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UNIVERSITY OF CALIFORNIA,
IRVINE

“Proving” Rape under Japanese Law:
Evaluation of the Force or Intimidation Requirement in Court Cases

THESIS

submitted in partial satisfaction of the requirements
for the degree of

MASTER OF ARTS
in Social Ecology

by

Mutsumi Ogaki

Thesis Committee:
Associate Professor Naomi F. Sugie, Chair
Associate Professor Nicholas Scurich
Assistant Professor Lee Cabatingan

2020

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ABSTRACT OF THE THESIS

**“Proving” Rape under Japanese Law:
Evaluation of the Force or Intimidation Requirement in Court Cases**

By

Mutsumi Ogaki

Master of Arts in Social Ecology

University of California, Irvine, 2020

Associate Professor Naomi Sugie, Chair

In 2017, Japan underwent the first major amendment of its rape law in 110 years. The reform focused on revising the definition of rape and its sentencing practice to extend legal protection and reflect victim experiences in the law. But one of the most controversial agendas of the reform – mitigation or elimination of the requirement of force or intimidation in Japanese rape law was left unmodified after multitudes of negotiations among legal scholars, law practitioners and activists. Although the requirement is thought to exclude or disqualify particular rape scenarios, it is valued as a practical criterion to assess consent. To examine the various claims of the interpretation and application of the force and intimidation requirement in practice, this study analyzes publicly available court judgements in rape cases since the reform. The findings suggest that trial judges use the force requirement for three primary purposes: 1) to specify the degree of sufficient unlawful force, 2) to evaluate (the lack of) victim resistance, and 3) to assess the defendant’s knowledge of lack of victim consent. The study suggests that the non-guilty verdicts examined in the study hinged on the exceptionally high standard to demonstrate lack of victim resistance and defendant’s knowledge of lack of consent. The paper contributes to a discussion of further legal reform by highlighting the ways the current rape law enables inconsistent judicial decisions in rape cases driven by limited and biased understanding of sexual assault. It situates the findings within the social, cultural and legal context of Japan.

“Proving” Rape under Japanese Law:
Evaluation of the Force or Intimidation Requirement in Court Cases

On April 11, 2019, near Tokyo station in Japan, over 400 people came together to participate in a public demonstration called “flower demo” to protest against a series of alleged rape cases ruled non-guilty in March of the same year (Kawahara, 2019). These court rulings, one of which involved long-term sexual abuse and incest, acknowledged that non-consensual sexual intercourse occurred but did not find enough force or intimidation to constitute rape. The current Japanese Penal Code defines rape as forcible sexual intercourse committed using force or threat of force, and therefore, requires a proof of “force or intimidation” inflicted by a defendant to find him or her guilty of rape (Sugita, 2013). Akiko Matsuo, an initiator of the public demonstration, tweeted with a hashtag #itisrape to question the Japanese justice system that continues to operate using a limited definition of “rape” even after a major legal reform in 2017 that aimed to reflect victim experiences in the law (Mukuda, 2020). Others joined her to advocate for further legal amendment given the 2017 reform contained a condition to be reviewed in approximately three years after its implementation (Flower demo, 2019; Kawahara, 2019; Ministry of Justice, 2017). In particular, legal scholars and activists argued that the legal requirement to “prove” rape through the demonstration of sufficient force or intimidation is influenced by judges’ limited, biased, or false understanding of sexual assault (Flower demo, 2019; Shimaoka, 2017; Sugita, 2013; Tsunoda, 2001).

The 2017 reform focused on revising the concept of rape and its sentencing practice in order to extend legal protections and better reflect victim experiences in the law (CSCP, 2015d). Mitigation or abolition of the force or intimidation requirement was one of the major controversial points during the reform, but it remains unmodified after a multitude of discussions and negotiations among scholars, legal practitioners, and activists. There remains debate about

the advantages and disadvantages of the requirement. Scholars and activists who took an active role in the negotiations to change the requirement argued that it contributes to sexist judicial decisions because it is based on patriarchal ideologies of the time of the law's development from over 100 years ago (CSCP, 2014a; CSCP, 2014b). Others claim that it helps judges evaluate what happened in a case since it functions to be a presumably objective criterion of lack of consent (CSCP, 2015a).

To better understand the strong resistance and eventual rejection of the proposal to amend the force/intimidation requirement during the rape law reform in 2017, this paper aims to clarify the competing claims regarding the roles of the requirement. Following an overview of the 2017 rape law reform, the force/intimidation requirement, the persistence of rape myths in judicial decisions, and the legal landscape of rape cases in Japan, I present my research on application of the force/intimidation requirement. Using publicly available court judgements in rape cases since the reform, this study analyzes how judges apply the requirement in practice. The findings identified three major ways judges utilize the requirement in trials. First, the requirement sets a benchmark for sufficient unlawful force. Specifically, judges find that a defendant used a sufficient degree of force when the defendant either suppressed or intervened significantly with victim resistance. This determination is based on the judges' understanding of the circumstances of the crime. Second, it provides guidance to judges to understand the meaning of lack of victim consent. Judges evaluate various possible victim responses to force by focusing on victim resistance as a substitute of lack of consent. Third, it is used to evaluate a defendant's knowledge of lack of consent. Judges assume that defendant's use of force shows that he or she knew that the sex was against the victim's will.

Since the selection of the legal cases is not representative, this study does not seek to explain the legal evaluations of force/intimidation in every rape case tried in Japan. Instead, it aims to contribute to the scholarship on Japanese rape law reform by situating the findings from these cases in the competing claims about the force/intimidation requirement made during the Commission on Sex Crime Penalties (hereafter the commission or CSCP) to provide insights into its application in practice. The paper concludes by discussing implications of keeping the force/intimidation requirement in the current Japanese rape law.

Overview of the 2017 Rape Law Reform

In response to domestic and international pressures to better reflect the experiences of sexual assault victims in the rape law, in 2014, Japan's Ministry of Justice formed an expert investigative commission, CSCP, to evaluate the current legal practices surrounding sex crimes and identify areas in the Penal Code that require amendment (CSCP, 2015d; Watanabe, 2019). The commission was composed of 12 members, which included six legal scholars, two lawyers, a prosecutor, a representative from the National Police Agency, and a clinical psychologist. During the second and third meetings, the commission also invited speakers from relevant fields for expert testimony. While the CSCP was asked to provide recommendations for legal reform, it was the Legislative Council of the Ministry of Justice that created a specific proposal of changes to the existing laws. On March 7, 2017, "The Proposal to Revise A Part of the Penal Code (刑法の一部を改正する法律案) was introduced to the Diet (Maesawa, 2017). The proposal was approved on June 16, 2017 and went into effect on July 13, 2017, making the reform the first major amendment in the last 110 years since the enforcement of the original rape law in 1908 (Ministry of Justice, 2017; Watanabe, 2019).

Some key ideas reviewed and amended in the reform include the definition of rape, the minimum penalty of rape, the prosecution of rape without a victim complaint, a new penalty of rape by guardians (for reviews, see CSCP, 2015d; Maesawa, 2017; Shimaoka, 2017). The concept of rape was changed from the traditional Japanese term *gōkan* (強姦), a word that captures only forcible heterosexual penile-vaginal intercourse by a man against a woman, to more expansive *kyōsei seikō tō* (強制性交等), meaning “forcible sexual intercourse, etc” (Ministry of Justice, 2017; Trzaskawka, 2019). This change expanded the definition of rape by removing gender specification of victims and adding anal and oral intercourse, which is a notable amendment of the rape law. However, the ‘etc’ in the revised terminology for rape reflects the dominant view in Japan that continues to view penile-vaginal intercourse as the only form of sexual intercourse. Anal and oral sex are referred as *seikō ruiji kōi*, or “acts similar to sexual intercourse”. Now the revised rape law punishes “*A person who, through assault or intimidation, forcibly commits sexual intercourse, anal intercourse or oral intercourse (hereinafter referred to as “sexual intercourse, etc.”) with another person of not less than thirteen years of age*”¹. The minimum sentencing of rape was raised from 3 to 5 years of incarceration. Proof of force or intimidation is now unnecessary when guardians rape minors (under the age of 18) who are under their guardianship. The creation of the new penalty for rape by guardians was an alternative solution to mitigating or removing the force/intimidation requirement from rape cases generally. The commission recognized that a significant power differential between a defendant and a victim, such as that occurring in cases of incest, can obscure lack of consent and consequently, rape can be committed without force or intimidation in those situations (CSCP,

¹ Translations of Japanese laws are drawn from the Ministry of Justice’s Japanese Law Translation Database System unless otherwise specified.
<http://www.japaneselawtranslation.go.jp/law/detail/?id=3432&vm=04&re=2&new=1>

2015d). However, this form of legal protection was not extended to other groups that might be equally vulnerable due to their relationships with the perpetrators, such as teacher-student, supervisor-subordinate, and sport coach-mentee.

Ultimately, the point of amending the force/intimidation requirement was not incorporated into the final proposal for legal reform keeping the requirement in Japanese rape law. The next section presents the debate on the functions of the force/intimidation requirement presented during the CSCP.

Debate on the Force/Intimidation Requirement

Evidence of Consent

One of the major arguments raised during the CSCP to support the force/intimidation requirement is that it is used as a presumably objective criterion to examine lack of victim consent (CSCP, 2015a). Because rape cases often rely on claims of defendants and victims to demonstrate the occurrence, it is argued that the requirement of force/intimidation provides a framework for the judges to evaluate behaviors of defendant and victim based on their claims. Mihoko Tanabe, a judge and a member of the CSCP explained that the essential elements courts look for to determine whether a rape occurred include 1) presence of force or intimidation, 2) occurrence of sexual intercourse, and 3) lack of victim consent (CSCP, 2015a, p. 3). Before the legal reform in 2017, the Japanese rape law criminalized “*A person who, through assault or intimidation, forcibly commits sexual intercourse with a female of not less than thirteen years of age*”. The notion of consent is technically not included in the law; therefore, victim resistance plays a key role in determining lack of consent. Using victim resistance as a proxy of lack of consent complicates legal evaluation of consent because it concerns not only the absence of

consent but also whether the defendant knew that the victim did not consent (Cowan, 2007). Shimaoka (2017) pointed out that if demonstrating that sex was committed against a victim's will is a purpose of the force/intimidation requirement, the mere presence of force or intimidation should be sufficient, and its degree should not matter. But in reality, whether or not the defendant's behavior reached unlawful force becomes a point of dispute.

Several activist groups advocate for the Japanese justice system to adopt an affirmative consent model after Sweden's "Yes means Yes" approach, which requires individuals to actively seek consent when having sex (Human Rights Now, 2020; Spring, 2020). However, viewing non-consensual sex as the central element of rape has been met with a significant resistance during the CSCP because of a concern to convict individuals who engage in non-consensual sex as a result of genuine mistaken belief of consent. As a defense lawyer, Keiko Miyata feared that such a shift in judicial practice will challenge the legal principle of innocent until proven guilty and place the burden on a defendant to prove that there existed consent. She explained that in cases of rape, there could be a wide gap in the understanding of consent between a defendant and a victim: "since sexual intercourse or sexual interaction is a tool for communication, there are cases that occur due to a gap in the communication"²(CSCP, 2015b, p. 5). Also, literature suggests that mere transplantation of a foreign model to push ideal values is likely to only result in symbolic change, or worse, backfire (Estrich, 1986; Merry, 2006). Without the general public's understanding of why non-consensual sex alone should constitute rape, the affirmative approach might not contribute to a reduction of rape in Japan (Kamon, 2019).

² 性行為、性関係というのがコミュニケーションの手段である以上、そのコミュニケーションのギャップによって起こってしまう。

In contrast, those who advocate for the mitigation or abolition of the force/intimidation requirement argued that relying on the requirement as a defense for genuine mistaken belief of consent can be abused in a relationship or situation in which a victim cannot easily express active resistance. Research has shown that an involuntary state of paralysis known as tonic immobility is a common yet overlooked defense reaction to fear experienced by sexual assault victims (Marx et al., 2008; Möller, Söndergaard & Helström, 2017). The tonic state hinders their ability to resist, which can last for a few seconds to several hours. While freezing or inability to resist out of fear or surprise might be slowly but increasingly recognized by judges in rape by strangers, the similar phenomenon in acquaintance rape is still not widely understood (Saito & Otake, 2019; Tanaka, 2018). Saito and Otake (2019) interviewed Japanese sexual assault victims and identified that *entrapment* is a common process in non-consensual sex that functions to suppress victim resistance. Perpetrators take advantage of their higher-up or senior status to create a condition in which victims cannot explicitly resist, refuse, or avoid the assault. During the CSCP, Yukiko Tsunoda, a lawyer, stated that, “Depending on cases, there are ones that are acknowledged to be non-consensual but still found not-guilty due to a lack of intention (*mens rea*) because the defendant either couldn’t recognize lack of consent or misinterpreted it”³ (CSCP, 2015a, p. 3). She argued that it privileges the perspectives of a perpetrator even when the judges examine victim experiences during an incident. It is particularly concerning given a limited understanding of sexual consent among the general public in Japan. There was a survey conducted by a major Japanese TV show on “behaviors that are inevitable to communicate sexual consent”⁴, which showed that 27% of the sample believed that being in a car together

³ 判例によっては不同意であることを認定しながら加害者が被害者が不同意であると認識できなかったあるいは誤解したということで故意がないという形で無罪になっているものもあるわけです

⁴ 性行為の同意があったと思われても仕方ないもの

alone constitutes consent while 35% of the surveyed found that being heavily drunk counts as consent (Suzuki & Osawa, 2017).

Definitional Boundaries around Rape

It has also been pointed out that the distinction between lawful and unlawful force is arbitrary and influenced by patriarchal ideologies (Burns, 2005; Sugita, 2013). In one of the court judgements evaluated during the CSCP, the defendant was acquitted because he did not use any force exceeding what is socially accepted in “normal” consensual sex in the society (CSCP, 2014a). Examples of such forms of violence listed in the judgement included a male being on top of a female, pinning of legs by use of hands, and removing clothes. Such an evaluation of force through a victim’s resistance can be understood to reflect views that accept and expect male aggression and female subordination (Burns, 2005; Burt, 1980). Although individual Japanese judges have discretion to determine the admissibility of evidence drawing from “knowledge and rules widely gained from experience”,^{5,6} court judgements do not necessarily clearly tell whose knowledge, experience, and perspectives influence recognition of particular evidence (Sugita, 2013, p. 126). In addition to their own knowledge, judges need to consider knowledge about sexual assault provided by research and victim experience. Mika Kobayashi, an activist invited to the CSCP explained that there is a significant gap between victims’ and non-victims’ perceptions of force and intimidation during a time of sexual assault. Referring to her own victimization experience, she spoke to the commission about perceptions of force or intimidation unique to sexual interaction, that cannot and should not be assumed by ‘those who live in peace’⁷

⁵ 広く経験から帰納して得られた知識、法則

⁶ Code of Criminal Procedure Article 318 (刑事訴訟法第三百十八条)

⁷ 平穏に暮らしている人

(CSCP, 2014a, p. 16). Therefore, she argues that society and legal practitioners need to understand “what it looks like for people to decide not to resist to protect their lives”⁸ (CSCP, 2014a, p. 16-17). Using the force/intimidation requirement to evaluate unlawful force was criticized to be based on a limited understanding of the nature of sexual assault and does not capture diverse victim experience (Sugita, 2013; Tanaka, 2018; Tsunoda, 2001).

Another justification for keeping the force/intimidation requirement is because there is another form of rape called “quasi-rape” or “quasi-forcible sexual intercourse”, which punishes “*A person who commits sexual intercourse, etc. with another person by taking advantage of a loss of consciousness or inability to resist, or by causing a loss of consciousness or inability to resist*”. Examples of quasi-rape cases include intoxication and various forms of deception such as those based on religious beliefs, false medical treatment, or false employment screening requirement (see Kanmoto, 2013; Maeda, 2019 for more examples). To constitute a quasi-rape, force or intimidation is not an essential element, but prosecutors have to demonstrate that the assault violated one’s sexual freedom to the same extent as if it the defendant employed force or intimidation (Ida, 2015; Kanmoto, 2013). Therefore, it is argued that the evaluation of loss of consciousness or inability to resist conforms to the same level of high standard as the force/intimidation requirement in rape. Also, looking at the recent rulings in quasi-rape cases, the legal concept of inability to resist (*kōkyo funō*) is claimed to flexibly capture a variety of physical and psychological states that a victim has difficulty refusing sexual intercourse (Maeda, 2019). This includes a case where a victim believed that refusing a sexual intercourse will place people close to her in danger. However, because the interpretation of the legal concept can be indeed “flexible” and influenced by other circumstances of each rape scenario, it has been

⁸ その瞬間に自分の命を守るために抵抗しないという選択をした行動がどんな状態であるのか

criticized as being too vague, contributing to inconsistent understanding and application by judges and not comprehensible by the public (CSCP, 2015a; CSCP, 2015c; Tanaka, 2018). Kanmoto (2013) argued that there is no standard guideline for judges to decide whether *kōkyo funō* in rape by deception is examined through subjective (victim's) perspectives or objective (third-person's) perspectives. Therefore, depending on judges' perspectives and understanding of arguments presented at the trial, their judgements can vary.

Rape Myths in Judicial Decisions

A central question posed during the CSCP was whether rape myths influence judicial decisions in rape cases. Rape myths refer to stereotypical beliefs, that are often false or biased, of what a typical rape looks like and how a victim should behave (Burt, 1980). Burt, who coined the term rape myth acceptance, argued that the sources of rape myths are cultural attitudes that support male sexual aggression and female sexual reluctance. When victims' behaviors are considered to deviate from the socially normative or ideal behaviors of their assigned gender, they are disbelieved, trivialized, or blamed (van der Bruggen & Grubb, 2014; West & Zimmerman, 1987; Yamawaki & Tschanz, 2005). In an examination of Japanese judicial decisions of sexual assault cases, Burns (2005) identified legal discourses of “*tsūjō* (normal, natural, acceptable)” and “*fushizen* (abnormal, unnatural, unacceptable)”. The former discourse involved common elements of rape myths, such as the offender is a stranger and has previously convicted of sex crime. The *tsūjō* rape elements were found to mitigate the requirement to demonstrate lack of consent through the presence of force or intimidation. Judgements were less likely to require strong victim resistance. In contrast, cases that were deemed to be *fushizen* due to a defendant and a victim being acquaintances and the victim's behavior viewed to be provocative, judgements were more likely to examine closely the degree of force and the victim

resistance. Feminist legal scholarship has long argued that socially dominant ideologies, such as patriarchal and sexist perspectives, are reflected in law and influence judicial decisions, expectations and experiences (MacKinnon, 1989; Smart, 1989). Vagueness of Japanese laws make it even easier for judicial decisions to diminish a defendant's legal culpability based on victims' behaviors that deviate from the widely believed 'scripts' of rape.

To define behaviors that constitute crime, Japanese laws tend to leave much space for judges' interpretation instead of listing specific behaviors that constitute a given crime. Although such a list is not written in the law, it can be said that it exists as collective knowledge in the justice system because the primary source that guides judicial decisions in court is a pool of previous legal decisions. As a civil law country, precedents do not have a legally binding force, however, the Japanese legal system has a unique history of being influenced by both civil and common law systems (Itoh, 2016). Therefore, precedents, particularly those ruled by higher courts, are often influential and provide judges with guidance on interpreting law in later cases (Itoh, 1970). Long-standing precedents, including those referred to for more than half a century, are not uncommon in many fields of law in Japan. For instance, one of the most cited judgements regarding the force/intimidation requirement in rape was ruled in 1958 by the Supreme Court (Tanaka, 2018). The specific level or type of force/intimidation sufficient to constitute rape is not defined in the law, and instead, has been shaped by previous court rulings, such as this 1958 precedent, which stated:

“Even if the act of force or intimidation is such that it is deemed to be insufficient by simply observing the act itself, it should be understood that it is sufficient if it is deemed to inhibit the ability of the other party to resist or makes it significantly difficult for the

other party to resist, considering the other party's age, gender, behavior, personal history, time and place where the act took place, or environmental or other relevant factors.”^{9, 10}

This ruling emphasized the need to situate the force or intimidation in the context of the crime committed. Literature shows that there is a decrease in court cases that focus exclusively on the degree of force/intimidation and more judgements are attentive of contextual factors (Yamamoto & Konishi, 2017). However, whether a defendant's behavior constitutes a sufficient degree and form of unlawful force remains to be a key component of judicial decision in rape cases. Also, Tanaka (2018) pointed out that the 1958 precedent does not mention the victim's psychological state, and therefore, it is up to the individual judge to decide how and how much to take it into consideration. Moreover, whether it is a misreading of the aforementioned famous ruling or inconsistent interpretation of the law, a common indicator of sufficient unlawful force/intimidation is when it places a victim in a state that is extremely difficult to resist an assault (Burns, 2005; Shimaoka, 2017). Therefore, evaluation of force/intimidation places a significant emphasis on the physical resistance by victims. For instance, a Supreme Court ruling from 2011 found a defendant not guilty of rape after having two guilty rulings from trials in lower courts because the court did not find enough level of force using the victim resistance standard (Sugita, 2013). In contrast to the previous decisions of the courts acknowledging the victim's testimony to be trustworthy, the Court questioned the victim's lack of effort to run away

⁹ Original Japanese terms or phrases are provided 1) when they are translated by the author or 2) when multiple English translations are available. Quotes are translated to keep the original order of words and meanings as much as possible.

¹⁰ その暴行または脅迫の行為は、単にそれのみを取り上げて観察すれば右の程度には達しないと認められるようなものであっても、その相手方の年齢、性別、素行、経歴等やそれがなされた時間、場所の四囲の環境その他具体的事情の如何と相伴って、相手方の抗拒を不能にし又はこれを著しく困難ならしめるものであれば足りると解すべきである。

or actively seek help from a security guard and other people nearby. Sugita (2013) argued for the bystander effect at play, a state in which people hesitate, delay, or avoid helping a victim when other people are present at the scene. He stated that the Court underestimated that passersby are even less likely to intervene in a quarrel between a man and woman. In fact, the security guard testified that he thought the defendant and the victim looked like a couple. Also, the Court claimed that her description of the assault to be unnatural and hard to believe because she was “in a situation in which she could have rejected the assault if she had resisted even a little bit”¹¹ (Sugita, 2013, p. 224). Tanaka (2018) explained that judges with limited understanding of sexual assault expect rape victims to engage in “avoidance, resistance, escape, seeking help, and immediate disclosure of victimization”¹² as these are common behaviors seen in victims of other crime such as robbery and assault (p. 70). However, these are indeed behaviors that many sexual assault victims have difficulty doing (Saito & Otake, 2019). Misapplication of such a standard can contribute to inadequate evaluation of victim behavior in rape cases and place a significant emphasis of what did not happen rather than what happened during an assault.

Legal Landscape of Rape Cases in Japan

Stereotypical or false beliefs about sexual assault victims also influence the reporting rate of sex crimes because many victims decide not to report for fear of being blamed and disbelieved. Victims of *entrapment* in acquaintance rape are particularly vulnerable because their wish to avoid disruption of their existing social relationship with the perpetrators often results in a refusal to disclose their victimization to anyone including their family members and close friends, let alone the police (Saito & Otake, 2019). The victims also have difficulty recognizing

¹¹ わずかな抵抗をしさえすればこれを拒むことができる態様である

¹² 回避、抵抗、逃走、援助要請、直後開示

that what they experienced constitutes sexual violence due to the absence of physical force and their tendency to blame themselves for not resisting (Harned, 2005). This further contributes to their silence. According to Sugita (2013), the cases reported to the police only account for about 20% of sex crimes that actually occur. Other statistics show even lower rates of reported cases (Research and Training Institute, 2020; Tsunoda, 2001). The number of rape cases is reduced in quantity through attrition as it moves up each stage of the process of seeking justice in the system from the police station to the court. The number of rape cases recognized by the police (ninchi kensū) in 2018 was 1,307 (National Police Agency, 2020). This is highly correlated with the number of cases cleared (kenkyo kensū), which refers to cases in which the suspects are apprehended by the police. Then, 1,190 of them led to apprehension of suspects in 2018, contributing to a high clearance rate of 91%. However, not every case is prosecuted. In 2018, 492 cases were prosecuted while the majority of the cases (760) were not prosecuted. 511 cases were not prosecuted due to insufficient grounds for charging (Ministry of Justice, 2019). The number of rape cases prosecuted is very small considering the estimated population of Japan in 2018 was 126,443,000 (Statistics Bureau of Japan, 2018). Non-prosecution rate for rape is usually around 50%, about 10% higher than the overall non-prosecution rate for the criminal offenses. Johnson (2002) explained that the conservative and selective Japanese prosecutorial practice is an institutional mechanism to avoid mistaken charges and convicting innocent individuals. It is also a strategy for Japanese prosecutors to maintain a high conviction rate. According to the statistics report by the Supreme Court of Japan (n.d.), the overall conviction rate for first trials of criminal cases in 2018 was approximately 97%. Although statistics on rape specifically were not available in the report, out of the 1,474 sex crime cases tried in a district

court in 2018, 1,428 cases were ruled guilty and 9 cases were found not guilty¹³. Therefore, victims' unwillingness to report to the authorities and selective charging policy focusing on 'winnable' cases have potentially contributed to a skewed picture of which victims' experiences are represented through the justice system.

DATA AND METHOD

Data

For the current study, I use court judgements in rape cases to examine how judges apply the force/intimidation requirement in practice in the period following the 2017 reform. Court judgement or *hanketsu* in Japanese is a written document issued by judges following a conclusion of oral hearing in a full criminal trial. Japanese court judgements include the final decision of the court (*shubun*), the reasons for decision (*riyū*), and the facts (*jijitsu*). The section of facts typically contains claims of both parties, including an explanation of the points of dispute if there are any, and the court's evaluation of these claims, concluding whether each claim is recognized or not (Fujioka, 2013). The section of facts is sometimes labeled as 'points of dispute' (*sōten*), and in cases with no apparent points of dispute, it can be either omitted or integrated into the reasons for decision.

This study retrieved full texts of court judgements in rape cases by searching the following electronic databases: Courts of Japan, Westlaw Japan, and LEX/DB. Using the

¹³ For a review on comparison of adjusted calculation of the conviction rates between the U.S. and Japan, see (Johnson, 2002, p. 214-242). Mere juxtaposition of statistics between the countries can be misleading due to differences in the justice systems and statistical calculations. The U.S. has significant amount of uncontested cases that enter plea-bargaining and avoid trials while most of the criminal cases filed in Japan undergo full trials since Japan does not have an arraignment system. Also, Japanese statistics only includes cases of complete acquittals and ignores partial acquittals. Pre-adjusted data shows that the average U.S. acquittal rate is 175 time more than that of Japan. Adjusted comparison shows that the U.S. juries acquit 8 times more often than Japanese judges.

function to search cases by the specific laws applied, the study sought rape cases in which the revised rape laws (the Penal Code 177 and 178) were employed. The judgements were published between 2017 and 2020. From the initial pool of 44 cases found, 27 were excluded because of multiple charges other than rape, such as burglary, kidnapping, and fraud. The exclusion criterion is to ensure the analysis captures judges' understanding and interpretation of the Japanese rape law through their evaluation of presented facts and claims. Without access to more textually rich materials, such as trial transcripts, including the cases in which the defendants were charged with rape and other crimes will increase the risk of misinterpreting important elements that explain law in action. As a result, this inclusion criteria retrieved 17 cases in total across the three databases, which include 5 forcible sexual intercourse, 6 forcible sexual intercourse resulting in physical injury, and 6 quasi-forcible sexual intercourse. The length of judgement varies depending on the cases, and for the cases reviewed for the study, it varied from 2 to 10 single-spaced pages of text. A brief summary of the cases analyzed is provided in Table 1.

Although it is beyond the scope of this study, limited access to court judgements in Japan is worth noting and relevant to the inferences the study draws from the findings. For those who are not lawyers, access to court judgements is extremely limited in Japan. I expected to see more cases available since prosecutors request 350 to 500 rape cases each year to be tried in court (Ministry of Justice, 2019). However, many court judgements are not publicly available even through courts, journals, or commercial databases, and it is not clear if there are systematic criteria for those that are published. Also, many of the electronic and commercial databases that publish court judgements are not readily accessible to the public due to its cost and membership requirement. Therefore, although the study does not assess generalizability of the cases

examined, it provides insight into how judges apply the force/intimidation requirement in practice.

During each trial, judges need to make various decisions. The major one being whether a defendant is guilty or not, and others include severity of punishment, admissibility of evidence, credibility of testimonies, and application of relevant legal rules and concepts. Unfortunately, court judgements are incomplete accounts of what influence judges' decisions because they cannot include all of the details of specific elements that gave rise to the conflicting accounts between a defendant and a victim or the points the legal representatives emphasize to convince judges. Moreover, since court judgements are written by judges, they provide the judges' own distillation of the events and arguments presented at trial, which the judges, then, use to justify their legal decision. Arguments that deviate from the judges' knowledge of rape and interpretation of the rape law are often deemed untrustworthy or unreasonable.

Analytical Approach

My analysis of the court judgements takes a feminist legal method of "feminist practical reasoning". Originally coined by Bartlett (1990), the approach combines practical reasoning's approach to a judicial decision as an outcome of multiple competing perspectives informed and influenced by legal and socio-cultural contexts of a case, with a feminist focus on identifying the law's power to disqualify and exclude particular victim experiences. It builds on what Bartlett defines as "the woman question", which is also referred to as "the question of the excluded" by other scholars (Freedman, 1990). Those are questions posed to identify the ways seemingly neutral or objective legal rules fail to reflect the experiences that are most vulnerable and excluded from legal protection. Feminist legal scholarship on rape law has demonstrated that

socially dominant assumptions about gender and sexuality are reflected in law and judicial decisions, sustaining legal and social beliefs of what a typical rape should look like (Burns, 2005; MacKinnon, 1989; Smart, 1989). Using the feminist practical reasoning approach, my analysis seeks to reveal “perspectives not represented in the dominant culture from which reason should proceed.” (Bartlett, 1990, p. 855).

In the initial stage of closely reading each court judgement and developing a system of coding, I placed great emphasis on judicial evaluation of facts that gave rise to the dispute and interpretation of law and relevant precedent. Analyzing the judges’ application of the force/intimidation requirement across multiple judgements allowed me to consider “whose interests particular rules or legal resolutions reflect and whose interest require more deliberate attention” (Bartlett, 1990, p. 857). Through the coding process, I identified the requirement’s primary roles in judicial evaluations of unlawful force, victim resistance, and defendant’s knowledge of lack of consent. The strength of the methodological approach is in its ability to incorporate feminist perspectives into traditional legal reasoning. Thus, it is equipped to consider multiple perspectives – within and beyond pre-existing legal rules. A limitation of the approach in this study is lack of access to textually rich data to better examine the process and dilemma of judicial decisions as it was described in the Data section. Although judges often quote statements by the defendant and victim in the court judgements, the study has limited data to assess the judges’ translation of competing claims presented by defense and prosecutor in court. It is possible that judges consciously or unconsciously mistranslate or adjust the arguments to justify their judgements. Although this study might not assess “accuracy” of the judges’ translation, this study aims to identify (in)consistency by examining the application of the force/intimidation requirement across multiple rape cases.

FINDINGS

Out of the 17 cases analyzed, two cases resulted in non-guilty verdicts (Case No. 10 and 16) and the rest of cases received imprisonment ranging from 3 years to 10 years. Three of the guilty convictions resulted in a suspension of imprisonment (*shikkō yūyo*) for up to 5 years, so long as the defendants would not commit another crime. Concerning the relationship between defendant and victim, not counting the one case in which the relationship was not clearly stated (Case No. 6), 4 cases were stranger rape and 12 constituted acquaintance rape. Recent acquaintances refer to a status of relationship in which a defendant and a victim had met less than 24 hours before an assault. There were 4 recent acquaintance rape cases among the 12 acquaintance rape cases. I include the sub-category of recent acquaintance because the literature shows that prior relationship between a defendant and a victim is a key element to influence judges' rape myth acceptance (Burns, 2005). The distinction is to see whether judges' responses to the recent acquaintance rape would differ significantly from stranger rape and acquaintance rape. Most of the guilty cases had no points of dispute since the defendants admitted charges pressed by prosecutors. Even when there were conflicting claims between defendant and victim, the court judgements had little difficulty deciding between two accounts. In contrast, both of the non-guilty cases employed clinical examinations to conduct extensive deliberation of the victims' claims about physical injuries the defendant caused (Case No. 10) or psychological state during the assault (Case No. 16). The force/intimidation requirement was used to assess victim behavior in each of the non-guilty cases, particularly focusing on victim resistance and consent.

The following three sub-sections present the analysis of judges' application of the force/intimidation requirement in rape cases examined. Here, I discuss the three themes identified in the analysis and some of "the woman questions" I posed when examining the court

judgements. First, I analyze how judges determine sufficient unlawful force. What are the contextual factors of cases that influence their decision of what form and degree of force is required to constitute rape? Second, I examine the ways judges rely on the force/intimidation requirement to make sense of victim behaviors during an assault. Is victim resistance in rape interpreted consistently across cases? Third, I identify judges' assumptions concerning defendant's knowledge of when sex lacks consent. When do judges admit a defendant's claim that they genuinely believed the victim was consenting?

Practical Benchmarks of Sufficient Unlawful Force

As previously discussed, prosecutors need to demonstrate sufficient force or intimidation to find a defendant guilty of rape when a victim is older than 13 years old. Since the Japanese rape law does not define the benchmark(s) of unlawful degree or forms of force/intimidation to constitute rape, the judges have to determine the illegality of defendants' acts. The force/intimidation criterion was not required in 7 of the 17 cases because either a victim was younger than 13 years old (Case No. 5) or the defendants were charged with quasi-rape (Case No. 12-17). Among the 10 cases that applied the requirement of force/intimidation, judges found enough degree of force/intimidation and found the defendants guilty when their acts: 1) suppressed victim resistance¹⁴ (Case No. 1, 3, 6, and 8), or 2) made victim resistance extremely difficult¹⁵ (Case No. 2, 4, 7, 9, 10, and 11). More severe forms of violent behaviors, including use of a stun gun (Case No. 6), punching the face of the victim with knuckles and strangling (Case No. 8), belong to the first group of cases. However, the two groups did not reveal significant differences in specific degrees or forms of assault the courts said to constitute

¹⁴ 被害者の反抗を抑圧した

¹⁵ 被害者の反抗を著しく困難にした

sufficient violence. Both groups contained the same forms of behaviors such as forcibly kissing a victim, pushing down a victim on the floor, and being on top of a victim. The evaluation of unlawful force is based on a collection of a defendant's behavior rather than examining whether forcibly kissing or removing a victim's clothes alone satisfies the requirement.

Several judgements reinforced that unlawful force is not necessarily equal to "strong" force (Case No. 1, 2, 3, 9 & 14). Such judgements often referred to the practical benchmarks set by previous decisions and compared the degree of force used in those cases within the sub-group of cases with similar facts (Case No.1, 2 & 14). However, the comparison was vague and none of the judgements cited any specific precedents: "The assault in this case is not considered to be very strong compared to similar cases"¹⁶ (Case No. 1). In Case No. 3, behaviors that constituted violence included forcibly kissing, groping, and laying the victim down to the ground. Although the judges reinforced that these behaviors do not constitute strong force in relation to other similar cases, they recognized these were sufficient because it placed the victim in fear, which kept the victim from strongly resisting the assault. Contextual factors of the case might have played a role in the recognition of sufficient force as some elements of rape stereotypes are identified. First, the victim was 17-year-old at the time of assault and the court described the assault as a heinous crime inflicting a great deal of sexual shame and humiliation on "a minor who is immature both physically and mentally"¹⁷ (p. 2). Second, the rape followed a surprise attack type of assault in which the defendant, who was working as a courier, raped the victim at her house. Another case (Case No. 2) also identified unlawful force in similar forms of behaviors by the defendant. The victim of this case was also young (19-year-old). In addition, the court

¹⁶本件の暴行は同種事案の中ではそれほど強度のものとは認められない

¹⁷心身ともに未成熟な未成年

interpreted that the defendant taking advantage of his status as her supervisor caused significant psychological pain.

Moreover, the defendant's knowledge of victim resistance influenced judges' recognition of unlawful force. Even when strong force was not used, being aware of and overpowering the victim's persistent resistance was condemned by the court as a malevolent and selfish act and found the defendant guilty of rape (Case No. 1). Also, in Case No. 3, the court acknowledged that the defendant attributed significant blame to the defendant for continuing the assault knowing that the victim was resisting. The court concluded that the defendant took advantage of the victim's inability to physically resist due to fear.

Therefore, the application of the force/intimidation requirement in the majority of cases was consistent with the 1958 precedents, and judges placed a great emphasis on contextual factors of an assault to determine sufficient degree of unlawful force. The findings suggest that the judges did not require behaviors that constitute "strong" force in the guilty cases examined in this study. Instead, degree of force was evaluated in relation to the circumstances of crime that shaped victim experiences. In addition to assessing the defendants' behavior, the judges considered victims' behavior, age, and relationship to the defendant to determine whether the force or intimidation in question intervened their resistance significantly.

Understanding (Lack of) Victim Resistance Through Force

Unlike the cases that took into account contextual factors when making an evaluation of the victim's (lack of) resistance, there were two court judgements that suggested the victim's lack of resistance might be interpreted as unreasonable, despite the context of the attack. In the first case (Case No. 11), one of the disputes was about the absence of consent. As evidence for

consent, the defense lawyer claimed that the victim did not seek help when her friends visited her house during the assault. The court refuted the claim as a reasonable behavior by a naïve 19-year-old, who wanted to protect her friends and herself from further victimization as she was experiencing significant fear and confusion. The court ultimately sentenced the defendant to 7 years and 6 months in prison. However, it described the victim's response as regrettable as she could have avoided the assault. Deliberate attention and relying on the victim's explicit resistance to show a lack of consent contributes to victim blaming in court by judges or/and defense attorneys leading to secondary victimization. Also, given the judges' fundamental assumption of avoidability of rape, which is a typical rape myth, it leads one to speculate whether the case outcome would have been different in the absence of young age and virginity since these are common characteristics of stereotypical rape scenarios (Burns, 2005).

In the second case (Case No. 16), which is one of the acquittal cases, an inconsistent evaluation of force and lack of resistance was seen. The main point of dispute was whether the victim was in a state of *kōkyo funō* (inability to resist) during the two assaults in question due to a long term physical and sexual abuse by the defendant that predated the assaults. Some of the forms of force employed by the defendant previously included the defendant punching the victim's face, kicking her legs, and stepping on her back. These acts are considered to use relatively strong force given the other cases analyzed in the previous section. However, the court stated that the force used was not strong enough to coerce the victim to tolerate "acts considered being normally unbearable"¹⁸ (p. 8). Unbearable acts here refer to incestuous sexual intercourse with her biological father. According to the court, the psychological form of *kōkyo funō* is established when a victim is deemed to be in a state "in which it is extremely difficult to expect

¹⁸ 通常耐え難い行為

actions other than accepting or tolerating sexual intercourse, such as rejecting sexual intercourse, taking into account the relationship between the initiator and the other party and the situation at the time of intercourse”¹⁹ (p. 7). The prosecutor presented to the court a clinical report, which suggested that the victim was experiencing depersonalization or dissociation during the times of assault. Although the court found the report reliable, it refused to reflect it in the judgement. The court emphasized that the *kōkyo funō* is a legal judgement rather than a clinical one:

“Whether or not A (victim) was in the state of *kōkyo funō* is a legal decision, and since the court must practice its exclusive right, the testimony and the results of the clinical examination by the E doctor (hereinafter referred to as ‘E examination’) are from the standpoint of an expert psychiatrist and it is only valued to the extent that A’s psychological condition at that time is clarified, and does not bind the court’s judgement regarding A’s state of *kōkyo funō* as a legal decision.”²⁰

This judgement seemed to set the benchmark unnecessarily high, especially considering that the court recognized the following facts: 1) the absence of consent, 2) the continuous sexual abuse placed the victim under the defendant’s psychological control, and 3) the family financial situation had strengthened the unequal power structure between the defendant and the victim. According to the prosecutors, the victim felt beholden to the defendant because she had

¹⁹ このうち心理的抗拒不能とは、行為者と相手方との関係性や性交の際の状況等を総合的に考慮し、相手方において、性交を拒否するなど、性交を承諾・認容する以外の行為を期待することが著しく困難な心理状態にあると認められる場合を指すものと解される。

²⁰ Aが抗拒不能の状態にあったかどうかは、法律判断であり、裁判所がその専権において判断すべき事項であることから、同証言及びE医師における精神鑑定（以下「E鑑定」という。）の結果は、専門家である精神科医師としての立場から当時のAの精神状態等を明らかにする限度で尊重されるに止まり、法律判断としてのAの抗拒不能に関する裁判所の判断を何ら拘束するものではない。

borrowed a large sum of money from him to pay for her school tuition. When the victim resisted an assault, the defendant complained about the debt by saying “You just take the money and do nothing”²¹ (p. 3). Nonetheless, the court concluded that the victim was not “in a state where she could not defy the intent of the defendant in all aspects of everyday life”²² (p. 8). To support this view, the court pointed out that she made decisions about school against her parents’ opposition. This speaks to the claim concerning limited legal understanding of forms and degrees of force/intimidation that are unique to sexual assault (CSCP, 2014a; Sugita, 2013; Tanaka, 2018). Is resisting a sexual assault the same as saying no in another type of interaction with the father? While the judge might have not been dismissive of empirical evidence of victim’s response to sexual assault, it could be interpreted that the court’s judgement is, in a sense, conforming to rape stereotypes, assuming that a victim in the state of *kōkyo funō* is helplessly under the control of defendant in every aspect of her life.

Evaluation of Defendant’s Knowledge of Victim Consent

Focusing on the victim's resistance to determine whether a defendant’s behavior constitutes unlawful force can lead to the defendant using the absence of victim resistance as a defense. This is particularly plausible considering defendants’ recognition of lack of consent or victim’s inability to consent were at dispute in some of the cases examined. In Case No. 10, the other non-guilty judgement, lack of strong force and victim resistance were used as defense to argue that the defendant was not aware of an absence of victim consent, thereby lacking criminal liability. The victim explained that she was not able to resist the assault because she “blanked

²¹ 金を取るだけ取って何もしないじゃないか。

²² 日常生活全般において、Aが監護権者である被告人の意向に逆らうことが全くできない状態であったとまでは認め難い。

out”²³ (p. 4). The court acknowledged that the defendant’s initiation of oral intercourse was enough to place the victim in a state that was extremely difficult to resist the assault considering the time and place the incident took place, the difference in physiques between the defendant and the victim, and the victim’s young age (25-year-old). However, the court ultimately denied the legal culpability of the defendant’s behavior since there remained a reasonable doubt that he lacked intention to engage in sex against the victim’s will. The court explained that the defendant’s mistaken belief of the presence of consent is plausible because he did not employ strong force during the sexual intercourse in question. The judgement based the decision on the victim’s failure “to show the resistance in a way that was obvious to the defendant”²⁴ (p. 9). This reads as if the victim was responsible for explicitly resisting. However, it is a faulty assumption because it goes against the current state of knowledge about victim response to sexual assault that rape victims often cannot physically resist an assault (Saito & Otake, 2019; Tanaka, 2018).

In Case No. 17, the points of dispute concerned whether the victim was in the state of *shinshin sōshitsu* due to her intellectual disability and autism, and whether the defendant knew that. The court referred to an evaluation by a psychiatrist who specializes in developmental disorders and autism. The court considered the evaluation as reliable and legitimate, and countered the defendant’s claim that the victim was capable of understanding sexual acts she was engaging in. In addition, the court referred to a letter the defendant had written to the victim to explain about erection and ejaculation using easy-to-understand words and illustrations and pointed out that the defendant knew that the victim lacked knowledge about sexual phenomena. An interesting point that the court highlighted was the lack of evidence that could demonstrate

²³ 頭が真っ白になって

²⁴ 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

the defendant's genuine belief of the victim's ability to consent. Because the defendant was a staff member at the care facility at which the victim resided, there was an assumption that the defendant knew that the victim was legally unable to consent to sex due to her intellectual disability and autism. The court said "Since there is no evidence for the defendant to recognize that A (the victim) has come to understand the social and ethical meanings of sexual acts and phenomena at the time of each crime, it can be inferred that the defendant knew that A (the victim) was not understanding the social and ethical meanings of sexual acts and phenomena"²⁵ (Case No. 17). Although this point alone did not lead to the court's conclusion to settle the dispute, this ruling required more deliberate attention to the defendant's claim about his knowledge of lack of victim consent than the case mentioned in the previous paragraph. It shows that requiring a defendant to prove why he or she believes consent was given for sex does not necessarily challenge the legal presumption of innocent until proven guilty. This speaks against the concern shared during the CSCP over how the affirmed consent approach places an unnecessary burden of proof on the defendants (CSCP, 2015b).

DISCUSSION

The force or intimidation requirement in Japanese rape law is viewed as a remaining task of the 2017 reform and motivation for further revision of the current law. There exists a lively debate regarding the outcomes of removing and keeping the requirement in the law as illustrated during the CSCP (CSCP, 2015d). To contribute to the ongoing conversation regarding further legal reform to reflect victims' experiences in the law, this study analyzed 17 court judgements

²⁵ 被告人においてAが性的行為や性的現象の社会・倫理的な意味を理解するに至ったと認識するような事情もないから、本件各犯行時においても、被告人は、Aが性的行為や性的現象について社会・倫理的な意味を理解していないと認識していたと推認することができる

to understand how judges employ the requirement in rape cases. The findings highlighted three major patterns in the application of the requirement.

First, judges used the force requirement to determine benchmarks for a sufficient degree of unlawful force in relation to the judges' understanding of circumstances in each rape case. Since the current law does not define the level or form of force that is necessary to determine illegality of sexual intercourse, drawing from previous decisions provides judges with collective knowledge of sufficient unlawful force. Considering the findings by Burns (2005), the legal interpretation of what counts as unlawful force overall seemed to have been expanded.

Scholarship shows that patriarchal ideologies expect and tolerate male aggression and female subordination in consensual sexual intercourse (Burns, 2005; Burt, 1980). Examples include a male pushing down a female onto bed, being on top of or pinning a female, and removing clothes while she resists. There have been judgements that denied the presence of unlawful force when the defendant's behavior did not go beyond what can be seen in "regular" sex (CSCP, 2014a). Therefore, judges conforming to patriarchal views may require a higher degree of force and/or visible signs of force, such as injuries or damaged clothes, to distinguish consensual and non-consensual sex, which leads to clear yet misinformed recognition of unlawful force (Sugita, 2013). However, no court judgement examined in the study dismissed victims' claims of violence inflicted on them based on the argument that these behaviors are also seen in non-criminal sex. Even when the defendants' behaviors are not considered "strong" compared to other similar cases, the judges took into consideration of how the victims might have perceived and experienced the force or intimidation.

Second, judges used the requirement to evaluate whether lack of victim resistance was "reasonable" considering the victim's particular experiences. Since the most common benchmark

of unlawful force requires a defendant's behavior to make it extremely difficult for a victim to resist an assault, a significant emphasis is placed on victim resistance to evaluate the presence of force. Controversial precedents hinged on a rape myth and patriarchal assumption that victims should and can resist rape (CSCP, 2014a; CSCP, 2014b; Sugita, 2013; Tanaka, 2018). Although such an assumption was not seen in most of the judgements analyzed in the current study, it appeared to influence the non-guilty ruling of the Case No. 16, in which the judgement denied the state of *kōkyo funō* (inability to resist) of the victim because she had confronted and resisted the defendant in a non-sexual situation, which implied that she could have resisted the sexual assault as well. Interestingly, this is contrary to the arguments raised during the CSCP that judges do not reflect on empirical evidence for psychological condition of *kōkyo funō*, this judgement demanded clinical evidence of dissociation or depersonalization (CSCP, 2014a; CSCP, 2015a; Maeda, 2019). This seems to be an exclusionary high standard for the proof of irresistibility compared to other cases. I argue that this is a form of rape myth as it is based on a limited understanding of sexual violence. While the phenomenon of “freeze” out of fear and unable to resist an assault might be increasingly recognized, how judges should consider such a victim response is not reflected in the law and precedents (Tanaka, 2018). Also, both the force/intimidation requirement and the legal concept of *kōkyo funō* do not adequately capture “entrapment”, a process of forcing unwanted sex using unequal power relations between a defendant and a victim (Saito & Otake, 2019). The process can be better described as “self-preservation” in a long-term sexually abusive relationship, including Case No. 16. However, it might be misinterpreted as consent using the current rape law.

Third, judges used the force/intimidation requirement to assess whether a defendant was aware of lack of victim consent. Judges assume that the presence of sufficient unlawful force

indicates that a defendant knowingly committed non-consensual sex. However, in the other non-guilty judgement (Case No. 10), although the court recognized that the sexual intercourse was against the victim's will and lack of active resistance was a reasonable response, it denied the legal culpability of the defendant because a lack of strong force implies that the defendant could have genuinely believed that the victim was consenting. Evaluating a defendant's intention to commit rape is problematic when such a great emphasis is placed on victim resistance because it leads to trivializing sexual assault, minimizing defendant's legal responsibility, and blaming rape victims in cases without explicit signs of victim resistance.

Taken together, the findings suggest that while the force/intimidation requirement helps judges apply legal rules to contextual factors of each rape victimization scenario, rape myths judges hold can lead to inconsistent and unjust interpretation and disqualification of victim experiences that do not conform to their knowledge and perception about sexual assault. Double requirements of proof of force/intimidation and lack of consent can limit the scope of scenarios that count as rape. In jurisdictions that define rape as non-consensual sex, requiring the proof of force is redundant when a victim's lack of consent is already established (Kinports, 2001). In the case of Japan, this can be a triple requirement when proof of the defendant's knowledge of lack of consent is added. In both of the non-guilty judgements, lack of consent was acknowledged by the court, therefore, these cases seem to demonstrate the consequences of raising the standard to "prove" rape using the force/intimidation requirement. They suggest that sexual intercourse against one's will alone does not constitute a violation of one's sexual autonomy under the Japanese rape law. Some members of the CSCP voiced their skepticism with law reform as a means to reflect victim experience in law. Hitoshi Saeki argued that if the current legal practices do not adequately incorporate victim's psychological conditions during assault, then it is more

training that is necessary rather than rewriting the Penal Code (CSCP, 2015a). However, I argue that the vague law allows judges to use concepts undefined in the law such as victim resistance and consent, which leads to inconsistent legal interpretations, especially when coupled with contexts that do and do not conform to rape myths. Also, simply expanding interpretation of the existing vague concepts, such as *kōkyo funō*, is still susceptible to inconsistencies in judicial decisions. While it might allow more flexible application of the concepts, it only increases the options for judges to choose from and it does not limit its problematic interpretation. Therefore, the Japanese rape law (specifically, articles 177 and 178 of the Penal Code) must be better defined in order to provide judges with clearer guidance to facilitate judicial evaluation that is consistent and attentive to each unique situation. Since the purpose of the Japanese rape law is to punish individuals who violate others' sexual freedom and autonomy, it is reasonable to revise it to expand legal protection to those who are vulnerable and not protected under the current law.

The current study demonstrates ways in which judges perpetuate rape myths through the application of the force/intimidation requirement. When applying the force/intimidation requirement, judges often rely more on a victim's behavior, such as resistance during an assault, than on the defendant's behavior. Although it is necessary to consider victim experiences, excessive or unjustified deliberation of their claims is susceptible to secondary victimization and victim blaming in court. Therefore, re-evaluation of the purposes to focus on "force" is necessary to modify the current rape law. While a measure to assess violence inflicted on the victim should be kept in the law, any future legal reform should significantly modify or remove the current force/intimidation requirement so as to enable punishment of non-consensual sex. This will allow assessment of legal culpability of a defendant's behaviors that constitute non-consensual sex without having to "prove" rape through the high standard of unlawful force. The further

discussion of the legal reform should be informed by empirical evidence of rape offense and victimization. Legal protection of rape victims is maximized when legal reform and raising awareness through data-driven training occur hand in hand.

Future research might examine the functions of the force/intimidation requirement by using more diverse, representative, and textually rich materials. Lack of access to data is one of the limitations of the study as it was described in the Method section. Analyzing trial transcripts provides more insights into understanding the roles the requirement plays in the process of judicial decision during trial. Also, this study was unable to study the influence the selective prosecution has on skewing the representation of the rape cases that reach the trial phase. Focusing on those cases dismissed by prosecutors for insufficient grounds for charging due to the high standard set by the force/intimidation requirement might better demonstrate trivialization, disqualification, and exclusion of particular rape victimization. Another limitation is that this study focused on the judges' legal interpretation of the Japanese rape law as described in judicial decisions. While this study attempts to consider socio-cultural and legal contexts of the rape cases to study the process and outcome of court judgements, there are several assumptions involved with trying to reveal the degree and patterns of interpretive flexibility judges have in applying the force/intimidation requirement. Supplementing textual analysis of judicial decisions with interviews of judges might uncover additional key perspectives and institutional conventions, in which judges base their interpretation of the law.

Despite these limitations, this study contributes to the scholarship of rape law reform in and outside of Japan. The analysis of the court judgements in rape cases advance our understanding of the primary functions of the force/intimidation requirement in proving rape under the current law. An empirical examination of the requirement can inform the negotiation

of the extent of amendment of the law as Japan gears up for further rape law reform. While most scholarship regarding the Japanese rape law and the force/intimidation requirement is published in Japanese only, this paper contributes to a wider literature on rape law reform. Although this study focuses on the Japanese context, requirements of force and unclear guidelines on sufficient force are seen in many other countries around the world (Equality Now, 2017). Re-writing rape law to clarify legal expectations and reflect victim experiences is a crucial step toward more consistent and just judgement.

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Table 1: Description of Court Judgements

Case No.	Judgement Date	Court	Crime Type	Relationship Between the Defendant and the Victim	Case Outcome	Judges' Application of the Force/Intimidation Requirement
1	11/15/2017	Tokyo District Court	Forcible sexual intercourse	Recent acquaintances	3 years (suspended for 5 years)	The judges acknowledged that the degree of force used in this case was not strong compared to other similar cases, but found it sufficient because it suppressed victim resistance.
2	07/13/2018	Matsuyama District Court	Forcible sexual intercourse	Supervisor/subordinate	3 years (suspended for 5 years)	The judges acknowledged that the degree of force used in this case was not strong compared to other similar cases, but found it sufficient because it made victim resistance extremely difficult.
3	08/30/2018	Fukuoka District Court	Forcible sexual intercourse	Acquaintances	4 years	The judges recognized that the defendant did not use strong force in relation to other similar cases, but found that his behavior constituted unlawful force. The judges concluded that he took advantage of the victim's inability to physically resist due to fear and thus was aware of lack of victim consent.
4	12/26/2018	Kobe District Court	Forcible sexual intercourse	Strangers	6 years	The judges acknowledged that the force used in this case made victim resistance extremely difficult.
5	04/03/2019	Maebashi District Court	Forcible sexual intercourse.	Acquaintances	3 years and 6 months	N/A
6	06/01/2018	Yamagata District Court	Forcible sexual intercourse resulting in physical injury	Not clearly stated	3 years (suspended for 5 years)	The judges acknowledged that the force used in this case suppressed victim resistance.

7	10/05/2018	Nagoya District Court	Forcible sexual intercourse resulting in physical injury	Recent acquaintances	10 years	The judges acknowledged that the force used in this case made victim resistance extremely difficult.
8	03/05/2019	Aomori District Court	Forcible sexual intercourse resulting in physical injury	Strangers	More than 5 years and 6 months and less than 8 years	The judges recognized that the defendant suppressed victim resistance by assaulting the victim with strong force and provoking intense fear.
9	03/13/2019	Kushiro District Court	Forcible sexual intercourse resulting in physical injury	Strangers	7 years	The judges acknowledged that the degree of force used in this case was not strong compared to other similar cases, but found it sufficient because it made victim resistance extremely difficult.
10	03/19/2019	Shizuoka District Court Hamamatsu Branch	Forcible sexual intercourse resulting in physical injury	Strangers	Not guilty	The judges denied the legal culpability of the defendant because lack of strong force and victim resistance implied that there remained a reasonable doubt that he might have genuinely mistaken that the victim was consenting.
11	05/30/2019	Sendai District Court	Forcible sexual intercourse resulting in physical injury	Recent acquaintances	7 years and 6 months	The judges acknowledged that the force used in this case made victim resistance extremely difficult.
12	10/19/2017	Kofu District Court	Quasi-forcible sexual intercourse	Acquaintances	3 years and 6 months	N/A
13	09/27/2018	Tokyo District Court	Quasi-forcible sexual intercourse	Acquaintances	5 years and 6 months	N/A
14	10/18/2018	Kagoshima District Court	Quasi-forcible sexual intercourse	Recent acquaintances	5 years and 6 months	N/A

15	01/11/2019	Nagoya District Court	Quasi-forcible sexual intercourse	Acquaintances	7 years	N/A
16	03/26/2019	Nagoya District Court Okazaki Branch	Quasi-forcible sexual intercourse	Biological father/daughter	Not guilty	N/A
17	09/17/2019	Nagasaki District Court	Quasi-forcible sexual intercourse	Acquaintances	6 years	N/A