

Report: “Rape as Sexual Discrimination” Symposium

Summary by AJWRC

The Okinawan girl sexually assaulted by a US Marine in February has dropped charges against her aggressor, and the perpetrator has been released from police custody, but this issue has brought into discussion the fundamental question of whether the 100-year-old Japanese criminal justice system is capable of appropriately adjudicating sex crimes. On March 1—the day following this news—the Japanese Federation of Bar Associations (JFBA) held a symposium focusing on the question “How should we reexamine conventional law when viewing sex crimes from the perspective of violence based on sexual discrimination?” Participants in the symposium engaged in earnest discussion on topics such as the condition of resistance in rape cases, criminal procedures, and the provision by which a formal complaint on the part of the victim is necessary for prosecution. What follows is a summary of the arguments made by each of the panelists.

Yukiko Tsunoda (JFBA; Vice-Chairperson of the Gender Equality Committee)

The realization that sexual violence is an institution that perpetuates the subjugation of women is gradually emerging, but it is nonetheless apparent that there is a lack of understanding in

many judgments of criminal cases concerning the structural framework of sexual discrimination within society. As a result, victimized women inevitably confront a sexist criminal code when seeking justice. There are several problems associated with the adjudication of sex-related crimes, including, but not limited to the failure to criminalize marital rape, the exclusion of the rape of men from the legal definition of rape due to men’s physical composition, and the provision in the law which states that a perpetrator can only be convicted after a formal complaint from the victim.

Tomiko Memesawa (JFBA; member of the Gender Equality Committee)

There is a gap between criminal courts and civil courts in the rendering of decisions in cases involving sexual violence. Upon analyzing the innocent verdicts handed down in recent criminal cases, it is quite clear that the determination that the accused is innocent is now less commonly frequently based upon a low level of violence against the victim, and now increasingly upon a false stereotype of the victim: the victim’s credibility is negated pursuing testimony from the victim to a further extent than is required of the victimizer. Issues having no direct relationship with the incident—



Japanese Federation of Bar Associations symposium discussing "Rape as Sexual Discrimination."

such as the fact that the victim works at a bar or has had multiple partners—are usually discussed *ad infinitum* in sexual assault cases. This trend can be thought of as “subconscious sexual discrimination.”

Toyoji Saito (Professor, Osaka University of Economics)

The argument for the “protection of virtue” (sexual order in society) was once very strong in the overall discourse concerning the protection of legal interests (values protected by law) in rape and indecent assault cases. Lately, however, the protection of sexual freedom and sexual self-determination is the norm. In contrast to the sexual freedom argument, it has been proposed to put more focus on the severity of sexual violence. Indeed, once we take into account the indivisible unity between the mind and the body and begin to think of sexual safety as the protection of sexual human rights, it will then be possible to construct a framework in which sex is protected as a unique legal interest, along with life, body, liberty, property, and other such interests. Our

immediate tasks include neutralizing the gender specificity of victimization as a means of abolishing the dual framework of rape and indecent assault, objectively classifying various types of sexual violence, and adopting laws which protect victims of rape.

Tomoe Yatagawa (Adjunct professor)

Traditional male-centered rape laws sought to protect the chastity of women; hence the degree of resistance on the part of the victim was used as the standard by which to determine the extent of assault or intimidation on the part of the perpetrator. In other words, because the prosecution of sexual violence was based on chastity, female victims were continually made to stand trial. Laws protecting rape victims’ in court, as well as laws expanding the definition of rape, began to emerge throughout the US and Europe in the 1970s, thereby excluding the concept of chastity from the conditions establishing the criminal act of rape. Through this new way of thinking about rape, sexual contact without consent came to be regarded as assault in and of itself. For example, the state of New Jersey defines the absence of consent as “any act of sexual penetration engaged in by the defendant without the freely and affirmatively given permission on the part of the victim sanctioning the sexual act,” and, in order to convict an individual for the crime of rape, a prosecutor must establish the following: 1) that the victim was penetrated without their free and affirmative permission; 2) that a rational person would not have believed that they had the free and affirmative permission of the victim,

given the circumstances and the behavior of the victim; and 3) if evidence is presented demonstrating that the defendant believed that consent had been given, that the defendant's belief was irrational in light of the circumstances surrounding the alleged crime. In Japan, the traditional attitude towards rape continues to prevail as the de facto standard in evaluating sexual assault cases; but if the concept of "assault" as a necessary condition for the prosecution of rape can be adapted to express the same meaning as the "unjustified use of force against another individual," as is case in crimes of criminal assault and indecent assault, then it may be possible to apply a new framework for the crime of rape in which intercourse without consent is considered rape.

Yumiko Suto (Women Against Sexual Violence; Women's Counseling Kyoto)

When speaking with rape victims in my capacity as a counselor, I get a true sense of the strong impact being made by the necessary condition of resistance in rape cases. Police and prosecutors usually have compassion for young victims who lack sexual experience, but in other cases they very frequently hurt victims and make them feel bad by questioning them about things like their previous sexual experience. Many victims do not actually "resist" out of shock or fear. Furthermore, many women I meet through counseling tell me that it is very difficult for them to file a criminal

complaint. This difficulty stems from a variety of possible circumstances, such as having met the aggressor through a matchmaking website, having entered into contractual relationships for pornography or prostitution, or being in a relationship with or married to the aggressor. If the aggressor is not taken to court, though, women will invariably feel as though they were never truly recognized as a victim. Comprehensive laws to prevent all forms of sexual violence must be introduced in Japan.

Conclusions

A majority of the panelists agreed that there is a need to reexamine the legal provision which necessitates a complaint from the victim to prosecute the perpetrator. As Ms. Tsunoda pointed out, this provision is "designed to protect the privacy of the victim, but it actually puts up an extra hurdle which victims must overcome in their pursuit of legal action. Even if an individual has a written complaint in-hand, it is very likely that the police will not even take it. There is a clear need for a far-reaching victim assistance program." Mr. Saito explained that there was an overhaul of procedural laws in the US, and that this overhaul cleared the path for the adoption of laws to protect the victims of rape. As a result, he pointed out, an immediate increase was seen in the number of lawsuits filed by victims.

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