



性別暴力與司法議題

GENDER-BASED VIOLENCE AND JUDICIAL PRACTICES

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違反被害人的意願 AGAINST THE VICTIM'S WILL

- 刑法上的強制性交罪、強制猥褻罪，均以「違反被害人的意願」為要件，行為人的行為須違反被害人的意願，才會成立強制性交罪、強制猥褻罪。

Under the Criminal Code, the major element of sexual assault crimes is “against the victim’s will.” Only when the offender’s conduct is against the victim’s will, does the offender commits sexual assault crimes.

- 司法判決以被害人是否有明示或暗示表達不願意，來認定行為人是否成立犯罪，在部分案件中，訴訟過程聚焦在被害人而非行為人。

In the judicial practice, whether the victim expresses unwillingness explicitly or implicitly is the key issue in terms of determining if the offender commits sexual assault crimes. In some cases, the judicial proceedings focus on victims rather than offenders.



性侵害案件的特色

CHARACTERISTICS OF SEXUAL ASSAULT CASES

- ▣ 性侵害案件具有隱密性。

Sexual assault cases are covert.

- ▣ 除了被害人的指證外，性侵害案件通常欠缺其他直接證據或補強證據。

Sexual assault cases usually lack direct evidence or corroborating evidence except the victim's testimony.

- ▣ 司法判決著重在被害人指證的可信度，以被害人案發前、案發時、案發後的行為、反應、現場情形及其他情狀，判斷被害人指證是否屬實。

Judgements emphasize the reliability of the victim's testimony. Judges determine whether the victim's testimony is reliable by relevant factors, such as the victim's behavior and reactions before, during, and after the incident and other circumstances at the scene.



被害人指證的可信度

RELIABILITY OF THE VICTIM'S TESTIMONY

- ▣ 被害人與被告平日的互動關係。

The ordinary interactions between the victim and the accused.

- ▣ 以案發前的情境推測案發時被害人的意願。

Inferring the victim's consent by circumstances before the incident.

- ▣ 被害人案發時有無積極呼救、抗拒或逃跑。

Whether the victim called for help, resisted or escaped at the time of the incident.

- ▣ 有無外傷顯示被害人遭受強制力。

Any injury showing the victim suffered force.

- ▣ 被害人案發後的情緒反應。

The victim's emotional reactions after the incident.



被害人指證的可信度

RELIABILITY OF THE VICTIM'S TESTIMONY

- ▣ 被害人有無在案發後立即將事情揭露或報警、驗傷。

Whether the victim revealed the accident, reported to the police or examined injuries immediately after the incident.

- ▣ 被害人案發後與被告的互動關係。

The interactions between the victim and the accused after the incident.

- ▣ 有無其他與犯罪無關的因素促使被害人作出指控。

Any irrelevant factor triggering the victim's allegations.

- ▣ 其他不合理的情狀。

Other unreasonable factors and circumstances.



性侵害犯罪的問題

THE PROBLEMS OF SEXUAL ASSAULT CRIMES

- ❑ 刑法以「違反被害人的意願」為要件，導致司法判決著重在「被害人的意願」，進而造成訴訟過程聚焦在被害人。

Because of the element “against the victim’s will” under the Criminal Code, judgements emphasize on the victim’s will, so that the judicial proceedings focus on victims.

- ❑ 由於性侵害案件通常缺乏補強證據，基於證據法則，如果被害人的證詞沒有其他補強證據作為支持，就應判決被告無罪。

Due to the lack of corroborating evidence in sexual assault cases, under the evidentiary rule, if the victim’s testimony is not supported by corroborating evidence, the defendant has to be considered not-guilty.

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什麼是性侵害犯罪迷思？

What are sexual assault crime myths?

司法判決將行為人及被害人套用到性別刻板印象所塑造的特定形象中，如果行為人或被害人的條件不符合這些形象，就無法達到有罪判決的確信心證，不成立性侵害犯罪。

Judgements applying specific images of gender stereotypes to the offender and the victim. If the offender's image or the victim's image is not consistent with gender stereotypes, the elements of sexual assault crimes may not be proved beyond the reasonable doubt, leading to a not-guilty verdict.



如何破除性侵害犯罪迷思？

How to break sexual assault crime myths?

- ❑ 判斷個案事實是否符合性侵害犯罪時，應採用客觀標準，以理性的第三人角度為標準。

Adopting an objective standard such as a reasonable third party's perspective regarding deciding whether the offender commits sexual assault crimes or not.

- ❑ 應綜合男性及女性的觀點，並理解行為人及被害人這個世代的性觀念及性行為模式。

Incorporating both men's view and women's view. Understanding the sexual attitudes and sexual behavior patterns exercised by the generation of the offender and the victim.



消除對婦女一切形式歧視公約 CEDAW

- ▣ 為實施聯合國1979年消除對婦女一切形式歧視公約，公約施行法經立法院於2011年5月20日通過，總統於2011年6月8日公布，自2012年1月1日起施行。

In order to carry out the 1979 CEDAW passed by United Nations, the Enforcement Act was passed by the Legislative Yuan on May 20th, 2011, promulgated by the president of ROC on June 8th, 2011, and implemented on January 1st, 2012.

- ▣ 公約所揭示保障性別人權及促進性別平等的規定，具有國內法律的效力。

All terms and conditions specified in the Convention regarding protection to human rights of different genders and promotion of sexual equality shall have the same effect as domestic laws.

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最高法院110年度台上字第1781號判決：

The Judgement of Supreme Court in 2021:

- 參照消除對婦女一切形式歧視公約所揭示保障性別平等、消除性別歧視的意旨，打破性別刻板印象及性侵害犯罪迷思。

Referring to the protection of gender equality and the elimination of gender discrimination revealed in the Convention as well as breaking gender stereotypes and sexual assault crime myths.

- 性侵害犯罪的保護法益為個人性自主決定權，依照個人意願自主決定「是否」、「何時」、「如何」及與「何人」為性行為，必須是「No Means No」、「only Yes Means Yes」。

Sexual assault crimes aim to protect individual's determination of sex. Any individual shall decide whether he/she has sex, when, how and who he/she has sex with. Not only “No Means No” but also “only Yes Means Yes” are taken into consideration.

“ 最高法院110年度台上字第1781號判決：

The Judgement of Supreme Court in 2021:

- 對方沉默時不是同意，對方不確定或猶豫也不是同意；在對方未同意前的任何單獨與你同行回家或休息，只能視為一般人際互動，不是性暗示；同意擁抱或接吻，不表示想要性交；對方同意後也可反悔拒絕。

Simply silence is not consent. Indetermination or hesitation is not consent either. Going home or taking a rest with you is a social interaction rather than an implication of sex without any consent. Consent of hugging or kissing doesn't imply having sex. Any individual has the right to say "No" even though he/she consents before.

- 不得將性侵害的發生歸咎於被害人個人因素或反應，卻忽視加害人在性行為發生時是否確保對方是在自願情況下的責任。

Do not attribute the sexual assault incident to the victim's personal factor or reaction. Do not neglect the offender's responsibility of ensuring the victim's consent of having sex.



從No Means NO到Yes Means Yes From “No Means No” to “Yes Means Yes”

過去司法判決聚焦在「違反被害人的意願」，如果沒有證據證明被害人有明示或暗示表達不願意，就可能認定為「並未違反被害人的意願」。

In the previous judicial practice, judgements focused on “against the victim’s will.” If there was no evidence to prove the victim showed unwillingness explicitly or implicitly, the offender might “not” be regarded as being “against the victim’s will.”



從No Means NO到Yes Means Yes From “No Means No” to “Yes Means Yes”

最高法院110年度台上字第1781號判決將重點轉到「被害人明確的同意」，如果沒有證據證明行為人知悉被害人有明確的同意，就應認定為「違反被害人的意願」。

The 2021 Judgement of Supreme Court shifted the focal point from “against the victim’s will” to “the victim’s affirmative consent.” If there is no evidence to prove the offender obtains the victim’s affirmative consent, the offender may be regarded as being “against the victim’s will.”



被害人的保護措施 PROTECTION MEASURES OF VICTIMS

- ▣ 被害人及其家屬的隱私均可受到保護。

The privacy of the victim and the victim's relatives is protected.

- ▣ 被害人與被告、第三人或旁聽人間，得有適當隔離保護措施。

Appropriate isolation facilities are applied between the victim and the accused, the third party and the spectators.

- ▣ 被害人的法定代理人、配偶、親屬、專業人員或被害人信賴之人，經被害人同意後，得在場陪同。

The victim's statutory agent, spouse, relatives, professionals or trusted people may be present and accompany the victim with the victim's consent.



被害人的保護措施

PROTECTION MEASURES OF VICTIMS

- 刑事訴訟法於2019年12月10日修正，並於2020年1月8日公布，新增被害人訴訟參與的制度。

The Code of Criminal Procedure was amended on December 10th, 2019, and promulgated on January 8th, 2020. The amendment established victim participation system.

- 性侵害犯罪的被害人可聲請訴訟參與，訴訟參與人有選任代理人的權利、卷證資訊獲知權、到場及陳述意見權。

The victim of sexual assault crimes may petition for participation in the judicial proceedings. The participant may retain an agent, inspect the files and exhibits, and be present and state opinions at the trial.



被害人的保護措施

PROTECTION MEASURES OF VICTIMS

- ▣ 被害人因身心創傷或壓力而無法於審判中作證，其於警詢及偵查中的證詞具有證據能力，避免被害人重複陳述造成二次傷害。

If the victim is unable to testify due to mental or physical traumas during the trial, the victim's testimony during the investigation is admissible, preventing the victim from secondary victimization.

- ▣ 詢問兒童或心智障礙之被害人時，由司法詢問員協助詢問。

Examining victims who are children or mental disabled with the assistance of professionals, such as intermediaries.

- ▣ 被告或辯護人不當詰問被害人時，審判長得禁止詰問。

If the defendant or defense attorney examines the victim inappropriately, the presiding judge may prohibit the defendant or defense attorney from examination.



感謝聆聽

Thanks for your attention !