

Legal Reforms After a Century of Immobility

The 2017 Revision of Sex Crimes in the Penal Code of Japan

Charlotte BEKKERS*

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I. INTRODUCTION

This article will analyse the responsiveness of the Japanese criminal justice system in the face of sustained international and domestic criticism concerning its policy on sex crimes and its overly lenient treatment of perpetrators of sexual offences.¹ On the international level, human rights bodies such as the UN Committee on the Elimination of All Forms of Discrimina-

* Postgraduate International Research Student, University of Tōkyō.
This article was written under the supervision of Prof. Dr. Dimitri VANOVERBEKE, Professor of Sociology of Law, Faculty of Law, University of Tōkyō. Please direct all correspondence regarding this article to vanoverbeke@j.u-tokyo.ac.jp.
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¹ M. HIRAYAMA, A Future Prospect of Criminal Justice Policy for Sex Crimes in Japan – the Roles of the Lay Judge System There, in: Liu/Miyazawa (eds.), *Crime and Justice in Contemporary Japan* (2018) 303.

tion against Women (2003; 2009; 2016), the UN Committee on the Rights of the Child (2004; 2010), and the UN Human Rights Committee (2008; 2014) have repeatedly reprimanded the Japanese government for failing to fulfil its obligation as a State Party to bring its policies in line with the respective treaties. Domestically, the outdated nature of Japan's sex crime laws has long been the subject of debate among lawyers, rape crisis centres, and academics. Furthermore, a re-examination of the Penal Code regulations for sexual offences had already been requested in the Third Basic Plan for Gender Equality (2010), as well as in the supplementary resolutions of the House of Representatives and the House of Councillors at the time of the 2004 and 2010 Penal Code revisions.

Finally, a substantive legal response to this long-standing criticism came in June 2017, when both houses of Japan's parliament approved a bill aimed at revising the country's century-old sex crime laws.² This article will analyse to what extent the 2017 Penal Code revision on sex crimes effectively addressed the persistent claims for reforms made by, *inter alia*, international human rights bodies, academics, lawyers, and victims. Which points of criticism were addressed in the 2017 Penal Code reform on sex crimes? And why is it that others were left unresolved? Before we can answer these questions, however, attention must be paid to the socio-political process preceding the 2017 Penal Code reform and to the major concerns articulated by various actors on the deficiencies of the legal framework regarding sex crimes in Japan.

II. SOCIO-POLITICAL BACKGROUND: GLOBAL ISSUE TURNED DOMESTIC

Before turning to the 2017 Penal Code reform regarding sex crimes, we will take a step back and briefly examine how sexual violence came to be recognized as a topic serious enough to merit political attention, both on the international level and domestically in Japan. Initially, sexual violence was not included on the international policy agenda even when discrimination against women started to attract global attention in the 1970s. Furthermore, it was understood very narrowly as an issue of violence against women. A

2 The Penal Code now in force in Japan was enacted in 1907 and came into force the following year. Except for a few minor changes, the Penal Code provisions on sex crimes remained virtually unchanged for a period of 110 years. One such exception was the abolishment of former Article 183 on adultery, under which penal provisions were limited to women only. Because equality of the sexes before the law became guaranteed with the enforcement of the post-war Constitution in 1947, the provision was removed from the Penal Code. Another amendment took place in 1958, when the necessity of a victim complaint to enable prosecution was removed in cases of rape with more than one assailant.

more comprehensive approach to the issue of sexual violence took hold by the end of the 20th century. In Japan, domestic recognition of the salience of the issue of sexual violence coalesced with increasing international pressure to promote gender equality in the 1990s. As will be discussed in detail below, the 1995 Beijing Declaration and Platform for Action spurred the realization of a domestic institutional framework to address issues of gender equality, including eliminating violence against women. However, the Japanese government stopped short of introducing reforms to strengthen its legal framework on sex crimes. This invited criticism not only from domestic actors but also increasingly from international human rights bodies, as we will see below.

1. *The Problem without a Name: the Global Recognition and Problematicization of Sexual Violence in the 1980s and 1990s*

Over the last half-century, many nation-states across the world have amended their penal code provisions regarding sex crimes.³ The beginning of this global trend can be traced back to the recognition and problematicization of sexual violence by second-wave feminists in Europe and the US in the second half of the 1970s.⁴ Efforts by feminist-led grassroots organizations in these countries led to substantive changes in domestic rape laws and to the criminalization of previously prevalent yet unnamed phenomena such as domestic violence or sexual harassment.⁵

The formal inclusion of combatting violence against women on the global policy agenda took a while longer. Although the United Nations had adopted the Convention on the Elimination of All Forms of Discrimination against Women during its General Assembly in 1979, there was no legislation that directly referred to it, as the concept of violence against women had yet to mature.⁶ A first step in the direction came about a decade later, when in 1988 the Committee on the Elimination of Discrimination against Women (CEDAW) suggested in its General Recommendation no. 12 that State Parties' future periodical reports should include information on the

3 D. J. FRANK/B. J. CAMP/S. A. BOUTCHER, Worldwide Trends in the Criminal Regulation of Sex, 1945 to 2005, *American Sociological Review* 75(6) (2010) 867, 867–868.

4 M. MITSUNARI [三成美保]/T. SASANUMA [笹沼朋子]/N. TATEISHI [立石直子]/T. YATAGAWA [谷田川知恵], ジェンダー法学入門 (第3版) [Introduction to Legal Gender Studies] (3rd ed., 2019) 112.

5 T. YATAGAWA [谷田川知恵], 女性に対する暴力とドメスティック・バイオレンス [Violence against Women and Domestic Violence], in: Tsujimura [辻村]/Nukatsuka [糠塚]/Yatagawa [谷田川] (eds.), 概説 ジェンダーと人権 [Gender and Human Rights] (2021) 201, 202.

6 YATAGAWA, *supra* note 5, 202.

domestic legislation in force to protect victims of sexual violence, information on preventive measures in place, and statistical data about the incidence of all kinds of violence against women.⁷ Further confirmation came in the form of General Recommendation no. 19 issued in 1992, which clarifies that the Convention extends to violence against women and makes detailed recommendations for State Parties.⁸ The first international instrument explicitly addressing violence against women and offering a framework for (inter)national action was the Declaration on the Elimination of Violence Against Women, which was adopted by the United Nations General Assembly in December 1993.⁹ Successive initiatives such as the 1994 International Conference on Population and Development and the 1995 Beijing Declaration and Platform for Action firmly established the eradication of gender-based violence on the domestic and international political agenda by expanding the policy area and identifying specific actions for governments to undertake.¹⁰

In what has been called a “stealth pandemic” by Richards and Haglund,¹¹ the issue of sexual violence was for an extremely long time overlooked by national legal systems and public policy frameworks.¹² Spurred on by second-wave feminists who decried the inaptness of their domestic justice systems and strove for legal reforms, this definitively changed when the issue gained global recognition in the 1980s and 1990s.¹³ By the end of the 20th century, many governments across the world had introduced substantive and procedural legal reforms to change how their justice system responds to and prevents sexual violence.¹⁴ While these reforms vary considerably across countries, what they have in common is a rupture from “traditional” rape laws in favour of a more nuanced and gender-neutral approach to sexual violence, one which is characterized by increasing punitiveness for sex offenders, an emphasis on victims’ rights,¹⁵ a comprehensive understanding of violence as being both physical and psychological, and the

7 UN WOMEN, General Recommendations made by the Committee on the Elimination of Discrimination against Women, available at <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

8 UN WOMEN, *supra* note 7.

9 UN WOMEN, Global norms and standards: ending violence against women, available at <https://www.unwomen.org/en/what-we-do/ending-violence-against-women/global-norms-and-standards>.

10 UN WOMEN, *supra* note 9.

11 D. L. RICHARDS/J. HAGLUND, *Violence Against Women and the Law* (2015) x.

12 UN WOMEN, *supra* note 9.

13 YATAGAWA, *supra* note 5, 203.

14 MITSUNARI/SASANUMA/ TATEISHI/YATAGAWA, *supra* note 4, 100.

general understanding that sexual violence is an infringement of the rights to sexual freedom and sexual self-determination.¹⁶

2. *A Century of Near-Immobility: Incremental Change in Japan*

a) *Domestic recognition coincides with international pressure (1980–2000)*

As early as 2004, Jennifer CHAN-TIBERGHIE made the astute observation that while the 1990s are often branded as a “Lost Decade” for Japan due to economic malaise, it was at the same time a crucial decade for the promotion of the human rights of women and children.¹⁷ As CHAN-TIBERGHIE writes, previously marginalized issues of sexuality as diverse as sexual harassment, military sexual slavery, child prostitution, domestic violence, and restrictions in the access to contraception were redefined as human rights violations and became subject to policy consideration.¹⁸

Starting slowly in the first half of the 1980s, an increasing awareness of the issue of sexual violence developed in the 1990s across multiple areas in Japanese society. On the domestic level, the establishment of the first rape crisis centres¹⁹ and the emergence of the first defence lawyers for victims of sexual violence²⁰ were indicative of a growing consciousness of the issue. A pioneer in Asia, in 1983 the Tōkyō Rape Crisis Centre was established as the first non-governmental organization in Japan to provide telephone counselling and support for (female) victims of sexual violence.²¹ Through her work as a legal adviser to the Centre since 1986, lawyer Yukiko TSUNODA experienced first-hand the deficiencies of the criminal justice system in reflecting and responding to the reality faced by victims of sexual violence. Already in 1991, TSUNODA identified in her book “性の法律学” (*Sei no hōritsu-gaku* The Juris-

15 T. YATAGAWA [谷田川知恵], 性暴力 [Sexual Violence], in Tsujimura [辻村]/Nukatsuka [糠塚]/Yatagawa [谷田川] (eds.), 概説 ジェンダーと人権 [Gender and Human Rights] (2021) 223, 245.

16 Y. IWAI [岩井宣子], 序—性犯罪規定の見直しにむけて— [Introduction – Towards a Revision of the Sex Crime Provisions], in: Women’s Research Society on Crime [女性犯罪研究会], 性犯罪・被害—性犯罪規定の見直しに向けて [Sex Crimes and Victims of Sexual Violence – Towards a Revision of the Sex Crime Provisions] (2014) 4.

17 J. CHAN-TIBERGHIE, Gender and Human Rights Politics in Japan. Global Norms and Domestic Networks (2004) 2.

18 CHAN-TIBERGHIE, *supra* note 17, 5.

19 C. BURNS, Sexual Violence and the Law in Japan (2005) 178 note 1.

20 Prominent examples include Yukiko TSUNODA [角田由紀子], Kazue DANBAYASHI [段林和江], and Yōko HAYASHI [林陽子].

21 東京・強姦救援センター [Tōkyō Rape Crisis Centre], blog available at <https://ameblo.jp/tokyo-rcc/>.

prudence of Sex) many of the flaws that later would become the source of criticism by international human rights bodies. She pointed out how an element of rape established in a judicial precedent of 1949²² often proved an insurmountable obstacle for victims who sought to have their case brought to court; according to the ruling the victim must either have been assaulted to a degree that made resistance extremely difficult or subjected to a degree of intimidation that made resistance extremely difficult.²³ She furthermore denounced the Japanese criminal justice system for failing to criminally prosecute cases of marital rape, incest, or sexual violence by schoolteachers.²⁴

Increasing recognition on the domestic level coalesced with growing international pressure to respond to the issue of violence against women. Organized two years after the Declaration on Ending Violence against Women was adopted by the United Nations General Assembly, the Fourth World Conference On Women held in Beijing in 1995 reasserted the eradication of violence against women as a priority and is said to have greatly influenced the Japanese official delegation's commitment to improving cooperation with local NGOs.²⁵ Furthermore, as a State Party to the Convention on the Elimination of All Forms of Discrimination Against Women since ratifying it in 1985, the Japanese government was obliged to submit a report at least every four years regarding its progress in implementing the provisions of the Convention. At the same time, the Japanese government may also have been intrinsically motivated to demonstrate a proactive attitude, as it was trying to increase its presence in the United Nations, and by extension, in the international arena.²⁶

Both the preparation leading up to and the developments during and after the 1995 Fourth World Conference on Women greatly influenced Japanese domestic policy. The upcoming conference provided the necessary impetus to set up the Headquarters for the Promotion of Gender Equality within the Cabinet as well as the Office for Gender Equality and Council for Gender Equality in the Prime Minister's Office, both of which were established in 1994.²⁷ Upon request from Prime Minister MURAYAMA in August 1994, the Council for Gender Equality put forward their "Vision of Gender Equality: Creating New Values for the 21st Century" in July 1996,²⁸ which recom-

22 Supreme Court, 10 May 1949, 刑集 Keishū 3, 711.

23 Y. TSUNODA [角田由紀子], 性の法律学 [The Jurisprudence of Sex] (1991) 40–41.

24 TSUNODA, *supra* note 23, 35, 42, 220–223.

25 BURNS, *supra* note 19, 156.

26 BURNS, *supra* note 19, 156.

27 男女共同参画局 [Gender Equality Bureau Cabinet Office], 執務提要 [Performance of Official Duties: An Outline], available at https://www.gender.go.jp/about_danjo/law/kihon/situmu2-1.html.

28 Gender Equality Bureau Cabinet Office, *supra* note 27.

mended among other measures an examination of the existing laws and penal regulations regarding sex crimes and adoption of additional legal measures if and when needed.²⁹ Taking the Council's publication as a stepping stone, in December 1996 the Headquarters for the Promotion of Gender Equality formulated the "National Plan of Action for the Promotion of a Gender-Equal Society by the year 2000", which included a dedicated section on the elimination of violence against women. Strict enforcement and appropriate punishment for sex crimes, the enhancement of recuperative measures for victims of sexual violence, and the introduction of preventive measures against domestic violence were identified as concrete action points.³⁰ These increasing efforts to promote gender equality, which included the elimination of violence against women, culminated in the adoption of the Basic Act for a Gender-Equal Society.³¹ The law went into effect in 1999 and laid out the basic principles and clarified the responsibilities of the State, local governments, and citizens in regard to the formation of a gender-equal society.³² The promulgation and enactment of this law was a milestone as it provided the basis for the national government to formulate five-year plans with concrete goals and long-term policy directions. As one of the eleven objectives identified, the First Basic Plan for Gender Equality of December 2000 consolidated the elimination of all forms of violence against women as an integral part of the domestic policy agenda.³³

b) Incremental change in the face of increasing domestic and international criticism (2000–2014)

The first decade of the 21st century was characterized by growing public scrutiny in light of widely publicized sex crime cases and a rapid succession of criticism by various international human rights bodies. It also

29 男女共同参画ビジョン — 21世紀の新たな価値の創造 [Vision of Gender Equality: Creating New Values for the 21st Century], available at <https://www.ipss.go.jp/publication/j/shiryoku/no.13/data/shiryoku/syakaifukushi/588.pdf>.

30 男女行動参画 2000 年プラン — 男女共同参画社会の形成の促進に関する平成 12 年 (西暦 2000 年) 度までの国内行動計画 — [National Plan of Action for the Promotion of a Gender-Equal Society by the Year 2000], available at <https://www.ipss.go.jp/publication/j/shiryoku/no.13/data/shiryoku/syakaifukushi/610.pdf>.

31 男女共同参画社会基本法 *Danjo kyōdō sankaku shakai kihon-hō* [Basic Act for a Gender Equal Society], Law No. 78/1999.

32 男女共同参画局 [Gender Equality Bureau Cabinet Office], 男女共同参画社会基本法 [Basic Act for a Gender Equal Society], available at https://www.gender.go.jp/about_danjo/law/kihon/9906kihonhou.html.

33 男女共同参画局 [Gender Equality Bureau Cabinet Office], 男女共同参画基本法計画の変更について [About the Changes to the First Basic Plan for Gender Equality], available at https://www.gender.go.jp/about_danjo/basic_plans/1st/index.html.

showed indications of a certain degree of responsiveness on the side of the Japanese criminal justice system, as will be illustrated below.

Around the turn of the century, heightened public interest and increasing pressure from the victims' rights movement led the Japanese government to clarify and affirm victims' rights through a reform of the Code of Criminal Procedure in May 2000.³⁴ In an effort to lessen the emotional impact of testifying, victims of sexual violence were henceforth allowed to testify as a witness while being shielded from the defendant by a partition wall or through the use of video conferencing.³⁵ Furthermore, the statute of limitations for filing a formal complaint in cases of the crime of rape, previously set at a six-month time limit, was abolished.³⁶ A little less than a year later, the "Law for the Prevention of Spousal Violence and the Protection of Victims" was promulgated on 13 April 2001 and came into effect in October of the same year.³⁷ The law represented a significant rupture with the past. As the first law to intervene in the private sphere, it was indicative of changing social attitudes towards domestic or spousal violence. What was formerly simply dismissed as a "marital dispute" and left outside the purview of the law was reconceptualized as an unacceptable human rights violation and became subject to government jurisdiction.³⁸

The underreported and heinous nature of sex crimes came to light when in 2003 newspapers publicized a scandal that involved the routine gang-raping of possibly dozens of girls by members of the Waseda University student club "*Super Free*" (スーパーフリー *sūpāfūrī*) in the period from 2001 and 2003.³⁹ The shocking news reverberated through Japanese society, damaging the credibility of both the justice and police systems and giving legitimacy to the voices calling for legal reforms. This was further fuelled by the political gaffes of senior Liberal Democratic Party politicians, who, rather than denouncing the crimes, lauded the virility of the *Super Free* members for being able to gang-rape women⁴⁰ and suggested that the girls in question had

34 S. MATSUI, Justice for the Accused or Justice for Victims? The Protection of Victims' Rights in Japan, *Asian-Pacific Law & Policy Journal* 13-1 (2011) 54, 65.

35 MITSUNARI/SASANUMA/ TATEISHI/YATAGAWA, *supra* note 4, 113.

36 YATAGAWA, *supra* note 15, 238.

37 配偶者からの暴力の防止及び被害者の保護に関する法律 *Haigū-sha kara no bōryoku no bōshi oyobi higai-sha no hogo ni kansuru hōritsu* [Law for the Prevention of Spousal Violence and the Protection of Victims], Law No. 31/2001.

38 Y. TSUNODA [角田由紀子], 性と法律. 変わったこと、変えたいこと [Sex and the Law. What has changed, what we would like to change] (2013) 56.

39 K. MAENOSONO [前之園和喜], 性暴力をめぐる語りは何をもたらすのか [What Narratives of Sexual Violence Bring About] (2022) 115.

“asked for it” with their appearance.⁴¹ The scandal provided the necessary incentive for the Japanese government to finally introduce some minor yet meaningful legal reforms on sex crimes. The 2004 Penal Code revision⁴² increased the minimum sentence for the crime of rape from two to three years, whereas the minimum sentence for the crime of indecent assault or rape resulting in injury or death was raised to five years instead of the previous three years. In a clear reaction to the so-called “*Super Free*” scandal and the subsequent public outrage, a new provision was added to the Penal Code to establish the crime of gang rape. The intention to review the existing laws and regulations regarding sex crimes, as had already been recommended by the Council for Gender Equality in 1996, was expressed in the supplementary resolutions⁴³ of the Upper House and Lower House of the Diet which accompanied the legislative bill of the 2004 Penal Code revision. In these resolutions, it was written that further consideration should be given to the penalties for crimes that infringe on sexual freedom, in light of the graveness of the damage these crimes cause. A re-examination of the Penal Code provisions on sex crimes was subsequently requested in the Third Basic Plan for Gender Equality in 2010.⁴⁴ The glaring discrepancy between the outdated Penal Code provisions and the reality of societal views on sex crimes in 21st-century Japan became even more apparent with the (re)introduction⁴⁵ of the lay-judge system in 2009. Less than a year after the lay judge system was introduced, scholars already noted heavier sentencing patterns for perpetrators of sex crimes – a trend that would continue in the years afterward – and ascribed it to

40 “[ジャパノウオッチ] [スーパーフリー事件] [性暴力に甘い認識]” [‘Japan Watch’ ‘Super Free Scandal’ Lenient perception of sexual violence], *Yomiuri Shinbun*, 15 July 2003, 2.

41 R. YOSHIDA, Fukuda accused of defending rape, *The Japan Times*, 4 July 2003, available at <https://www.japantimes.co.jp/news/2003/07/04/national/fukuda-accused-of-defending-rape/>.

42 刑法等の一部を改正する法律 *Keihō-tō no ichibu o kaisei suru hōritsu* [Law to Amend Part of the Penal Code], Law No. 156/2004.

43 法務省 [Ministry of Justice], 平成 16 年及び平成 22 年刑法等改正の概要 (附帯決議を含む) [Outline of the 2004 and 2010 Penal Code revisions (including supplementary resolutions)], available at https://www.moj.go.jp/keiji1/keiji12_00091.html.

44 男女共同参画局 [Gender Equality Bureau Cabinet Office], 第 3 次男女共同参画基本計画 [The Third Basic Plan for Gender Equality], available at https://www.gender.go.jp/about_danjo/basic_plans/3rd/index.html.

45 For a detailed examination of Japan’s earlier experiments with the lay judge system as well as an analysis of trial by jury in contemporary Japan, see D. VANOVERBEKE, *Juries in the Japanese Legal System: The Continuing Struggle for Citizen Participation and Democracy* (2015).

increasing public discontent about the leniency of the Japanese criminal justice system with perpetrators of sex crimes.⁴⁶

While the 1990s saw some decisive steps forwards concerning the institutional framework to promote gender equality, the hesitancy of the Japanese government to comprehensively address the issue of sexual violence by bringing its domestic policy in line with the treaties it was party to did not go unnoticed by international human rights bodies. In 1998, the concluding observations of the Human Rights Committee's fourth periodic report on Japan had already expressed concern about the country's low age of consent (set at thirteen) and the absence of any remedial measures to lower the high incidence of domestic violence and rape. It was, furthermore, troubled by the fact that courts in Japan consider domestic violence, including rape, to be a normal occurrence of marital life.⁴⁷ However, international criticism only really took off starting in 2003. In the period between 2003 and 2016, at least three international human rights bodies criticized the outdated nature of Japan's sex crime laws in seven different reports. The Human Rights Committee (HRC), the Committee on the Rights of the Child (CRC), and CEDAW all pointed out the deficiencies in Japan's legal framework regarding sex crimes from their respective points of view and recommended appropriate action.

For example, the fact that neither marital rape nor incest was explicitly defined as a crime under the Penal Code has been a recurring concern of the HRC⁴⁸ and CEDAW.⁴⁹ All three of the above-named human rights bodies have recommended that the age of consent for sexual activities, standing at thirteen years of age, be raised without delay.⁵⁰ Both the HRC⁵¹ and

46 M. HIRAYAMA [平山真理], 裁判員裁判と性犯罪 [Lay Judge Trials and Sex Crimes], 立命館法学 Ritsumeikan Hōgaku 5(6) (2009) 2092, 2093. See also S. NANBU [南部さおり], 性犯罪と裁判員制度 [Sex Crimes and the Lay Judge System], in: Women's Research Society on Crime [女性犯罪研究会], 性犯罪・被害—性犯罪規定の見直しに向けて [Sex Crimes and Victims of Sexual Violence – Towards a Revision of the Sex Crime Provisions] (2014) 185.

47 Human Rights Committee, CCPR/C/79/Add.102, 1998, 6.

48 Human Rights Committee, CCPR/C/79/Add.102, 1998, 6; CCPR/C/JPN/CO/5, 2008, 4.

49 Committee on the Elimination of Discrimination Against Women, A/58/38, 2003, 135; CEDAW/C/JPN/CO/6, 2009, 7; CEDAW/C/JPN/CO/7-8, 2016, 7.

50 Human Rights Committee, CCPR/C/79/Add.102, 1998, 6; CCPR/C/JPN/CO/5, 2008, 8; CCPR/C/JPN/CO/6, 2014, 3. Committee on the Elimination of Discrimination Against Women, CEDAW/C/JPN/CO/7-8, 2016, 6. Committee on the Rights of the Child, CRC/C/15/Add.231, 2004, 5.

51 Human Rights Committee, CCPR/C/JPN/CO/5, 2008, 4; CCPR/C/JPN/CO/6, 2014, 3.

CEDAW⁵² have repeatedly urged the Japanese government to eliminate the requirement of a victim complaint to ensure the possibility of prosecuting sex crimes *ex officio* and have denounced the lenient statutory penalties for the crime of rape. They have also advocated the mandatory introduction of gender-sensitive training on the topic of sexual violence for the judiciary, law enforcement personnel, healthcare care providers, and social workers.⁵³ Last but not least, the broadening of the definition of rape, including the removal of gendered categories of victim and offender as well as the inclusion of sexual acts other than penile-vaginal penetration, has been an adamant request of all three aforementioned bodies.⁵⁴

Aside from these shared criticisms, the committees have also set their own accents. For example, regarding the requirement of assault or intimidation as an element of the crime of rape, the HRC has emphasized the need to remove the burden placed on victims to provide evidence that they resisted the assault. It has furthermore reproached Japanese judges for their practice of paying excessive attention to victims' sexual past when handing down their sentences.⁵⁵ CEDAW, for its part, has long urged the Japanese government to strengthen its infrastructure regarding counselling and support centres, as well as shelters for victims of sexual violence, and to lend support to non-governmental organizations providing such services.⁵⁶

For a long period of time, the Japanese criminal justice system seemingly remained impassive to these frequent and numerous criticisms. While some minor reforms were introduced in 2004 in the wake of the *Super Free* scandal and the ensuing public uproar, it was hardly a long-term solution. We will see in the next part how it came to a more elaborate revision in 2017.

52 Committee on the Elimination of Discrimination Against Women, A/58/38, 2003, 135; CEDAW/C/JPN/CO/6, 2009, 7; CEDAW/C/JPN/CO/7-8, 2016, 7.

53 Human Rights Committee, CCPR/C/JPN/CO/5, 2008, 4. Committee on the Elimination of Discrimination Against Women, CEDAW/C/JPN/CO/6, 2009, 7; CEDAW/C/JPN/CO/7-8, 2016, 7.

54 Human Rights Committee, CCPR/C/JPN/CO/5, 2008, 4; CCPR/C/JPN/CO/6, 2014, 3. Committee on the Elimination of Discrimination Against Women, CEDAW/C/JPN/CO/7-8, 2016, 7. Committee on the Rights of the Child, CRC/C/15/Add.231, 2004, 11; CRC/C/JPN/CO/3, 2010, 6.

55 Human Rights Committee, CCPR/C/JPN/CO/5, 2008, 4; CCPR/C/JPN/CO/6, 2014, 3.

56 Committee on the Elimination of Discrimination Against Women, CEDAW/C/JPN/CO/6, 2009, 7; CEDAW/C/JPN/CO/7-8, 2016, 7.

III. THE 2017 PENAL CODE REFORM ON SEX CRIMES: PROCESS AND OUTCOME

Having taken a look at how sexual violence came to appear on the international and domestic policy agenda and in which way the legal framework concerning sex crimes in Japan was considered to be deficient, we will now turn our focus to the 2017 legal reforms in the Penal Code of Japan. Which points of criticism were addressed in the 2017 Penal Code reform on sex crimes? And why is it that others were not responded to? The answers to these questions can be found by paying attention to two crucial steps in the policy process, namely the discussions of the Investigative Committee on the Penal Regulations for Sex Crimes (性犯罪の罰則に関する検討会 *Sei-hanzai no bassoku ni kansuru kentō-kai*) and those of the Legislative Council's Criminal Law Working Group on Sex Crimes (法制審議会—刑事法(性犯罪関係)部会 *Hōsei shingi-kai – keiji-hō (sei-hanzai kankei) bukai*). As advisory bodies to the Ministry of Justice, they set the groundwork for legal reform by naming and delineating the possible points of revision. A rigorous examination of their records of proceedings will clarify which of the requested reforms were accommodated and why others were seemingly put on the back burner. Before diving into the details of the content, we will first have a brief look at the policy process leading up to the 2017 Penal Code revision on sex crimes.

1. *The Policy Process Leading up to the 2017 Penal Code Reform on Sex Crimes (2014–2017)*

On 11 September 2014, then Minister of Justice Midori MATSUSHIMA made national headlines when she stated in an interview that she had “always resented the fact that stealing is considered more grave than raping a woman and possibly ruining her life”.⁵⁷ While MATSUSHIMA had assumed her position only a week earlier, she quickly declared it her priority to impose tougher penalties for sex offenders by revising the country's archaic sex crime statutes. Later that month, she announced that in October of the same year the Ministry of Justice would set up an investigative committee to debate a sweeping revision of Penal Code provisions on sex crimes.⁵⁸

57 “新聞僚に聞く：安倍改造内閣 法相・松島みどり氏/復興相・竹下亘氏” [Interview with the new Cabinet Ministers in Reshuffled Abe Cabinet: Minister of Justice Midori MATSUSHIMA/Minister of Reconstruction Wataru TAKESHITA], *Mainichi Shinbun*, 13 September 2014, 6.

58 “性犯罪厳罰化へ検討会 親告罪の是非も議論 法相方針” [Investigative Committee for Tightening the Punishment for Sexual Offences; Pros and Cons of Crimes Subject to Prosecution upon Complaint also to be Debated; Policy of the Minister of Justice], *Asahi Shinbun*, 1 October 2014, 4.

The investigative committee met a total of twelve times between October 2014 and August 2015. It is important to know that the discussions proceeded on the basis of a list of revision proposals prepared by the Criminal Affairs Bureau of the Ministry of Justice. A total of twelve participants (whether individuals or representatives of an organization) were invited to speak their minds on the revision proposals and the current state of affairs during two hearing sessions organized in November 2014. Based on these hearing sessions, the investigative committee then began debating each revision proposal. Its findings were summarized in an official report,⁵⁹ which was submitted to then Minister of Justice Yōko KAMIKAWA on 6 August 2015.⁶⁰

A little less than two months later on 2 October 2015, KAMIKAWA announced at a press conference the intent of the Ministry of Justice to prevent sex crimes by imposing tougher penalties for offenders. She stated that the Legislative Council, an advisory body of the Ministry of Justice, would start discussions about the outline of the Penal Code reform based on the investigative committee's final report.⁶¹ Much like with the investigative committee, the Ministry's secretariat had compiled a list of revision proposals that formed the foundation for the working group's discussions. Only those proposals that had received an "in-favour" majority in the investigative committee's final report were included in the list. The Legislative Council's working group on sex crimes held seven meetings between November 2015 and June 2016. While the revision proposals generated broad and lively debates, the final outline adopted by the Legislative Council's working group on sex crimes differed only marginally from the original outline compiled by the Ministry's secretariat. After it was submitted, the Legislative Council accepted the working group's revision outline in its entirety during a 12 September 2016 plenary meeting and submitted it to Minister of Justice Katsutoshi KANEDA that same day.⁶² The Ministry then started drafting the bill to revise the Penal Code, which was formally

59 法務省 [Ministry of Justice], 「性犯罪の罰則に関する検討会」取りまとめ報告書 [Final Report of the Investigative Committee on the Penal Regulations for Sex Crimes], available at https://www.moj.go.jp/keiji1/keiji12_00090.html.

60 “強姦罪、厳罰化求める「告訴不要」の意見多数 有識会議” [Harsher Punishments for Rape; Majority of Opinions calling for Abolishment of Victim Complaints; Investigative Committee], Asahi Shinbun, 7 August 2015, 38.

61 “性犯罪の厳罰化、諮問へ 法相、法制審に 告訴不要も議論” [Tightening of Punishment for Sex Crimes Sent to Legislative Council by Minister of Justice, Abolishment of Victim Complaint also to be Discussed], Asahi Shinbun, 3 October 2015, 3.

62 “法制審、性犯罪の厳罰化を答申 「親告罪」から除外も” [Legislative Council Submits Findings on Stricter Punishment for Sex Crimes; Exclusion from Crimes Upon Complaint], Asahi Shinbun, 13 September 2016, 37.

adopted by the Abe Cabinet on 7 March 2017.⁶³ Acknowledging the high level of public interest, Minister KANEDA expressed his intention to have the bill enacted by the Diet without delay. The bill was adopted unanimously by both the House of Representatives and the House of Councillors on 8 June⁶⁴ and 16 June respectively.⁶⁵ This approval by both the lower and upper chambers of the Diet, Japan's parliament, was the first large-scale revision of sex crime laws since the enactment of the Penal Code in 1907. The "Law to Amend a Part of the Penal Code"⁶⁶ was promulgated on 23 June and came into force on 13 July 2017.⁶⁷

2. *Responsive Change*

This section will explain the content of the reform and highlight how the Japanese justice system has been responsive to domestic and international criticism by focusing on those requests that were addressed in the 2017 Penal Code revision. Roughly speaking, four substantive legal reforms can be distinguished: (1) the revision of the crime of forcible sexual intercourse, (2) the establishment of the crimes of sexual indecency or sexual intercourse by guardians, (3) the abolishment of the requirement of a victim complaint, and (4) the revision of the crime of rape at the scene of a robbery. The details of the reforms will be discussed respectively below.

a) *Revision of the crime of forcible sexual intercourse (Article 177)*

Killing two (actually three) birds with one stone, the threefold revision of the (former) crime of rape under Article 177 accommodated multiple long-standing demands of the international human rights bodies. First, the 2017 Penal Code revision removed the gendered stipulations of the 'subject' and 'object' of the action of the crime of rape so as to include men in the category of victims and women in the category of perpetrators. Second, it

63 “性犯罪厳罰化へ法案決定 男女とも被害者・告訴なしで立件” [Legislative Proposal Regarding Stricter Punishments for Sex Crimes Decided; Victims can be both Male and Female; Criminal Cases possible without Victim Complaints], Asahi Shinbun, 8 March 2017, 37.

64 “性犯罪厳罰化、衆院委で可決” [Stricter Punishments for Sex Crimes adopted by House of Representatives], Asahi Shinbun, 8 June 2017, 11.

65 “性犯罪を厳罰化 被害者の告訴不要に 改正刑法成立” [Stricter Punishments for Sex Crimes; Victim Complaint no longer Needed; Establishment of Revised Penal Code], Asahi Shinbun, 17 June 2017, 1.

66 刑法の一部を改正する法律 *Keihō no ichibu o kaisei suru hōritsu* [Law to Amend Part of the Penal Code], Law No. 72/2017.

67 “改正刑法が施行 性犯罪を厳罰化” [Revised Penal Code Comes into Force; Stricter Punishment for Sex Crimes], Asahi Shinbun, 13 July 2017, 38.

broadened the scope of actions that would constitute the crime of rape by including anal and oral intercourse in addition to already recognized penile-vaginal intercourse. To reflect these alterations, the name of the crime was changed from “rape” (強姦 *gōkan*) to the more gender-neutral “forcible sexual intercourse” (強制性交 *kyōsei seikō*). Last but not least, the minimum penalty was raised from three to five years imprisonment with hard labour.

b) Establishment of the crimes of indecency (Article 179, Clause 1) and sexual intercourse (Article 179, Clause 2) as perpetrated by guardians

Another eagerly anticipated reform was the establishment of a new type of crime to punish incest.⁶⁸ Criminal prosecution of guardians who sexually abuse children finally became possible with the introduction of Article 179 into the Japanese Penal Code, which punishes guardians who commit an act of indecency against or have sexual intercourse with a child under the age of eighteen by taking advantage of the influence arising from having custody over the child.

Out of all the revision proposals that were discussed by the Legislative Council’s working group on sex crimes, this was the one that instigated the most heated and complex debate. Some additional explanation might therefore be necessary to understand both the implications and limitations of this newly established crime. First, the notion of “guardian” (監護者 *kango-sha*) is not limited to persons with the legal right of guardianship and can also signify persons who are in fact taking care of a minor, regardless of whether or not they are legally recognized as guardians. However, the crime can only be established if the child-guardian relationship is of such a continuing nature that the guardian also has such an influence on the child’s overall well-being that the child is both psychologically and economically dependent on the guardian.⁶⁹ Second, unlike the crimes of indecent assault (Arti-

68 The lack of a legal framework to punish incest was already pointed out in the 1990s. See K. DANBAYASHI [段林和江], 強姦罪の問題点 [The Problematic Issues with The Crime of Rape], in: Watanabe [渡辺] (ed.), 女性・暴力・人権 [Women – Violence – Human Rights] (1994) 214, 226; 229–230. See also M. NOGUCHI [野口真理子], 性暴力を許さない [No Tolerance of Sexual Violence], in: Tsutsumi [堤]/Kubota [窪田] (eds.), ジェンダーを学ぶ [Learning About Gender] (1998) 209, 212.

69 Multiple members of the Legislative Council’s working group pointed out that the crime was too narrowly defined to reflect the reality of many sex crime cases. They advocated broadening the language of the provision, as its current phrasing would preclude sexual abuse by sports coaches, school teachers, or family members other than the custodian from falling under the statute. However, the majority rejected these propositions, often based on the perceived difficulty such an amendment would bring in proving the assailant’s influence over the victim. 法務省 [Ministry of Justice], 法制審議会 – 刑事法 (性犯罪関係) 部会 第3 会議議事録 [Legislative Coun-

cle 176) or forcible sexual intercourse (Article 177), assault or intimidation is not required as an element of the offense.

c) Abolishment of the requirement of a victim complaint

Another long-awaited change was the abolishment of the rule according to which law enforcement could prosecute a suspect only when the victim filed a complaint.⁷⁰ While it was already possible for the crime of gang rape under Article 178-2 or indecent assault or rape resulting in death or injury under Article 181, with the enforcement of the 2017 Penal Code revision, all sex crimes became prosecutable *ex officio*.

Moreover, retroactive application of the law has also been permitted, meaning that sexual offenses committed prior to the legal revision can also be prosecuted without a victim complaint. However, this is not allowed in cases in which the right to file an accusation has already been lost. For example, it would not be possible for a plaintiff to refile after already having dropped charges in the past.⁷¹

d) Revision of the crime of rape at the scene of a robbery (Article 241)

The last, but certainly not least, substantive legal reform was revision of the crime of rape at the scene of a robbery under Article 241. Not so much a subject of international attention as of domestic criticism,⁷² the disparate treatment of the crimes of rape and robbery based on their order of occurrence was finally resolved with the 2017 Penal Code amendment. Prior to this revision, when an assailant first robbed a victim and then raped him or her, the crime of rape at the scene of robbery under Article 241 applied, which stipulated the particularly heavy penalty of imprisonment for life or

cil – Criminal Law (Sex Crimes) Working Group Record of Proceedings of Third Meeting], 16 December 2015, 12–14, 16, 18–19, available at https://www.moj.go.jp/keiji1/keiji12_00126.html.

70 See, for example K. DANBAYASHI [段林], 暴力と女性 [Violence and Women], in: Sasaki [佐々木] (ed.), 女性が変わる生活と法 [Women Changing Lives and the Law] (2000) 140, 143–144. See also M. SHIBATA [柴田守], 性犯罪の親告罪規定と公訴時効 [The Statute of Limitations and the Necessity of a Victim Complaint in Sex Crimes], in: Women's Research Society on Crime [女性犯罪研究会], 性犯罪・被害—性犯罪規定の見直しに向けて [Sex Crimes and Victims of Sexual Violence – Towards a Revision of the Sex Crime Provisions] (2014) 167, 172.

71 法務省 [Ministry of Justice], 法制審議会 – 刑事法 (性犯罪関係) 部会 第5会議事録 [Legislative Council – Criminal Law (Sex Crimes) Working Group Record of Proceedings of Fifth Meeting], 25 March 2016, 26–27, available at https://www.moj.go.jp/keiji1/keiji12_00132.html.

72 See, for example DANBAYASHI, *supra* note 70, 149. See also NOGUCHI, *supra* note 68, 219.

for a definite term of not less than seven years. By contrast, when an assailant first raped a victim and later robbed them, the crimes of rape (Article 177) and robbery (Article 236) were merely treated as concurrent offenses, with the discretionary sentence ranging from a minimum prison sentence of five years to a maximum of thirty years.

The 2017 Penal Code revision changed Article 241 in three ways. First, the rewritten Article 241 stipulates that if the (attempted) crime of rape and the (attempted) crime of robbery happen on the same occasion, they will be punished without regard for their order of occurrence, with a minimum penalty of seven years imprisonment. Second, there is a possibility of a reduced penalty if commission of either crime is voluntarily suspended or if the underlying conduct ends only in an attempt to commit the crime, except for cases resulting in death. Third, if death arises as the result of the conduct associated with either of the two crimes, the death penalty or life imprisonment is to be imposed.

3. *The Limits of Responsiveness*

As illustrated above, the 2017 Penal Code reform undeniably provided answers to many of the domestic and international criticisms described in the first part of this paper. However, at the same time it also put multiple demands on the back burner. The most prominent among these include (1) the explicit criminalization of marital rape, (2) raising the age of consent, and (3) relaxing or abolishing the requirement of assault or intimidation. While all of them were covered during the discussions of the investigative committee, they failed to secure an “in-favour” majority. Because the discussions of the Legislative Council’s working group on sex crimes proceeded on the basis of the committee’s final report, they were, in practical terms, not included at this stage of the policy process. A rigorous examination of the records of proceedings will clarify why they failed to be subject to further consideration.

a) *Explicit criminalization of marital rape*

Even though the lack of an explicit criminalization of marital rape had been one of the criticisms most voiced by lawyers,⁷³ academics,⁷⁴ and human

73 See DANBAYASHI, *supra* note 70, 222–224. See also TSUNODA, *supra* note 38, 156–160.

74 See, for example M. HAYASHI [林美月子], 性的自由・性的表現に関する罪 [Crimes Related To Sexual Freedom and Sexual Expression], 法学セミナー Hōgaku Seminā No. 455 (1992) 90, 95–96. See also N. WAKAO [若尾典子], 女性の身体と人権—性的

rights bodies for nearly twenty years, it was not included in the 2017 Penal Code revision. In fact, originally it was not even taken up in the list of revisions proposals prepared by the Criminal Affairs Bureau of the Ministry of Justice. This did not, however, deter committee members⁷⁵ or participants of the hearing sessions⁷⁶ from raising the issue. They drew attention to the fact that while the current article on rape does not exempt spouses, law enforcement and the judiciary rarely prosecuted cases of marital rape under it. Adding a provision that stipulates the inclusion of spouses would therefore facilitate criminal prosecution of marital rape.

However, the majority of the committee members contended that there was no need for such a provision as the article does not explicitly exclude spouses from the category of victims. Emphasizing that judges, prosecutors, and police officers all recognize the existence of marital rape, the explanation of the low number of indictments was said to be found in the difficulty of proving that the activity took place without consent. The inclusion of a specific provision would not change this. Instead, the final report of the investigative committee points out the need to fix the societal misperception that rape between spouses does not exist, and as such the committee favoured public awareness campaigns in lieu of legal reform.⁷⁷

自己決定権への歩み [Women's Bodies and Women's Human Rights – Steps Towards the Rights of Sexual Self-Determination] (2005) 273.

75 Lawyer Yukiko TSUNODA brought up the topic during the first meeting of the investigative committee. See 法務省 [Ministry of Justice], 性犯罪の罰則に関する検討会第1会議 議事録 [Investigative Committee on the Penal Regulations for Sex Crimes – Record of Proceedings of First Meeting], 31 October 2014, 7, available at https://www.moj.go.jp/keiji1/keiji12_00091.html. She elaborately explained the necessity of an explicit criminalization of marital rape during the committee's fourth meeting, but her appeal fell on deaf ears. See 法務省 [Ministry of Justice], 性犯罪の罰則に関する検討会第4会議 議事録 [Investigative Committee on the Penal Regulations for Sex Crimes Record of Proceedings of Fourth Meeting], 24 December 2014, 22–25, available at https://www.moj.go.jp/keiji1/keiji12_00097.html.

76 For the appeals made by participants of the hearing sessions to explicitly criminalize marital rape, see 法務省 [Ministry of Justice], 性犯罪の罰則に関する検討会第3会議 議事録 [Investigative Committee on the Penal Regulations for Sex Crimes – Record of Proceedings of Third Meeting], 28 November 2014, 3, 14, 20, 23, available at https://www.moj.go.jp/keiji1/keiji12_00095.html. See also 法務省 [Ministry of Justice], 性犯罪の罰則に関する検討会第2会議 議事録 [Investigative Committee on the Penal Regulations for Sex Crimes – Record of Proceeding of Second Meeting], 21 November 2014, 22, available at https://www.moj.go.jp/keiji1/keiji12_00093.html.

77 Ministry of Justice, Final Report of the Investigative Committee on the Penal Regulations for Sex Crimes, *supra* note 59, 11–12.

b) Raising the age of consent

Along with the previous point, the low age of consent has been a long-standing criticism of all the aforementioned international human rights bodies. In contrast to the previous point, raising the age of consent was included in the list of revisions proposals prepared by the Criminal Affairs Bureau of the Ministry of Justice. What is striking about this revision proposal is the stark division of opinions between participants of the hearing sessions and the members of the investigative committee. Two-thirds of the participants of the hearing sessions strongly agreed with raising the age of consent, while the discussions of the investigative committee produced no clear majority either in favour of or against the proposal. Arguments in favour emphasized that at the age of thirteen children can hardly be considered capable of resistance in instances of non-consensual sexual activities. Those against a revision argued that the international criticism about the low age of consent is regrettable, given that in addition to the Penal Code, the Child Welfare Act and local prefectural regulations also offer legal protection and these provisions are frequently applied in cases where victims of sexual violence are between the ages of thirteen and eighteen. Opponents therefore questioned the appropriateness of dealing with this issue under the Penal Code, instead mulling over the introduction of new regulations on children's sexual protection and safety in the Child Welfare Act.⁷⁸

c) Relaxing or abolishing the requirement of assault or intimidation

Relaxing or abolishing the element of assault (暴行 *bōko*) or intimidation (脅迫 *kyōhaku*) for the crime of rape has been a persistent demand made by domestic actors⁷⁹ and occasionally also by international human rights bodies such as the HRC. As one of, if not the most controversial issues when talking about sexual violence, discussions on this topic often evoke a stark divide between the two sides. This was also the case during the discussions of the investigative committee. On the one hand, victims⁸⁰ as well as individuals who through their profession have come into close contact with

78 Ministry of Justice, Final Report of the Investigative Committee on the Penal Regulations for Sex Crimes, *supra* note 59, 26–28.

79 See, for example Y. HAYASHI [林陽子], 強姦をめぐる法状況 [The Legal Situation Regarding Rape], 法学セミナー *Hōgaku Seminā* No. 430 (1990) 28, 30. See also DANBAYASHI, *supra* note 68, 221.

80 法務省 [Ministry of Justice], 性犯罪の罰則に関する検討会第 2 会議 議事録 [Investigative Committee on the Penal Regulations for Sex Crimes – Record of Proceeding of Second Meeting], 21 November 2014, 16–17, available at https://www.moj.go.jp/keiji1/keiji12_00093.html.

victims of sexual violence – such as lawyers,⁸¹ clinical psychologists,⁸² or those involved with crisis centres⁸³ – have argued that this requirement poses too much of a hurdle. Based on their practical experience, they contend that the current law is out of touch with the reality faced by victims of sexual violence in that judicial precedent holds that for a sexual activity to be considered rape it requires establishing that the victim was either physically assaulted by the assailant or intimidated to the extent that it was extremely difficult to resist the assailant's advances. In particular, those victims whose reactions do not fall within the traditional categories of fight-or-flight (e.g. victims who lose their voice, exhibit freezing behaviour, or act compliant out of fear for their lives) often fail to have their cases brought to court, let alone secure conviction of the perpetrator.⁸⁴ As the essence of the crime of forcible sexual intercourse is, after all, its non-consensual nature, whether and to which degree assault or intimidation occurred should not be the decisive factor in determining if the crime took place.⁸⁵ By contrast, theoretical practitioners of the law, such as criminal law scholars, emphasize that the aspect and the degree of assault or intimidation exercised by the assailant is only one of many factors that judges consider when forming their verdict. Contesting the argument that abolishing or relaxing this requirement would lead to more convictions, they argue that it would in fact impede criminal prosecution because prosecutors need to present evidence that the crime was committed beyond reasonable doubt. Abolishing or relaxing the requirement would make it difficult to prove a victim's subjective account of events and therefore to convict an accused.⁸⁶

81 MINISTRY OF JUSTICE, Record of Proceeding of Second Meeting, *supra* note 80, 24–25. See also 法務省 [Ministry of Justice], 性犯罪の罰則に関する検討会第3会議事録 [Investigative Committee on the Penal Regulations for Sex Crimes – Record of Proceeding of Third Meeting], 28 November 2014, 16–17, available at https://www.moj.go.jp/keiji1/keiji12_00095.html.

82 MINISTRY OF JUSTICE, Record of Proceeding of Second Meeting, *supra* note 80, 13–14.

83 MINISTRY OF JUSTICE, Record of Proceeding of Third Meeting, *supra* note 81, 21.

84 MINISTRY OF JUSTICE, Final Report of the Investigative Committee on the Penal Regulations for Sex Crimes, *supra* note 59, 18–19.

85 M. KOJIMOTO [柑本美和], 強姦罪と準強姦罪 [The Crime of Rape and the Crime of Incapacitated Rape], in: Women's Research Society on Crime [女性犯罪研究会], 性犯罪・被害—性犯罪規定の見直しに向けて [Sex Crimes and Victims of Sexual Violence – Towards a Revision of the Sex Crime Provisions] (2014) 157.

86 MINISTRY OF JUSTICE, Final Report of the Investigative Committee on the Penal Regulations for Sex Crimes, *supra* note 59, 19–20.

IV. EVALUATING THE 2017 PENAL CODE REFORM ON SEX CRIMES: RECEPTION, IMPLEMENTATION, AND CURRENT STATE OF AFFAIRS

The 2017 amendment of Japan's Penal Code provisions on sex crimes did not take place in a vacuum. While the statement by Minister of Justice Midori MATSUSHIMA in September 2014 might have ignited the fire, the debate on legal reforms had been smouldering beneath the surface for at least two decades. As seen in the second part of this paper, from the 1990s an increasingly diverse set of actors – among which lawyers, academics, rape crisis centres, and eventually also international human rights bodies – started to call out the Japanese criminal justice system for failing to comprehensively address the issue of sexual violence. Some minor improvements and interim solutions during the first years of the 21st century aside, the calls for legal reform remained largely unanswered until the promulgation and implementation of the “Law to Amend a Part of the Penal Code” in June and July 2017, respectively.

How can we evaluate the 2017 Penal Code reform on sex crimes and, by extension, the responsiveness of the Japanese criminal justice system? As the question does not lend itself to a clear-cut answer, we will try to formulate a nuanced understanding by approaching it from three different, yet overlapping angles. First, we will have a look at the initial reception of the Penal Code revision on sex crimes in the first two years after its promulgation. A look at a variety of sources such as newspaper editorials, academic articles, and statements by victim support groups will show that the opinions were not unequivocally positive. Next, the focus will shift to the way that courts apply the Penal Code regulations on sex crimes. A series of court acquittals in sex crime cases in March 2019 is exemplary of the limits of the Penal Code in providing legal protection to victims of sexual violence and reflecting their reality, even after the 2017 reforms. Finally, this paper will conclude with some observations on the current state of affairs and on the responsiveness of the Japanese criminal justice system to sex crimes at large.

1. The Initial Reception of the 2017 Penal Code Reform on Sex Crimes

In June 2017, Japan made national and international headlines when both houses of its parliament approved a bill aimed at revising the country's century-old sex crime laws. However, the revision received a mixed welcome. Citing reforms such as the broadening of the definition of rape to include male victims, the abolishment of the requirement of a victim complaint for prosecution, and the establishment of a new category of crime for sexual abuse by custodians, it was lauded by leading national newspapers, such as the *Mainichi Shinbun* and the *Asahi Shinbun*, for being the first

major revision on sex crimes in 110 years.⁸⁷ In the months after the revision, a plethora of academic articles were published by legal scholars that explained in detail not only the content but also the significance of the 2017 Penal Code reform,⁸⁸ thereby signalling an increased interest in the topic of sexual violence. In more or less similar wording, a great number of these articles stated that the recent Penal Code revision was motivated by the increasing recognition that sex crimes are serious and heinous criminal offences that not only inflict great physical and mental suffering on victims for many years but also gravely violate a person's rights to sexual freedom and sexual self-determination. These articles praised the revision for ensuring an enhanced protection of victims' rights and suggested that the newly introduced legal reforms will significantly impact criminal law practice.⁸⁹ Some authors argued that whether the current revision on sex crimes is sufficient or not needs to be re-examined in the future in light of both the reality of sex crimes and the way that the new provisions are implemented.⁹⁰ Others defended the decision of the Ministry of Justice and its advisory bodies not to pursue certain revisions, such as relaxing or abolishing the requirement of assault or intimidation, or to include sexual abuse by, for instance school teachers or sport activity leaders in the newly established crime for sexual abuse by custodians.⁹¹ While acknowledging that the 2017 Penal Code revision had not addressed all the criticisms, many legal scholars were, in short, cautious about the necessity of additional legal reforms.

87 “性暴力をなくすために:/ 上 被害者の声、ようやく法に 悪夢、トラウマ 苦しみを 知っ” [To End Sexual Violence: Victims' Voices Finally Reflected in Law; Nightmares, Trauma, and Suffering], *Mainichi Shinbun*, 17 June 2017, 30. “性暴力撲滅へ 「大きな一歩」 被害者、法改正喜ぶ” [A Big Step Towards Elimination of Sexual Violence, Victims Rejoice at Law Reforms], *Asahi Shinbun*, 17 June 2017, 34.

88 A few examples include: R. HIGUCHI [樋口亮介], 性犯罪規定の改正 [The Revision of Sex Crime Regulations], *法律時報 Hōritsu Jihō* 89-11 (2017) 112. T. HASHIZUME [橋爪隆], 性犯罪に対処するための刑法改正について [Revisions to the Penal Code to Deal with Sex Crimes], *法律のひろば Hōritsu no Hiroba* 70-11 (2017) 4. K. KITAGAWA [北川佳世子], 強制性交等の罪・準強制性交等の罪 [On the Crimes of Forcible Sexual Intercourse and Incapacitated Forcible Sexual Intercourse], *法律時報 Hōritsu Jihō* 90-4 (2018) 55. T. IMAI [今井猛嘉], 監護者わいせつ罪及び監護者性交等罪 [On the Crimes of Forcible Indecency or Sexual Intercourse by Guardians], *法律時報 Hōritsu Jihō* 90-4 (2018) 63.

89 T. TANOJIRI [田野尻猛], 性犯罪の罰則整備に関する刑法改正の概要 [Outline of the Penal Code Revisions Concerning the Penal Provisions on Sex Crimes], *論究ジュリスト Ronkyū Jurisuto* 23 (2017) 112, 119.

90 K. KITAGAWA [北川佳世子], 性犯罪の罰則に関する刑法改正 [The Penal Code Revision on Sex Crimes Provisions], *法学教室 Hōgaku Kyōshitsu* 445 (2017) 62, 68.

91 S. FUKAMACHI [深町晋也], 性犯罪 [Sex Crimes], *法学教室 Hōgaku Kyōshitsu* 457 (2018) 107, 111–114.

Even before it came into force, however, the 2017 Penal Code revision on sex crimes was also criticized for being long overdue, and it was found lacking in many respects, as we will see below. This because it had failed to include precisely those reforms that lawyers, victim support organizations, and even the participants in the investigative committee's hearing sessions had most passionately advocated, such as the abolishment or relaxation of the requirement of assault or intimidation, the explicit recognition of marital rape, and raising the age of consent, to name a few. At the time when the revision outline was accepted by the Legislative Council's plenary meeting and submitted to the Ministry of Justice in September 2016, a coalition of four grassroots organizations therefore joined hands to launch the "*Believe – わたしは知ってる*" [*Believe – I know it*] campaign.⁹² Through this public campaign, the organizations not only sought to put pressure on the country's bicameral legislature to push through the Penal Code revision the following year, but also to highlight the fact that the most crucial legislative reform, namely abolishment of the requirement of assault or intimidation, had been disregarded.⁹³ Over the course of the campaign, the involved organizations met with forty-five Diet members and launched an online petition to advocate additional legal reforms, which gained more than 30,000 signatures before it was handed to then Minister of Justice Katsutoshi KANEDA on 7 June 2017. Thanks to their efforts, the coalition was able to request that a clause be added in the bill's supplementary resolutions which stipulated that the government was to review the bill three years after its implementation and, if necessary, make the appropriate amendments to bring the law in line with the reality of sex crime cases.⁹⁴ Although pleased about their successful campaign, at the press conference held to celebrate the adoption of the Penal Code revision the organizers were also quick to point out that these reforms were only the start rather

92 The four organizations involved in the campaign were 明日少女隊 [Tomorrow Girls Troop], しあわせなみだ [Happy Tears], ちゃぶ台返し女子アクション [Chabujo], and 性暴力と刑法を考える当事者の会 [Association of Parties Concerned with Sexual Violence and the Penal Code]. As a coalition, they were called "刑法性犯罪を変えよう!プロジェクト" [Let's Change Sex Crime Laws Project]. See BELIEVE WATASHI, 刑法性犯罪を変えよう!プロジェクト [Let's Change Sex Crime Laws Project], available at <https://www.believe-watashi.com/organisers>.

93 BELIEVE WATASHI, キャンペーンについて [About the campaign], available at <https://www.believe-watashi.com/about>.

94 BELIEVE WATASHI, 金田法務大臣へ異例の面会実現! 3 万筆以上の署名を届けてきました [Unprecedented Meeting with Minister of Justice Kaneda – Over 30,000 signatures delivered], available at <https://www.believe-watashi.com/single-post/mr-kaneda>.

than the goal, and that further changes were needed to construct a legal framework that really reflects the nature of sexual violence.⁹⁵

Similar critical appraisal came from those who through their profession come into close contact with victims of sexual violence, such as lawyers,⁹⁶ sexual assault nurse examiners (SANE),⁹⁷ and psychologists.⁹⁸ They pointed out that while the 2017 Penal Code reform on sex crimes undoubtedly represents a historic move and is a sign of progress, there remains much room for improvement. Identifying flaws such as the stringent requirement of assault or intimidation, the presumed capability to resist non-consensual sexual activities at the young age of thirteen, the limited possibility of criminal prosecution for marital rape, and the inability to deal with sexual abuse by teachers, sports coaches, and other figures of authority, these articles emphasize that despite the reforms, Japan's legal framework on sex crimes remains very much out of touch with the reality that victims of sexual violence face. The view that the reforms had stopped halfway⁹⁹ was also shared by some theoretical practitioners of the law, who disagreed with their colleagues' reluctance towards additional legal reforms.¹⁰⁰ One illustrative example is a paper by criminal law scholar Mana SHIMAOKA, in

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- 95 “性犯罪厳罰化 親への処罰拡大 評価 NPO 代表から 被害者支援充実訴え” [Stricter Punishment for Sex Crimes; Expanding Punishment to Parents; Appraisal; NGO Representatives Appeal for More Support for Victims], *Yomiuri Shinbun*, 17 June 2017, 30.
- 96 S. UCHIKOSHI [打越さく良], 110 年ぶりの刑法性犯罪規定の改正と残された課題 [First Amendment of the Criminal Code Provisions on Sex Crimes in 110 Years and Remaining Challenges], *助産雑誌 Josan Zasshi* 72-5 (2018) 359. See also Y. TSUNODA [角田由紀子], 性犯罪法の改正—改正の意義と課題 [The Reform of Sex Crime Law – Significance and Challenges of the Reform], *論究ジュリスト Ronkyū Jurisuto* 23 (2017) 120.
- 97 J. YAMAMOTO [山本潤], 性暴力被害者と必要な支援 SANE (性暴力被害者支援看護師) の立場から [Victims of Sexual Violence and the Support They Need – From the Perspective of SANE], *助産雑誌 Josan Zasshi* 72-5 (2018) 352.
- 98 A. SAITŌ [斎藤梓], 被害者支援の現場から見た性犯罪にかかわる刑法改正の意義 [The Significance of the Penal Code Revisions on Sex Crimes from the Perspective of Somebody in the Field of Victim Assistance], *刑事法ジャーナル Keiji-hō Jānaru* No. 55 (2018) 17.
- 99 Y. SEKI [関良徳], 性刑法 - だれをどのように守るものであるべきか [Sex Crime Law – Who Should Be Protected and How?], in: Taniguchi [谷口]/Ayabe [綾部]/Ikeda [池田] (eds.), *セクシュアリティと法 身体・社会・言説との交錯 [Sexuality and Law – The Intersection of Body, Society, and Discourse]* (2017) 38, 50.
- 100 S. TATSUI [辰井聡子], 性犯罪に関する刑法改正—強制性交等罪を中心に [Penal Code Reforms on Sex Crimes – Focus on the Crime of Forcible Sexual Intercourse], *刑事法ジャーナル Keiji-hō Jānaru* No. 55 (2018) 4. S. SHINADA [品田智史], 監護者性交等罪の検討 [Examination of the Crime of Sexual Intercourse by Custodians], *刑事法ジャーナル Keiji-hō Jānaru* No. 55 (2018) 10.

which she fiercely criticizes the Japanese government for once again having passed up the chance to catch up with the EU and the US, despite lagging more than thirty years behind Western reform of sex crime laws.¹⁰¹

In a nutshell, the 2017 Penal Code reform on sex crimes fell short of being the comprehensive change long sought after. While undeniably a major step towards international standards, it left at the same time ample room for improvement, as suggested by the examples described above.

2. *The 2017 Penal Code Reform on Sex Crimes: Ink on Paper or a Rupture with the Past? Lessons from the Flower Demo Movement*

In March 2019, a string of court rulings in sex crime cases sparked public outrage as district courts across Japan acquitted defendants who stood trial for crimes of sexual assault, despite having acknowledged in three out of four cases that the sexual activities had taken place without the consent of the plaintiff.¹⁰² Outcry on social media and calls for action led to a demonstration on 11 April 2019, when more than 450 people gathered in front of Tōkyō Station to protest the recent verdicts. Aptly named the “Flower Demo Movement” – participants held flowers to symbolize solidarity with victims of sexual violence – protesters gathered each month in public spaces to show public dissent with the verdicts and to urge the government to expedite the review of the 2017 Penal Code reform on sex crimes, as had been stipulated by its supplementary resolutions. The demonstrations spread rapidly, and within one year they had grown into a national movement with more than 10,000 participants and with rallies organized in all 47 prefectures of Japan.¹⁰³ Arguably due – at least in part – to the public pressure, three out of the four above-mentioned verdicts had been overturned on appeal by the end of the next year and amended to a judgment of guilty.¹⁰⁴

When evaluating the responsiveness of the Japanese criminal justice system, the March 2019 cases and the ensuing public protests are particularly instructive in three ways. First, as three out of the four cases were brought to court under the revised Penal Code,¹⁰⁵ they give us concrete examples of the limitations of the Penal Code in providing legal protection to victims of sexu-

101 M. SHIMAOKA [島岡まな], 性犯罪の保護法益及び刑法改正骨子への批判的考察 [Protected Legal Interests in Relation to Sex Crimes and Critical Considerations on Criminal Law Amendment], 慶應法学 Keiō Hōgaku 37 (2017) 19, 21.

102 K. ITŌ [伊藤和子], なぜ、それが無罪なのか!?性被害を軽視する日本の司法 [How is that not guilty? The Japanese Judiciary that Belittles Victims of Sexual Violence] (2019) 20.

103 FLOWER DEMO [フラワーデモ], フラワーデモを記録する [Recording the Flower Demo Movement] (2020) 9–11, 38–39.

104 YATAGAWA, *supra* note 15, 244.

al violence, even after the 2017 reforms. As such, the court rulings are highly relevant to the discussion on the need for additional legal reforms. How the criminal justice system responded to the public outrage following the rulings of its district courts is also indicative of its degree of responsiveness.

a) The Okazaki and Shizuoka cases: Lack of understanding of continuous sexual violence and unequal power settings

Out of the four cases, the court ruling that attracted the most fierce criticism involved the acquittal of a defendant who had continuously sexually abused his daughter from the age of fourteen to nineteen.¹⁰⁶ He was indicted for having forced sexual intercourse with his then nineteen-year-old daughter on two occasions in August and September 2017. On 26 March 2019, the Okazaki Branch of the Nagoya District Court exonerated the defendant of the crime of incapacitated sexual intercourse, on the basis that it was unable to establish the victim's incapacity to resist.¹⁰⁷ While the court had acknowledged (1) that the victim had been sexually abused by her biological father for more than five years prior to the two incidents that were now being brought to trial (2) that she had suffered severe physical abuse at the hands of her father in the two weeks leading up to the incidents, and (3) that the two incidents of forced sexual intercourse took place without the consent of the victim, it ruled that the father-daughter relationship was not characterized as a strongly subservient one such that the daughter would be in a state in which resisting her father would be extremely difficult. As such, the court ruling seems to have suggested that the victim could have resisted if she had wanted to.¹⁰⁸

On 28 March 2019, the Shizuoka District Court acquitted a defendant who was brought to trial for allegedly sexually abusing his twelve-year-old daughter three times a week for approximately two years. In the ruling, the judge mentioned that it was unnatural that no one had noticed the sexual abuse taking place, as the victim lived in a house with seven other family members. Pointing to inconsistencies in the victim's statement, the court dismissed the prosecutor's allegations on the grounds that the victim's testimony, which was the only direct evidence, was not credible.¹⁰⁹

105 In one of the four cases, the Kurume case, the events took place before the new Penal Code came into force in July 2017. However, as the problem of an excessive focus on resistance associated with the requirement of assault or intimidation was not addressed by the 2017 Penal Code revisions, this case is included here as it shows the limitations of the Penal Code in providing legal protection to victims of sexual violence.

106 ITō, *supra* note 102, 20.

107 Nagoya District Court Okazaki Branch, 26 March 2019, ウエストロー・ジャパン Westlaw Japan Database.

108 For a detailed discussion of the case, see ITō, *supra* note 102, 20–34.

What these two cases have in common is that the rulings failed to properly take into account the continuous nature of the sexual abuse and the unequal power setting in which it took place, or its effects on the victim's mental state. Especially in the Okazaki case, while the court had conceded that the sexual abuse had taken place over a period of approximately five years, in formulating the verdict the judge in question focused solely on the degree of assault or intimidation used by the defendant on the two occasions in 2017. Furthermore, the judge was oblivious to the severe psychological distress a victim suffers when submitted to such years-long sexual abuse, which renders resistance impossible. While both of these non-guilty verdicts were overturned on appeal to the High Courts,¹¹⁰ the fact that the choice of whether to give weight to the aspects of continuous abuse and unequal power is not codified in law but left to the discretion of the presiding judge has been strongly criticized.¹¹¹

b) The Kurume and Hamamatsu Cases: Excessive focus on resistance

On 12 March 2019, the Kurume Branch of the Fukuoka District Court acquitted a defendant accused of incapacitated forced sexual intercourse on the grounds that he had misinterpreted consent because of a lack of resistance on the victim's part.¹¹² While the court had established that the victim was intoxicated to the point of vomiting and losing consciousness and was in no condition to refuse, it ruled that the circumstances could have misled the

109 Shizuoka District Court, 28 March 2019, ウェストロー・ジャパン Westlaw Japan Database.

110 In the Okazaki Case, on 12 March 2020 the Nagoya High Court overturned the district court's ruling on the grounds that its interpretation of the victim's inability to resist was unreasonable (不合理 *fu-gōri*) and sentenced the defendant to ten years' imprisonment. The Supreme Court of Japan upheld the High Court's ruling in a decision from 4 November 2020. Similarly, in the Shizuoka Case, the Tōkyō High Court handed down a seven-year prison term to the defendant on 21 December 2020, thereby overturning the district court's ruling on the grounds that its assessment of the evidence was mistaken (事実誤認 *jijitsu gonin*). The Supreme Court of Japan upheld the High Court's ruling in a decision from 15 September 2021.

111 E. YANO [矢野恵美], 暴力とジェンダー — 性犯罪、DV、セクハラを中心に [Violence and Gender – Focusing on Sexual Offences, Domestic Violence, and Sexual Harassment], in: Ninomiya [二宮]/Kazama [風間] (eds.), 家族の変容と法制度の再構築 — ジェンダー/セクシュアリティ/子供の視点から [Family Transformation and Legal Restructuring – Gender/Sexuality/Children's perspectives] (2022) 239, 241, 250, 254.

112 “準強姦：被告に無罪判決 「女性許容と誤信の可能性」 福岡・地裁久留米支部” [Incapacitated Rape: Defendant Acquitted “Possibility of Mistaken Belief about Woman's Permission”, Fukuoka District Court, Kurume Branch], Mainichi Shinbun, 12 March 2019, 9.

defendant into believing that the victim had given her consent. This is because she was able to utter some words and had not expressed a clear rejection of his actions.¹¹³ In a similar fashion, on March 19 the Hamamatsu Branch of the Shizuoka District Court absolved a defendant of the crime of forcible sexual intercourse resulting in injury because the victim had not resisted “in a way that was clearly recognizable for the defendant”.¹¹⁴

The Kurume and Hamamatsu cases exemplify very well a recurring element in three out of the four court cases, that is, the excessive focus that is being placed on the degree of resistance victims should put up in order for the court to conclude that the sexual act was performed against their will. As a result of these rulings, the abolishment of the requirement of assault or intimidation became the primary concern of the voices calling for legal reforms.

3. *The Current State of Affairs Regarding the Debate on Sex Crimes*

In the wake of the March court rulings and strengthened by public support, on 13 May 2019 Japan’s first incorporated sexual assault survivors’ organization named *Spring*¹¹⁵ submitted a request to the Ministry of Justice to expedite its review of the 2017 Penal Code revision.¹¹⁶ In reaction to the controversial court rulings which put excessive focus on the victims’ resistance, the abolishment of the requirement of assault or intimidation and the establishment of a new crime for non-consensual sexual intercourse lay at the heart of their demand. *Spring* also submitted the request to the Supreme Court, demanding mandatory training for legal professionals based on the findings of psychiatric and psychological research so as to improve their understanding of the nature of sexual violence.¹¹⁷

113 FLOWER DEMO, *supra* note 103, 34. However, on 5 February 2020 the Fukuoka High Court overturned the district court’s ruling on the grounds that its interpretation of the victim’s inability to resist as well as the defendant’s claim of misinterpreted consent was unreasonable (不合理 *fugōri*), and it sentenced the defendant to four years imprisonment. The Supreme Court of Japan upheld the high court’s ruling in a decision from 12 May 2021.

114 The Japanese original is as follows: “被告人からみて明らかにそれと分かるような形での抵抗を示すことができていなかった。”, Shizuoka District Court Hamamatsu Branch, 19 March 2019, ウェストロー・ジャパン Westlaw Japan Database.

115 For more information on the organization, see <http://spring-voice.org/>.

116 “性犯罪：刑法見直し訴え 被害者団体、法相に要望提出” [Sex Crimes: Victims’ Group Submits Request to Minister of Justice for Review of Penal Code], Mainichi Shinbun, 15 May 2019, 23.

117 SPRING, “[刑法性犯罪] 要望書提出および記者会見のご案内” [Notification about the Submission of the Request for the Review of the Penal Code Provisions on Sex

At the same time, the coalition of four grassroots organizations that had been the driving force behind the addition of the supplementary resolutions two years earlier had expanded and come to comprise twelve organizations.¹¹⁸ As part of their “刑法改正市民プロジェクト” [*Keihō kaisei shimin purojekuto*, Citizens’ Criminal Law Reform Project], they engaged in lobbying and advocacy efforts over the course of the subsequent months with the aim of spurring legal reforms, ultimately handing over a petition with more than 94,000 signatures to Minister of Justice Masako MORI on 17 March 2020.¹¹⁹ Their efforts came to fruition on 31 March 2020, when the Ministry of Justice announced that an investigative committee would start discussions on the necessity of additional legal reforms.¹²⁰ In contrast to the previous investigative committee in which only two out of twelve members had direct experience with victims of sexual violence, ten out of seventeen members of the new committee were practitioners who could represent the victim’s point of view in the discussions.¹²¹ In a decision welcomed by many, then executive director of the aforementioned *Spring* and activist Jun YAMAMOTO was also appointed. As the first member who was a survivor of sexual violence, her inclusion in the discussions is at least indicative of the intention of the Ministry of Justice to accede to the request by the *Citizens’ Criminal Law Reform Project* and others to have the legal framework reflect the reality of sex crime cases. After sixteen sessions, the investigative committee submitted its final report to then Minister of Justice Yōko KAMIKAWA on 21 May 2021.¹²² Since October 2021, the Legislative Council has proceeded with discussions on reform based on this document.

Crimes and Press Conference], PDF available for download at <https://perma.cc/8YAN-X2VS>.

118 For an overview of the organizations involved as well as their activities, see <https://community.camp-fire.jp/projects/view/399659>.

119 法務省 [Ministry of Justice], まさこ法務大臣が、性犯罪に関する刑法改正を求める市民団体でつくる「刑法改正市民プロジェクト」の方々と面会し、性犯罪に関する刑法改正を求める要望書などを受け取りました [Minister of Justice Mori Masako Met with Members of the ‘Citizen’s Criminal Law Reform Project’, a Group of Grassroots Organizations that Seeks the Revision of the Criminal Code Regulations on Sex Crimes, and Received a Request for the Revision of the Penal Code], 17 March 2020, available at https://www.moj.go.jp/hisho/kouhou/hisho06_00067.html.

120 “性犯罪法改正議論の検討会” [Investigative Committee to Discuss Penal Code Revisions on Sex Crimes], *Yomiuri Shinbun*, 1 April 2020, 27.

121 For a list of the members of the committee, see 法務省 [Ministry of Justice], 性犯罪に関する刑事法検討会委員名簿 [Criminal Law Investigative Committee on Sex Crimes], available at https://www.moj.go.jp/keiji1/keiji12_00020.html.

122 “性犯罪規定見直し 報告” [Final Report on Review of Regulations on Sex Crimes], *Yomiuri Shinbun*, 22 May 2021, 29.

On 24 October 2022, the Ministry of Justice released a tentative proposal to revise the Penal Code's regulations on sex crimes.¹²³ The draft¹²⁴ not only revisits those points of reform that previously had been put on the back burner but also touches upon possible new categories of sex crimes, such as 'grooming' and illicit photography or videography or the distribution thereof. With the inclusion of reforms such as raising the age of sexual consent to sixteen years, the explicit criminalization of marital rape, and the establishment of a provision for sexual abuse by people in positions of power (e.g. teachers, employers), it addresses to a certain extent the criticisms of the 2017 Penal Code revision. While welcoming these revisions, the representatives of the *Citizens' Criminal Law Reform Project* have called the draft insufficient, as it did not reflect their call for the simple and clear stipulation that sexual intercourse without consent is a crime.¹²⁵ In fact, despite an elaborate list of eight scenarios that would constitute the act of forcible sexual intercourse, such as terrorizing or shocking the victim or taking advantage of social or economic status, the proposal does not convey this key message, as the essential phrasing "against the will of a person" (人の意思に反して *hito no ishi ni hanshite*) is nowhere to be found. The draft will function as a springboard for the Legislative Council's further discussions, with the debate on the topic of consent likely remaining contentious.

4. *Conclusion: Evaluating the Responsiveness of the Japanese Criminal Justice System*

In the 1980s and 1990s, the issue of sexual violence gained global recognition. By the end of the 20th century, after many countries across the world had introduced substantive and procedural legal reforms to change how their justice system responds to and prevents sexual violence, the "traditional" rape laws in place in Japan came under increased scrutiny. For a long time, the Japanese criminal justice system seemed impassive in the face of international pressure and domestic criticism concerning its lenient policy on sex

123 “強制性交罪の要件 明示 法務省案 「恐怖」や「地位悪用」” [Requirements for Forcible Sexual Intercourse Clarified, Proposal by Ministry of Justice; “Fear” and “Abuse of Status”], *Yomiuri Shinbun*, 25 October 2022, 30.

124 For the tentative proposal, see 法務省 [Ministry of Justice], 法制審議会 - 刑事法 (性犯罪関係) 部会 第回会議 試案 [Legislative Council – Criminal Law (Sex Crimes), Tentative Proposal, 10th Meeting], 24 October 2022, available at https://www.moj.go.jp/shingi1/shingi06100001_00067.html.

125 “「不同意性交」、こぼれ落ちた声「意に反すれば罪、明確に」 刑法改正試案” [Draft Amendment to the Penal Code; ‘Nonconsensual Intercourse’; Spillover of Voices Calling for Making Sex Against One’s Will a Clear Crime], *Asahi Shinbun*, 25 October 2022, 26.

crimes. While some amendments were made to the Penal Code in 2004, the reforms were not the result of a thorough discussion of the deficiencies of the legal framework.¹²⁶ Rather than an honest attempt to comprehensively address the issue of sexual violence, they were a quick fix intended to mitigate the public uproar in the wake of the *Super Free* scandal. Although a re-examination of the Penal Code provisions on sex crimes was requested in the Third Basic Plan for Gender Equality from 2010, as well as in the supplementary resolutions of the House of Representatives and the House of Councillors at the time of the 2004 and 2010 Penal Code revisions, it remained mere ink on paper until 2014. A renewed public interest in sex crime cases following the (re)introduction of the lay judge system in 2009¹²⁷ and a growing body of critical research on gender and law authored by Japanese scholars¹²⁸ are said to have contributed to the actualization of the policy process leading up to the 2017 Penal Code reform.¹²⁹

To what extent did the 2017 Penal Code revision on sex crimes address the criticisms by lawyers, academics, and international human rights bodies? In evaluating the responsiveness of the Japanese justice system, it must be said that the 2017 Penal Code revision is rather close to the bare minimum. Broadening the definition of rape to include male victims and raising its statutory penalty, abolishing the requirement of a victim complaint to enable prosecution, and establishing a new crime for sexual abuse by custodians are all important reforms, but they do not add up to the comprehensive and nuanced approach to sexual violence that was sought. The 2017 Penal Code revision failed to meet the then already fifteen-year-old demands of raising the age of consent or explicitly criminalizing marital rape, let alone engage with the recent wave of legal reforms¹³⁰ that places consent at the centre of sex crime laws.

However, the overall assessment need not be so bleak. Hopeful signs that the Japanese criminal justice system is moving towards one that better reflects the reality of sexual violence and that meets the needs of victims are

126 M. MAKINO [牧野雅子], 増補 刑事司法とジェンダー [Extended Edition Criminal Justice and Gender] (2020) 44–45.

127 HIRAYAMA, *supra* note 1, 304.

128 See, for example, the works of Miyoko TSUJIMURA [辻村みよ子], Tomoe YATAGAWA [谷田川知恵], Miho MITSUNARI [三成美保], and Masako MAKINO [牧野雅子].

129 T. SHIMAYA [嶋矢貴之], 現行法下戦前期における性犯罪規定の立法・判例・解釈論 [Legislation, Case Law, and Interpretation of Sexual Offense Provisions in the Pre-war Period under the Current Penal Code], in: Higuchi [樋口]/Fukamachi [深町] (eds.), 性犯罪規定の比較法研究 [Comparative Research on Sex Offense Law] (2020) 802.

130 YATAGAWA, *supra* note 15, 246.

also to be found. For example, on 29 November 2017 the Grand Bench of the Supreme Court of Japan issued a ruling stating that sexual intent (性的意図 *seiteki ito*) is not a prerequisite for establishing the crime of indecent assault, thereby altering a judicial precedent dating back to 1970 which was increasingly challenged by both scholarship and lower courts.¹³¹ Furthermore, on 11 June 2020 the Japanese government unveiled an elaborate three-year plan aimed at enhancing measures against sexual violence and sex crimes.¹³² In relation to the criminal justice system, the proposed policies included (1) providing prosecutors with training to gain a better understanding of the psychology of victims of sexual violence, (2) educating police officers in all forty-seven prefectures about the importance of a thorough and prompt handling of victim complaints in sex crime cases and about the necessity of cooperation and an exchange of views with local rape crisis centres, and (3) expanding and improving sex offender rehabilitation programs to reduce recidivism rates, to name only a few.¹³³ Although it cannot be said with certainty, the fact that three out of four verdicts from the March 2019 string of acquittals were overturned on appeal to the High Courts and replaced with a verdict of guilty also suggests that the criminal justice system is coming to reject the traditionally narrow interpretation of sex crimes and the underlying facts, consistent with changing public opinion. More recently, the tentative proposal released at the end of October 2022 seems to have taken to heart the criticisms made after the 2017 revision, although the concept of consent has yet to gain ground. But even if the draft were to be implemented as such, the Penal Code would still make great strides in providing legal protection for people in vulnerable positions whose sexual abuse is prone to be overlooked and disbelieved, such as children and spouses.

Taking these developments into account, the responsiveness of the Japanese criminal justice system has taken a turn for the better. The credit for this evolution can be attributed to the recent Flower Demonstrations and to the brave survivors of sexual violence who came forward with their stories of sexual abuse, with journalist Shiori ITŌ's case¹³⁴ even having gained global attention. Without this bottom-up movement, the ubiquity of sexual

131 Grand Bench of the Supreme Court, 29 November 2017, ウエストロー・ジャパン Westlaw Japan Database.

132 “性犯罪抑止に GPS 検討 加害者に装着義務化案 政府方針” [Government Policy; Examination on Requiring Perpetrators to Wear GPS To Deter Sex Crimes], Asahi Shinbun, 12 June 2020, 1.

133 男女共同参画局 [Gender Equality Bureau Cabinet Office], 性犯罪・性暴力対策の強化の方針 全文 [Policy to Strengthen Measures Against Sex Crimes and Sexual Violence (Full Document)], available at https://www.gender.go.jp/policy/no_violence/seibouryoku/measures.html.

134 See S. ITŌ [伊藤詩織], ブラックボックス [Black Box] (2017).

violence in everyday life would not have become so widely recognized, and the Japanese criminal justice system most likely would not have felt compelled to react. However, it must not be forgotten that the movement was built upon and supported by the decades-long efforts of lawyers, crisis centres, grassroots organizations, and academics to bring the deficiencies of the legal system to the forefront. With even trailblazing lawyer Yukiko TSUNODA¹³⁵ and activist-survivor Jun YAMAMOTO¹³⁶ cautiously optimistic about the future developments regarding sex crime laws in Japan, one cannot help but also feeling a little hopeful.

SUMMARY

This article has analysed the responsiveness of the Japanese criminal justice system in the face of sustained international and domestic criticism concerning its policy on sex crimes and its overly lenient treatment of perpetrators of sexual offences. On the international level, human rights bodies such as the UN Committee on the Elimination of Discrimination against Women (2003; 2009; 2016), the UN Committee on the Rights of the Child (2004; 2010), and the UN Human Rights Committee (2008; 2014) have repeatedly reprimanded the Japanese government for failing to fulfil its obligation as a State Party to bring its policies in line with the respective treaties. Domestically, the outdated nature of Japan's sex crime laws has long been the subject of debate among lawyers, victim support groups, and academics. Furthermore, a re-examination of the Penal Code regulations for sexual offences had already been requested in the Third Basic Plan for Gender Equality from 2010, as well as in the supplementary resolutions of the House of Representatives and the House of Councillors at the time of the 2004 and 2010 Penal Code revisions.

Finally, a substantive legal response to this long-standing criticism came in June 2017, when both houses of Japan's parliament approved a bill aimed at revising the century-old sex crime laws. To what extent did the 2017 Penal Code revision on sex crimes address the criticisms by lawyers, academics, and international human rights bodies? In evaluating the responsiveness of the Japanese criminal justice system, it must be said that the 2017 Penal Code revision was rather close to the bare minimum. Broadening the definition of rape to include male victims and raising its statutory penalty, abolishing the requirement of a victim complaint to enable prosecution, and establishing a new crime for sexual abuse by custodians are all important reforms, but they

135 E. DALTON/C. NORMA, *Voices from the Contemporary Japanese Feminist Movement* (2022) 68.

136 DALTON/NORMA, *supra* note 135, 33.

do not add up to the comprehensive and nuanced approach to sexual violence that was sought. The 2017 Penal Code revision failed to meet the then already 15-year-old demands of raising the age of consent or explicitly criminalizing marital rape, let alone engage with the recent wave of legal reforms that places consent at the centre of sex crime laws.

However, the overall assessment need not be so bleak. Hopeful signs that the Japanese criminal justice system is moving towards one that better reflects the reality of sexual violence and that meets the needs of victims are also to be found. The fact that in the wake of the Flower Demo movement three out of four verdicts from the March 2019 string of acquittals in sex crimes cases were overturned on appeal to the High Courts and replaced with a verdict of guilty suggests that the criminal justice system is coming to reject the traditionally narrow interpretation of sex crimes and the underlying facts, consistent with changing public opinion. Furthermore, the inclusion of activist-survivor Jun YAMAMOTO on an investigative committee and the increased participation of practitioners in the discussions on the necessity of additional legal reforms is at least indicative of the intention of the Ministry of Justice to have the legal framework reflect the reality of sex crime cases. As a result, the tentative proposal released by the Ministry of Justice at the end of October 2022 seems to have taken to heart the criticisms made after the 2017 revision, although the concept of consent has yet to gain ground. Taking these and other recent developments into account, this article concludes that the responsiveness of the Japanese criminal justice system has taken a turn for the better.

ZUSAMMENFASSUNG

Dieser Beitrag analysiert die Anpassungsfähigkeit des japanischen Strafrechtssystems angesichts der anhaltenden internationalen und nationalen Kritik bezüglich Sexualstraftaten und der übermäßig nachsichtigen Behandlung von Sexualstraftätern. Auf internationaler Ebene haben Menschenrechtsorgane wie der UN-Ausschuss für die Beseitigung der Diskriminierung der Frau (2003; 2009; 2016), der UN-Ausschuss für die Rechte des Kindes (2004; 2010) und der UN-Menschenrechtsausschuss (2008; 2014) die japanische Regierung wiederholt dafür gerügt, dass sie ihrer Verpflichtung als Vertragsstaat, ihr Strafrechtssystem mit den jeweiligen Verträgen in Einklang zu bringen, nicht nachkommt. Im Inland ist das veraltete japanische Sexualstrafrecht seit langem Gegenstand von Diskussionen unter Anwälten, Opferschutzgruppen und Wissenschaftlern. Darüber hinaus wurde eine Überprüfung der Vorschriften des Strafgesetzes für Sexualdelikte bereits im Dritten Basisplan für die Gleichstellung der Geschlechter aus dem Jahr 2010 sowie in den ergänzenden Entschlüssen des Unter- und des Oberhauses anlässlich der Überarbeitungen des Strafgesetzes 2004 und 2010 gefordert.

Eine substanzielle rechtliche Antwort auf die langjährige Kritik kam schließlich im Juni 2017, als beide Häuser des japanischen Parlaments einen Gesetzesentwurf zur Überarbeitung der über 100 Jahre alten Gesetze über Sexualverbrechen verabschiedeten. Inwieweit wurde bei der Überarbeitung des Strafgesetzes von 2017 auf die Kritik von Juristen, Wissenschaftlern und internationalen Menschenrechtsorganisationen eingegangen? Bei der Bewertung der Reaktionsfähigkeit des japanischen Strafrechtssystems muss festgestellt werden, dass die Überarbeitung des Strafgesetzes von 2017 eher das absolute Minimum darstellt. Die Ausweitung der Definition von Vergewaltigung auf männliche Opfer, die Anhebung des Strafmaßes, die Abschaffung des Erfordernisses einer Anzeige des Opfers, um eine Strafverfolgung zu ermöglichen, und die Einführung eines neuen Straftatbestands für sexuellen Missbrauch durch Aufsichtspersonen sind allesamt wichtige Reformen, aber sie reichen nicht aus, um den angestrebten umfassenden und nuancierten Ansatz zur Bekämpfung sexueller Gewalt zu erreichen. Mit der Überarbeitung des Strafgesetzes von 2017 wurden die damals bereits 15 Jahre alten Forderungen nach einer Anhebung der Sexualmündigkeit oder einer ausdrücklichen Kriminalisierung der Vergewaltigung in der Ehe nicht erfüllt, ganz zu schweigen, dass auf die jüngste internationale Welle gesetzlicher Reformen, die das Einverständnis in den Mittelpunkt des Sexualstrafrechts stellen, eingegangen worden wäre.

Die Gesamtbewertung muss jedoch nicht so düster ausfallen. Es gibt auch Anzeichen für Hoffnung, dass sich das japanische Strafrechtssystem zu einem System entwickelt, das die Realität sexueller Gewalt besser widerspiegelt und den Bedürfnissen der Opfer gerecht wird. Die Tatsache, dass im Zuge der Flower-Demo-Bewegung drei von vier Urteilen aus der Reihe der Freisprüche bei Sexualdelikten vom März 2019 in der Berufung vor den Obergerichten aufgehoben und durch einen Schuldspruch ersetzt wurden, deutet darauf hin, dass die Strafjustiz die traditionell enge Auslegung von Sexualdelikten und der zugrunde liegenden Tatsachen im Einklang mit der sich ändernden öffentlichen Meinung ablehnt. Darüber hinaus ist die Aufnahme der Aktivistin und Überlebenden Jun YAMAMOTO in einen Untersuchungsausschuss und die verstärkte Beteiligung von Praktikern an den Diskussionen über die Notwendigkeit zusätzlicher gesetzlicher Reformen zumindest ein Indiz für die Absicht des Justizministeriums, den rechtlichen Rahmen an die Realität von Sexualverbrechen anzupassen. In diesem Sinne scheint der Ende Oktober 2022 vom Justizministerium veröffentlichte vorläufige Vorschlag die nach der Überarbeitung von 2017 geäußerte Kritik zu beherzigen, auch wenn das Konzept der Einwilligung noch nicht aufgegriffen wurde. Vor dem Hintergrund dieser und anderer aktueller Entwicklungen kommt der Artikel zu dem Schluss, dass sich die Anpassungsfähigkeit des japanischen Strafrechtssystems zum Besseren gewendet hat.

(Die Redaktion)