

Abstract

Preparing Evaluation Standards for Non-consensual Sexual Acts: Research on Case Studies from Korea and Other Countries

Deuk-kyoung Yoon

Mijeong Lee

Gyeong-hui Yu

Jee-Myoung Kang

Min-Kyung Han

Although non-consensual sexual acts have not been legislated under current Korean criminal law, it is necessary to introduce it to ensure the real guarantee of sexual self-determination, which is a benefit and protection under the rape law. Meanwhile, implications are being given on introducing the crime of non-consensual sexual acts; legislation on sexual violence without assault or threats, based on the consent of the victim, is being introduced in other countries.

In this study, in order to ensure the actual guarantee of sexual

self-determination and considering the necessity of introducing laws against non-consensual sexual acts, we examined cases of sexual violence without assault or threats that were handled at Korean domestic counseling centers and classified them by type, and through reviewing laws from other countries that have been introduced against non-consensual sexual acts, as well as precedents and policies, we reviewed cases where a standard of consent and non-consent was recognized, as well as cases where there was no recognition, and suggested which matters should be considered as evaluation standards for non-consent in introducing legislation against non-consensual sexual acts in Korea.

Focus group interviews were conducted with the heads of six counseling centers from across Korea to investigate counseling cases of sexual violence without assault or threats related to non-consensual sexual acts. We collected information on cases where there was the problem of sexual violence that occurred in a domestic violence situation; cases where there was a context in which the person did not have the ability to refuse a relationship with the other person; cases where there was sexual violence when the victim was defenseless; cases where the victim was reliant on the perpetrator for financial reasons; and cases where because of the perpetrator's power or fear of rumors, it was not possible for the victim to refuse the perpetrator.

The majority of the counseling cases examined were those where the victim was in a weak or vulnerable position. With regard to sexual violence, it is necessary to consider as an important criterion for determining consent whether or not the victim had the freedom to consent to a sexual act in a vulnerable situation, or if they had the ability to consent using their own free will.

Foreign case studies from the UK and Germany were reviewed. In a legislative effort to fill gaps in punishing sexually violating acts, the UK imposes a provision that punishes "sexual acts without consent" and Germany punishes "sexual acts contrary to discernable will" (sexuelle Handlungen gegen den erkennbaren Willen).

With regard to introducing new legislation in Korea, it is expected that the existing system of Article 32 of the Criminal Act and related special laws will not be maintained, even if it is said that they follow either the UK's legislative model or Germany's legislative model. In the long term, in order to strengthen the protection of sexual self-determination, it would be appropriate to move toward a full revision of the sex crimes law by referring to the German legislative model in terms of conformity with Korea's criminal law system.

According to results analyzed from precedents, 6 out of 10 cases from the German Federal Supreme Court case analysis were cases where it was recognized that a sexual act was contrary to recognizable intentions. They seem to be appropriate cases of recognition, and it seems that these can be usefully utilized in Korea's introduction of legislation on non-consensual sexual acts.

In case studies of non-recognition, there was a case in which the court did not recognize that a sexual act happened contrary to the victim's recognizable intention. In this case, inside, the person did not want to have sex, but on the surface, gave consent. When asked to have sex, the person expressed refusal indirectly by saying "I have a boyfriend." It is necessary to review whether this should be recognized as a sexual act contrary to a recognizable intention.

In addition, there were cases in which a decision was made that

obscured the legislative purpose of Article 177 (1) of the revised Penal Code of Germany, such as revoking the decision of the state court due to differences in viewpoints between the state court and the Federal Supreme Court. This is similar to the situation in Korea where victims who cannot present evidence other than their own testimony to prove their victimization can be put in a difficult situation in having the credibility of their testimony and their victimization recognized.

Research areas: Criminal Act/Act on Special Cases Concerning the Punishment, ETC. of Sexual Crimes, Sexual Violence Crime, Non-Consensual Sexual Crime

Keywords: Non-Consensual Sexual Crime, Sexual Self-Determination, Sexual Activity without Consent, Sexual Acts Contrary to Discernable Will, Cases of Sexual Violence without Assault or Threats, Yes_means_yes model, No_means_no model