

Noticeable Judicial Precedents

The Judgment of the Supreme Court related to Criminal Indecency

Kayoko Kitagawa
(Professor, Waseda Law School)

1. The Japanese Supreme Court convened a Grand Bench of the Supreme Court on November 29, 2017, overturning a prior judicial precedent related to the subjective requirements of criminal indecency (Supreme Court Decision of November 29, 2017; Criminal Case Collection #71, Vol. 9, Page 467). To constitute an indecent act under Article 176 (forcible indecency) of the Penal Code, the Court revised the conventional interpretation that uniformly insisted on the perpetrator's sexual intention and shifted to an interpretation that focuses on the content and extent of the sexual damage that the victim suffered. This change in judicial precedent is related to the amendment of the sex crime provisions in the Penal Code in June 2017 (see Topics in Japanese Law "Recent Legislation," No. 2), in accordance with modern social evaluations of sex crimes.
2. Although it is not expressly stipulated in the Penal Code, the criminal courts had hitherto adopted the notion that "a sexual intention of whetting or satisfying the perpetrator's sexual appetite" was required to constitute an indecent act. This interpretation was indicated by the Supreme Court on January 29, 1970 (Criminal Case Collection #24, Vol. 1, Page 1). According to this interpretation, even if a woman were photographed nude for purposes of retaliation, insult, or abuse, this act would not constitute criminal indecency. However, two out of five Supreme Court justices dissented against the judgment in the 1970 case. Moreover, many academic scholars have criticized the 1970 Judgment and insisted that such sexual intention is irrelevant to the violation of sexual freedom, which is a protected legal benefit of criminal indecency; thus, numerous criticisms have deemed this requirement unnecessary.
3. Regarding the opinion that sexual intention is necessary for criminal

indecenty to be established, since the “indecent” act that is subject to punishment under Article 176 is not objectively clear, the subjective requirement of sexual intention must be considered to determine whether an act is indecent. For example, when a doctor treats a patient, one cannot judge whether the doctor is intending to provide medical treatment or is simply pretending to provide medical treatment while actually engaging in criminal indecenty by simply observing the outward form of the action itself (doctor case). However, since broad punishment is not warranted, such cases should be limited to subjective requirements.

4. In a 2017 case, to produce child pornography, the defendant forced the victim, a seven-year-old girl, to touch his penis, hold it in her mouth, and also touched the victim’s private parts. The findings of the judgment of the first instance were that the defendant’s explanation that he had no intention of whetting and satisfying his sexual appetite but intended to obtain money cannot be rejected, and thus, a reasonable doubt remains regarding whether the defendant had a sexual intention. The judgment of the prior instance affirmed these findings in the judgment of the first instance, and the court held that it is inappropriate to maintain the 1970 Judgment at this time because forcible indecenty is formed when the defendant objectively conducts an act violating the victim’s sexual freedom with an awareness of the effect. The defendant’s lawyer alleged violation of the judicial precedent, but the Supreme Court supported the judgment of the prior instance.
5. In overturning the precedent, the Supreme Court stated the following;
 - (1) “Basically, a criminal provision pertaining to sexual damage or the construction of the provision has a characteristic that it cannot determine subjects of punishment without taking into account how such damage is accepted by society, “ “The 1970 Judgment can be understood that it required in a blanket manner the act to be conducted under a sexual intention of whetting or satisfying the perpetrator’s sexual appetite, regardless of the nature and content of the act, as a requirement for the formation of forcible indecenty, to determine the extent of subjects of punishment for the crime, taking into account how the crime was accepted by society at the time. However, this construction cannot be deemed as solid and unchallenged.” It is

apparent that the recent revisions of the Penal Code related to sex crimes “ ”reflect changes in how society generally accepts crimes pertaining to sexual damage and the reality of the crimes.” “In present times, in construing the requirements for the formation of forcible indecency, the Court should look at whether the victim suffered sexual damages or not and the content and extent of the damage. It is inevitable to say that it has become further difficult to find substantial grounds for supporting the legitimacy of the construction of the 1970 Judgment,”

- (2) “With that being said, among acts that should be evaluated as an indecent act stipulated in Article 176 of the Penal Code, ① there are acts that, as an act leading to rape, can be immediately evaluated as an indecent act for the reason that the acts themselves have an apparent sexual nature and can be confirmed without doubt to have a sexual meaning, regardless of the specific situation in which such acts were conducted and other factors. On the other hand, ② there are acts that people cannot tell whether the acts themselves have an apparent sexual nature or not, and for which it is difficult to evaluate whether they have a sexual meaning or not without taking into account the specific situation in which such acts were conducted and other factors. ③ Moreover, given the severity of the statutory penalty stipulated in the same article, not all the acts that can be seen to have a hint of a sexual meaning should be evaluated as deserving of punishment as an indecent act stipulated in the same article. The question of what kinds of acts have a sexual meaning and should be seen to deserve punishment pursuant to the same article is a matter of normative evaluation that should be determined objectively in consideration of how society at that time generally accepts crimes pertaining to sexual damage.” ” Therefore, it is undeniable that there are some cases in which, as one of such individual and specific conditions, the perpetrator’s purpose and other subjective conditions should be considered as a factor for determination.”
- (3) “However, although there are such cases, it is not appropriate to require the perpetrator’s sexual intention other than an intention of committing the crime as a requirement for the formation of forcible indecency in a blanket manner. The construction made in the 1970

Judgement should be amended.”

6. The Supreme Court concluded that the acts of this case are consistent with ① in 5(2), and that without the need to consider other conditions, the act has a strong sexual meaning and is apparently an objectively indecent act. According to the judgment of the Supreme Court, the case involving the above-mentioned doctor case was consistent with ② or, depending on the circumstances, ③ in 5(2).
7. The majority of criminal law scholar in Japan also support the new judicial precedent. However, we can observe that the definition of criminal indecency itself is far from clear, as we know that there are acts such as ② or ③. In considering the extent to which perpetrators are punished for indecent acts, the discussion will continue.

(27 December 2018)