

# APOLOGY AS A FUNCTION OF CRIMINAL JUSTICE©

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*“What is called for is greater scope and encouragement for enabling the reparative value of retraction and apology...reconceiving the available remedies so as to focus more on the human...”<sup>1</sup>*

*- Justice Albie Sachs*

## INTRODUCTION: The “I’m sorry – Don’t worry, not a problem” Paradigm<sup>2</sup>

The requirement of a post-wrongdoing expression of apology and remorse is perhaps something that we take for granted within modern society. The word “sorry” harbors at the tip of our tongues, ready to ship out at the slightest jostle of a fellow passenger on a train. From our earliest childhood memories, our response to any perceived wrongdoing is to utter the ‘fix-it phrase’: “sorry”. It is little wonder that our response (if any at all) to an apology is equally rarely considered; such is the usual triviality of the incident. Therefore, what has emerged is a general social understanding of apology and forgiveness: you do a minor wrong, you apologise or use the ‘fix-it phrase’, and you receive the customary forgiveness, what Joanna Shapland refers to as the “I’m sorry – Don’t worry, not a problem routine”.<sup>3</sup>

The process has devolved from a considered, measured and cognitive exercise in self-evaluation and re-establishing relationships, into a social nicety. The following questions therefore emerge: what happens when the incident, the wrongdoing and the harm grows exponentially? When a wrongdoing breaks the law and necessitates state intervention? What use is “sorry” then?

## JURISTIC APOLOGY

The origin of the word apology is the Greek word *apologia*: “a formal defence

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<sup>1</sup> *Dikoko v. Mokhalta* 2006 (6) SA (CC), 112.

<sup>2</sup> Shapland, *Forgiveness and Restorative justice: Is it Necessary? Is it Helpful?*, Oxford Journal of Law and Religion, 2016, 1.

<sup>3</sup> *Ibid.*

against an accusation”;<sup>4</sup> it did not become an expression of sorrow or remorse until the late 16<sup>th</sup> century.<sup>5</sup> In the formal setting of the courtroom, an apology rendered by a convicted person is often done through their solicitor. What is evident in this juristic apology is *apologia* rather than a display of remorse: it is exercised as a mechanism of defence on the accused’s behalf, not for the purposes of defending against an accusation but against a sentence. Juristic apology is a tool of mitigation.<sup>6</sup> Therefore, an apology, as Bibas and Bierschbach claim, should be a process which evinces: “moral lessons, brings catharsis, and reconciles and heals offenders, victims and society”.<sup>7</sup> Yet, the current usage of this juristic apology is nothing more than a legal fiction, designed to further defend the convicted, or what is referred to as the “individual badness model” of apology.<sup>8</sup> It excludes those factors that are required to ensure a restorative apology takes place: a display of actual sorrow to the party or parties wronged, and an undertaking to prevent future repetition.<sup>9</sup>

A juristic apology is arguably open to manipulation and deception by an offender, and varying degrees of interpretation by the state. Therefore, scholars, such as Michael O’Hear, argue that apology should bear little to no impact upon sentence at all: “defendants, victims, and the public deserve rational, meaningful sentences that are derived from analytical processes open to public knowledge and debate.”<sup>10</sup> O’Hear suggests a purely utilitarian consideration of sentence and the removal of consideration of an apology altogether. Bibas and Bierschbach suggest that the proposition goes too far; not only is there room for an apology within the criminal

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<sup>4</sup> Oxford English Dictionary, 7<sup>th</sup> Edition, 2012, 28.

<sup>5</sup> Rather interestingly one of the earliest examples of an apology in its reformed sense of sorrow, is from Shakespeare’s Richard III. See- <http://www.worldwidewords.org/topicalwords/tw-apoi.htm>.

<sup>6</sup> In my experience as a former defence solicitor, and I suggest this to be common practice, the apology tendered at the Bar was not necessarily an explicit instruction. It was rather a pro-forma element of the plea in mitigation. Moreover when asked to provide advice to clients as to what to do when interviewed by social work Criminal Justice Social Work Report (CJSWR), the advice becomes almost pro-forma: display remorse and contrition.

<sup>7</sup> Bibas, Stephanos, and Bierschbach, Richard A., *Integrating Remorse and Apology into Criminal Procedure*, 114 Yale L.J. 85 (2004), 89.

<sup>8</sup> *Ibid.*

<sup>9</sup> These are the element provided in the progressive definition of apology given in s3 of the Apologies (Scotland) Act 2016, available here: [http://www.legislation.gov.uk/asp/2016/5/pdfs/asp\\_20160005\\_en.pdf](http://www.legislation.gov.uk/asp/2016/5/pdfs/asp_20160005_en.pdf).

<sup>10</sup> O’Hear, Michael, *Remorse, Cooperation, and “Acceptance of Responsibility”*: *The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 Nw. U. L. Rev. 1507, 1553.

justice system but that an apology can form an effective part of the criminal justice process. Nevertheless, “[r]emorse and apology are not substitutes for punishment in most cases, as the restorative justice movement mistakenly contends” nor should they form some kind of mechanism of “humiliation” in the form of “shaming”.<sup>11</sup>

Largely, I agree with their assessment that an apology can form a more integrated part of the criminal justice process, but as part of a restorative justice (RJ) practice. However, I disagree with their assessment of the RJ movement supporting an apology as an alternative to punishment. I would argue this statement is far from the mainstream thinking of RJ practitioners. In fact, the majority of practitioners favour a post-criminal justice process intervention, as more in keeping with the ideals of RJ. Furthermore, the suggestion of a further integrative approach, including measures such as to make victim-offender “mediation more widely available”,<sup>12</sup> would be impracticable and potentially harmful to victims. RJ practices must arise from an admission of guilt. Arguably, O’Hear’s model of RJ, at any stage, may be more acceptable to the American criminal justice system that he is writing about, due to the large victim discretion in controlling the charges leveled within that system.

The advantage of a fully integrative approach to an apology in the criminal justice process is that it brings the RJ process into play at the appropriate juncture, thereby ensuring the state also receives an apology, on behalf of the public. The court, however, must do more to ensure this forms part of the restorative process and not mitigation. This is because it has the potential to serve the offenders’ need to apologise and atone for his wrongdoing; what Stephen Garvey refers to as the offender “humbling his will” in atonement.<sup>13</sup> The disadvantage is that, it arguably diminishes or sidelines the role of the victim in the apology process, in favour of the state. It removes the ability of the offender and the victim, as Nils Christie in his seminal work argues, to “own” their incident; the process of the state subsumes

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<sup>11</sup> Ibid at 7, 91.

<sup>12</sup> Ibid at 7, 133.

<sup>13</sup> Garvey, Stephen p., ‘*Restorative Justice, Punishment and Atonement*’, 2003 Utah L. Rev. 303, 313.

the incident.<sup>14</sup>

I share Christie's concern that the victim is too often sidelined. However, I reject his premise that the solution is to sideline the state entirely. It smacks of the Shakespearean, "first thing we do, let's kill all the lawyers" - far too extreme for my preferred mode of reform.<sup>15</sup> As well, I share Garvey's sentiment that RJ cannot fully replace criminal justice, but again I fear he overstates that the majority of the RJ community wish to see this take place. Garvey also gives the grossly false inference that the RJ apology is the easy way out for an accused; this I cannot accept. The RJ process (when appropriately deployed) can be a deeply difficult and emotionally taxing process for an accused person. RJ offers a process of confrontation, reflection and atonement. This can be more difficult than incarceration, which offers seclusion from society, no checks on reflection, and little chance of meaningful atonement in most cases. As a society, we are kidding ourselves if we believe that when we send people to prison, they sit in their cells and contemplate their wrongdoing. The convict is a recovering citizen and requires assistance during their period of rehabilitation. The RJ process provides structured self-reflection, and enables the convict to find their way to an apology and rehabilitation.

### BEYOND "SORRY"

In the landmark South African case of *Dikoko*<sup>16</sup>, Justice Albie Sachs (perhaps the most high-profile RJ practitioner and advocate) eloquently argues in favour of the allowance for an apology to be introduced into the judicial system. Although this is a defamation case, Justice Sachs indicates that the same principles are applicable within the criminal law.<sup>17</sup> Based on the work of Ann Skelton, who is a prominent South African jurist, Justice Sachs identifies that the principle of *ubuntu-botho*, which acts as an undercurrent within all South African law, is based on key

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<sup>14</sup> Christie, Nils, 'Conflict as Property' The British Journal of Criminology, Vol. 1, 1977.

<sup>15</sup> Henry VI, Part II, Act IV, Scene II.

<sup>16</sup> Ibid at 1.

<sup>17</sup> Ibid at 1, 115.

elements of RJ; these elements “have been identified as encounter, reparation, reintegration and participation”.<sup>18</sup> Similarly to Shapland, Justice Sachs also favours a “less formal” space outside the trappings of the court for an apology to take place.<sup>19</sup> Hence, he suggests a model in which the mechanism of apology spans the gap between conviction and reintegration thereby enabling RJ to become an integrated part of the criminal justice system.

Shapland argues that an apology from an offender must form part of a two-stage process in order to be considered restorative. At the first stage, the ‘vertical apology’ of the offender to the state must take place. In succession, there is the ‘horizontal apology’ between the offender and the victim. When brought together, this forms a ‘triadic communication’ of a RJ apology.<sup>20</sup> Shapland argues that the apology is a mechanism for potential forgiveness, but only at the horizontal stage. At this stage, apology and forgiveness form Hohfeldian correlatives, with the accused entitled to his gift of apology and the victim entitled to his gift of forgiveness, neither party being forced to exchange gifts.<sup>21</sup> To force forgiveness and an apology would “destroy the moral power of forgiveness, apology or mercy”.<sup>22</sup> Shapland, however, would seem to inextricably link an apology with forgiveness.

At the vertical apology stage, Shapland argues that the communication is aimed towards “society, not to the victim”.<sup>23</sup> It may be argued that this is the integrated apology as it forms part of the criminal justice process. Shapland, however, would suggest that this does not form part of the RJ process. This is the opportunity for the offender to feel public shame in their newly acquired legal label and atone to the public at large. According to John Braithwaite, this is the “uncoupling of punishment and shame” wherein shame is a by-product of the sentence.<sup>24</sup> It is, in

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<sup>18</sup> Ibid at 1, 114.

<sup>19</sup> Ibid

<sup>20</sup> Ibid at 2, 5.

<sup>21</sup> Hohfeldian “jural correlatives” see Hohfeld, Wesley Newcomb, ‘Some Fundamental Legal Conceptions As Applied In Judicial Reasoning’, Yale Law Journal, Vol. 23, 1913, pp. 16-59, 30.

<sup>22</sup> Braithwaite, John, ‘Restorative Justice and Therapeutic Jurisprudence’, 38 Crim. L.Bull. 244, 246 (2002), 262.

<sup>23</sup> Ibid.

<sup>24</sup> Braithwaite, John, *Crime, Shame and Reintegration*, Cambridge University Press, First Edition, 1989, 59.

fact, more akin to harassment, and not the more positive “integrative shame”,<sup>25</sup> which enables the offender to learn from their experience and is proven to reduce recidivism. I would respectfully disagree. This forms the beginning of the integrative shaming process aimed at enabling the accused to formally accept his guilt.

Shapland dismisses the restorative power of the ‘vertical apology’. In her view, forgiveness is not possible with ‘vertical apologies’ since “[t]he state, receiving [this] apology,...seems bounded by the offence.”<sup>26</sup> Hence, it does not grant forgiveness. Whether the state is capable of forgiveness has most commonly been observed through the state’s ability to exercise mercy. This creates what is known as the ‘mercy puzzle’ in criminal punishment.<sup>27</sup>

In an exchange of articles revolving around the release of Abdelbaset Ali al-Megrahi, R. A. Duff and Lindsay Farmer discuss the role of mercy in the criminal justice system. Duff argues that the purpose of mercy is to temper justice but, at the same time, it must not go so far as to undermine it.<sup>28</sup> He argues that the Minister’s decision in Megrahi was to “allow a merciful impulse to override, rather than appropriately temper, the demands of justice”.<sup>29</sup> In this way, the act of mercy supplanted the state’s obligation to punish for the crimes committed. In response to Duff’s reasoning, Farmer concurs, “there is no relationship between the right to punish and the right to mercy”; justice does not demand mercy.<sup>30</sup> Where he disagrees with Duff is the normative mechanism used to display mercy, and whether it was correctly exercised in the case involving Abdelbaset Ali al-Megrahi. Farmer argues that, historically, the use of mercy was exercised at the exhaustion of a legal remedy. This has changed since what was once “a power which was

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid at 2, 7-8.

<sup>27</sup> Duff, R. A, ‘Justice, Mercy and Punishment’, Sept. 2009, 1.

<sup>28</sup> Ibid, 2.

<sup>29</sup> Ibid, 4.

<sup>30</sup> Farmer, Lindsay, ‘*Mercy and Criminal Justice; a reply to Antony Duff*’, Criminal Justice Scotland, Nov. 2009, 2.

beyond the law has become legally regulated” by statute.<sup>31</sup> The executive acted lawfully and within the remits of justice in exercising this legal power. Regardless of whether the use of the power was right or wrong, Farmer suggests that we demur to our respective higher powers.<sup>32</sup>

In many respects, I agree with Farmer and Duff<sup>33</sup> in regards to the role of mercy within the criminal justice system. However, this role should be viewed as being separate from the role of forgiveness. The state’s ability to forgive should not be confused with its ability to exercise mercy. This is because forgiveness can be exercised independently from a display of mercy. Mercy, on the other hand, is a particular action of the state. Such an action is binary, and there is a normative mechanism through which the state may engage it. In my view, forgiveness is a fundamental principle of the rehabilitative criminal justice system, not a binary decision; it can be in part, and in small stages. Therefore, I disagree with Shapland’s assessment of the state’s capacity for forgiveness. As previously mentioned, during sentencing, the state will take into consideration displays of contrition, and carry out the sentence of an accused whilst also taking active steps towards forgiveness.

For example, forgiveness takes place when the state grants an inmate early release from incarceration. This decision is based on the offender’s physical manifestation of apology or atonement, repentance and reform. Hence, following an apology, if the offender maintains good behaviour and good performance without any new problems being reported, the state may decide that there is no need for further punishment. The state’s capacity for forgiveness is inherent within its restraint in chastisement. Justice Sachs indicated that the state deploys “soft vengeance of a just society”.<sup>34</sup> In this way, progress towards forgiveness and rehabilitation can take place. Even so, this does not suggest that when the state forgives, it forgets. Rather,

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid, 4.

<sup>33</sup> Duff, R. A, ‘Justice, Mercy and Criminal Justice: A Response to Lindsay Farmer’, Dec. 2009, 1.

<sup>34</sup> Quote attributable to Justice Albie Sachs, University of Strathclyde event ‘Justice Albie Sachs Seminar for Strathclyde PG Law Students’, 3<sup>rd</sup> December 2014.

the state takes the approach of the wise since “the wise forgive, but do not forget”.<sup>35</sup>

The ‘horizontal apology’ is a much more intimate form of apology as it takes place between the victim and the offender.<sup>36</sup> According to Gerry Johnstone: “[i]t is crucial to the success of restorative conferencing that authentic apology, forgiveness and reconciliation take place”.<sup>37</sup> Johnstone, however, overstates the role of forgiveness. Based on Shapland’s research with RJ conferencing in England and Wales, 62% of RJ conferences resulted in an apology, whereas very few ended in forgiveness, or even referred to the word “forgive”.<sup>38</sup> ‘Horizontal apology’ at RJ conferencing “provides the opportunity for a direct apology to the victim.”<sup>39</sup> Also, there is no need to persuade offenders to apologize. Shapland implies that offenders, as part of their reform, have a fundamental need to apologise out of their own free will, which is indicative of Braithwaite’s ‘integrative shame’.

Conversely, there are a large number of victims who simply wish to understand the harm caused to them, and thereafter have a desire to mitigate potential harm to others by reducing recidivism in their offenders. With this mindset, it becomes apparent that there is no need to show forgiveness. Johnstone argues that forgiveness is not a realistic expectation since victims are simply not “saintly enough to waive ‘quid pro quo justice’”.<sup>40</sup>

Certainly, the empirical evidence would suggest that saintliness might indeed increase the likelihood of forgiveness, as those that are religious are more likely to use terms such as ‘forgive’.<sup>41</sup> However, this is a somewhat cynical observation. I would resist a binary application, in terms of an absolute forgiveness or an absolute rejection. Forgiveness is far too complex a human process to be weighed down in absolutes or ‘quid pro quo’ since it is much more nuanced than that. According to

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<sup>35</sup> Quote attributable to famed American Psychiatrist Thomas Szasz.

<sup>36</sup> This may include the victim’s family and friends.

<sup>37</sup> Johnstone, Gerry, *Restorative Justice*, Routledge, 2<sup>nd</sup> Edition, 2011, Chapter 6, 109.

<sup>38</sup> *Ibid* at 2, 10-11.

<sup>39</sup> *Ibid* at 2, 10.

<sup>40</sup> *Ibid* at 27, 110.

<sup>41</sup> *Ibid* at 2, 11.



Shapland, forgiveness has further roles after an unqualified apology through RJ. Forgiveness can be of one's self since "self blame" by the victim is just as much a common reaction as blaming the offender. In this way, forgiveness serves the victim whilst apology remains important during the RJ process.<sup>42</sup>

Finally, the 'horizontal apology' has a more nuanced role. Although the offender is the one who gives the apology, this act serves the interests of both the victim and the offender. When an apology takes place during RJ conferencing, this is not simply a conduit to forgiveness. Rather, the effect of the apology goes even further. It enables the offender to unburden themselves of their former act, and begin the process of reintegration into society. It is the latter process that completes the 'triadic communication', which links the offender back into society. Therefore, even if forgiveness is not achieved, the tripartite process is still enabled and society is satisfied. As a result, the victim has a greater understanding of the harm caused, and the accused has started to reintegrate back into society. This clarifies that forgiveness is not at the heart of the RJ process. Rather, the apology "is seen as central to the process of restoration".<sup>43</sup>

### LIMITS OF APOLOGY

An apology should be given without limit - that is to say unconditional, unreserved and unequivocal in its admission of guilt. However, the act of giving an apology as a function of RJ has been criticized for being limited. This is because, in some cases, an accused person should not be entitled to offer an apology, even of the appropriate standard and with the consent of the victim. Certain crimes, such as domestic violence, are beyond apology.<sup>44</sup> Julie Stubbs argues that in crimes wherein the act of apology forms part of the *modus operandi* of the accused, it would be immoral to allow an accused to perform the apology ritual. If this occurred, the apology would form part of the accused's recidivism, to "buy back

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<sup>42</sup> Ibid at 2, 3.

<sup>43</sup> Sherman, Lawrence and Strang, Sherman, Repairing the Harm: Victims and Restorative Justice, 2003 Utah Law Review Vol. 15, 28.

<sup>44</sup> Stubbs, Julie, 'Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice', Journal of Criminology and Criminal Justice, Vol.7(2), 169-187.

favour”,<sup>45</sup> rather than rehabilitation.

As a prosecutor who has tried numerous domestic abuse cases, I can understand the problems that could result from an apology. However, I would argue that no crime is beyond apology, and abandoning this principle would abandon the belief not just in RJ but also in rehabilitative justice. An apology should be accepted as more than the act of “sorry” and a simplistic conduit to forgiveness; it is an invaluable tool for offender acceptance, reflection and reform. Only then can it be deployed with any crime. Nevertheless, like any hardware, apology is dangerous in the unpracticed hands. Hence, it is the role of the experienced RJ practitioner to guide the process and ensure safety - groundwork is key.<sup>46</sup>

#### CONCLUSION: “AS RIGHT AS POSSIBLE”<sup>46</sup>

Apology is not, in and of itself, a solution. Nor is it a means to an inevitable end. The act of an apology, when properly understood and applied, is an integral function within the criminal justice system. Apology enables acceptance, reflection and reform by the offender post-conviction. As indicated by Shapland, an apology is a two-stage process that leads to the ‘triadic communication’ between three essential parties: the state, the offender and the victim. Although apology can be applied either vertically or horizontally, it must be equally important at both stages in order to be utilized as a tool of RJ. For this reason, it is essential that apology be further integrated, at the vertical stage, into the criminal justice system. Hence, we must create a greater (and safer) space for apology within the traditional criminal justice system. I disagree that the apology is the means to a set end - namely forgiveness. Forgiveness has its own independent role to play at both the vertical and horizontal stages. However, they are not inextricably linked. The concept of an apology – not necessarily the act of giving it – is essential to the RJ process, forgiveness is not. To paraphrase Alexander Pope: [t]o err is human, to apologise human, to forgive; divine.

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<sup>45</sup> Ibid, 177.

<sup>46</sup> Zehr, Howard, *The Little Book of Restorative Justice*, Good Books, 2<sup>nd</sup> Edition, 2014, 36.