Judicial Persons as Victims: An Introduction from a Japanese Perspective

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1. Introduction

First, I would like to elaborate on topics that I find interesting because I believe that this knowledge might make it easier for the readers to follow the paper. I specialize in dogmatic analyses of material criminal law with a greater focus on dogmatic legal matters than on matters such as criminology or victimology. However, I will attempt to bridge the gap between dogmatic criminal law and empirical criminology. While this is a very difficult goal to achieve, I will attempt it in this paper.

When we discuss the status of a judicial person, particularly when referring to a company, in the context of criminal law, we generally regard the judicial person as a criminal rather than as a victim. For example, compliance programs are designed to prevent judicial persons from committing crimes; however, we do not have any such mechanism in place to avoid the victimization of judicial persons.

I propose certain legal frameworks for judicial persons who are victims and point out certain examples from the Japanese perspective.

The term judicial person, in this paper, refers to a company. There are certain complications related to whether or not a judicial person should be registered with the appellation "judicial person" in order to be protected by the legal system. However, in this present study, these complex problems have been ignored.

2. Legal dogmatic analyses

I would like to begin with the topic of "intimidation of a judicial person." Intimidation is known as *kyohaku-zai* and is regulated under Article

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222 of the Japanese Criminal Code[1]. The following case is provided as an example:

This example involves a Japanese man and a company. We shall refer to the man as Mr. M and the company as T Corporation.

In the recent past, Mr. M, a long-time employee of a famous electronics maker, T Corporation, was laid-off by the company. Mr. M was disgruntled and angry and soon thought of different ways to harass the management. Exasperated, he approached the president of T Corporation and informed him of his intention to supply a large quantity of T-radios that were broken and not functioning to showrooms across Japan. The president, who was aware of the fact that his company had just launched a substantial commercial campaign based on tradition, quality, and trustworthiness, was intimidated; he was worried that his company's good name would be ruined. On account of his anxiety, he took an extended sick leave.

Who is the victim in this scenario—T Corporation or the president? Who suffers from harm in this fictitious example? Since the president was intimidated and suffered from anxiety, does that make him the victim?

If Mr. M proceeds to distribute the dysfunctional products to as many stores as possible, T Corporation might be at serious risk of losing its sales and market share; moreover, its high-profile commercial campaign could become redundant. Does this make T Corporation, in its capacity as a judicial person, the victim?

According to the criminal justice system in Japan, in legal terms, criminals are only able to intimidate a physical person, and not a judicial person. This is because a judicial person does not have private life and, therefore, cannot be "threatened."

In the above example, the president's personal interests were not threatened in any way; as a matter of fact, it was the company's interests

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[1] Article 222 (Intimidation).
(1) A person who intimidates another through a threat to another's life, body, freedom, reputation or property shall be punished by imprisonment with work for not more than 2 years or a fine of not more than 300,000 yen.
(2) The same shall apply to a person who intimidates another through a threat to the life, body, freedom, reputation, or property of the relatives of another.

alone that were under threat.

Therefore, as it can be argued that no harm has been done, should Mr. M be permitted to go free?

As per the Japanese law, Mr. M will be punished. He will be punished for the forcible obstruction of business. This is termed as *iryokugyomubogai-zai* (Article 234 of the Japanese Criminal Code[2]). It is very easy to prosecute under this provision; however, the law pertaining to the forcible obstruction of business (*iryokugyomubogai-zai*) is not characterized in definite terms. In the Japanese, Scandinavian, and German law, this type of crime is referred to as an "abstract endangering crime."

However, unfortunately, the definition of the "forcible obstruction of business" is not entirely clear; it is vague, making it difficult to understand which actions merit punishment. Is the shoplifter obstructing business or the person who murders a CEO?

If we are to introduce another aspect to the former case, where an irate Mr. M threatens, to place useless T Corporation radios in shops across Japan unless he is paid ￥20,000,000 is he punishable for obstructing business? The answer is no. Under the Japanese criminal justice system, according to section 249 of the Japanese Criminal Code[3], *kyokatsu-zai*, Mr. M is charged with extortion (blackmailing a judicial person in the form of T Corporation).

Considering this example, why is it that the abovementioned crime against T Corporation is punishable as blackmail, while the intimidation in the former case is not punishable? To a certain extent, both these cases are identical. In both examples, the president is intimidated. The only difference is in whether it is the funds or the trust of the company that is in jeopardy.

I believe that the reason for this problem is the failure of the Japanese

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2 Article 234 (Forcible Obstruction of Business).
A person who obstructs the business of another by force shall be dealt with in the same manner as proscribed under the preceding Article.

3 Article 249 (Extortion).
(1) A person who extorts another to deliver property shall be punished by imprisonment with work for not more than 10 years.
(2) The same shall apply to a person who obtains or causes another to obtain a profit by the means proscribed under the preceding paragraph.

criminal law theory to distinguish between the management of the company (CEO, boards, etc.) and the actual judicial person (the company). If the management of the company and the judicial person do not have the same interests, they should not be treated as one.

I claim that the cases wherein judicial persons are victims should be categorized into the following three types.

- Type A: A judicial person is attacked and harmed by another judicial person.
- Type B: A judicial person is attacked and harmed by a physical person who is independent of the said judicial person.
- Type C: A judicial person is attacked and harmed by a physical person who is employed by the judicial person.

The following are examples of the abovementioned types.

- Type A: Manufacture and sale of imitations
- Type B: The intimidation or blackmail of a judicial person
- Type C: Embezzlement or breach of duty [faith]

I believe that this categorization provides us with a type of legal framework; subsequently, we should research and formulate theories based on these three categories.

3. Empirical research

3. 1 Introduction

In Japan, we have yet to observe any thorough empirical research on this topic. However, Waseda University has conducted some minor research. I will be addressing this issue later. I am aware that Price Waterhouse Coopers has conducted extensive research on the issue of economic crime. However, in this paper, I am referring to research where the type of harm caused to the victim is taken into consideration.

In the research conducted by Waseda University on "the CSR (Corporate Social Responsibility) rules and the compliance programs" in Japanese companies[4], the focus was only on the victims of type A, namely, the cases where a judicial person is harmed by another judicial person.

Although only limited data is available on the topic, I would still like to elaborate on Waseda's research.

3. 2 Questions and results

Our project team, the 21st-century Center of Excellence, Waseda Institute for Corporation Law and Society (COE), administered a questionnaire on CSR and the measures against it to 3,103 leading corporations in Japan. We received responses from 942 corporations.

The questionnaire contained 30 questions on issues such as CSR, corporate ethics/compliance of laws and regulations, damages incurred or experienced as a victim in a business process, evaluation of legal dispositions, and future legal systems. The questionnaire provided space for respondents to comment on the theme of the survey.

Below are the questions and responses on the damages incurred or experienced as a victim in the business process.

The questions were as follows:

- Q17: Have you suffered damages resulting from other companies' violations of laws and regulations? If "Yes," what type of company was responsible for such violations—domestic or foreign?
- Q18: If you have had such an experience, can you explain the type of damages that you suffered? (Please differentiate the cause of the damages between domestic and foreign companies.)
- Q19: If you answered in the affirmative to Question 17, how would you evaluate the relief measures provided as compensation for the damages in the civil procedure? (space provided)
- Q20: If you answered in the affirmative to Question 17, how would you evaluate the criminal justice system when they were involved in a criminal case as a victim? (space provided)

Below are the responses to Q17 and Q18 that were indicated by

[4] The survey of the Japanese corporations regarding their attitudes toward CSR, corporate compliance programs, and corporate governance was conducted by the project team of the School of Law, Waseda University, in 2003. The results are not officially published in English.

Yes/No or as multiple-choice answers.

- With regard to Q17, 74.41% stated "No" and 25.59% stated "Yes" as their answer to the first part of the question. For the second part, 14.24% identified the company as a domestic one, while 82.23% identified the company as a foreign one; 3.10% indicated both and 0.43% were unsure.
- With regard to Q18, the respondents indicated the type of damage they had suffered. The number of cases is indicated in parenthesis (domestic (Japanese) corporation, foreign (non-Japanese) corporation).

1. Formation of cartels (3, **3**)
2. Prearranged bidding (6, **0**)
3. Under bargain sales (12, **2**)
4. Resale price restrictions (0, **0**)
5. Delay in the payments of subcontractors (10, **1**)
6. Misleading representation (34, **11**)
7. Patent infringement (91, **42**)
8. Similar trademark (54, **56**)
9. Defective products (61, **21**)
10. Bribery (1, **0**)
11. Violation of reporting requirements to the regulatory authority (8, **1**)
12. Other (41, **17**)

Since Q19 and Q20 do not correspond to statistical and quantitative analysis, their answers have been provided below.

3. 3 Analysis and discussion

3. 3. 1 Quantitative research

From the data provided (see Table 1), it appears that companies adhering to CSR rules tend to be victimized more often than companies that do not adhere to them.

This appears strange, since it can be assumed that companies that adhere to these CSR rules take special interest in attempting to prevent causing and avoid becoming victims of corporate crime. However, no

cross research was conducted on the reasons for the CSR rules being formulated. In many cases, I assume that the experience of having dealt with corporate crime would naturally lead to the formulation of CSR rules.

Let us now consider another example based the survey data (see Table 2). When companies, which have been victimized in the past, conduct business with other companies, they often inquire if their counterpart adheres to CSR rules. This might be an attempt to try and avoid being victimized again by selecting partners based on whether or not they adhere to CSR rules. Thus, they presume that having a CSR program is a symbol of genuineness.

Other data (see Table 3) from the survey indicates that the more detailed a company's compliance program, the less is the risk of victimization.

By cross tabulating, I have attempted to create a table on the basis of Q17 and the following questions:

1. Do you follow internal company rules that emphasize the importance of the so-called corporate social responsibility (CSR) to your employees? (Q1)
2. Do you have an in-house system to educate your employees in order to make them comply with the related laws and regulations? (Q8)
3. Do you have a specific system to find and prevent cases wherein an individual employee of yours or your corporation, by having violated related laws and regulations, is involved in illegal conduct? (Q9)
4. Do you have a well-defined procedure that allows employees who would like to report a possible violation of the compliance program to be heard? (Q14)
5. Do you attempt to voluntarily disclose your compliance program to shareholders? (Q11)
6. Do you attempt to voluntarily disclose your compliance program to consumers? (Q12)
7. Do you have a specific third-party audit system to check for possi-

Table 1

	Experiences of victimization	No experiences of victimization
Yes	29.5% (185)	70.5% (443)
No	17.6% (54)	82.4% (252)
Total	239	695

Table 2

	Experiences of victimization	No experiences of victimization
Yes	17.8% (42)	6.4% (44)
No	82.2% (194)	93.6% (645)
Total	236	689

Table 3

	Victimization		Relative frequency	No victimization		Relative frequency
Have CSR	189	79%	1.00	449	65%	1.00
Educate employees	191	80%	1.01	429	62%	0.96
Specific systems that prevent harm	186	78%	0.98	446	64%	0.97
Well-defined procedures	137	57%	0.72	287	41%	0.64
Information for shareholders	99	41%	0.52	195	28%	0.43
Information for e-customers	62	26%	0.33	97	14%	0.22
Specific third-party audit systems	45	19%	0.24	73	11%	0.16
Total	239			695		

ble scandals that might occur within your corporation? (Q13)

There were no differences in the results of the first three questions; however, certain differences were observed in the results of the last four questions. The last four questions mainly deal with whether respondents have detailed compliance programs that are meant to disseminate the corporation's information among outsiders. Corporations that have suffered damages on account of laws and regulations being violated by other companies tend to have detailed compliance programs that are meant for public presentation.

Generally, compliance programs are effective in preventing crimes that fall within the category of Type C, namely, where a person within the company is the offender.

3. 3. 2 Qualitative research

As part of the survey, the companies were encouraged to comment on the topic and share their experiences of victimization. The response rate was unexpectedly high, that is, many corporations responded to Q19 and Q20.

Several companies have commented on the possible consequences of a case being brought forth. Typically, the company is awarded damages. Some companies find the damages to be sufficient; however, most point out that in cases wherein the company stands to lose the trust of its customers and is possibly forced to halt its activities, the damages awarded are never sufficient.

3. 3. 3 Analysis based on the three types of harm

From the perspective of victimology, we may be able to state something with regard to how companies can be prevented from being victimized. In general, when a physical person is being referred to with respect to him/her being an easy victim of crime, they are often perceived as (1) kind individuals who do not tend to doubt others, (2) individuals who lack physical strength, and (3) individuals who find it difficult to communicate and maintain good relationships with others. If these characteristics are applied to judicial persons (corporations), then the corresponding types of judicial persons are (1) corporations that pay attention when conducting trade with others, (2) healthy corporations that have sufficient capital and

are sensitive to illegal matters, and (3) a popular corporation which has no troubles with others is not tending to be victims easily.

Next, I will provide a detailed explanation by analyzing the three different types of harm.

First, let us examine Type A, wherein a judicial person is attacked and harmed by another judicial person. In attempting to avoid becoming a victim of a Type A crime, the abovementioned steps can be undertaken. That is, knowing one's trade partner, disseminating information regarding compliance programs to others, and avoiding illegal matters. Thus, it becomes difficult for a trade partner to abuse the corporation.

A typical example of a Type A crime is the manufacture and sale of product imitations. Another example is the stealing of trade secrets. In Japan, in 2006, regulations to punish those who stole trade secrets were provided for under the Unfair Competition Prevention Act. Although these regulations are relatively new, harsher punishments were introduced in 2007. However, it is extremely interesting to note that these regulations have never been employed. In fact, most conflicts are resolved through civil cases, and the punishments only serve a symbolic function.

Moreover, the stealing of trade secrets may also correspond to Types B or C. However, the Unfair Competition Act mainly punishes perpetrators of the Type C category, namely, where a corporate employee colludes to pass on his corporation's trade secrets to others. As a matter of fact, a Type C category of crime is most common; however, at the same time, it is possible to adequately discipline this type of crime within the corporation. Therefore, I doubt the effectiveness of punishment being meted out for the Type C category of crime. In addition, to say the least, this is not the proper method for meting out punishment.

Second, we examine the Type B category, wherein a judicial person is attacked and harmed by a physical person who is independent of the said judicial person.

A typical Type B crime involves intimidation or blackmail of the judicial person. It is usually carried out by the mafia (or the so-called *yakuza*) in Japan. The so-called "*sokaiya*," meaning racketeer in Japanese, can be

referred to as an example. Most of them are members of the mafia, and they often intimidate judicial persons by disturbing stockholders meeting. If a corporation offers them certain benefits, such as money or stocks, then the corporation itself will be prosecuted (*rieki-kyoyo-zai*). Thus, it is very important for corporation to stay away from the mafia.

In order to avoid becoming victims of this kind of crime, CSR and/or compliance programs may serve an effective measure. In Waseda's survey, the companies were asked to offer their opinions with regard to the kinds of issues that should be considered as appropriate subjects of CSR (Q2). Of the corporations that have a CSR program in place, 78.3% suggested the severing of relationships with antisocial groups. This implies that a considerable number of Japanese corporations attempt to break their existing relationship with the mafia, and this should prove helpful in trying to avoid becoming victims.

Here, I would like to point out that Types A and B are relatively similar. When a corporate employee harms the corporation to which he belongs, his crime is categorized as a Type A crime. However, if he does so after having left the corporation, that is, after he has resigned, his crime will be categorized as a Type B crime.

Lastly, we examine the Type C category, wherein a judicial person is attacked and harmed by a physical person who is employed by the judicial person. Examples include embezzlement and/or the breach of duty [faith]. Type C crimes occur within the corporation; therefore, at times, these problems can be resolved within the corporation itself. In the Japanese criminal law theory, a considerably important principle is that criminal law must be employed as the ultima ratio, or in other words, as the last option for resolving conflicts. Further, it should not intervene in normal everyday life. Thus, resolving a conflict within the corporation itself is regarded as a better alternative. However, this is not the case when the damages caused are extensive. Large scale embezzlement is an extremely serious crime. It is believed to be the most common problematic type of economic crime. If corporate workers are sincere, a Type C crime will never occur. This implies that if the compliance programs are effective and rules and regulations are followed, corporations can avoid becoming victims of crime.

4. Conclusion

The only manner in which justice can be administered to these companies is to prevent them from becoming victims in the first place. This can be achieved through criminal law. We need to establish victimology for judicial persons; criminology, or the science of criminal law, and victimology can also work together in this regard. This request is the essence of this paper; moreover, this paper is only an introduction. Further criminological and legal dogmatic researches are necessary.

I hope to construct the framework for this innovative and interesting research area and contribute to its development.

*The author would like to note that this paper was originally written for a presentation at a joint graduate conference on crime, law and society between Waseda University and the University of California Irvine on November 1–2, 2007.