

Doctoral dissertation summary

Bridging the Gap

— Recommendations for Sex Crime Law Amendment in Japan

Through a Comparative Study of
Japan and United States —

日本の性犯罪処罰規定のあり方に関する比較法的研究
— アメリカ州法の性犯罪規定を通して —

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Sex crimes are globally one of the most under-prosecuted crimes. Recently, there has been increasing awareness of the long-lasting and devastating consequences of sex crimes to its victims and the need for proper punishment of these crimes. In Japan, there is incessant public criticism that the existing law accurately captures neither the nature of sex crimes nor the gravity of harms caused by such crimes. Through a comparative analysis of the sex crime laws of Japan and the United States, this dissertation aims to bridge the gap between the realities of sex crimes experienced by victims and those of sex crime criminal prosecution by making sex crime law amendment recommendations for Japan.

Recognizing the social significance of effective sex crime laws, every state in the United States has engaged in sex crime law reforms in the 1960s and 1970s. Many adopted rape shield laws that protect victims during the investigation and trials, provided an extra layer of legal protection for vulnerable groups, including children, prisoners, and the elderly, and amended varying elements of sex crimes with the purpose of more effective sex crime prosecution. Even after the initial reforms, the state laws have gone through numerous amendments. Some were considered successful, while others were remembered as misguided attempts. Many successful and unsuccessful attempts that states have made to improve all aspects of their sex crime laws can serve as a meaningful reference when the legislature and the experts of Japan decide whether it is necessary to further reform the laws following the sex crime law amendment in 2017, and if so, how.

Therefore, this dissertation compares sex crime laws of the United States and Japan with the purpose of utilizing the lessons learned from the state laws and their application to evaluate and improve the sex crime law of Japan. The comparative analysis is made on the legal elements and penalties of sex crimes of the two jurisdictions. By comparing legal texts of relevant statutes, court decisions, and expert materials, this dissertation analyzes the legal elements of Japan's existing sex crime law and determines whether the laws provide the courts with a clear, consistent, and fair guidance tool. Based on the analysis, recommendations for changes that can provide for a more proper scope of penalization are identified by asking pertinent questions, including whether the existing law renders proper and just sex crime punishment, whether the law adequately addresses a victim's perspective and protect a victim's rights, and whether the law provides sufficient protection for the defendants accused of sex crimes, mainly, the constitutional rights in their criminal defense. Additionally, research from the various fields, including psychology and neuroscience, and crime statistics are analyzed to accurately reflect the realities of sex crimes.

Before delving into the comparative analysis, the dissertation addresses the fundamental question of why Japan and the United States punish sex crimes. The question is evaluated through a review of protected interest for sex crimes in Japan and the legislative intent for U.S. state laws. By considering the severity and nature of the harm that sex crimes cause to the victims, this dissertation suggests that

various protected interests identified by experts in Japan, such as bodily safety, bodily integrity, dignity, the right to be free from sexual violence or the right to determine who and when others may enter into the person's intimate sphere, all accurately present identification of the purpose of sex crime laws. It is recognized that sex crimes negatively impact various aspects of a victim's physical and psychological well-being and violate fundamental rights associated with maintaining a person's dignity as a human being. The dissertation, therefore, suggests that the purpose of criminal law for sex crimes is to discourage and punish acts that cause long-lasting grave harms to a victim at the expense of the mere sexual gratification of the perpetrator.

Subsequently, for the comparative analysis, the dissertation evaluates five major aspects of sex crime laws of the two jurisdictions that comprise subjective and objective elements of sex crimes that should be proved beyond a reasonable doubt to find a defendant guilty of the charged crimes. First and foremost, the dissertation identifies four objective elements in the sex crimes laws of Japan and the United States: the acts and the means elements constituting a sex crime, an element protecting vulnerable groups, and an element addressing technology-facilitated sex crimes. First, acts that are punishable when committed by meeting all other elements of sex crime statutes, such as indecent act and sexual intercourse, including oral, vaginal, and anal sexual intercourse, under the sex crime laws of Japan, are compared with various acts, such as sexual battery contact, penetration, and intercourse under the U.S. state laws. The definitions of the acts ultimately determine the boundaries of punishable acts. Examining which definitions most effectively afford protection for sex crime victims in Japan and the United States, a broader definition of sexual intercourse is recommended for Japan to capture more diverse types of sexual violence experienced by victims of varying gender identities and sexual preferences.

Second, sex crimes usually involve acts that are considered legal unless committed under specific criminal circumstances. Therefore, the punishable means utilized to carry out the acts, or in other words, the means that correspond to the legal element of a crime, are compared and analyzed. For example, means elements under sex crime laws of Japan are compared with the varied counterparts in U.S. sex crime laws ranging from strict force, forcible compulsion to consent. By evaluating the elements, relevant court decisions, and expert opinions, adopting a consent-based element with a list of means that satisfies the element, in replacement of force or threat element, is advocated as a way to depart from a perpetrator-centered judicial analysis of sex crimes in Japan. Additionally, a more concrete definition and a broader scope are suggested for the element of using a person's loss of consciousness and the inability to resist.

Third, the composition and robustness of the extra layer of legal protection for vulnerable groups are compared. By offering example state laws that provide protection for various groups, including students, recipients of psychotherapy services, prisoners, and children, it is suggested that Article 179

under the Penal Code of Japan that punish guardians who commit sexual acts by using their influence as guardians over children is expanded to include other adults that play integral parts of children's lives and exert great influence over the children. Additionally, a comparison with the U.S. states and other western countries and opinions from criminal law experts, such as Mana Shimaoka, indicate that that the current age of consent in Japan is too low to sufficiently protect children from sexual violence and account for a disparity of power between children and adults. Therefore, a recommendation is made that the age of consent should be increased from 13 to 16.

Fourth, the problem of increasing technology-facilitated crimes is introduced. The dissertation reviews the relevant laws and prefectural ordinances in Japan and the expert discussion about how to manage the crimes in Japan. The example U.S. laws that penalize various technology-facilitated crimes also reviewed, including those on the production and distribution of private or sexual images without consent, online grooming of children, and the production and distribution of deepfakes (synthetic video images featuring a victim in a sexual manner) without consent. Additionally, the issue of whether and how to punish minors who commit technology-facilitated crimes is discussed. Based on the review, introducing laws on technology-facilitated sex crimes is recommended for Japan.

Finally, a subjective element in Japan and *mens rea* for the United States, which go to a defendant's culpability, are compared. By analyzing court decisions, the dissertation argues that judicial evaluation of *koi*, the required subjective element for sex crimes in Japan, is often perpetrator-centered. By introducing different *mens rea* elements applied in the state U.S. sex crime laws and analyzing expert opinions about improving the application of the subjective element for Japan, the dissertation proposes the introduction of a *kasitsu*-based offense that enables penalization of a sex crime perpetrator who demonstrates a reckless disregard for a victim's lack of consent.

Based on the discussions, the dissertation recommends amendments to sex crime law in Japan by introducing model sex crime laws for Japan. The model sex crime laws serve as a prototype that reflects proposed changes with respect to the five aspects analyzed from this dissertation. The dissertation also gauges the potential impact of the recommendations and addresses possible concerns related to them. Through a comparison that provides insights into the effectiveness of sex crime laws of two drastically different jurisdictions, this dissertation aims to assist the incredibly challenging assignment of shaping the sex crime laws in Japan.

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