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CONTROL OF SEX CRIMES BY PENAL CODE OF JAPAN

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I

In the light of comparative law, the provisions of the Penal Code of Japan have a striking feature. The Code interferes with order in sexual behaviour only to a very small extent and as this represents an interesting phase in the cultural history of this country, I wish to introduce it to the rest of the world through this writing. At the 4th International Criminological Congress held at the Hague in 1960, Professor Tappan enumerated penal provisions for homosexuality in various States of the United States of America, and in so doing he pointed out the excessive interference of the law seen there in this connection. I had the good fortune to listen to his lecture on that occasion, and ever since it has always been engraved on my mind. Since then it has been my wish to write about this special feature of our Penal Code, and now I am going to do it and have done with the task which I have imposed upon myself stimulated by the said lecture of Professor Tappan.

Our Penal Code now in force was legislated in 1907, came into force the following year and has been in force ever since. But it was in 1880 that the first Penal Code in the Western form was legislated in this country. We now call this last the "Old Penal Code." This was drafted by the drafting committee, under the chairmanship of Professor Boissonade who was invited to Japan at that time, and accordingly, the penal code of France was its major model. On the other hand, our Penal Code now in force has been written out largely under the specific influence of the penal code of Germany. Thus it must be noted that with respect to the provisions for sex offences, the Code altogether lacks provisions for incest, homosexuality and sodomy, whereas they are usually found in the legislation of Germany, France, the United States and various other countries. The Penal Code of Japan provides, of course, for rape, indecency through compulsion, panderism, bigamy, public indecency, distribution of obscene objects and others, but all these neither have any special feature worth mentioning nor come within the scope of the present consideration.

As for adultery, by the way, we had formerly penal provisions bounding on wives only. But in correspondence to the setting up of the new declarative provisions for the equality of man and woman in the 1946 Constitution, the unconstitutionality of the unequal punishment for the sexes provided for by the Penal Code became a problem. As the result of discussions over which should be adopted, "equal punishment" for both sexes or "equal non-punishment," the latter superseded the former, and the provisions of the Penal Code for adultery was deleted in 1947. As for prostitution, it used to be under the state control and administration, which maintained public hygiene by compulsory health examination of prostitutes and area limitation of the practice. However, as the cry against public licencing of
prostitution became loud, the Anti-Prostitution Law was legislated in 1956, coming into force the following year. Since then prostitution has been prohibited in an overall way, without distinction of person or place.

It is clear that the Penal Code of Japan aims to prevent the decadence of sex customs along the common-sense lines followed in civilized society. But in spite of this, no step has been taken for punishing incest, homosexuality, sodomy and other unnatural sexual behaviours, which are punishable in some countries while they go unpunished in other countries. This constitutes one of the special features of our Penal Code. With regard to this matter, it is thought that it also involves a cultural and historical significance. Records do not show whether this had been presupposed at the beginning of the legislation. However, in view of the results of its enforcement in the last half century, it seems that the facts of Japanese life do not need such law provisions, and here the writer wishes to state some of his own views and observations on this point.

II

Observations on homosexuality reveal that the behaviour of this kind does exist in this country. It is not prohibited by law, so it has never been statistically recorded, hence no reliable figures are available. No such thorough investigation as has been made public in Kinsey's report having ever been conducted, it is to be regretted that actual conditions cannot be made clear. However, the assumption of a sexologist made from cases with which he has been approached for counselling tells that, if we include persons who experienced it only once in puberty, the cases of homosexual experience may amount to about 30% in males. But, as this is an inference drawn by the sexologist from cases brought to him for counselling, the figure may well be a gross exaggeration. We who are not specialists in sexology cannot assume that such large figure as 30% represents actualities. We feel that 3% is much nearer the truth. This estimate, though it is at such low figure, is made by taking into account those who are segregated from the other sex, such as men and boys living a collective life in prisons, and in juvenile reform-and-training schools. In short, as no reliable figures are available, nothing certain can be said, but this kind of misconduct is so scarce in Japanese society that practically never has it been taken up as a problem.

Thus in the actual conditions of Japan, there is no fear of homosexuality becoming prevalent though we have no provisions of law for it. This does not mean, however, that we have had no such practice in the bygone days. There was a time before the middle of the 19th century when the influence of the Western culture had not yet been noticeable, during which time homosexual behaviour was quite prevalent, especially among samurai. Of course no statistical figures are available on such old days, but sundry other records tell of the fact. It is said that samurai had a strange superstitious belief that if they had carnal intercourse with women they would become weak, and on this account they used to play with handsome boys. This practice seems to have been seen more especially among the upper class samurai. Why has not this been handed down to the modernized Japan, and why such wholesome state exists instead? My own interpretation of this matter is as follows.

The Japanese as a nation are much less luscious than Westerners in all their modes of living. They appreciate simplicity above everything else. I believe I need not say that this
national character manifests itself in various phases of Japanese culture. But this characteristic of the Japanese is best seen in their arts: such as extremely short forms of verse as the haikai (seventeen-syllable verse), the tanka (verse of thirty-one syllables), the simple and abstruse theatrical art of the no-play, simple and elegant sumie-paintings in Indian ink, etc. Through all these, we may say, runs that hard-to-define thing which constitutes the essence of Zen. On the other hand, we must admit the defect of the old Japanese culture in that it lacked power to build up grand systems of learning and to promote the development of theoretic, scientific recognitions. However, here I am not to dwell on the merits and demerits of the Japanese character. Whether it be our strong or weak point, the fact remains of our having been of plain and simple nature, of our having a strong dislike for what is intricate, thick or luscious, which is easily seen in our dietary habit, too, of preferring fish and vegetables to meat. Today our mode of living has been much Europeanized or Americanized; we gradually have come to consume more and more meat. But for all that, we still retain our old habits and customs to a remarkably greater degree as compared with any of the peoples in Europe, America, the Middle Near East. So it is natural that our sex habit, as part of our living attitudes, too, should be simple, and as for homosexuality, it is thought that, although it was once considerably prevalent among samurai, it was not of such nature as to survive until today.

Besides, the Japanese traditionally like to be natural, and hate unnaturalness. So, such unnatural thing as homosexuality may have been repugnant to us. It may be argued that it was on this account that the once prevalent malpractice of homosexual behaviours died out quickly and has never been revived. It is also thought that the emotional habit of the Japanese race to abhor squalor and foulness has had much to do with this. This time-old feeling of detesting foulness is different from the modern rational thought of hygiene. It is emotional to a very high degree. The Japanese are often said to be a people who make much of cleanliness and purity, but this trait does not always come from rational reasoning but often from emotional habits. In this sense, I personally don’t think we can take much pride in our so-called love of cleanliness. However, our national tendency toward the love of purity and the hatred of what is dirty and degraded is certainly remarkable. The malpractices of homosexuality and other unnatural behaviours are attended in our minds with this sort of hatred against squalor, just because they are unnatural. This may be another reason why they have never taken fast and deep roots in our society.

What has been stated above applies also to sodomy and incest. Especially, sodomy is felt to be unnatural and foul; it is generally felt to be a behaviour in which by having copulation with beasts man loses his dignity, lets himself be ranked the same with beasts and thus falls into the bestial world. Of course some performers of the malpractice may not altogether entertain such a feeling, or, otherwise, will do the deed after eradicating such feeling to a certain extent or altogether killing it. But this feeling of degradation generally attendant on the act may serve to make potential performers desist from this sort of perversion.

Further, with respect to sodomy, one of the main causes leading to the suppression among us of such perversion may be that the Japanese were originally a farming race and had little chance to handle domestic animals. Judging from the fact that, even in countries where there are penal regulations for sodomy, the offenders of this crime are chiefly found among those employed in the live-stock industry, it can be said that it is but natural that the cases are few and far between among our people who are traditionally a farming race.
Generally speaking, the Japanese are not so keen as Western peoples on forming affectionate relationships with domestic animals, and, in a sense, we are inferior to the Westerners in the protection and kind treatment of animals. So much so that possibilities are few to make us fall into committing such kind of behaviour and degrading ourselves to the level of beasts. In our country, cases of sodomy are surmised to be far fewer than those of homosexuality. Of course no need is felt to control it by legal punishment.

III

Incest is also attended with a strong feeling of uncleanliness and squalor, the same as homosexuality and sodomy. However, incest is a relation that happens between different sexes, so it can be said that it is more natural and differs from the other two behaviours. The abhorrence of incest in the light of healthy morals seems to be derived from taboos developed in human society. From the biological point of view, there is no special reason for instinctively avoiding it. It stands to reason that, in the immemorial antiquity when human beings were few in number, their multiplication could not be hoped for except by incest, so it is thought that population must have been increased by this means. At those times, incest must have been natural and even reasonable. By and by, however, intermarriages among remote kinsmen and kinswomen began, and people came to hate bodily connections between near relatives, which resulted in an order being established in human society different from that in other animal circles.

This order of morals or humanity has nothing to do with biological instincts and is a custom peculiar to the human race. It may be said that, the same as the sexual shyness which is peculiar to the human being, such order is biologically meaningless. As no other beings than the human race have such a custom, it is surely a singular one. Because it is singular and peculiar, the human race can be considered to have established a biologically unreasonable custom. People who advocate freedom in sex behaviours make it their business to censure excessive shyness in sex matters seen in human society, while psychoanalysts regard it as the root from which Oedipus Complex develops. Viewed from a stand diametrically opposite, it is thought to be the product of a noble emotion which, because it is peculiar to human society, distinguishes man from other animals, or is a vital stay of moral order. With people who cry for sex liberation on the one hand and rigid moralists on the other, it would indeed be quite interesting and significant to single out this point and discuss it as a problem of manners, delving deeply into what lies at the root of this phenomenon, but now is not the time for it. Here we are concerned with this matter only in relation to the Penal Code, so I have just cursorily touched upon the ethical thoughts lying at the basis of the legal control of such sex custom. Now I will go just so far as to point out that these ethical thoughts have a significant bearing on the basic question as to which standpoint we should choose as being more culturally advanced: the one or the other mentioned above.

While in olden days moral rigorism was the most powerful guiding principle of our society, in modern times the theory of sex liberation has come to have its day. The latter is thought to be "modern" and progressive, but it is highly questionable if it is really so. Seen from the biological standpoint mentioned above, it may be argued that priority should be given to the liberation theory, for it bids for the removal of unreasonable restrictions. But
viewed from the point of appreciating the value of customs peculiar to the human race, it may be said that it should be given to rigorism. As for differences in habits and customs which exist or have existed between the East and the West too, if seen from such point of view, one cannot easily determine which are more advanced than the other. So here I am not going to discuss any such matter. Regarding the differences simply as such, I only wish to call the reader's attention to the fact that there are different ways of feeling about lots of things between us and other races, about incest for instance, and that this comes solely from differences of tradition and not of reasoning.

Incest is generally abhorred in civilized society everywhere, whether or not it is punishable as crime. This comes from the habits and customs naturally evolved and is not a thing that has developed from the theories of eugenics, etc. However, regardless of where it comes from, it meets, in its effects, the requirements of eugenics, and thus it has its rational significance. Whatever the basis for this thought may be, incest is regarded as detestable, and many countries have penal provisions against it in their criminal codes, whereas the Penal Code of our country utterly lets pass this question. This has lasted for long years without our being troubled by frequent occurrence of behaviours of this kind which are against public morals. I do not mean to say, however, that Japanese society is entirely free from this sort of behaviour.

IV

As incest is not held as a crime in Japan, there are no criminal statistics available regarding this matter, and it is not possible to grasp the actual situation statistically. However, it sometimes happens that its existence is revealed by the life records of patients of mental clinics; and some criminal cases of infanticide show that they have resulted from commission of incest. Accordingly, it is obvious that the behaviour of this kind does exist in Japan today. But the fact that no call whatever for the need of setting forth penal provisions for it has ever come from any section of our society, shows its commission occurs very seldom, if ever. It is so rare a phenomenon in this country. Even in those few cases which have come to my knowledge, which I happened to come across as a criminologist, the behaviour between blood relatives did not exist; the occurrences were only between relatives by affinity, or between an adoptive father and his adopted daughter. But as this is an inference drawn from the few cases I have come across, I do not venture to say that such behaviour is altogether non-existent among blood relatives. Rumour sometimes is heard of this happening between brother and sister by blood; however, mostly it is committed by those who have lived separately until puberty or are living together in cramped dwellings where they cannot help coming into close physical contact with each other. It is assumed therefore that instances of such behaviour are far fewer between blood relatives than between relatives by affinity and other relations. In short, in Japan too, cases of incest do exist. However there is no sign of their increase, nor is the situation such that it calls for provisions in the Penal Code.

In our country also, in the remote past, there prevailed a thought that held incest and sodomy as a crime. Japan received the penal code of China at the beginning of the 8th century, and on it was compiled our first systematic penal code. However, in the days of
At present the word *tsumi* is often used synonymously with "crime," but in those days the word did not mean quite the same thing as "crime" as it is now used. This meaning of the word was taken under situations wherein there was no sufficient differentiation between law, morals and religion. Therefore, it is not to be assumed that it was taken in any meaning so legally accurate as the term "crime" is in the present usage. However, of the crimes of incest, that which was committed between mother and child alone was taken up as *tsumi*. *Tsumi* comprised only 22 in all, so that the fact that incest and sodomy were counted among them indicates that fairly great emphasis was laid on the seriousness of the two offences. It is also necessary to pay attention to the fact that these offences were attended with a sense of religious defilement.

Notwithstanding such history, we have no penal provisions for incest, and yet there is no indication that our sex order is disintegrated on that account. Why? Here also we see the effect of traditional customs, on which account the Japanese have a strong feeling of disgust at the offence, holding it as a kind of pollution. We Japanese sometimes describe moral vulgarisms as "deeds no better than those of beasts." The feeling we entertain with regard to incest is one exactly such; we have, as it were, physiological abhorrence of it. This is a behaviour quite common among feathered and bestial beings, but among human beings it is considered as a thing that should never be done, else the dignity of human race will be lost. Such way of thinking may not be peculiar to us Japanese; other races may share it, too, with differences in degree and nuance according to differences in tradition. Anyhow, as long as there is such strong antipathy to the act, there is no fear that the behaviour of this sort should prevail, even where there is no legal sanction to menace the offenders. Herein lies the main reason we think it unnecessary for us to have specific provisions in the Penal Code for the offence. In the point that it is customarily attended with a feeling of abhorrence, this behaviour has a character definitely antipodal to that of other sex crimes, such as adultery and rape.

We cannot say for certain that there are fewer cases of incest in Japan than in Western countries. But if such is the fact, it may have something to do with the differences in the habits of daily living, too. Unlike in European countries, in Japan there is scarcely any occasion where persons, either those who are near relatives or who are not, exchange greetings touching each other by kissing or embracing, or some other forms of physical contact. It is inferred that where bodily contact is habitually practiced among parents and their fully grown up children, naturally more chances occur when passion induces them to commit incest than where no such custom exists. Not only this but there is another thing upon which I base this assumption. It is such knowledge I have of the psychology of testimony as the following.

There are lots of records in Germany and France reporting cases where girls in puberty went to law with their teachers or pastors, who were alleged to have treated them lewdly, who upon investigation were found to be innocent, the grounds of the cases being proved largely to be the concoction of the girls' imagination. It is said that girls in such cases generally have no malicious intentions, but their power of imagination is so brisk at this age that they often tend to mix facts with imaginations, which frequently is the cause of court affairs of this kind. It is easy to ascertain by various evidences that such confusion sometimes occurs in Japanese girls of this age, too, but such cases of sexual false charge as are reported in foreign countries are extremely difficult to find in this country. There
is every reason to believe that cases of this sort do exist, but in the whole course of my investigations which I made going as far afield as I could, I have never been able to meet with a single incontestable case of this kind, brought to court or not. So few are such cases in Japan. Suppose these cases are so few in Japan as it appears, it may be due to our custom because of which boys and girls in puberty seldom, if ever, get into bodily contact with one another in their daily lives. We may say that, in such situation, there is little room for the sort of confusion of facts with imaginations as mentioned above. I believe that all in all we shall not be seriously amiss if we believe in the low frequency of incest in our country.

As we have seen so far, the Penal Code of Japan interferes with the sex life of the people to a very small degree, as compared with those of most other advanced countries, and this Code has been in force for so long years. Nearly one century has passed since the promulgation of the old Code, but during this long time we have never been troubled for lack of provisions for penal sex behaviours. Naturally, no call for their setting forth has ever been raised. As a matter of fact, the affair is given no consideration whatever in the work of amending the Penal Code, now being carried on by full deliberation of a committee of specialists in penal law who have already prepared a draft amendment and of those who are still continuing deliberation as members of an enlarged committee. In short, so far as the affair is concerned, we are thoroughly contented with our present legal provisions. This is one of the specific characteristics of Penal Code of Japan that has not been much noticed by people in other countries. The reason for which this characteristic is maintained as it is has been described, I hope, clearly and convincingly enough. It is not that the matter is not taken up because our sex custom has gone too far into decadence for that, but simply because it is unnecessary. Things may be a little different now, but prior to the termination of the War II, the Confucian code of morality used to have special authoritative influence in our country, so we had more rigid ideas about sex order, but in spite of that our Penal Code went by such lenient principle of non-interference for the crimes as we have here seen. Will not the fact that this lenient principle sufficed for us be of much interest to the legislators of other countries?