

# Sexual Violence and the Japanese Criminal Judicial System



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## Have police and prosecutors become pro-woman?

**Nakano:** I think there are two reasons why there is such a high rate of sex violence committed by US troops in Japan. One is that US soldiers have a sense that Japan is an American colony. The other is that Japan is a paradise for sexual violence. The Japanese legal system has serious problems.

**Yatagawa:** I've heard that US soldiers know that they can get off more lightly in Japan than in the US, so they prefer to go to trial, not in their own country, but here in Japan.

**Nakano:** From the perspective on the ground, Japanese police have not changed the way they handle sexual violence. Police still ask victims during interrogation whether they desperately resisted their attackers when they resisted their attackers when they were assaulted.

Consequently, this has led victims to feel as if they were the ones being accused.

As Jane appeals the ruling in her last trial (see box 1), we can see that what needs to be done immediately after such suffering is to release victims from fear and to insure their safety. Minimizing the ill effects of sexual violence on victims depends on whether victims' requests for proper care are granted, and accordingly, whether they are able to recover themselves prior to the interrogation by undergoing a medical examination and receiving appropriate treatments at the hospital. It is then only after victims regain their balance in this way that a police investigation may achieve efficacy in a true sense. Current police investigation procedures and objectives, however, are not strictly governed by any specific rules or law. Instead, there is simply an internal regulation stating, "Handle each case with great care so that an examinee may preserve her dignity."

**Box 1: The Case of Jane**

Jane (not her real name) is an Australian woman living in Japan. She was raped by a US serviceman in April of 2002 in Kanagawa Prefecture, and immediately afterward called the police. However, instead of providing her with immediate medical treatment, the police forced her to cooperate with the investigation, bringing her back to the scene of the crime to take pictures, which caused her serious suffering. She was finally taken to a hospital after several hours of investigation. She left the police station about 10 hours after the incident, without having had any meals or anything to drink and without even being given a replacement for her underwear, which was taken as evidence. After being told that the Japanese prosecutor dropped charges against the perpetrator, she took her case to civil court, and was awarded 3 million yen in compensation in 2005.

Jane also took out a lawsuit against the Kanagawa prefectural police for the humiliating investigation, which is in violation of rules laid out in police documents such as the *Guidelines to Protect Victims of Crimes* and in the *Handbook on Support for Victims of Sexual Crimes*. In December 2007, the Tokyo District Court ruled that the Kanagawa police response to Jane was not illegal, due to the requirements of conducting investigations and maintaining evidence. Regarding the obligation of police to provide appropriate care for victims of sexual assaults, the Court ruled that while the *Guidelines* and the *Handbook* are not insignificant, they nevertheless contain only internal rules and resource materials and are thus not legally binding. This decision is currently under appeal in the Tokyo High Court.

Thus, the way each investigation is handled is different, depending on the police and prosecutors working on the case, and this leads to further suffering for victims. Due to the ambiguity of this regulation, individual police officers can insist that it is essential for the sake of the investigation to take the victims back to the scene of a crime of sexual violence, while their memories are still fresh, and to instruct the victims to give a detailed account of the incident. Facing these obstacles, the majority of the victims will hesitate to file charges.

In addition, although police assign female officers to investigate sexual

assault, their role has ended up as no more than a formality. The important thing is that victims derive a sense of safety and trust in the police so that they can tell them about their assault. Another barrier for victims trying to take their cases to court is the pride that prosecutors take in their ability to establish suspects' guilt—nearly one hundred percent of defendants brought to trial receive a guilty verdict.

**Yatagawa:** Even when police and prosecutors are moved with sympathy for victims, they are constantly afraid of the possibility that when it comes to actually



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filing a suit against the suspect, the victim might fail to tolerate the counter-questions during the trial or that her testimony might be inconsistent. Both risks have incapacitated the police and prosecutors from moving forward with trials as they attempt to convict the accused.

It is therefore understandable, on one hand, why police and prosecutors tend to conclude that a sexual violence case should be dismissed unless they are convinced that there is no room for doubt about the suspect's guilt and that their efforts to put him on trial won't be in vain. But on the other hand, police and prosecutors do not challenge the sexism that has penetrated judicial proceedings. Instead, they caution victims, "You will be asked more terrifying questions about the case during the counter-examinations of the defendant. Are you really capable of that?"

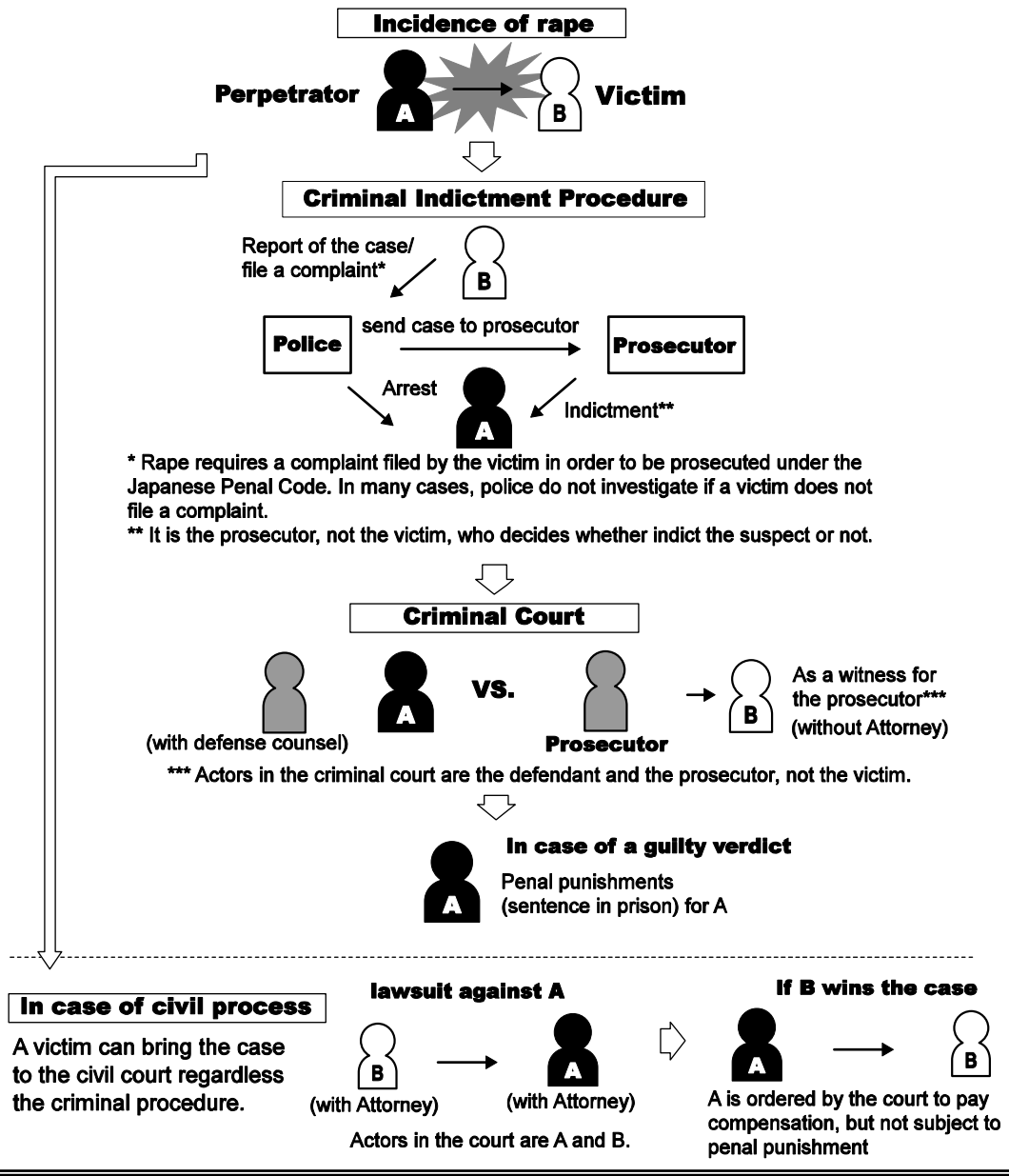
**Nakano:** In the Japanese criminal justice system, the court appoints a defense counsel for the defendant, but victims do not have any legal representation. Victims are targeted by this system as an object of study, to examine to see whether they are able to undergo all the judicial proceedings required for a public trial, aiming at punishing the assailant.

**Yatagawa:** This is a fundamental problem with the Japanese criminal judicial system. The parties involved here are just the prosecutors and the defendant, while victims are counted by prosecutors as merely one of their helpful leads to produce enough evidence to convict the defendant. This system has not been designed for victims (see box 2).

**Nakano:** As far as filing a criminal suit in the capacity of the state is concerned, there's a real necessity to provide a lawyer for victims when the police question them and begin the investigation—this is particularly essential for victims of sexual violence, which are subject to power relations established through deep-seated sex discrimination, from the time that crimes occur to the end of the criminal procedures. This is due to the structure of judicial proceedings, which are always attended by the risk that victims will be forced to suffer damage from sexually discriminatory treatment from society. The criminal judicial system in Japan must approve of the attendance of a lawyer to guard victims against sexism throughout the judicial proceedings.

**Box 2: Criminal Procedure in Japan**

Unlike the civil court process for settling disputes among citizens, the criminal procedure is a mechanism with the aim of maintaining social order that is used by the state to enforce punishments on criminals who have violated certain prohibited acts. In other words, it is not a system that aiming at redress for victims. The following chart shows how a sexual assault case (in this case, rape) is handled in each process.



## A pre-modern legal framework and the crime of rape

**Yatagawa:** The problem with the criminal judicial system in Japan arises from the fact that the system is grounded in sexism—the present legal structure was devised exclusively by men over one hundred years ago, and at that time, women were not entitled to a variety of rights, including suffrage. As a result, men organized a legal structure to exercise dominion over women. Take civil law, for example, which designated women as legally incapacitated and necessitated that women receive permission from their husbands for any civil action. And in criminal law, criminal conversation laws prescribed severe punishment for adultery, but only a wife and her partner in an affair could be subject to a penalty—in other words, this law was established for the purpose of keeping a wife's chastity.

Here women's chastity refers to their sexual loyalty to men, which men make use of as their exclusive right, sexually exploiting the women whom they dominate. Bearing this in mind, a woman was not then supposed to allow a man, other than her husband to have sexual access to her. For the sake of fulfilling the duty of loyalty to her husband, when faced with the danger of rape, a woman had to offer total resistance to a sexual assaulter in order to safeguard her husband's right, which is, so to speak, left to the care of the woman. Therefore, a woman would not be judged a "victim of sexual assault" in those days until she it had been successfully verified that she had made desperate efforts to guard her chastity and her sexual loyalty to her husband. On the contrary, in cases where a woman failed to prove either of these two, then the judge would rule that she

was guilty of complicity in the crime of adultery.

The constitution adopted by the Japanese government in 1947, however, prohibits sexual discrimination, and in conformity with this, laws such as criminal conversation and the designation of women as legally incapacitated were deleted. But the current legal system as it relates to rape is still based on the old legal framework, which was, as mentioned before, very closely related to criminal conversation. The sexual history of a victim is still taken into account in trials because the legally protected interests are still the same as they were a century ago—namely, sexual loyalty. The idea that underlies the judicial system is that it's not necessary to protect women who do not have sexual loyalty to their husband.

**Nakano:** Today, the legally protected interest relating to sexual assault is explained as sexual freedom, and some legal textbooks explain sexual freedom simply as the freedom to decide to have sex or not. This kind of simplified explanation lacks recognition of the psychological and physical damage caused by sexual violence and demonstrates a lack of awareness that sexual assault is a crime against the human body. Yet it must be pointed out that because of the penetration into the body that accompanies each case, sexual assault differs widely from robbery and other crimes. The former entails direct physical contact with the assailant and the violence endured by victims lasts much longer. Concerning bodily damage, the current legal system only considers pregnancy. But what about women who cannot get pregnant? The discrimination that underpins the current judicial system's way of thinking is really appalling.

**Box 3: Classification of Crimes of Sexual Assault in the Japanese Penal Code**

**Crime of Rape** (*Article 177*) is applied when, through assault or intimidation, a person forcibly inserts a male sex organ into the female sex organ of a woman or girl over thirteen years old. The same is applied even when no assault or intimidation was identified if the victim is under thirteen years' old. Punishments range from 3 to 20 years' imprisonment.

**Forcible Indecency** (*Article 176*) is applied when, through assault or intimidation, a person forcibly commits other types of sexual assault against a person over 13 years old (regardless gender). In cases where the victim is under 13 years' old and no assault or intimidation was identified, the same classification is applied. Punishments range from 6 months' to 10 years' imprisonment.

**Quasi-Rape/Quasi-Forcible Indecency** (*Article 178-2*) is applied when a person commits rape or other types of sexual assaults by making a victim incapable of resistance (for example, by using drugs or alcohol to make the victim unconscious). Punishments are the same as for the crime of rape or forcible indecency.

**Crime of Gang Rape** (*Article 178-2*) was established in 2004 with the purpose of providing heavier punishment than is currently possible for the crime of rape in cases where two or more persons jointly commit rape or quasi-rape. Punishments range from 4 to 20 years' imprisonment. Unlike the crimes of rape and quasi-rape, gang rape can be indicted without a complaint filed by the victim.

**Death or Injury Resulting from Rape/Forcible Indecency/Gang Rape** (*Article 181*) is applied when a victim is killed or injured as a result of rape, forcible indecency, or gang rape. Punishments range from 3 years imprisonment to a life sentence in cases of forcible indecency, more than 5 years of imprisonment to a life sentence in cases of rape, and more than 6 years of imprisonment to a life sentence in cases of gang rape.

**Intended Rape** (*Article 177 and 179*) is applied when a person is identified as having been intending to rape and force intercourse or to use assault or intimidation as a means to rape, even though an actual rape did not occur.

**Consent or refusal by victims**

**Yatagawa:** I expect that inquiries into women's consent or refusal to perform a sexual act will remain as the basis for judgments on sexual assault—that is to say, in cases where a woman's consent has been affirmed, sex will not be judged as

an illegal act, but instead as an ordinary sexual act. Yet this has not gotten at the crux of the problem with the judicial system—that for the purpose of deciding whether a woman consented to or refused to perform a sexual act, the court requires her to provide proof that the violence inflicted on her during the sexual assault

was to the degree that her life was endangered. But in cases where a power relationship exists between the rapist and the victim, it's possible for the victim to be raped without being psychically held down. But despite this, considerations of such power relations play no part in the current judicial system; thus, in cases of sexual assault, courts adjudicate based on outdated criterion, only asking whether there was "violence or a threat of violence that made it significantly difficult for the victim to resist."

**Nakano:** The matter of the presence or absence of a victim's consent often becomes an issue in civil trials, as well as is in criminal trials. In either case, consent is often deemed affirmative by the court in accordance with men's values, who assume that what a victim means by sexual assault is "part of an ordinary sexual act that wouldn't offer women any great problems."

Japan's current judicial system tends to present difficult legal hurdles that the weak must face in trying to prove their refusal. Workers are often overwhelmed by wild arguments by perpetrators, such as "You signed onto the terms of this contract, which means that you actually agree with the defendant," although the victim was so reluctant to sign the contract it could be said that she or he was forced to accept it. Given this type of situation, unless these types of discrimination within the legal system are challenged, courts will continue to accept arguments such as, "Since you didn't say 'no,' I took 'yes' as your answer," courts as objective evidence of consent by victims.

**Yatagawa:** This is the logic of the strong—that is, the strong won't take "no" for an answer, even if they

recognize that the only reason the weak do not refuse is because they can't say "no" in the presence of the strong.

**Nakano:** Despite the force of this unsound logic, in my view, when it comes down to the question about the consent or refusal by the victim to perform a sexual act, a brief refutation from the victim saying, "I did not yield my consent to the act," should suffice.

**Yatagawa:** I think so, too.

**Nakano:** After all, what matters is how decisively we can expose the structure of power relations behind a case to reveal the way the assailant wielded his power to control and damage the victim. Thus, it is vital for my work as a lawyer to handle individual cases in a way that makes explicit the various forms of control used over victims—such as verbal abuse and the abuse of economic power. We should not miss opportunities to analyze and present to the court the underlying structure of violence employed by the assailant to place the victim under his control, even if this power structure is disclosed through just a single email that the assailant sent to the victim.

**Yatagawa:** It is often argued that if the courts determine whether an act qualifies as sexual assault based solely on consent or refusal of a woman to perform a sexual act, this will damage the stability of the law. It is argued that this is why a woman who has been sexually assaulted needs to produce evidence not only of the absence of her consent, but also of her firm resistance to the severe violence committed by the assailant.

However, when it comes to murder, in cases where only a single

eyewitness to the incident is available, the judge depends greatly on the truth of the eyewitness's statement. Despite a lack of physical evidence, if the court finds the eyewitness's statement credible, a murder suspect will be found guilty. Of course, if the reverse is true—if the court is suspicious of the eyewitness's statement, then the murder suspect will be cleared of charges. In my opinion, this same line of thinking should be introduced in cases of sexual violence. As things stand now, when it comes to crimes of sexual violence, a court will not admit a victim's claims that "I was coerced into a sexual act without giving consent" as sufficient evidence to establish the suspect's guilt. Courts still demand substantial evidence of severe violence against the victim.

**Nakano:** Logically, these are two different issues: whether victims agreed or not and whether there was severe violence or not.

### **What are the goals for the movement?**

**Yatagawa:** I think that it is crucial to create legal protections that are equivalent to the Rape Shield Law in the US, which protects victims from references being made to their sexual histories in the court. I am well aware of the opposition to such a law, which expresses deep concern about the way this type of system may adversely impact the protection of the defendant or even hinder the court from investigating a case. But if we had such a system, victimized woman could then be safe from unfair questioning, such as, "So that's it—you've already had sexual relations with dozens of men before now. That explains what happened to you this time—you consented to a sexual act as usual, didn't you?" In order to abolish



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the sexism that underpins current criminal law, is both pragmatically and figuratively necessary to introduce the type of system.

Further, it is necessary to establish a law explicating fixed patterns of cases in which the unambiguous power disparity between perpetrators and victims makes it extremely unlikely that a woman would actually agree to have sex. A while ago, there was a news report about a prison guard who sexually assaulted a female detainee; he was given a two-year prison sentence on charges of assault and abusive insult by a special governmental officer. If, however, the guard had been found guilty of rape, then he would have been sentenced to between three and twenty years' imprisonment, without a stay of execution. But since he was instead convicted of assault and abusive insult by a special governmental officer, the assailant, as it stands now, will serve a sentence of just one month to seven years in prison, in conformity with the current law. Under US criminal law, this type of



case would be classified as rape, regardless of whether the victim consented.

I am thus inclined to think that, just as in other countries, Japan must systematically classify cases in which sex is defined as rape, requiring courts to find rape suspects guilty of rape, regardless of whether the victim consented, if the suspect could have possibly exercised power over the plaintiff to perform the sexual act in question. In other words, in these cases, any claim by an assailant that a victim consented would be rejected in principle. When it comes to sex between a prison guard and a prisoner, an employer and an employee, a teacher and a student, a physician and a patient, and so forth, it should be assumed that consent to have sex was not mutual. Many of other countries have already changed their laws in this way.

At present, rape cases are classified as “quasi-rape” when circumstances were such that a victim could barely resist. In cases where the victim was a child, it doesn’t matter if the child agreed or not—the assailant is found guilty of sexual assault. New legislation is needed to extend the applicability of this provision to other cases sexual assault. What needs changing most is the interpretation of “violence or threat to the degree it is extremely difficult for a victim to resist.” This is the Supreme Court precedent set in 1949, and its interpretation has not changed. If what the court means by the “to the degree that it is extremely difficult for a victim to resist” is considered subjectively from the victim's point of view, I could concede this. But this is not the case—this description is interpreted based on men’s values, which means there is a tacit acceptance that women, when they are involved in a sexual act, are inevitably

treated somewhat roughly by men. As a result, the court still demands hard evidence to confirm that victims suffered severe violence during sex.

In cases of gang rape, when a victim makes an accusation, the court should follow the principle that claims from the perpetrator that there was mutual consent are not admissible. After a gang rape committed by US soldiers in Hiroshima, the district public prosecutors office decided not to bring an indictment against the soldiers because the victim had initially engaged in sexual intercourse with one of the soldiers by mutual consent, despite the fact that the other three soldiers then came and raped her. In such circumstances, the court should not accept claims from perpetrators that the victim consented to have sex unless they can produce hard evidence that consent was actively given by the victim.

Adding to that, in my opinion we should abolish the provision in the rape law that requires a complaint filed by the victim in order to prosecute a sexual assault, so that even in cases in which a victim does not take legal action against an assailant, prosecutors are able to press charges. No other countries have such provisions. It is due to the current legal system’s historical legacy that the crime of rape was established in relation to the crime of adultery in pre-modern law. In 1873, the government issued a notice declaring that when a husband decided not to file a criminal complaint, adultery would not be prosecuted. Since the crime of rape was considered to be related to the crime of adultery, the same procedure was, and still is, applied in cases of rape.

On the one hand, there is some truth in the idea that it is not necessary to take cases to court when victims don't want to. On the other hand, however, it

should be pointed out that the reason why a victim fears going to court is that she may suffer what we call “second rape”—that is, during the course of a trial, the victim is questioned about her past sexual behavior. Beyond that, in cases where rape resulted in bodily injury or in cases of gang rape, victims are, regardless of whether they wished to file a criminal complaint or not, required to attend a trial that violates their privacy. That’s unacceptable. In any case of sexual assault, it is imperative that measures are taken to protect the victim. Once we establish measures to protect victims, such as enacting the Rape Shield Law, we should then eliminate the provision requiring the victim to file a complaint before a rape can be prosecuted.

**Nakano:** Criminal justice procedures are also a process through which victims regain their dignity. Establishing the guilt of a subject and punishing him appropriately has great significance for a victim in the process of regaining self-confidence. The most important thing for a victim is that she has a sense that her accusation is just, that she can regain her self-confidence, and that she can make determinations based on her own will. Thus, if criminal justice proceedings go on regardless of a victim's wishes, this can be even more damaging to victims, especially in cases of sexual violence.

From this viewpoint, the consequences of the provision that makes sexual assault indictable only after the victim has filed a complaint should be analyzed in terms of the damage borne by victims. There are problems in terms of crisis intervention as well as problems

with the criminal procedure process after the damage takes place. What behavior is appropriate for the judiciary when they first meet victims? What can supporters do to empower victims going through criminal procedures in order to ensure that victims feel justified and do not lose heart in the middle of trial? When these problems have been appropriately addressed, victims can then maintain a good relationship with society.

I think the first thing we must do is look at the previous experiences of victims who have suffered due to defects in Japan’s criminal law system. To draw lessons from these experiences, it’s necessary for us to visualize their suffering. From the viewpoint of victims, it has already been decided from the very beginning of the judicial process whether or not they can win their case. To ensure that victims have a voice as the subject of criminal procedures, it’s essential to introduce decisive measures, such the appointment of defense counsel to represent victims during investigations. In order to make these changes, there must be a thorough reform of the existing legal system. And in order to reform the system, it is necessary to provide concrete examples of what can be lost when women suffer sexual violence and to show how victims should be treated when they face sufferings. Based on these efforts, we need to work toward legislation to eliminate violence against women more systematically. If these challenges form the core of our movement, I think that we can substantially change the current trend and make a difference.

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