra note 2, at 1018.

205. See supra text accompanying note 35. Considering the American culture, making a compelled apology would be “personally degrading.” Wagatsuma & Rosett, supra note 1, at 462.

206. Id. at 461.
States, the sincerity requirement must satisfy the societal preoccupation with the "problematics of wholeheartedness," while the Japanese are more likely "to accept the external act of apology at face value and not to disturb the superficial concord by challenging the sincerity of the person apologizing." Some of the survey responses indicate that the Korean approach with respect to sincerity is more like that seen in the United States than Japan.

A culture's emphasis on individual sincerity in the apology act is only one factor influencing its resort to a compelled apology. There might also be legal (i.e., constitutional) limitations on the authority of a court to order such a remedy. The next discussion addresses these points for Japan, the United States, and Korea.

1. Japan

The cultural expectation of the apology (coupled with a relaxed requirement of sincerity) might make Japan a setting where apologies, more than being expected, are compelled by a proper authority. Wagatsuma and Rosett observe that law enforcement officials in Japan can and do obtain written apologies for transgressions from citizens (which are then filed away, with no serious consequence for the transgressor). A more coercive atmosphere appears in Professor John O. Haley's example of two American criminal defendants who maintained their innocence, failed to apologize to the court, and received maximum sentences. Whether the defendants were guilty or not seems beside the

207. Id. at 473.
208. Id. at 472-73. In a similar light, given that Japan is a collectivist, rather than individualist society, "when a collectivist apologizes, it is only a social form, not to be taken literally." Triandis, supra note 14, at 155-56.
209. Perhaps the different approaches to sincerity would explain why, with respect to Japan's apology to Korea relating to the military occupation, many Koreans believe that Japan has not fully apologized, whereas many Japanese believe that they have already apologized on multiple occasions. See supra note 20.
210. Wagatsuma & Rosett, supra note 1, at 489.
211. Professor Haley's full account:

A Japanese attorney recently related to my law class at the University of Washington his experience in defending two American servicemen accused of raping a Japanese woman. She had charged the two with the crime in an affidavit to the prosecutor, but then left Japan with a third U.S. soldier. The affidavit was the sole basis of prosecution. The attorney advised the two defendants first to obtain a letter from the woman stating that she had been fully compensated and had absolved them completely. As advised the accused paid her $1,000 dollars and obtained the letter. The lawyer then argued that to convict the accused solely on the basis of the affidavit constituted an unconstitutional denial of a fair trial since they had no opportunity to cross-examine the witness. After listening attentively to the argument, the judge leaned forward and asked the soldiers if they had anything to say, "We are not guilty, your honor," was the immediate reply. The lawyer cringed. Although few
point in the story. Once the defendants were in a situation where an apology was expected, their "options" were to apologize and receive leniency or not apologize and face the maximum sentence.

Extending the discussion, the question here is whether the sociocultural regard for, and expectation of, an apology could compel a Japanese court to order an apology from a party who refuses to apologize voluntarily. Japanese law authorizes courts to order an apology, usually by publication in a newspaper, as part of the relief granted in cases involving defamation (to restore the plaintiff's reputation) and intellectual property infringement (to restore a business's good will). Some commentators note that although a court-ordered apology is permissible in certain types of cases, and parties often request it, it is not usually employed, and courts are reluctant to issue it. One judge in Japan indicated to this author that courts seldom order an apology, even in defamation cases.

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Japanese attorneys are as knowledgeable as he about American law, it had not even occurred to him that the defendants might not offer apologies. The time and money spent on the letter were wasted. The judge sentenced the two soldiers to the maximum term of imprisonment, not suspended. More telling, Japanese students need only hear what the servicemen said to the judge to react. They know what happened next. Only Americans have to be told.


The Supreme Court of Japan upheld the legality of court-ordered apologies in defamation cases in *Oguri v. Kageyama*. The court ruled that such a remedy does not violate the freedoms of speech, expression, thought, or conscience as provided for in the Japanese Constitution. In *Oguri*, the defendant, a candidate for elective office, stated in public speeches that the plaintiff, his opponent, had received a bribe in connection with a government contract. The trial court found in favor of the plaintiff and ordered the defendant to publish a letter of apology in local newspapers and issue radio broadcasts. A majority of the Supreme Court affirmed the decision, with only brief discussion of the constitutional challenges. The majority's reference to the freedom of speech or expression did not indicate an implicit freedom of silence. Instead, the only mention of freedom of expression in the opinion


216. JAPAN CONST. art. 21 ("Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.").

217. Id. art. 19 ("Freedom of thought and conscience shall not be violated.").

218. An English translation of the apology that the defendant was ordered to sign and publish reads as follows:

Dear Mr. Kageyama:

I confess that I committed a great sin by injuring your honor by broadcasting, as an official candidate of the Japan Communist Party for the electorate of Tokushima Prefecture, three defamatory speeches for five minute periods on the radio Tokushima, respectively, at 9:20 p.m., Sept. 21, at 9:30 p.m., Sept. 25, and at 9:20 p.m., Sept. 27. In those speeches, I said with no reliable sources that 'you received a commission amounting to ¥8,000,000 for purchasing a generator for the Sakasu Power Plant while you were in the office of Deputy Governor of the prefecture.'

Mr. Goro Abe later published an open letter in The Tokushima Press on the twenty-ninth of the same month where he elaborately disclosed the true circumstances when the generator was purchased and declared that it was not only illegal but immoral to impair other’s reputation by spreading false informations, providing me an opportunity to apologize. However, on the contrary, I went further by publishing an open letter in the same paper, saying, ‘No matter how hard you may try to defend yourself, it is impossible to deny the fact that you received the bribe of ¥8,000,000. Why have you not said a single word to justify yourself, while the Communist Party has kept accusing you of this for nearly three months?’

I feel deeply ashamed of myself and apologize to you for what I have done to your reputation and for causing annoyance to you and to many others by making such speeches and subsequently publishing distorted facts in the newspaper.

Kiyomi Oguri

Ouchi, *supra* note 215, at 74. It is difficult to imagine a court ordering such an apology in the United States, or an individual apologizing in this manner.
concerned whether such freedom protected the defendant’s right to make the defamatory statements. With regard to other constitutional challenges, the majority acknowledged that violation of the freedom of conscience was one of the grounds for appeal, but offered no further elaboration. The majority instead quoted the provision of the Civil Code under which the trial court ordered the apology, noted that the ordering of a publication of apology under the statute “has been approved by past theory and precedent,” and declared that newspapers have previously complied with such court orders. Three concurring opinions directly addressed the freedom of conscience, one explaining that the right refers to freedom of religion or faith, which was not applicable to the case. Two justices dissented, urging that the freedom of conscience prohibits court-ordered apologies. Justice Fujita wrote that “forcing someone ... to announce to the outside world against his real feelings his judgment concerning the rightness or wrongness, or goodness or evil of things, and to order him to utter an apology that he did not really feel, is truly a violation of the ... freedom of conscience.” In brief, a court-ordered apology is not inconsistent with Japan’s constitution; Japanese law allows for it in certain types of cases, although it appears to be an infrequent remedy.

2. The United States

In the United States, courts have expressed an aversion to compelled apologies due to practical as well as constitutional considerations. Some courts have indicated that due to the very nature of an apology, it should not come at the behest of a court judgment. An oft-quoted opinion by Justice Pomeroy of the Pennsylvania Supreme Court explains why a court-ordered apology is misguided. In Pennsylvania Human Relations Commission v. Alto-Reste Park Cemetery Association, the court invalidated a decision by the state human rights commission ordering a cemetery to send a public apology to a woman for refusing to bury the remains of her husband because of his race. The majority of the court did not address the apology specifically. In a separate concurring opinion,

219. Maki, supra note 215, at 48. The court described the argument as “groundless” and noted that “publication of baseless facts” is an abuse of the freedom of expression. Id.
220. Id. at 49.
221. "If a person has injured the reputation of another, the Court [may require] the former to take suitable measures for the restoration of the latter’s reputation.” Id. (quoting Civil Code art. 723).
222. Id.
223. Id. at 52 (Tanaka, J., concurring).
224. Id. at 62 (Fujita, J., dissenting), 63-64 (Tarumi, J., dissenting).
225. Id. at 62-63 (Fujita, J., dissenting).
Justice Pomeroy wrote that because an apology is "a communication of the emotion of remorse for one's past acts," it is "beyond the reach of any government," and indeed is tyranny "[t]o order up that particular emotion."\textsuperscript{227} If the ordering authority desires "only the outward act" of a "public manifestation of remorse" and is indifferent to actual remorse, he explained, "then it would be either extracting a lie from those willing to lie ('I'm sorry,' but I'm really not) or asking the courts of this State to hold in contempt those who will not lie ('I'm not sorry and I will not say that I am')."\textsuperscript{228}

As an aside, a cross-cultural analysis of the Pomeroy opinion may help explain why a court-ordered apology finds support in Japan and general scorn stateside. Wagatsuma and Rosett indicate that in Japan, the external or outward act of an apology is sufficient, with the Japanese treating with some indifference the apologizer's actual remorse or wholeheartedness in the expression of remorse. The public act is all that is necessary to restore harmony and recognize the hierarchical order of the collectivity. In the United States, however, an apology is more focused on the relative wants of the individual, who upon being injured by another, demands a sincere expression of the remorse emotion. This, Justice Pomeroy urged, is not something a court of law should order. Differences in judicial approaches to court-ordered apologies may therefore hinge on the relative importance a society places on sincerity.

With concerns similar to those expressed by Justice Pomeroy, a federal appeals court, in an unpublished decision,\textsuperscript{229} saw as an abuse of discretion the district court's ordering the defendant employer to apologize to the plaintiff employee for the defendant's "reprehensible" conduct.\textsuperscript{230} The purpose of the forced apology, the appeals court reasoned, was to right a moral wrong; "[t]he law, however, is not usually concerned with procuring apologies to make morally right a legal wrong done to the plaintiff."\textsuperscript{231}

Courts in a number of decisions have rejected requests for an apology, reflecting judicial reluctance, if not hostility, to the institutionalization of

\textsuperscript{227} Id. at 890 (Pomeroy, J., concurring).

\textsuperscript{228} Id. Justice Pomeroy wrote, "Given the choice, I would rather hold in contempt the former, not the latter. But in my view the Commission should eschew purporting to order the expression of an emotion, whether or not the emotion is in fact entertained by the one so ordered." Id.

\textsuperscript{229} Rule 28(g) of the U.S. Court of Appeals for the Sixth Circuit Rules restricts citation of the case to limited situations. 6th Cir. R. 28(g).

\textsuperscript{230} Woodruff v. Ohman, 29 Fed. Appx. 337, 346 (6th Cir. 2002). The district court ordered the apology on the ground that compensatory damages alone could not remedy the damage caused. Id.

\textsuperscript{231} Id.
the apology. In some cases, courts have exhibited a heavy-handed disdain for the apology request and function. In the extreme, they have displayed an excessive show of disapproval. Yet even with knowledge of such decisions and an understanding that court-ordered apologies are unconstitutional, parties in litigation have not been dissuaded from requesting the court to order an apology. This is perhaps a testament to the strong desire for the emotional healing that an apology, more than monetary compensation, can deliver. In many of these cases, courts have


233. See Lieber, 277 N.Y.S.2d at 591 (describing apology as "nothing more than a useless, vain and meaningless gesture.").

234. In McKee v. Turner, 491 F.2d 1106 (9th Cir. 1974), the plaintiff attorney alleged that an assistant U.S. attorney made defamatory remarks in a letter to the chief judge of a federal district court and sought $150,000 in damages. The district court dismissed the action, based on the ground that the defendant's letter was within the scope of his duties, relying on Barr v. Matteo, 360 U.S. 564 (1959). The matter of the plaintiff's desire for an apology surfaced, on appeal to the Court of Appeals, when "[a]t the opening of his oral arguments in our court, counsel for McKee, in the presence of McKee, began with a statement that the plaintiff wanted no money from Turner—he just wanted an apology from Turner. He closed with the same statement." McKee, 491 F.2d at 1107. The court of appeals' opinion will likely be included in any text on the judicial treatment of the apology. The court began its opinion, "This is much to do about nothing, but we must do it," id. at 1106, and followed with the statement, "We are not commissioned to run around getting apologies," id. at 1107, which has proven quotable. Then the court added, "However, to McKee we apologize for Turner;" not understanding what an apology is or why the plaintiff requested it. id.

235. See Cohen, Advising Clients, supra note 2, at 1018. The First Amendment limitations against a court-ordered apology are discussed infra text accompanying notes 243–248.

236. In some cases, a party desires only an apology, and the lack of an apology prompts the lawsuit. This presents a vicious circle. The injured person would not sue if she received an apology. The injurer morally might wish to apologize but does not do so on advice of counsel, fearing negative legal consequences. Thus the lack of an apology results in a lawsuit, with demands for injunctive and monetary relief. See O'Hara & Yarn, supra note 7, at 1122–24. One Korean attorney in the survey stated that the purpose of some lawsuits in defamation cases is to obtain an apology from the defendant in exchange for an agreement to withdraw the suit. Perhaps the extreme case is when a plaintiff declares on the record that she wishes only an apology and no damages, as counsel did on appeal in McKee, 491 F.2d at 1106. The candor proved fatal, with the court ruling that the plaintiff "completely vitiates the prayer of his complaint. We, therefore, hold that McKee's case is de minimis . . . and does not present a justiciable controversy." Id. at 1107.
ignored the apology request or denied it without comment.\(^{237}\) In others, courts have refused to order an apology because it was not authorized by the statute under which relief was sought.\(^{238}\) Yet there is a small but significant number of cases where the trial court ordered an apology with no (reported) challenge or objection from the apologizer-to-be.\(^{239}\) It should be noted that many cases in this group fit within one of two categories—defendants in criminal actions ordered to apologize to the victim\(^{240}\) and attorneys ordered to apologize for misconduct,\(^{241}\) persons not best situated to challenge the apology order.\(^{242}\)


\(^{238}\) See Birnbaum v. United States, 588 F.2d 319, 321, 335 (2d Cir. 1978) (an apology requested for the government opening mail; the apology was not available under 28 U.S.C. § 1346(b), which stipulates money damages); Gray v. UAW Local 12 Jeep, No. 3:02CV7618, 2004 U.S. Dist. LEXIS 5877, at *5–7 (N.D. Ohio Mar. 16, 2004) (an apology requested from a union for discrimination; the apology was not available under ADA); City of Minneapolis v. Richardson, 239 N.W.2d 197, 205 (Minn. 1976) (an apology requested because of unfair discriminatory practices by police; the apology was not available under Minn. St. 1971, § 363.071(2)); Alto-Reste Park Cemetery Ass’n, 306 A.2d at 889 (an apology requested because of race-based discrimination in denying burial in cemetery; the apology was not available under Pennsylvania Human Relations Act); see also Virgin Islands v. Bryan, No. 1989–129, 1990 U.S. Dist. LEXIS 20855, at *2 (V.I. Feb. 20, 1990) (an apology requested from opposing counsel on behalf of client; the apology was not available under 28 U.S.C. § 1927); Illinois v. Johnson, 528 N.E.2d 1360, 1361–62 (Ill. App. Ct. 1988) (a published apology in a newspaper requested for driving under influence of alcohol; the apology was not available under Ill. Rev. Stat. 1987, ch. 38, §§5-6.3.1).

\(^{239}\) E.g., Desjardins v. Van Buren Cmty. Hosp., 969 F.2d 1280, 1282 (1st Cir. 1992) (per curiam). The case is discussed further infra note 248.


\(^{242}\) A notable exception is the persistent and unyielding efforts of the attorney in In re Snyder, 472 U.S. 634 (1985). In that case, an attorney was directed to appear at a show cause
Courts considering an ordered apology must also address the more glaring constitutional limitations of such a remedy. A court-ordered apology triggers First Amendment concerns because the practical result is that the defendant is ordered to "speak in a manner that may well contravene the beliefs the defendant holds." The Supreme Court has reaffirmed its view that the right to free speech includes the right not to speak. Perhaps due to the simplicity of the question, there is a surprisingly small number of cases in which a court refers to the First Amendment to deny a request for a court-ordered apology. One example is a Virginia state decision in which the trial court declined to order the plaintiff's counsel to apologize, as requested by the defendant and his lawyer, tersely stating, "First Amendment concerns preclude the Court from ordering the apology." In another case, the Court of Appeals of New York upheld a state human rights commission decision ordering a restaurant owner to apologize to an employee for offensive remarks; voicing his strong objections, a dissenting judge wrote:

As to the written apology, in my view the First Amendment protects both the right to speak and the right to remain silent. Just as the First Amendment permits recovery of money damages for libelous speech, it permits the State to protect an employee against the offensive and humiliating speech of his employer. It may not, however, require the employer to apologize any more
than it could require that school children recite the pledge of allegiance... unless it can be shown that such an enforcement device is essential to the constitutionally permissible purpose of the law. No such showing has been made here.  

To date, the above declarations from state court decisions appear to comprise the U.S. position on the First Amendment's prohibition of a court-ordered apology. Ultimately, in a jurisdiction where the legal system is generally undeveloped with respect to the use of apology in dispute settlement, it is no surprise to see a request for court-ordered apology rejected when pitted against the venerable right of free speech.

3. Korea, Comparatively

Korea is a jurisdiction where the courts of a constitutional democracy have been in operation for less than two decades. The body of decisional law is not as full as those of jurisdictions in the West; the Korean judiciary (as well as Korean jurisprudence) is still seeking its own identity. Yet with respect to the issue of the permissibility of a court-ordered apology, the court of last resort on questions of constitutional law has spoken in a full, elaborate opinion. Ultimately siding with the


248. A decision by the federal courts on the question appears to be elusive. The U.S. Court of Appeals for the First Circuit experienced a near miss in an employment discrimination case, where the district court ordered, in favor of the plaintiff, damages, attorney fees and costs, and a public apology in a local newspaper. Desjardins v. Van Buren Comm. Hosp., 969 F.2d 1280, 1281 (1st Cir. 1992) (per curiam). On appeal, the defendant argued that the order of a public apology violates the First Amendment. The Court of Appeals, however, declined to address the issue, since it was not raised in the district court and therefore waived. Id.

249. The Korean judiciary includes the Constitutional Court, as well as the Supreme Court of Korea. The Korean Constitution provides that the Supreme Court of Korea is "the highest court of the State." S. KOREA CONST. art. 101(2). The Constitutional Court was established by constitutional amendment in 1987. The Constitutional Court has jurisdiction over

1. The constitutionality of a law upon the request of the courts;
2. Impeachment;
3. Dissolution of a political party;
4. Competence disputes between State agencies, between State agencies and local governments, and between local governments; and
5. Constitutional complaint as prescribed by Act.

Id. art. 111(1). For a discussion of the origins of the Constitutional Court, its failed predecessors, and its outlook in the opening years, see DAE-KYU YOON, LAW AND POLITICAL AUTHORITY IN SOUTH KOREA 168-70 (1990); James M. West & Dae-Kyu Yoon, The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?, 40 AM. J. COMP. L. 73 (1990). A more recent work that discusses the court's work in its first 15 years and the relationship between the Constitutional Court and the Supreme Court is available in TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 206-46 (2003).
U.S. position, the Constitutional Court determined in 1991 that a court-ordered apology is contrary to the Korean Constitution.250

The case arose when a former Miss Korea brought an action against Dong-A-Ilbo (a major newspaper), its president, and chief editor for allegedly defaming her in an article. The plaintiff sought, in addition to compensatory damages, a publication of an apology in a newspaper under Section 764 of the Civil Code, which provides that in a defamation action a court may order "suitable measures" against the responsible party in order to restore a victim's reputation.251 Previously, Korean courts had ordered apologies in defamation cases where damages could not restore the plaintiff's reputation.252 The defendants' motion challenged the constitutionality of any interpretation of Section 764 that would allow the court to order a party to apologize; the district court denied the motion. The defendants then filed a direct petition to the Constitutional Court.253

In a unanimous decision, the Constitutional Court ruled that Section 764 was unconstitutional to the extent that it allowed a court to order a publication of apology (sah-jweh),254 as such an interpretation violated the freedom of conscience, a fundamental right guaranteed by the Korean Constitution.255 The court explained that as used in Article 19 of the Constitution, "conscience" refers to "a world view, a life view, an ideology, a belief and . . . value[] or ethical judgments in inner thoughts


251. Civil Act § 764 ("Special Rules which Govern in a case where of Defamation"). The provision reads in full: "The court may, on the application of the injured party, order the person who has impaired another's fame to take suitable measures to restore the injured party's fame, either in lieu of, or together with damages." Civil Act, translated in 3 STATUTES OF THE REPUBLIC OF KOREA, supra note 198, at 135.

252. 89 Hun-Mah 160, 3 CONSTITUTIONAL COURT DECISIONS 149.

253. The Constitutional Court Act permits such a petition.

254. "Publication of apology" is a translation for the Korean phrase that appears in the opinion, sah-jweh gwang-goh, literally meaning, "apology advertisement." The phrase has also been translated as "notice of apology." See Notice of Apology Case, supra note 250. In the text of the opinion, in addition to the phrase, sah-jweh gwang-goh, the court also uses sah-gwah and sah-jweh to refer to the apology generally. 89 Hun-Mah 160, 3 CONSTITUTIONAL COURT DECISIONS 149, 152, 154, 155, 156.

255. S. KOREA CONST. art. 19 ("All citizens shall enjoy freedom of conscience.").
affecting one's formation of personality." Freedom of conscience, then, protects against governmental intervention with people's judgment of what is right and wrong. The court further commented that freedom of conscience also refers to freedom of silence, which protects people from being compelled by the government "into making ethical judgments public." A court-ordered publication of apology violates the freedom of conscience in that it compels a personal judgment that one's behavior amounted to unlawful conduct. It disrupts a person's dignity and "distorts his conscience and forces a dual personality upon him by ordering him to express what is not his conscience as his conscience." In the case of a corporate party, the court explained, the violation occurs by forcing a representative "to express his fabricated conscience."

Technically, the court's decision applies only to defamation cases because it hinged on the constitutionality of Section 764, which is limited to cases of libel or slander. Yet the court's basis for its decision—the constitutionally guaranteed freedom of conscience—seemingly applies to a broad range of cases without regard to the nature of the action. It is difficult to imagine what compelled apology would not violate the court's interpretation of the constitutionally protected freedom of conscience.

Thus, the Constitutional Court of Korea in Dong-A-Ilbo disagreed squarely with the decision of the Supreme Court of Japan in Oguri, decided 35 years earlier. The essential aspects of the two cases are remarkably similar. Both involved judicial authority to order an apology against a party in a defamation action under a provision of the states' respective civil codes, the contents of which were virtually identical. Both cases weighed the court-ordered apology against the freedom of conscience, which both constitutions explicitly provide. The essential

256. Notice of Apology Case, supra note 250, at 139.
257. Id.
258. Id.
259. 89 Hun-Mah 160, 3 CONSTITUTIONAL COURT DECISIONS 149, 155.
260. Notice of Apology Case, supra note 250, at 139.
261. Id.
262. As Professor Kyu Ho Houm has noted, the court could have decided the case on a much narrower ground by declaring that a court-ordered apology against the defendant publisher violates the constitutionally protected freedom of press, S. KOREA CONST. art. 21(1). Kyu Ho Youm, Jonathan Marshall First Amendment Chair Professor, University of Oregon School of Journalism and Communication, Remarks at Santa Clara Law School: Korean Law in the Wake of Globalization (Apr. 22, 2005). The court did not refer to the right of dignity, which is also provided for in the Constitution. S. KOREA CONST. art. 10 ("All citizens shall be assured of human dignity and worth and have the right to pursue happiness.").
263. Compare supra notes 221 (Civil Code art. 723) and 251 (Civil Act § 764).
264. JAPAN CONST. art. 19; S. KOREA CONST. art. 19. The similarity of Korean law to Japanese law is not mere coincidence. Much of the civil law system implemented in Korea during the Japanese occupation was kept intact after liberation. Thus, a significant portion of
core of the Constitutional Court’s decision in Dong-A-Ilbo appears in the dissenting opinions in Oguri. Specifically, the dissent in Oguri described the previous practice of ordering an apology in defamation cases as “a bad custom” that should be overruled. The Constitutional Court quite agreed, and like the dissent in Oguri, found constitutional restrictions on continuing the practice. The minority in Oguri described freedom of conscience as including “the inward freedom to make distinctions between right and wrong . . . [as well as] the freedom to announce or not to announce to the outside world one’s judgments in regard to distinctions between right and wrong.” Similarly, the court in Dong-A-Ilbo saw freedom of conscience as a freedom of “inner thought from the state’s intervention of people’s ethical judgment of the right or wrong and the good or bad.”

How the Constitutional Court in Dong-A-Ilbo chose to place the freedom of silence in the framework of the Korean Constitution distinguishes the Korean approach to court-ordered apologies from the U.S. approach. In the United States, the freedom of speech in the First Amendment entails the right not to speak. The Korean Constitution also provides for freedom of speech, and the Constitutional Court could have construed it to contain a similar right. Instead, the court chose the approach previously seen in Justice Tarumi’s dissent in Oguri, finding the freedom of silence in the fundamental right of freedom of conscience, a right the U.S. Constitution does not explicitly provide. This decision gave the Constitutional Court the opportunity to elaborate, however amorphously, on the legal dimensions of a right that is likely universally desired but difficult to delineate. Although the court did not specifically identify the requisite conditions of an actionable claim

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Korean laws are still based on their Japanese counterparts. INTRODUCTION TO THE LAW AND LEGAL SYSTEM IN KOREA, supra note 103, at 528. Although the original Korean Constitution adopted in 1948 is said to have been a product of leading Korean legal scholars and jurists, much of it read similarly to the Japanese Constitution, which was shaped and approved by General Douglas MacArthur. For a discussion, see Ilhyung Lee, Equivalence at Law (and Society): Social Status in Korea, Race in America, 37 VAND. J. TRANSNAT’L L. 109, 133-37 (2004).

265. Maki, supra note 215, at 63 (Fujita, J., dissenting).
266. Id. at 62.
267. Notice of Apology Case, supra note 250, at 139.
268. See supra text accompanying note 245.
269. S. KOREA CONST. art. 21(1) (“All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association.”).
270. Justice Tarumi had written in dissent in Oguri that the freedom of conscience also guarantees the right of silence “to those who, as a matter of principle, wish to be silent.” Maki, supra note 215, at 66 (Tarumi, J., dissenting).
271. Notice of Apology Case, supra note 250, at 139.
for violation of freedom of conscience, the matter of a court-compelled apology proved an easy case.272

Departing from the legal strictures, the Constitutional Court also noted the impracticalities of a compelled apology. Echoing the concerns of U.S. commentators and jurists, the court noted that an apology (here, using the sah-gwah phrase)273 is meaningless if it is not made voluntarily or with "deep-rooted regret."274 Apologizing is a social virtue only if it is voluntary, the court noted; if not, it is oppressive, punitive, and retaliatory.275

It must be noted that the unanimous decision by the Constitutional Court drew a sharp critique from Professor Dai-Kwon Choi,276 a leading scholar in Korean constitutional law and sociology of law, who argued that the court neglected the cultural regard for the apology in Korea. Pro-

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272. The Constitutional Court also reasoned that a publication of an apology is an excessive and unnecessary restriction of rights, given the less restrictive means to achieve the same result—namely, requiring the defendant to pay for publication of the court’s civil or criminal judgment against the defendant, or a retraction of the defamatory story. 89 Hun-Mah 160, 3 CONSTITUTIONAL COURT DECISIONS 149, 157–58; Notice of Apology Case, supra note 250, at 139. The court’s characterization of the freedom of conscience as a fundamental right, its description of the court-ordered apology as overly extreme, and the reference to less restrictive alternatives that would satisfy the legislative purpose of providing relief to the plaintiff whose reputation was harmed sound of analysis seen in U.S. constitutional jurisprudence, in a case that was decided within the first five years of the court’s establishment.


274. *Id.*

275. *Id.* at 156–57. Of interest in the Constitutional Court’s decision rejecting the legality of a court-ordered apology is its reference to the approaches taken in other countries on the same question. The court noted that Japan is the only country to allow court-sanctioned ordered apologies, over the substantial objections of commentators, while Anglo-American jurisdictions and civil law countries like France, Germany, and Switzerland do not. *Id.* at 157. The decision was unanimous, and no member of the court objected to any reliance on foreign precedents in the case. This is in contrast to the still divided views of the members of the U.S. Supreme Court regarding what weight the Court can give to precedents from other countries. This matter received prominent mention in *Roper v. Simmons*, 543 U.S. 551 (2005), where the Court, in a deeply divided opinion, held that the Eighth and Fourteenth Amendments prohibit capital punishment for juvenile defendants. The majority, per Justice Kennedy, pointed out that at the time of the decision, the United States was the only country in the world which permitted the death penalty for juveniles and that the laws of other countries would be “instructive” in the Court’s task of interpreting the prohibition of “cruel and unusual punishments.” *Id.* at 575–76. This reference to, and reliance on, the views of other countries brought a sharp rebuke from Justice Scalia, in an opinion joined by two other justices, who wrote that the premise that “American law should conform to the laws of the rest of the world . . . ought to be rejected out of hand.” *Id.* at 624 (Scalia, J., dissenting). Justice Scalia was not reticent to voice his view that a question of American law should not be determined by the views of “like-minded foreigners.” *Id.* at 608. Justice O’Connor also dissented from the majority decision but specifically expressed her disagreement with Justice Scalia’s contention that “foreign and international law” should have no place in the decision of the case. *Id.* at 604 (O’Connor, J., dissenting).

Professor Choi stated that "cultural dictates" placed on Korean society have made the apology "highly desirable and meaningful" and "a critically important factor" in the resolution of disputes. Especially in defamation cases involving harm to the victim's reputation, the apology is a "culture-bound" remedy. Professor Choi saw culture as the predominate factor in the decision of the case. He was unconvinced with the court's view that the freedom of conscience should prohibit compelled apologies and was not troubled by an involuntary apology made only because of a court order.

Professor Choi's reliance on the cultural regard for the apology in dispute settlement, and his view that Korean culture can and should determine Korean law, appear to present a rather extreme form of cultural determinism—perhaps a "blood-and-soil relativism weighted in favor of the past." His ideas with respect to the apology case bring full circle

277. Id. at 218, 219. Professor Choi referred to a number of Korean sayings that stem from the "cultural dictates," such as: "[I]f you encounter a negotiation under way, then have it completed. If you encounter a dispute under way, then have it resolved ... ." and "[O]ne can have even a thousand won debt dissolved with a proper statement." Id. at 219.

278. Id. at 211; see id. at 219 (describing apology as a "desired personality trait").

279. Id. at 212.

280. Professor Choi emphasized the functional aspect of the apology in the settlement of conflicts and disputes. Id. at 209, 219.

281. Id. at 205, 224; see id. at 209, 211 (noting that "the culture demands an apology of one who initially offends another's reputation" and that apology is desired "in a culture where it is demanded of a wrongdoer").

282. He wrote:

Freedom of conscience is designed to protect one's strong conviction that it is morally wrong to obey what the law forces him to follow. Freedom of conscience becomes constitutionally relevant only when moral dictates and legal dictates collide, not when the only issue is whether one is willing to follow legal dictates. Thus, in order for freedom of conscience to be relevant, one has to show a strong moral (in many cases religiously based) conviction against the legal demand rather than mere dislike, reluctance or unwillingness to follow the law.

Id. at 210.

283. Even acknowledging that "the more voluntary an offer of an apology, the better[,]" id. at 209, and that "[p]erhaps an apology would be meaningless ... unless [it is] voluntarily made," Professor Choi urged that "[i]n terms of the soothing effect on the person wronged, a forced apology has the same effect as a voluntary one ... ." Id. at 211. He added, "An apology can be just, even if it is enforced by a court of justice." Id. at 220.

284. Professor Choi wrote: "[C]ultural differences are reflected in beliefs and values which in turn determine law. There is nothing wrong with the cultural importance attachment of an apology being reflected in judicial decisionmaking," id. at 220; and "[I]law is, and should be, based on the prevailing values, beliefs, and senses of right and wrong in the society where it functions. To that extent, law can be local," id. at 219. One criticism of this view is that it is not so clear what "Korean culture" is, given the changes in social attitudes.

285. Shaw, supra note 108, at 19. For a critique of cultural determinism, see YOON, supra note 249, at 32–35.
the discussion on the relationship between comparative culture and law with respect to the apology.

IV. CONCLUSION

Culture affects notions of the apology, and indeed, differing cultural norms in Japan and the United States might explain the dramatically different approaches to the apology in the two states. Generally, when one causes significant injury or harm to another, the Japanese practice is to apologize and the American inclination is to refuse an apology. The legal system in each country is consistent with its societal inclination or disinclination to apologize. That is, the Japanese bench and bar expect a party causing injury to apologize, and the apology becomes part of the settlement process. In contrast, American legal institutions undervalue the apology and have yet to develop a facilitating use for it.

Korea, Japan’s neighbor across the East Sea, is a society rich in culture and history. It is deeply influenced by Confucian ethics regarding harmony and conciliation, characteristics that have shaped the frequent use of the apology in Japan. Those Koreans who adhere to the traditional Confucian norms emphasizing societal harmony may well prefer an apology over silence (or denial) in anticipation of litigation. Yet Korea is a country that has seen remarkable political, economic, technological, and societal developments in recent decades. Some of the rapid changes in social attitudes and practices depart from deeply-rooted social norms and may yield a less frequent use of the apology in dispute settlement. A sampling of reactions from Korea’s legal actors indicate that, as a whole, the legal system is also in transition regarding the treatment of the apology.

The matter of the apology—in basic terms, an expression of remorse and responsibility of wrong—is a complex matter. There is every indication that the apology is no less complex in Korea. In addition to an appreciation of the (changing) local culture, understanding the apology in Korea requires knowledge of the relevant language in the expression of the apology, high-context communication, custom and practice, and a legal system in the early years of a constitutional democracy. In an effort to extend the discussion of the relationship between law, culture, and the apology beyond the United States and Japan, this Article provides an introduction to the apology in Korea. With this necessary foundation in

286. Perhaps Korea should be regarded as a prime example that a society’s cultural attitudes are neither permanent nor monolithic.
287. The differences regarding the apology in Japan and the United States have led to the observation that “Americans going to Japan often need to learn to apologize more freely, and
place, further scholarship, including empirical research, should more fully explore the role of the apology in dispute resolution in the context of Korean law and Korean culture.