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Section II: Gender-Based Violence and the Law

*Gavan Patrick Gray, Nidhi Shrivastava
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Abstract

This chapter is a transcript of an open-ended discussion that occurred between the authors when they met to discuss the subject matter of the second section of the book, which focuses on the effectiveness of legal responses to gendered violence. As with the previous introductory dialogue, the discussion takes place after preliminary drafts had been completed, and the authors share their thoughts on the subjects they will each discuss in more detail in the following chapters. These include the impact of cultural and gender bias within the Indian legal system, the insufficient impact of long-overdue reforms in Japan's sexual violence laws and the weaknesses that exist in constitutional protections offered to LGBTQ+ people in South Africa.

Keywords: Gender violence; law; legal reform; Japan; India; South Africa

Gray: In the World Economic Forum's Global Gender Gap rankings for 2020, South Africa does quite well in 17th place. India fares far worse at 112th. However, Japan sits at 120 and there is little reason, on paper, for this to be the case. I mentioned previously that the United States had a strong role in adding women's rights to the post-war constitution and this set the framework for a system where women, in theory, have considerable room for advancement within social institutions. In practice, the outcomes are far different and while some of the reasons for this can be explained by the male dominance of these institutions,

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an entrenched ‘old boys club’, some of it is down to the gender roles that still impact the way in which women are treated in the workplace.

These factors definitely have an impact on the way the law is interpreted and applied, but these laws themselves are generally a product of an even more old-fashioned worldview from decades and generations in the past. While things today are certainly not perfect, they are an improvement on the attitudes that existed in the time of the current generation’s great-grandparents. Yet, many laws which have a strong impact on women’s lives date from this period. When it comes to South Africa and India, I am sure there are similar problems in the present day, but in the case of legal standards are the laws more modern, in the sense that they were either drafted recently or are subject to regular revision or update, or are they more akin to Japan, where in 2017 the laws on sexual violence received their first significant revision in 100 years?

Shrivastava: That’s a good question, Gavan. Indian rape laws are rooted in colonial laws dated back to the time when India was colonised for 200 years. The treatment of rape victim-survivor during court trials, where the defence lawyers prod through a woman’s sexual history, are practices that date back to this period. In fact, to this day, a hundred-year-old book by Jaising Modi on jurisprudence and rape called *Medical Jurisprudence and Technology* is considered a law bible in India. During the research for the coming chapter, I looked it up and it was still in print in India. Students were praising the work, without realising that it is problematic in terms of the practices the author encourages. For example, Modi problematically assumes that if a woman is a virgin, she is of a ‘good character’. Thus, it is more likely that her rape happened, and her testimony can be trusted. Elizabeth Kolsky mentions in her research the case of *King vs. Patha Kala* from the early twentieth century, where a young woman named Viru was raped by someone from a lower caste. Feeling shameful, Viru attempted to commit suicide by jumping into the well. The judge in this case, punished Patha Kala by sentencing him to four years of imprisonment. Kolsky observes that although Viru was not on trial, the trial was about her because her non-consent, her appearance and caste, and her sexual history took centre stage. Because she fought back and later tried to ‘save her honour’ by attempting to kill herself, she became a model for defining a ‘good’ rape victim. Years later, in 1972, during the Mathura rape case – Mathura had been raped by two policemen – even the Indian Supreme Court refused to believe her because they doubted her character.

Gray: This goes back to the treatment of women in the sex industry I explored in my first chapter. So much apathy, and failure to provide protection or support, is excused based upon attacks on the character or moral quality of the women involved.

Shrivastava: Exactly. Of course, there is pressure for change and feminist organisations and lawyers have advocated for the courts to give more credence to the testimony of rape survivors. Yet, changes that occurred in 1983 were dismissed by many of these groups as purely symbolic. After an infamous gang-rape case in Delhi in 2012, there was another wave of pressure from scholars and this finally led to the 2013 amendments of rape laws. Some of the noticeable changes were that the legal term for ‘rape’ changed to ‘sexual assault’ to include different

types of sexual offences including penetration by objects, as happened during the 2012 rape case. The government also established a Nirbaya fund to help empower and provide resources to rape victim-survivors. Even so, sexist, patriarchal and often misogynistic attitudes towards rape victim-survivors are still quite widespread.

Gray: When it comes to legal punishments, the Japanese system can veer from excessively harsh to overly lenient without any seeming common standards as to what determines the severity. In actuality, the set punishments are clearly defined by fairly rigid laws that leave quite wide ranges for possible sentences. Murder, for example can result in sentences of from 5 to 20 years, or in extreme cases, the death penalty. This leaves a lot of leeway for judicial discretion, but in practice, the actual punishment will be strongly affected by precedents that take into account things like remorse, motive, apologies, settlement payments, the offender's age and character etc. In the same way, the treatment of violent sexual crime is often handled in a formal, by-rote manner that focuses on precedent and established standards rather than the specifics of each individual case and the impact the events have on the actual people involved.

The Japanese courts, in my view, have become, or perhaps always were, a very cold, bureaucratic system in which true justice takes a back seat to 'proper procedure'. One unfortunate outcome of this is that the system as it is currently applied often allows offenders to evade formal punishment by reaching out-of-court settlements with victims. It's a system that I feel, in the case of crimes of sexual violence, does too little to generate true justice for the victim, adequately punish offenders, or maintain the safety of the general public. It is improving but, at present, if I were to hear of an incident of sexual violence, I would not hold high hopes that the offender, even after being identified, would be properly punished by Japanese courts. Do you think that standards or procedures are significantly different in either South Africa or India? In other words, do you think that offenders in sex crimes, once they have been identified by the police or court, are more likely than not to receive a custodial sentence?

Dayal: If I can address that Gavan, there is quite a disparity in South Africa between what the legal system enshrines versus what the lived realities of citizens are. Because of my research interest, I will use an example that focuses on the experience of LGBTQ+ groups. In 1994, South Africans from all racial groups helped give birth to a new democracy that was meant to allow freedom, equality, social justice and opportunities for all. Due to this, South Africa has often been presented as a regional model for hope, social rebirth and democracy. However, today, more than two decades post-democracy, a paradox exists where, despite numerous policies and legislation guaranteeing the preservation of human rights, there are still significant levels of crime and human rights violations.

For example, the new South African Constitution marked it as one of the first countries in the world to prohibit discrimination based on gender identity and sexual orientation. There are also provisions for same-sex partners to marry, adopt and be legally recognised in deceased estates. Yet, as was discussed in the first section of this book, even when things seem to be moving in a progressive direction, deep flaws can remain and LGBTQ+ individuals in South Africa still

experience high rates of overt and covert violence. They can be said to straddle two worlds, one with intricate legal protections and another of continuing, often hidden, persecution. Part of the persistence of this problem can be attributed to the ‘un-African’ label that is assigned to LGBTQ+ individuals and the dominant themes of conservative community values, heteronormativity, heterosexism and patriarchy in South African societies. Gavan, I am wondering what the repercussions of sexual violence in Japan are?

Gray: Japan also has a somewhat deserved reputation for entrenched sexism, which many write off as misogyny. In my personal experience, this is not true at the broader level. There are certainly many misogynists and some of them rise to high positions where their public gaffs can create an impression that Japan’s political system is still completely unconcerned with the welfare of women. In practice though, I find that most Japanese men, whether young or old, have the basic level of concern for the welfare of all social groups that you would expect from a society that places such strong emphasis on egalitarianism and social harmony.

The problem, from my perspective, is that very few have a strong knowledge of the actual problems which women face, both in terms of their awareness of the extent of the problems that exist and their understanding of the way that these problems affect women. For example, in regard to sexual violence, many may think that rape is terrible but they might consider it as not being very common, considerably underestimating its rate of occurrence. Then, in terms of impact, they may view it as a crime of violence and consider that arrest and punishment of perpetrators is sufficient, believing the fact that Japan has strong laws against such offences will be enough to resolve the problem. Their lack of awareness of the flaws in the system, or the way in which the system itself can harm victims, does not mean they do not care; many Japanese men, I would say the great majority, find sexual violence against women utterly abhorrent but they are frequently lacking awareness of the scope, severity and impact of the problem.

What this means is that there is a fundamental problem in terms of understanding and education and that public attitudes to such issues have not yet caught up with what experts, activists and the victims themselves know about the subject. I’m curious whether general awareness levels and education about sexual violence and its impact on victims are widespread in Indian and South African institutions, especially among the police and courts, and also in systems like hospitals.

Shrivastava: Yes, there is definitely a need for deep, structural change in the Indian law enforcement system. In fact, rape survivor-victims are often hesitant to file First Information Reports (FIRs) because they are discouraged by the police officers themselves. The police in India are often viewed as corrupt and bureaucratic and as holding entrenched patriarchal and misogynistic attitudes. I mentioned the Mathura rape case earlier, and it was only the response to this that saw ‘custodial rape’ – in other words: sexual assault by police or jailers – as being a punishable crime, and this only happened in 1983. There are female police officers but even in popular culture, they are portrayed as unsupportive and corrupt.

Gray: Do you think there is room to improve this issue through greater training and awareness? Personally, I had initially thought that increasing the number of women involved directly in each element of the system was the way to go. However, when looking at the level of female representation in the police I was left wondering whether this is necessarily true. In Japan, only 10% of police officers are female and I thought this was terribly low, especially when you compare it with places like England and Wales where the level is over 30%. I was surprised to learn, though, that the level in the United States is only about 12% and, while this may be a problem, the United States still leads the field in many areas of responding to sexual violence.

One other factor that influenced my views is that there is sometimes a misconception that female victims of sexual violence will prefer to deal with female officers. In some cases, this is not true, and the victims prefer male officers who give them a greater sense of physical security. According to some experts, it is not the gender that is most important but rather the training the responders have received and, ideally, the use of non-police experts in forensic interviewing skills.

Dayal: Gavan, I think it is true that deeper reforms are required. As you said, the system itself can be very cold, impersonal and unsupportive. The objective of a criminal justice system is to ensure that criminal cases are processed speedily and that lawbreakers are handed appropriate punishments. But, in the case of South Africa, the criminal justice system has not been operating optimally. The Victims of Crime Surveys in South Africa for many years keeps revealing concerning statistics that show household satisfaction with the courts and the criminal justice system is constantly decreasing. Many households believe that the courts are too lenient on criminals when passing sentences, that court proceedings take far too long and the people who are at the receiving end of discrimination and violence suffer even more due to this. People lose trust in the legal system and this leads to a decrease in crime reporting because people who are affected by crimes, who are often part of a marginalised group, feel that their reports will not be given the attention they deserve. Some members of society also fear that they may experience secondary victimisation if they report crimes.

Shrivastava: I think, Gavan, you make a great point about if training and education can change/help with the issue of gender-based violence. However, while I do think they are great starting points for India, I believe that it will take re-learning of certain cultural attitudes and letting go of problematic ideologies such as favouring boys over girls, the reduction in the statistics of female infanticide and also acceptance of women's education and freedom to travel in public space that will reduce gender-based violence in India. India as a country is multi-layered, multi-religious and also shaped by the class and caste issues that shape it. Therefore, I think the solution to reduce gender-based violence will have to come from different avenues working together to change cultural attitudes in the country.

In the film, *Damini*, which I explore in this chapter, for example, the main character witnesses and reports the gang rape of a family servant by some of her relatives. She ends up having to fight against not just the perpetrators but corrupt police officers, biased lawyers and an uncaring legal system. Although she is

ultimately successful, we kind of see that it is the main character who has been leading this fight, not the victim herself, who is actually murdered and discarded, both physically and metaphorically, halfway through the movie. In one way this highlights a troubling fact that often the activists and reform-minded lawyers have more influence than the actual victims of these crimes. Is this something you see in either Japan or South Africa?

Gray: Well, in Japan most of the women who work in the sex industry tend to come from economically fragile groups. They are from small rural towns with few economic opportunities, women who left the education system early, single mothers and so on. So, it's not so much an issue of social class, as you can be relatively high class in Japan without having a lot of money, but of economic stability, or rather, of the lack thereof. So, in terms of the sex industry, economic class certainly leaves these women vulnerable to exploitation. In other areas, though, such as crimes of sexual assault, those who are affected can come from a much wider segment of society and it is not so much that the system disenfranchises the poor, as it is the way it privileges the wealthy and allows them to pervert justice. I think this is a common problem internationally, where higher economic classes have a greater variety of ways to exploit the weaknesses of the system and often at an individual level it is impossible to generate change. You need either a larger activist organisation or major media coverage to create the required pressure.

Shrivastava: Yes, they are meant to be support systems for all people but often the poor have limited access to them. This is represented in movies like *Damini* where victims of rape, where they are poor, are often unable to get justice when the perpetrators come from a higher class. So, there is a question too, of whether the same legal support exists for victims who are poor, middle and upper class and whether the systems have a classist element wherein victims of different types receive very different treatments.

Dayal: I feel that there are dynamics of class and economic status in my study on South African Indian LGBTQ+ people. Sometimes society assumes that because people are from a population group that is seen to be economically active, that they are immune to gender identity and sexual orientation discrimination. However, this is not the case. As per my research findings, LGBTQ+ people of Indian descent in South Africa experience gender identity and sexual orientation discrimination regardless of their economic backgrounds. However, in South Africa, many studies have confirmed that people who are in lower-income groups may experience higher levels of crimes, regardless of race.

Shrivastava: One other aspect of this is the specific economic reality of women as a social group. In India, for example, women are becoming much more independent, more involved in business, more career-oriented and are leaving their family homes and occupying public spaces. This empowerment is actually doing the opposite for men because they are starting to feel intimidated by such women. We sometimes forget how much masculinity is tied to the economy and personal economic performance. Even to the extent that in some cultures women are still seen as an economic burden because they are not expected to become financially independent. So there is an issue where middle-class women are finding

new opportunities due to these opening doors but for women from working-class or rural backgrounds, often the social mobility is significantly less open and so social class can be a huge factor in the problems we see. I'm assuming that something similar might exist in Japan?

Gray: I think that's right. The voices that are heard are those that come from the middle class, the professors, the politicians, the media personalities, and while they might be transmitting the stories of women from lower economic classes, those women still lack the power to advocate for their own stories.

Dayal: Yes, I see that too in communities where, due to a lack of money, people who experience discrimination feel silenced. Their lack of financial resources prevents them from entering a different social class where they would possibly have more open expression. Without economic independence, some people at the receiving end of discrimination and violence feel trapped in a community that can be very threatening to them and which might react in a very unsupportive or even negative way.

Shrivastava: It also works the other way, as Gavan mentioned. While poverty can restrict some people's access to support systems, wealth can give other people unfair access to, or the ability to buy, the justice system. But this not only happens in negative ways. There are stories like in *Damini*, where the main character's wealth gives her the privilege to highlight an injustice that the victim's poverty prevented her from addressing.

Dayal: That resonates completely with some beliefs in South Africa, in that a lot of the activist organisations are found in more middle to upper-class communities, and people from the low-income communities come to these people for representation. As a result, you have a class dynamic where people feel that their story will only be taken seriously if it is told by someone who is in a position of authority. There are also research studies that mention that events, such as Pride, that create visibility for LGBTQ+ people and their experiences often take place in areas that are not inclusive of people from all social groups.

Gray: When I was doing research in Thailand, it was often exactly that situation, where people from very, very poor communities had no way of interacting with the courts or with other agencies, except through these activist-intermediaries who were almost always middle class. In Japan, it is a little different though, as it is largely a middle-class society. There is poverty, of course, but it is far less clearly delineated. Wealth and poverty are often separate from superficial distinctions of high and low class so that someone who looks like they might be from a wealthy family might be living on the borderline of serious poverty, while someone who appears poor might have significant cash hidden away. When it comes to the justice system, it would definitely be money rather than social class which has the stronger influence. Victims will frequently be pressured to accept out of court settlements as the best way to resolve cases of sexual violence and one result is that the richer you are, the easier it is to escape more significant punishments by utilising your wealth.

Shrivastava: Yes, I think I can relate to that, as in my research I came across many scenarios where rich criminals would be able to buy off the victims. But I wonder whether it is money or gender norms that have the bigger influence

because I see very often that courts have certain expectations of women in these cases, where if they did not act in a proper manner they are automatically treated more like they encouraged the crime. There was one case where a lawyer was speaking to a victim of assault and he was trying to say that because she had a painting in her room which showed a semi-nude woman who had her hands bound – just because of the presence of this painting – the victim-survivor had been playing the role of the seductress and that she, rather than the man who had attacked her, was the immoral one. So if you're not prim and proper and quiet and meek then you are not the right kind of woman. But of course, if you are quiet and meek you will not make a fuss about the crime. And yet, at the same time, they expect women to fight back, and if they do not have marks on their body to show they resisted, then this is also used against them.

Gray: You mentioned this earlier and I was thinking how similar that is to Japan where, if there's no evidence that you've actually been fighting, then, it's suggestive of you being complicit to whatever happened. This issue has been highlighted by a few recent cases where people took advantage of positions of authority to abuse girls who were too frightened or traumatised to resist physically in such a manner.

Shrivastava: Sometimes it feels like the courts have a particular image of what an 'acceptable' victim is and what an 'unacceptable' victim is and, regardless of the crime, if you do not fit into the right bracket you will have a harder time achieving justice.

Gray: And, of course, we have to be careful with the terms we use. Typically when referring to women who suffered sexual crimes we will call them 'survivors', but it gets a little difficult when you are talking about the legal system, which still refers to perpetrators and victims. I just want to point out that if we talk about victims of crime it is not meant in any way other than to refer to the legal designations.

Shrivastava: In my research, I use Robin E. Field's term 'victim-survivors' to describe the people who have encountered rape and gender-based violence. The term victim-survivors, in a nutshell, means that we cannot define an individual's traumatic experience in one manner. Rather, it is up to them to decide whether they want to be addressed as a victim (as someone whose trauma needs to be acknowledged and supported) or as a survivor (where they have come to terms with the traumatic experience). The term – victim-survivor – allows the individual to exist in a liminal or third space and lets them define their experience the way in which they want to address it, rather than letting society decide for them. It is so difficult to find the correct term to describe them. How do you think courts, lawyers and society should describe them? Often, labels can also take away power from the person experiencing the trauma. How are labels handled in South Africa and Japan?

Dayal: Words have great power when speaking about gender. Because gender is seen as being on a spectrum, some people feel as though you shouldn't use the term homosexual, as it polarises the sexuality of the people involved. Yet, whereas language in some areas is so progressive and constantly changing, legal terminology is much more rigid and slow to change. There are a lot of researchers

writing about how the wrong labels can take power away from people, so perhaps that is something that needs to change in terms of the law.

Gray: I agree completely. I mentioned earlier the problem of the system being too cold and impersonal and here is one area where there is room for relatively easy and quick changes. Does there need to be a single catch-all term to refer to either ‘survivors’ or ‘victims’ or can we instead allow some flexibility and human interest to enter into things, leave room for those involved to reclaim their own agency and determine how they would like to be referred to in court proceedings?

Dayal: I think we may be moving in that direction but we are certainly not there yet. And I think we might expect attitudes to change much quicker than legal procedures. As Gavan mentioned, Japan only recently changed some sex crime laws and in many places, there are still such outdated systems in place. As long as awareness of the problems continues to increase, we are at least moving the right way.