

Chapter 5

Legal Responses to Sexual Violence in Japan: First Steps in a Lengthy Process of Rehabilitation

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Abstract

The Japanese legal system has several significant, deep-rooted and widely recognised flaws, one of which has been a history of weak support for the needs of victims of sexual violence. This structure of prosecutorial apathy has meant that female victims, and wider society, have been insufficiently protected from all but the most extreme cases of abuse and assault. However, a growing political interest in gender equality and the nascent development of a Japanese #MeToo movement has brought more pressure for reforms, with 2017 seeing the first significant change of Japan's sex crime laws in 110 years. Despite this, many serious flaws remain to be addressed, including: concerns over the statute of limitations for sexual crimes, the manner in which vague legal definitions can prevent the law from being effectively applied, the lack of support for victims, and the often arbitrary standards for prosecution and the settlement system that allows the wealthy to avoid more than cursory punishment. This chapter examines the efforts to introduce reforms and the extent to which such changes are likely to have a positive impact on the well-being, safety and legal rights of Japanese women.

Keywords: Japan; Sexual violence; gender violence; rape; women's rights; sexual assault

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Japan is, rightfully, recognised as one of the safest countries in the world, and its level of violent crime consistently ranks among the very lowest.¹ However, no country has yet established a perfect system of justice and, like all others, Japan has its weaknesses and areas where reforms are badly needed. One of these is the manner in which women are protected and served by the law. Unlike the generally proactive and effective nature of its approach to crime, in this area, Japan has failed to achieve the kind of gender equality that many other developed countries have demonstrated. Outmoded gender attitudes are reflected in archaic laws which, despite some recent revisions, remain unsuitable for addressing the requirements of women in respect to protection from violent crime, especially that of a sexual nature. Fortunately, public attitudes are changing and there is a growing wave of support for further change that could bring Japan more in line with its international peers and safeguard the rights and welfare of its female citizens. Perhaps the most important issue, though, is whether such changes will be purely superficial, aimed at changing laws alone as a symbolic gesture towards gender parity, or whether they will focus on some of the deeper, structural elements of the Japanese legal system which have been instrumental in preventing a more equitable application of justice in many cases of sexual violence.

Current Situation

Given Japan's low level of crime, many are often surprised by how strict its legal system is, with relatively severe punishments being common for offences that in other countries might be considered minor. In fact, Japan has been frequently criticised for failing to protect the rights of criminal suspects by subjecting them to harsh interrogations, spartan jail conditions and extended periods of detention without bail, based on flimsy evidence (HRW, 2019).

However, in some areas, its protection of victims also leaves a lot to be desired. In terms of gender equality, Japan ranks 110th out of 149 countries (WEF, 2018), and signs of this disparity can be seen in many elements of an otherwise admirable social system. One of these is the response toward sexual crimes against women. Considering the low level of other violent crimes, it is significant that 7.8% of Japanese women report that they have experienced forced sexual intercourse at some point (GoJ, 2017, p. 68). It is also notable that while roughly 20% of crimes in Japan are committed by minors, when it comes to the offences of rape and sexual assault they are the primary victims in 41.6% and 52.5% of cases, respectively (Ogasawara, 2011, p. 164).

It has been widely recognised for some time that such crimes, and the disproportionate targeting of minors, has been a shameful smear on Japan's national image and various campaigns – from women-only train cars to apps designed to protect young girls from molesters – have been part of the pushback against the problem. In recent years there have been more significant

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improvements, including the introduction of prefectural sexual assault hotlines, increased training of female investigators with a focus on victim awareness and greater collaboration with private support groups that offer specialised training and victim counselling. However, the demand for wider reform has been building, and many hoped that the worldwide #MeToo movement would play a part in helping Japan initiate such change. Initially, however, the movement was primarily localised around professional support networks that highlighted the problems faced in individual, high-profile cases, and many women still faced a backlash that included victim-blaming and social and professional ostracisation for those who challenged the system. The impact of the popular movement was not as visibly impactful as in neighbouring South Korea. Where it led directly to a significant policy change regarding gender-based violence (Hasunuma & Shin, 2019).

Despite the less forceful nature of the Japanese movement, since its beginning a series of court cases that resulted in the dismissal of charges for sexual crimes have reignited public anger over what is perceived as a failure to protect vulnerable women and generated a series of ‘flower demos’, public protests organised by a network of women’s rights groups. Their goal has been to highlight specific outstanding weaknesses in the legal system and put increased pressure on the government to respond with concrete policies that would address these long-standing failures (Osaki, 2020).

If anything, the COVID pandemic exacerbated the problems faced by women and created a higher impetus for change to occur sooner rather than later. From the beginning of the pandemic in late 2019, there were reports that levels of domestic violence were significantly higher than the previous year (Ando, 2020), while in late 2020 Seiko Hashimoto, the Minister for Gender Equality, announced that the number of consultations at support centres for sexual violence had increased 15.5% year on year (Tokyo Shinbun, 2021).

Recent Legal Changes

In 2017, Japan made the first major changes to its penal code on sex crimes in more than 110 years. These revisions increased the penalty for many crimes, altered the definition of ‘rape’ to move beyond vaginal penetration by a penis and allowed crimes such as rape and sexual assault to be prosecuted even where victims do not file charges (Osaki, 2017).

While these changes were both needed and welcome, they perhaps served a greater value in showing that after more than a century of intransigent resistance to the demands of modernity, meaningful change in the legal system was actually possible. They did not, however, go nearly far enough in addressing the myriad problems that still remain. The fact that these problems are so wide-ranging means that efforts to address them will likely involve a long campaign of incremental battles, rather than something that can be achieved in a single set of sweeping revisions. These include things like coercive exploitation in the pornography industry, where abolitionists and industry groups fight a back and

forth struggle over the balance between commercial freedom and the protection of human rights (Norma & Morita, 2020). It also involved the Joshi-Kousei elements of the sex trade, which commodify the sexualisation of schoolgirls (Ogaki, 2018). This is an industry with strong ties to the ongoing problem of domestic human trafficking in Japan where, despite the introduction of regional laws aimed at curtailing their exploitation, significant numbers of minors are inducted into the sex industry each year (Acadimia, 2018). However, these issues – tied as they are to the culturally embedded, and highly profitable, sex industry – will likely see a slower rate of change and the requirement of a general public shift in attitudes toward commercialised sex. In the short term, there exists far more potential to generate significant change in the way the legal system addresses the crimes of sexual violence. When the 2017 reforms were introduced, they included a provision that required a review of the sex crimes laws within three years, and many activist groups see this as an opportunity to focus on some key areas which the 2017 revisions failed to address (Sieg, 2019).

Outstanding Issues

Following the 2017 revisions, the key driver of public desire for further reforms was a series of highly publicised court cases in 2019 in which several, apparently clear-cut, cases of abuse and assault were dismissed due to the outstanding weaknesses in the legal system. In one of these cases, a man on trial for repeatedly raping his teenage daughter was acquitted on the grounds that she had not exhibited sufficient physical resistance to the attacks (Eiraku & Aizawa, 2019). While this might, on the face of it, seem like a lapse in judicial oversight, in this case the judge was merely following the written laws. Japan has long held the view that rape is inherently an act of violence and thus to show an incidence of rape there should be evidence that force or threats were used (Egawa, 2019). However, as has become abundantly clear as our understanding of such crimes has evolved, rape can be carried out in certain cases without non-sexual violence or the threat thereof – for example, where a victim is rendered drunk or insensible, is too terrified to resist physically or is in a relationship with the perpetrator where non-physical coercive control can be exerted, such as a family member, or teacher. Japan's failure to recognise such nuances led directly to the above instances of acquittal, but they also helped to focus a growing sense of public dissatisfaction with the outdated legal strictures. The problems that exist are, however, quite varied in nature and in scope, with some primarily requiring changes to the poorly worded or overly lenient laws. Others require broader change in how the laws themselves are applied, for example, the manner in which the prosecution system treats victims generally, and the role played in the prosecution process by Japan's 'settlement' system.

One area where revision of laws alone might suffice is the statute of limitations which applies to sex crimes. In 2010, the statute of limitations for murder and other capital crimes, which was previously 25 years, was abolished. Yet, the 10-year limit for rape charges, and the 7-year limit for sexual assault, remains fixed.

A 2019 case brought attention to their limitations when a suspect in a rape case was identified by DNA tests for a separate crime, just four days after the statute of limitations had expired. Luckily, in Japan the statute is suspended during any time the suspect is outside Japan, and in that case the suspect's international travel during the intervening years created a two-month extension that allowed charges to be made. Nonetheless, it ably highlighted the weakness of the current limits and the need, if not for abolition, then for a significantly extended period of potential arrest and prosecution (Sankei, 2019b).

A similar problem of insufficient legal regulation exists in the definition of, or failure to define, certain crimes. For example, voyeurism, the illicit observance, photography or recording of women without their knowledge, is a common problem in Japan, yet there is no actual crime that fits this action. As a result, offenders are instead charged under a variety of minor crime laws such as Trespassing, Nuisance Prevention or, in the case of minors being involved, the more serious Child Pornography Law (Maeda, 2016).

The vagaries of lax definition were further highlighted in a case where a man was arrested for 'splashing bodily fluid' onto the arm of a schoolgirl. Again, there was difficulty knowing what to charge him with. Indecent assault required the use of violence or threats and so was deemed inadmissible. The Nuisance Prevention Law could have been used but this would have limited the maximum punishment to one year of jail. Instead, the charge was deemed to be Common Assault, with a potential two-year sentence. If the act had been deemed to have damaged the girl's clothing, however, the law for Criminal Damage to Property could have been applied with a possible three-year prison sentence (Maeda, 2020).

The fact that it can be so unclear on what grounds sexual offenders should be charged, as well as the fact that damage to property is deemed more serious than both assault and sexual molestation, are clear signs that some fundamental changes in the wording of laws and their sentencing guidelines are still required.

Standards of Prosecution

Moving away from the definition of the crimes themselves, there exist several deeper problems with the manner in which the laws are applied, one of the most serious of which is the nature of prosecution in Japan. For a long time, Japan was regarded as a 'prosecutor's paradise' where the Office of Public Prosecutor enjoyed considerable leeway in deciding which cases to pursue and how to handle their enforcement. Since the 1990s there has been a general increase in transparency and victim's rights, yet, the influence of the prosecutor on criminal cases is still very powerful (Johnson, 2012, p. 37). One way that this comes into play with cases of sexual violence is that many such cases resolve with a decision to forgo prosecution. The most problematic aspect is that in such instances there is almost no transparency, there is no public record of the reasons for non-prosecution and even victims have only very limited opportunity, in cases involving death or injury, to access these records (Kamon, 2019, p. 53).

This is an especially critical issue as the prosecutors' office represents the last in a long line of hurdles that must be cleared for a sex crime to be brought to open court. The first barrier is the victim actually reporting the incident; the second is the police making an official crime report; the third is apprehending the suspect and the last, the prosecutors deciding to formally indict them on the criminal charges. The lack of transparency means that not only is it true that very few sex crimes are ever brought to court, we generally never learn why this failed to occur in the other instances, a situation that does a disservice to both victims' need for closure and the general public's need for understanding of the system's efficacy and its impact on public safety (Maita, 2020).

Considering the size of the Japanese population and the aforementioned government surveys that suggest one in 13 women are victims of rape or sexual assault, one can estimate that there are at least 66,000 incidents per year.² Yet, government records account for slightly less than 6,000 officially recognised cases (GoJ, 2019, p. 2), suggesting that, at a minimum, less than 10% of incidents are reported. Then, only a third of these are actually prosecuted, which would mean that, at most, only 3% of serious sexual crimes in Japan are prosecuted. The level of prosecutions has also been steadily declining, from 43.4% in 2014 to 34.2% in 2019 (GoJ, 2019, p. 5).

While we do not know the specific reasons for non-prosecution in individual cases, the government does release statistics that give a breakdown of reasons for choosing not to indict suspects where the grounds are 'insufficient evidence'. Between 2018 and 2019 there were 380 such cases related to sexual offences. The statistics reveal that, by far, the most common reasons for claiming insufficient evidence are the possibility that sex may have been consensual (47% of cases) or that the perpetrator may have believed it to be consensual (40% of cases), and that there was doubt regarding the truthfulness of the victim's statement in 89% of the former and 61% of the latter cases (GoJ, 2021, p. 3). This raises the question of whether such subjective judgements should be made at such a preliminary stage of the legal process, but it also shows, perhaps more importantly, that the majority of cases where non-indictment occurs are for other reasons than a lack of evidence and, while there has been little hard data generated on the numbers involved, the primary reasons appear to be victim hesitancy and the use of settlements.

Treatment of Victims

In any circumstances, there are numerous reasons why undergoing the lengthy and draining process of a criminal prosecution can be an undesirable ordeal on the part of a victim of sexual crimes: discomfort regarding the level of public disclosure, a sense of shame, fear of revenge on the part of the perpetrator or the effects of post-traumatic stress, among others. In Japan, these factors can be exacerbated by normative expectations to conform to certain social morals and

²In comparison, RAINN estimates 433,648 rapes and sexual assaults in the United States each year. <https://www.rainn.org/statistics/victims-sexual-violence>.

the fear that any involvement in such criminal proceedings, even as the victim, might tarnish one's reputation (Kamiya, 2019).

Victims also have to face interactions with police and prosecutors that can range from indifferent, to cold or even hostile. In one case a young woman was taken advantage of while in a severe state of intoxication and immediately went to the police to report a crime. However, prosecutors refused to indict the suspect because, during the man's recording of the act, the girl had said 'stop filming me' instead of 'stop raping me'. The possibility that the girl may have been resolved to her inability to stop the assault but still concerned about it being made a public spectacle was dismissed in favour of the common view that lack of direct, physical resistance negated possible conviction for rape (Ito, 2019).

There is also a seemingly widespread reluctance among police to pursue sexual assault aggressively, and stories of casual indifference to such crimes are commonplace (Maeda, 2019). The author has personally spoken with several lawyers representing victims of such crimes who reported that the police actively pressured their clients to forgo making a formal criminal report.³ A common barrier that any victim will have to cross at an early stage is being asked 'what did you do to resist', with the implicit message that if they did not do enough, then the inability of police or prosecutors to proceed is down to the victim's failure to act. This is only the beginning of a process that, for the victim, can be long, highly stressful and demeaning.

Given the history of poor treatment of victims, it is perhaps unsurprising that a 2020 survey of victims of sexual violence in Japan found that only 15% actually contact the police at all. Less than half of these, just 7%, were actually accepted as criminal reports, and a mere 10th of these, 0.7% of all cases, ended with convictions (Mainichi, 2020).

These outdated, and seemingly uncaring, attitudes towards victims extend beyond the justice system. Many victims are denied access to abortions by hospitals due to health regulations that require the consent of the father for the procedure to occur. No consideration is allowed for victims of rape, and in the absence of explicit guidelines on the matter, the common response is to simply refuse them the option (Oshiro, 2020).

The introduction of a lay-judge system to Japanese courts in 2009 allowed members of the public to serve as judges alongside several professionals (typically, six of the former and three of the latter). This system led to a general increase in the number of suspended sentences and greater leniency towards suspects, except in cases of sexual violence, where the average sentence increased (Johnson, 2012, p. 37). Professional judges openly welcomed these changes in a manner that suggested they were previously restricted from imposing what they felt were just sentences due to outdated procedural guidelines (Hirayama, 2012, p. 7). This certainly represents a positive development for victims. However, one weakness of

³In some cases, the same lawyers told me that criminal reports they submitted to the police on behalf of clients were returned to them without being filed, something that goes directly against the letter of the law.

the lay-judge system, in regard to the handling of cases of sexual violence, is that victims are often reluctant to take part in a court system in which key members of the court may not be public officials but figures from their own community. Matters of victim protection and anonymity still need to be addressed but steps have already begun such as the ability of victims to exclude candidate judges who may be known to them, and for pseudonyms to be used by victims (Hirayama, 2012, p. 12).

While some of the above may suggest that the Japanese system has a callous attitude toward victims, this is generally not the case. Rather, the current laws are written, and the system structured, in a way that fails to accommodate their needs or take account of their vulnerabilities. Often the reluctance of police or prosecutors to accept or proceed with cases is based entirely upon their knowledge of the likelihood of the case failing to reach a satisfactory conclusion for the victim. The primary problem on their part is that they take a purely responsive role, seeing it as their duty merely to enforce what is stipulated in law, rather than actively pressing for change from within. Thankfully, external forces have begun to consolidate efforts to promote victim rights, and principles of restorative justice and pressure for better patterns of response is building through a network of human rights groups and victim support groups (Ito & Ishii, 2020).

The Settlement Industry

One factor which some consider a significant impediment to the process of justice, especially in cases of sexual violence, is the Japanese system of settlements known as *jidan* (示談). The Japanese cultural preference for avoiding conflict favours, wherever possible, out-of-court agreements that will negate the need for a trial. As a result of this, in many cases, apologies and settlement payments are sufficient to bring matters to a resolution. There is a widespread public perception that this process means that to be wealthy means you will be able to skirt the law simply by paying the appropriate settlement. Some net commentators have referred to its application in sexual assault cases as ‘erasing rape with money’,⁴ and a 2019 case involving a student at a prestigious university, who was arrested on five separate occasions for crimes of sexual assault yet failed to be indicted every time, led many to question whether his continued freedom was entirely due to his family’s extensive wealth (Sankei, 2019a).

Of course, we have already seen that other reasons do exist for such failure to prosecute, whether reluctance of the victims to undergo the difficulty of the trial process or a lack of reliable evidence. However, we know these factors play a role only in a minority of cases. Meanwhile, week after week news stories announce the non-prosecution of suspects for unspecified reasons, raising constant questions

⁴For an example, see the following article on the Mag2News news blogging site, Mr. Keio, as expected ‘erasing rape with money.’ Why is Japan so soft on sex crimes? (ミスター慶応、予想通り「金でレイプもみ消し」完了。なぜ日本は性犯罪に甘いのか)。 <https://www.mag2.com/p/news/478270>.

of whether the suspects involved escaped more significant punishment through the use of a simple disbursement of cash. In the space of fewer than two weeks surrounding the writing of this piece, stories reported a man avoiding indictment over the suspected rape of a female acquaintance (Kumanichi, 2021), a former director of a talent agency avoiding indictment over the suspected rape of an aspiring model (Yahoo News, 2021a) and a former town councillor avoiding indictment over suspicion of exposing himself to a woman in a coffee shop (Yahoo News, 2021b). There may well have been others during the same period as such stories are a constant element of the news cycle and rarely merit more than a brief paragraph, despite the serious nature of the crimes they may refer to only in passing.

Law offices in Japan can make significant profits from the part they play in this cycle of payment and absolution and are eager to highlight their proficiency in achieving settlement of such matters. There is, in fact, a ‘Settlement Market’, wherein lawyers generally know how much they will have to pay to get someone to drop the charges in specific cases, e.g. a case of molestation above clothes will require X amount of Yen, while if the offender moves below clothing the cost will be a little higher, etc. (Tabata, 2020).

In this manner, skilled lawyers will be able to estimate how much a ‘get out of jail free’ card is likely to cost their prospective clients. One public defender’s office claims an 81% settlement rate for indecent assault cases, with an average settlement amount of ¥1,554,683 (roughly \$14,000) (Atom, 2020). Often, not only the lawyers, but the system as a whole acts to put pressure on victims to accept such settlements.

One improvement of the 2017 revisions was the introduction of a ‘non-confidential offence’ categorisation that allowed prosecutors to indict crimes of sexual violence even without the victims’ participation. In practice though, the support of the victim is generally crucial for the successful prosecution of such crimes, and it seems highly unlikely that we will see a significant increase in cases where suspects are convicted after a victim has agreed to a settlement (Maeda, 2017).

This settlement system is a difficult problem to address, though. On the one hand, it seems important that offenders should not be able to escape punishment simply by the payment of monetary amounts that might, to them, be relatively small. On the other hand, where the process of a criminal trial is too onerous for victims to endure, the settlement system does allow them some recourse for achieving a form of closure and limited justice. Perhaps one flaw in the current system is the notion that there is a ‘standard’ settlement price for specific offences. Rather than gauging such payments by the crime involved, it might be more equitable to have them mandated as either a set amount related to the crime or as a portion of the offender’s assets, whichever is higher. The latter, if set sufficiently high, might be one way to eliminate the possibility of wealthy individuals flaunting the system.

Movements Toward Reform

While Japan's legal system does have a long and very poor history in regard to its treatment of women in general and victims of sexual violence in particular, the 2017 revisions to the penal code are a strong sign that pressure for change has generated a response that is more than mere superficial, face-saving. The changes made were meaningful and fell short only in regard to the fact that the problems which exist are too widespread and varied to be fixed in a single burst of proactive zeal. As we saw with the issue of settlements, some of the problems still have no clear, single solution and the potential options need to be properly evaluated to ensure they will produce the greatest benefit.

Among the key issues that remain to be addressed is the revision of the age of consent to suitably reflect the impact of sexual crimes on minors. While all Japanese prefectures have superseding local laws that set higher ages, the national age remains 13, and this affects how several laws categorise crimes against minors. Another issue is that several crimes need to be properly defined, including the overly broad obscenity charge and the absence of a charge for voyeurism, among others. Perhaps one of the largest outstanding revisions is the issue of consent and an end to the prerequisite use of physical violence or threats to qualify a crime as rape or sexual assault. These and other key issues are, thankfully, being kept in the political spotlight by a variety of rights groups and political activists (HRN, 2020). Media coverage is also helping to raise public awareness of the nature of the problem and shine a spotlight on some of the key areas of needed change.

This is one potential danger regarding ongoing reform, namely that, by necessity, only a small portion of the required changes are properly highlighted in the public sphere. The full list of desirable changes is too long, too varied and too complex to easily explain to the general public, or political leaders, in a comprehensive fashion. The government review process that began after the 2017 revisions has now seen the 14th meeting of its fact-finding working group, which has laid out several of the areas it hopes to target in the next wave of revisions. In addition to those mentioned above, the group has shown an interest in examining the use of hormone therapy, medication and GPS tracking in dealing with repeat offenders. They have also worked with experts from Finland and Sweden to assess how those countries' approaches to sex crimes might be adapted for Japan (GoJ, 2020). In particular, it has focused on the 'Yes means Yes' form of explicit, consent-based sex that is endorsed in those countries, something that is very distinct from the 'No means No' form, requiring clear, demonstrable rejection to nullify consent, which underlies some of Japan's problematic laws (Mochizuki, 2020).

It remains to be seen what final set of recommendations this working group will deliver and whether they will, in fact, be accepted into law. Some scholars have expressed concerns, however, that attempts to impose standards that work in other cultures might not have, for all their good intentions, the same success in Japan (Kamon, 2019, p. 71). Once again, changing the laws is relatively easy, but if the structures and culture surrounding those laws have deeper flaws, then it may

be that greater and more long-term change is required, and it is important to focus on such change as a continuing process with deeper structural goals.

Conclusion

Japanese activism in the area of sexual violence has developed new strength in recent years, but the changes in awareness and legislation that have occurred do not represent a highpoint. Instead, it is merely the beginning of a long-overdue reassessment of a flawed system. While it has the power to initiate meaningful change – especially in specific issues such as the nature of consent and a better understanding of the plight of victims – it must not be a simple adjustment to the wording and impact of individual laws. The treatment of victims of sexual violence, by police, prosecutors, the courts and other institutions such as hospitals, needs to be comprehensively reviewed and revised. The fundamental nature of the system needs to shift in a manner that recognises and accounts for the underlying vulnerability of victims and the difficulty they have in negotiating the legal process without specially tailored support.

From the other end of the process, that of ensuring offenders are properly punished, the system of settlements and the manner in which it can exploit victims' reluctance to engage in stressful legal proceedings, needs to be examined. The extensive and profitable system of legal services that can reliably promise the avoidance of trials in the majority of sexual assault cases must have sufficient oversight to ensure it does not offer loopholes that can be used by wealthy offenders to escape meaningful justice.

Such assessment and revision is an ongoing process and one which requires careful consideration of the complexities involved, not simply to protect victims but to do so in a manner that ensures potentially innocent suspects continue to receive suitable legal protection. It is not a battle that can be won in a single day, and while further revisions of individual laws, such as those that occurred in 2017, are both welcome and necessary, the overall process must involve a level of deeper structural and societal analysis with the goal of constant improvement.

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