Criminal Law and Violence against Women: Rape in a Gender Equal Society

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The Legal Framework around Violence against Women

Around the turn of the century, a series of legislation related to violence against women was signed into law, including the Law for Punishing Acts Related to Child Prostitution and Child Pornography, and for Protecting Children (1999), the Anti-Stalking Law and Child Abuse Prevention Law in 2000, and the Law for Prevention of Spousal Violence and Protection of Victims (DV Prevention Law) in 2001. The Basic Plan on Gender Equality (a government-authored set of detailed measures to be implemented by 2005) offers provisions against five areas of crime against women – sexual crime, domestic violence, prostitution, sexual harassment, and stalking – in the chapter entitled, “Eliminate All Forms of Violence against Women.” On paper, it would seem that these legal augmentations to the existing laws such as the Prostitution Prevention Law and the Equal Employment Opportunity Law, would establish a sufficient legal framework to address the five areas as crimes against women.

The Responsiveness of Criminal Law

However, substantively speaking, in the context of the concept of violence against women, not only are the relevant crime types insufficient, but enforcement measures exhibit inconsistencies among them, with some crimes missing penal provisions. Therefore, it is in fact an inadequate framework for the comprehensive legal protection of the human rights of women. In particular, the Penal Code of Japan, (law No. 45 of Meiji Fortieth Year [1907]) is the oldest of above laws – in fact almost a century old since its enactment, though it predates the birth of the concept of violence against women. It includes certain acts that are criminal, thus punishable, and fall under crime against women. These criminally punishable acts include the crime of rape, indecent assault, murder, bodily injury, assault, threats, extortion, kidnapping, confinement, racketeering, and property destruction, etc. Of course, this is not to say that the earlier laws offered women greater protection. However, until about a half a century ago, the crime of adultery applied only to wives, the penal provision for the “crime of abortion” (Article 212, less than one year sentencing) against pregnant women remained intact long after the implementation of the Eugenic Protection law (currently renamed as the Maternal Protection Law), and there was systematically lax enforcement against violence inflicted by husbands prior to the enactment of the DV Prevention Law.

Considering this, the criminal law, in its century of existence as such, has clearly not been provisioned and managed with a strong consciousness around women’s human rights protection. Thus, it fails in the rigorous resolution for the issue of violence against women. Rather, it begs suspicion of a condoned tolerance of the issue, just as had been the case in the days leading up to the reconceptualization of inter-spousal violence under a new framework as domestic violence.

Known as some of the traditional crimes in the context of criminal law that also form the nuclei of the violence against women, the
criminal definition of rape and indecent assault have been revised with the heightening of awareness of women’s human rights in Western nations as well as Taiwan, its Asian neighbor, in the past four and a half centuries.\(^2\)

But Japan’s criminal law is an exception, wherein the international trend has had absolutely no influence on the existing operating paradigm for a century\(^3\). The structure of the crime of rape which requires the victim’s explicit dissent even in the face of demonstrated violence and threat, deems the sexual intercourse between a man and woman either sadistic or masochistic in nature. And so, as in pornographic portrayal of women, consent is premised as a desired end result only of violence in Criminal Law, hence the criticism that legally permissible sexual intercourse inevitably includes those that accompany violence against women.\(^4\) Criminal Law, as with the case of inter-spousal violence, continues to present a de facto admission of violence against women by the very nature of its conceptual structure, raising challenges around legal coherence with “Eliminate All Forms of Violence against Women.”

**Crimes of Rape and Indecent Assault**

Then, the question emerges, how should the crime of rape be revised? The revisions seen in other countries have consolidated gender neutralization, penalized inter-spousal rape, unified rape and indecent assault, relaxed the methods of violence, categorized crimes by methods of violence employed, and expanded the concept of “fornication.” However, for this paper, allow me to emphasize the real utility of unifying the crime of rape and indecent assault.

According to the Penal Code of Japan, the essence of the structure of rape is limited to acts related to fornication of males to females of thirteen years of age and older. On the other hand, the essence of the structure of the indecent assault is limited to indecent acts to a person of thirteen years of age and older regardless of their gender. If the victim is younger than thirteen years old, it is considered as indecent assault even if the perpetrator did not use physical violence or threat (Penal Code, Articles 176 and 177).

According to legal precedents, “fornication” is defined as penetrating the female genital with a penis, whereas an indecent act is defined as an act that is not intended for fornication but instead, for “a sexually-driven intent to have one’s sexual desires of the offender stimulated or fulfilled.” On the other hand, assault and threat in the context of rape is conditioned on its “level deemed to inhibit the ability of the victim to resist,” whereas the crime of indecent assault is “a force of any degree which is applied to one’s external physical body including hair or skin, for no justifiable reason.” For the crime of rape, the terms of sentencing is more than two years, no more than fifteen years, and for the crime of indecent assault, more than six months and no more than seven years. For an attempted act, however, the sentencing can be reduced by as much as half (Article 43, and Item 3 of Article 68).

Given the legal precedents, the process of distinguishing between the crime of rape and indecent assault leads to applicable crimes and subsequent sentencing levels that vary wildly, depending on whether the offender attempted “fornication” (which results in more than one year and no more than fifteen years), or only pursue an act of sexual stimulation short of fornication or indecent assault (which results in more than six months, no more than seven years). It also depends on whether the offender simply intended to insult/abuse the victim though the act technically may have seemed more similar to indecent assault (if the
charge of extortion is established, more than one month and no more than three years)\(^5\).

Unlike with other prevalent crimes, a successful charge of a sexual crime must fulfill a criterion known to be extremely difficult to establish in the court of law: the offender’s subjective predisposition going into the criminal act. As such, the fundamental principle of “mere suspicion shall benefit the defendant” may very well unjustly exonerate the offender. In addition, in the criminal sexual act itself, a tendency to overemphasize the integration of genitalia over acts of no intercourse, such as indecent assault, warrants objection.

Though the difference between the sentencing between rape and indecent assault may have been developed as a result of acknowledging the insidiousness and severe magnitude of the crime of forced genitalia integration, in cases wherein the offender committed anal or oral penetration with no intention to conduct genital penetration, only the crime of indecent assault applies, as these cases do not meet the definition for “fornication.”

As elaborated upon below, the act that falls short of a total penetration cannot be said to cause less pain and suffering for the victim than total penetration. One argument behind placing particular legal emphasis in “genitalia-to-genitalia penetration” is that the aim\(^6\) is to prevent the contamination of the patrilineal heritage via extrafamilial impregnation of wives\(^7\) of others, as with the crimes of rape and indecent assault. Therefore, needless to say, it is unacceptable, in light of the current development of a gender-equal society committed to eliminating all forms of violence against women, that such an emphasis be incorporated into the criminal legal assessment, nor that any of its relevant elements linger amidst a blanket of tolerance and condonement.\(^8\)

From the perspective of the victim to whom untold pain and suffering is inflicted, maintaining distinction between rape/fornication and indecent assault upon the existence of a genital penetration or the intention thereof, which leads to the sentencing within the limited minimum and maximum terms or its halving in some cases, does not offer any conceivable rationale. Furthermore, it poses material threat of inadequate applicability of the very penal regulations around sexual crime that is said to exist for the protection of the victim’s sexual freedom.\(^9\)

**The Concept of Consolidation of Sexual Crimes**

There had been a time when the Penal Code of Germany, which served as the archetype for that of Japan, maintained regulations around crimes of rape and sexual harassment in a manner similar to those of Japan. However, both crimes were
consolidated under the criminal category of sexual crimes under a revision that took place in 1998. It was deemed that sexual or similar acts of sexual and physical invasion amounted to sexual assault, and was thus positioned as “a particularly important embodiment” in the context of the crime of rape (the mandatory sentencing is more than two years, the same as that of the pre-revision days). The equivalence of acts of sexual semblance to sexual engagement from the perspective of the criminal justice discipline derives from the common characteristic that the victim suffers immense humiliation from criminal acts of sexual semblance, just as she would from the criminal act of sexual engagement10. I argue that this is legitimate. Striving towards a construction of gender equal society, the sexual criminal penal regulations befitting of the present, committed to “Eliminate All Forms of Violence against Women” must not rely on the fulfillment of the question around the existence of the offender’s subtle inner intent only to produce a divergent sentencing conclusion. Instead, it should rely on the criminal categories and sentencing in full accordance with the pain suffered by the victim. To this end, it is most desirable to contextualize the crimes of rape and indecent assault under their consolidation, then to set the sentencing terms in light of the interlinkage between magnitude of the violence and level of inflicted injury, or mode of the offensive act.

Footnotes:


3 As with the Criminal Litigation Law which sets the law of criminal procedure, the statute of limitation on sexual crimes was abolished in 2000, and a video link method for examining the witnesses became acceptable. In addition, certain advancements were also made around protection of victims of sexual crime. The details of the revised contents are elaborated in the “clause-by-clause explanation: the Two Laws around the Protection of Victims of Sexual Crimes” by Hiroya Matsuo edit., Yuhikaku Publishers (2001). However, on the substantive Penal Code, except for the revision in 1958, which eliminated the requirement of indictment for cases involving multiple offenders (Article 180, Item 2), no changes have been made around crimes of sexual assault and sexual harassment since initial enactment.


5 A legal precedent established that “the charge of
sexual harassment cannot be substantiated when the offender’s objective is to avenge, insult, or abuse the woman, although the act may entail stripping the women naked to photograph her nude in standing posture.” Refer to the Criminal Anthology of Supreme Court Decisions Vol. XXIV, No.1, p.1, 29, January, 1960.

6 In 1908, in the debate that took place at the time of the bill proposal, as regards to the crime of adultery, an opinion was lodged that an offense by wives shall be deemed punishable for jeopardizing the family lineage, but that husbands shall also be punished, even if penalties were varied, from the perspective of gender equality. However, it was promptly shot down by the subsequent rebuttal that “the law is not meant for predication of logic.” Excerpted from “Minutes of the 23rd Session of the Lower House Special Committee Deliberations,” Expanded Edition: A Comprehensive History of Criminal Law, pp.2032-2034, by Shinzansha Publishers (1990).

7 It can hardly be argued as unjust to apply weighted assessment of the fact of having impregnated the victim as a result of rape in due accordance to the inflicted injury, when considering its real magnitude. One example of an existing legislation is the Israeli Penal Code Article enacted in 1994, which states in its Article 345 (b), that “in the situation wherein physical or psychological injury, or pregnancy is induced,” twenty year-term sentencing would apply (in the absence of weighted assessment, sentencing term is sixteen years).

8 For literature on the critical examination of the crime of rape, refer to “the Protection of Sexual Freedom and the Regulation around Penalization of Rape Offenses” by Tomoe Ytagawa, in the Journal of Theoretical Research of Study of Law and Politics No.46, p.507 (2000).

9 To conclude that though the parameters of the sentencing terms for the crime of rape and that of indecent assault differ, the overlap of two to seven years offer a sufficiently wide range, so as to render sentencing operable, may be drawn prematurely. The statement by a prosecutor that the prosecution’s recommended sentencing severely constrained by the lower limit of the sentencing terms inhibit the extent of the punishment is introduced in “the Hopes for Women’s Legal Profession” by Masahide Maeda in the Japan Women’s Bar Association Bulletin No. 40, p. 11 (2002). Furthermore, on the research of sentencing terms around rape offense, the tendency of the presiding judges to issue sentences hovering in or near the lowest term limitation have been noted. Also refer to “Empirical Research on the Determination of Sentencing Terms (rape)” by Kentaro Onizuka in the Criminal Justice Research Report Vol. 17, No.3 (1967); “The Situation of Sentencing Terms for the Crime of Rape in Our Nation, and the Challenges for the Future” by Tamami Hagiwara in the Meiji Gakuin School of Law Research Journal Vol.68, No. 83 (1999). These documents raise serious suspicion that, while the wide range of sentencing terms is designed explicitly for flexible applicability on a case-by-case basis, the actual sentencing records in practice strongly reflect the lowest term limit in the hands of the prosecution and the presiding judges.


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