Sentencing sexual offences in South Korea

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Abstract

The sexual offence legislation in Korea has undergone significant changes over the past decade. After a number of high-profile sexual offences sparked an unprecedented public outcry, extensive legislative changes were made based on a more punitive approach. The increase in the statutory punishments and the implementation of new preventive measures were intended to increase the severity of punishment. However, ongoing criticism of sentencing outcomes has raised questions about the rationale behind the sentencing decision-making in sexual offence cases.

This thesis explores the gap between the rhetoric in the law and actual sentences imposed for sexual offences by triangulating the findings from the interviews with judicial practitioners (judges, prosecutors and lawyers) and analysing court decisions. The findings indicate that practitioners have concerns about the punitive orientation in the current sexual offence legislation, with the increase in the minimum statutory punishment and the pressure to convict compelling them to be extra-cautious when judging the credibility of victims. Moreover, the conservative and strictly hierarchical organisational culture of Korea, combined with the particular dynamics among judicial practitioners, provide further justification for the maintenance of the old practices through adherence to precedents. Silencing victims' voices during the judicial process is also facilitated by practitioners' inherent suspicions regarding the possibility of false accusations, as well as a profoundly embedded prejudice against victims. The use of informal criminal agreements well captures how the supposedly victim-oriented approach ironically benefits the accused by reducing sentencing outcomes.

This study argues that the current sentencing practices reflect the compromised outcome of the dillema faced by practitioners between a punitive law on the one hand and their deeply rooted bias against sexual offence victims on the other. The analysis of court decisions supports this argument by revealing the tendency amongst judges to sentence offenders to the least possible punishment, as well as their frequent use of suspended sentences.

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Chapter 1. Introduction

1.1. Introduction to the thesis

Over the past few decades, there have been fundamental changes in the legislation on sexual offences in the Republic of Korea (referred to herein as Korea). Since sexual offences were first recognised as a serious social problem in the 1980s, subsequent legislative changes have always focused on a more punitive approach (Byun, 2011; Ryu, 2013). Moreover, the punitive rhetoric of the law was further strengthened in response to the unprecedented public outcry generated by the series of high-profile sexual offences against children and disabled victims in the early 21st century (Kim, 2013; Seon, 2014). As a result, there has been an overall increase in the statutory punishment for sexual offences and various preventive measures (such as the sexual offender registration and the electronic monitoring system) have been implemented. Although this series of legislative changes based on the punitive approach was intended to result in harsher sentences, there has been persistent criticism of the lenient sentencing outcomes (Korean Women Lawyers Association, 2014; Kim and Ki, 2016).

Based on these grounds, this thesis intends to explore the gap between legislative attempts to increase sentences for sexual offences and the reality of the sentences imposed. To effectively address this central aim, the following questions are considered:

1) examine changes in the legal and policy framework for sentencing sexual offences over time
2) identify court decisions in sexual offence cases
3) analyse practitioners' perspectives on sentencing sexual offences
4) explore the factors and influences shaping practitioners' decision-making in practice

The first section of this chapter will provide background knowledge for the study. By illustrating the context of the social and cultural changes in terms of how Korean society has responded to sexual offence issues over time, this section intends to identify a research gap in sentencing studies in Korea. The next section further elaborates the research plan while discussing the originality and contribution of the study. Lastly, an overview of the thesis will be outlined.

1.2. Background context: identifying the missing gap

This section provides a brief summary of how Korean society has historically acknowledged and dealt with sexual offences. It explores how societal views on sexual offence issues have changed in relation to cultural influences. It then discusses the current situation and more recent discourses, focusing specifically on the way the Korean criminal justice system has responded to sexual offences, in order to figure out if there is any missing gap.

1.2.1. Sexual offences: Silenced discourses in Confucian society

Each society has diverse social and cultural norms for regulating sexual offences based on its religious, cultural and social background (Cobley, 2000). To gain a deeper understanding of how Korean society has addressed sexual offence issues over time, it is necessary to explore Confucian influences as Confucianism has been recognised as the foundation that governs the way of life in Korea (Kim and Finch, 2002). It seems to have lost its status as Korea's state ideology since the collapse of the last monarchy, Cho-sun, in 1910. However, it continues to play a significant role in contemporary Korean society as an ethical and philosophical system, emphasising core values and principles such as filial piety, strong family relationships and social stability (Chung, 2016). More in-depth implications of Confucianism will be further explored in the following chapters (Chapter 2 and

3).

Confucianism essentially teaches how to learn to be human through the teachings of the ancient Chinese philosopher, Confucius (551-479 BCE) (Wei-ming, 2000; Zhang and Ryden, 2002). His philosophy emphasised the significance of education, discipline and hard work, arguing that the betterment of the human condition through self-cultivation plays a critical role in creating social harmony and integrity (Chung, 2015). A number of researchers have stated that this Confucian faith in high achievement motivation is one of the powerful forces behind rapid recovery and economic growth, particularly in Korea, since the colonial period and the Korean War (Kim, 2009; Sleziak, 2013).

The Confucian emphasis on self-cultivation begins within the family as it is perceived as the basic unit of society (Wei-ming, 1996). Strengthening family bonds is believed to provide a sense of belonging; and as commitment to family is considered fundamental to social stability, it will ultimately lead to strong social connections (Haboush, 1991). As this sense of communal spirit or belonging also acts as an identity for the individual, it offers useful insights to understand Korean society and culture (Chung, 2016).

As a microcosm of society, each family member is assigned distinct roles and responsibilities (Kim and Finch, 2002). The fulfilment of such duties and the contribution to society upholds a communal spirit. It is expected that each member of a group, community or society will conform to social norms and interests; where socially acceptable conduct is that which benefits the group, and not necessarily the individual (Chung, 1995). Therefore, conformity to authority is strongly advised to maintain social harmony and a strict hierarchy is regarded as justified on a societal level.

In these circumstances, where the collective mindset can outweigh individual rights, it might be challenging to express different opinions even within a family. Individual voices might be easily dismissed or sacrificed in the name of upholding family values as preserving one’s reputation and status is considered more important than candour and honesty in Confucian societies (Hahm, 2012). In this context, it is unsurprising that consensus was

considered as an optimal approach to decision-making, negotiation as a typical means of conflict resolution, informal arbitration as a common alternative to formal legal procedures, and external intervention or formal legal process has not necessarily been favoured (Wei-ming, 1996). Understanding the variety of options available for conflict resolution is crucial in cases of sexual offences due to the presence of the 'informal criminal agreement'. This is a settlement reached by the defendant and the victim, and analysing it offers valuable insights into how the victim's voice is heard in practice. Later chapters (Chapters 4 and 7) will further explore this issue.

Another important aspect of the Confucian tradition of familism is the significance it places on family lineage and honouring ancestors (Oh, 1998). The preference for sons over daughters was influenced by the patrilineal Confucian notion of family; and the concept of ‘ideal womanhood’ was also defined in terms of being a ‘wise mother and good wife’ (Choi, 2010). These Confucian values resulted in the prioritisation of men over women, perpetuating patriarchal stereotypes and the subordinate status of women.

Patriarchy is a widespread issue of male domination and oppression of women by men (Chesney-Lind, 2006; Alvarez and Bachman, 2008). It is considered to be achieved through social structures that predominantly favour males (Hunnicutt, 2009). Therefore, it is criticised for reinforcing inequity by exaggerating biological differences (Millett, 1970). Moreover, it is further upheld and reinforced by common beliefs, customs and ideologies shared within the society (Gosselin, 2010).

In the case of Korea, patriarchal stereotypes were further consolidated by the Confucian tradition (Chang and Janeksela, 1996). The Confucian view of women’s obligations was linked to their duty as a good mother and a modest wife, restricting their responsibilities to domestic matters such as caring for family members and bearing a son to maintain the family’s lineage. In addition, the ideal portrayal of a woman was associated with being submissive, innocent and modest, thus justifying the significance of women’s chastity as an essential virtue (Kim, 1992). The categorisation of sexual offences as ‘crimes against chastity’ in the Korean Criminal Code until 1995 is an evident reflection of the social climate that prevailed at that time.

Given this social milieu, the Confucian tradition and patriarchal beliefs might have made it extremely difficult for anyone, especially victims, to speak out about sexual offences. Considering the cultural context and social consequences of the significant emphasis on family values, victims of sexual offences might have been more concerned about concealing their victimhood than the offence itself, due to the fear and stigma of bringing disgrace upon their family or society, which could have severe consequences (Kelly, 2008; Lee and Yang, 2012).

In addition, discussing sexual issues openly was perceived as a social taboo due to the reluctance regarding, and uneasiness in addressing private and intimate issues in public (Chang, 2012). This cultural context led to the public discussion of these ‘intimate’ issues being seen as shameful, and therefore they were dealt within only the private sphere (Seon, 2014). In that sense, even with regard to sexual violence in domestic settings, the preference was to resolve such issues within the boundaries of individual families. Government intervention and formal legal processes were considered intrusive; and overstepping the domain of personal family was seen as unacceptable until a gradual shift in the societal mood during the 1980s (Shim, 2001).

1.2.2. Changes in social climate since the 1980s

The previous section has illustrated the social and cultural context behind the lack of attention paid to sexual offences in Korea. The Confucian tradition has long played a powerful role in maintaining moral and social order; and patriarchal beliefs have further reinforced the submissive role of women. Under these circumstances, women’s voices were silenced and issues of sexual offences were not sufficiently discussed. Since the 1980s, however, there has been an increasing awareness of sexual offences; and this is the first time that sexual offences have been recognised as a serious social problem in Korea (Shim, 2002).

Against this backdrop, this section first aims to explore the gradual shift

in the social and cultural atmosphere in Korea during the 1980s. This was a critical period for Korea's economic development, which was remarkably successful after the devastation of the Japanese colonisation (1910-1945) and the Korean War (1950-1953). The government's focus on economic development plans centred on rebuilding the country. Rapid industrialisation and modernisation aimed at restoring economic prosperity resulted in the achievement of the 'Miracle on the Han River', named after the Han River in Seoul (Vogel, 1991). Having successfully hosted the 1988 Summer Olympics, Korea became one of the 'four little dragons of Asia', alongside Hong Kong, Singapore and Taiwan, all of which experienced remarkable economic growth in the second half of the 20th century (Tu, 1996).

Following the economic boom of the 1980s, Korea underwent significant social and cultural transformations. The Western influence, particularly due to the US intervention after the Korean war, had a significant impact on Korea, which will be further explored in Chapters 2 and 3. Egalitarian and Western values, including democracy and liberty, have caused shifts in social structures, resulting in a reshaping of societal viewpoints and ways of thinking (Chung, 2015). This gradual transition has presented a major challenge to the traditional feminine values associated with the Confucian tradition (Nam, 1991).

One of the notable changes has been made in education and the work place. Prior to the 1980s, there was little demand for women’s education, although female students were legally given equal opportunities due to compulsory primary education (Ahn, 2011). Sending daughters to higher education was viewed as a luxury, and a gender-based division of labour based on the Confucian tradition also justified women's primary role as being within the home (Chung, 2015).

Since the early 1980s, gender inequality in education has been increasingly recognised, and the Korean Women's Development Institute (KWDI) was established in 1983 to address this issue (Jang, 2003). Substantial progress was made throughout the decade as the government concentrated on developing education policies that prioritised eradicating gender disparities (Kim et al., 2001). As a result, there was a significant

increase in the proportion of female students admitted to middle school; compared to 47% in 1965 (males: 59.9%) the figure was 92.5% in 1980 (males: 97.5%).

Korean women have become increasingly active in various occupational and social arenas, with female participation in the economic labour market expanding from 29.8% in the 1980s to 53.1% in the 1990s (Males: 93.9%) (Ahn, 2011). In the 1960s and 1970s, many female workers, particularly young, unskilled, and uneducated workers, played a crucial role in manufacturing goods, such as textiles, apparel, and shoes for export to support economic growth (Yang, 2021). With the acceleration of industrialisation in the 1980s, the percentage of women employed in professional and managerial roles gradually rose from 1.5% in the 1960s to 3.5% in the 1980s (Jang, 2003).

The social and cultural landscape in Korea was ripe for change and for women to play a more active role in the society. Korean women have advocated for women's legal rights, receiving support from numerous women activists and feminist organisations such as the Korean Women’s Association United. These combined endeavours have resulted in notable achievements, such as the enactment of the Equal Employment Law in 1989 (Oh, 1998).

The 1980s marked a pivotal moment in addressing gender issues, as concerns and attention grew around the emergence of domestic violence and sexual offences as serious social problems (Yoon et al., 2004). In particular, two high-profile cases generated public outcry and prompted a range of legislative actions. These cases, which will be discussed in more detail in later chapters (Chapter 4), have similarities in that the perpetrators, who were killed by the domestic violence victims, were both their stepfathers. The cases were noteworthy not only due to the nature of the crime but also because they shed light on a topic seldom discussed in public (Shim, 2002). Due to heightened awareness and shifting social attitudes, there was a pressing demand for a criminal justice intervention to address issues related to sexual offences (Byun, 2004).

1.2.3. Calls for change: legislative responses

The previous section discussed how changes in the social climate have brought attention to the issue of sexual offences. The increasing awareness and concern have led to rapid legislative responses to alleviate the public outcry, and this section will focus on providing an overview of a number of legislative and policy changes. Although legislative responses will be further addressed in Chapter 4, the Korean society's way of dealing with sexual offence issues has mostly focused on taking more punitive measures through legislative changes.

The overarching direction of the legislative reforms in recent decades can be summarised in two aspects: a punitive rhetoric in the law and a victim-centred approach. In light of the unprecedented media and public attention, the last two decades in particular have been a turning point in the development of sexual offence legislation in Korea (Kim, 2010; Jeong and Park, 2013). A series of high-profile sexual offence cases involving children and disabled victims in the early 21st century further accelerated calls for a tougher approach (Kang et al., 2009; Yoon et al., 2014). Political rhetoric plays a paramount role in the operation of the criminal justice system, as policy is inevitably implemented through this system (Marion, 2007). As the legal and political discourse was heavily driven by the fearful public response, harsher punishment seemed justified almost as a panacea to combat sexual offences (Jeong and Park, 2013). In this regard, the aim of the recent legal changes might be closely related to Herbert Packer's crime control model, as it prioritises the protection of citizens through the effective suppression of crime (Packer, 1968). Further elaboration on this topic will be presented in subsequent chapters (Chapter 4).

Another significant aspect of the recent changes is a better recognition of the status of the victim (Kim, 2010). The victim's emergence as a key player is considered to be one of the common features of the recent criminal justice climate in many countries (Zedner, 2002). With victims' interests currently at the forefront of both academic and political agendas, there has been a notable trend towards reflecting their voices and enhancing their procedural rights

within the criminal justice system (Garland, 2001; Edwards, 2004). Specifically, sexual offence victims have received considerable attention due to the emotional, psychological and social impact of these offences (Richardson, 2000). To address public concerns, a variety of reforms and initiatives have been implemented to support the rights of victims (Goodey, 2005).

Similarly, victims have been a central part of recent legislative changes in Korea (Choo, 2014; Lee, 2016b). Although further discussion will be provided in later chapters (Chapter 4 and 7), various measures, including the introduction of lawyers for victims, have been implemented to better represent victims during the criminal justice process (Kang et al., 2009; Ahn and Choi, 2015). The ‘Crime Victim Protection Act’ was first enacted in 2005 to enhance victims' treatment, with a focus on prompting their participation. Subsequent amendments to the ‘Crime Procedures Act’ in 2007 further reinforced support for victims (Lee, 2014). Despite the implementation of various measures and legislative changes with a punitive rhetoric, public concern about sexual offences has not diminished and there has been continued criticism of the lenient sentencing of sexual offences.

The previous Chief Justice of the Supreme Court of Korea, Yong-hoon, Lee has acknowledged the public's concern by stating that "we have realised a potential discrepancy between the criminal punishments as outlined by the law and the general sentiment of the public" (Gliona, 2009). In reflecting on public opinion regarding sexual offences, practitioners have emphasised their commitment to ensuring that the voices of the public are heard and taken into account in practice, as evidenced by their ongoing efforts (Gender Law Association, 2014; Gwang-ju District Court, 2014).

The victim-centred approach can be considered a positive change since it better acknowledges the status of the victim, who historically has been regarded as a “forgotten actor” in the criminal justice system (Zedner, 2002:410). Nonetheless, it is crucial to recognise that this trend might reinforce a more punitive stance against crime (Walklate, 2007; Levenson et al., 2007; Lewis et al., 2014). Increasing sentence severity or extending police powers is often justified in the name of protecting vulnerable victims. The

political rhetoric highlighting the protection of the victim and society promotes victims' rights and needs; and is more likely to receive support from the fearful public and vulnerable victims in return (Wemmers, 1998). Previous studies have also identified the significant link between punitive public opinion and policy results (Nicholson-Crotty et al., 2009; McNeil, 2002; Wozniak, 2016). In this regard, Garland described the tendency to respond to victims' demands as a government strategy to "maintain good customer relations" (Garland, 1996:456).

Frequent revisions to sexual offence legislation, including the introduction of aggravated sentences and preventive measures, have also raised concerns among academics and practitioners in Korea (Seon, 2014; Gwan-ju district court, 2014). Their main criticism has been that an excessive focus on specific types of sexual violence offences could distort the criminal justice system as a whole. This is because the fragmented process of legislative change has led to what is described as a 'mosaic-like' legislation (Kim, 2008b; Kim, 2012).

There has also been scepticism about the abstract and unreliable nature of 'public opinion', and it has been argued that the current legislation on sexual offences might be the result of penal populism rather than thorough consideration (Hough and Roberts, 2002; Choi, 2014). Due to the lack of research into the actual impact of a punitive rhetoric in sexual offence legislation, the overall shift has been denounced as a "political and judicial placebo" (Fattah, 1992: xii). Academics have also noted that the concept of "political lipservice" (Wemmers, 1998:74) only applies to victim who are seen as passive and vulnerable, and does not address the underlying issues surrounding victim status (Fattah, 1992). Additionally, emphasising victims' rights might restrict or interfere with the procedural rights of defendants, particularly in cross-examination settings during sexual offence trials (Henderson, 1985; McCoy and McManimon, 1999).

1.2.4. Recent discourses and ongoing struggles

The previous section has provided a broad overview of how Korean society has addressed sexual offence issues in recent decades. The gradual shift in societal views and culture has brought attention to previously neglected sexual offences. The media coverage and subsequent public outcry have resulted in legislative changes and policies based on a more punitive approach. Whilst academics and practitioners have expressed concerns about the constant legislative reforms relying on a tougher approach, there remains a persistent question regarding the dissonance between legislative efforts to increase sentences for sexual offences and the reality of the sentences imposed.

Based on this ground, this section intends to discuss the current state of Korean society in terms of dealing with sexual offences by examining statistical reports and recent discourses. The orientation of the overall legislative change and policy on sexual offences has evidently moved towards a more punitive approach in recent years (Park and Lee, 2014). However, whether the shift in the legal rhetoric results in the expected changes in practice depends on how practitioners apply the law. While the saying ‘you cannot please all the people all the time' would perfectly capture the complexity of sentencing offenders (Ainsworth, 2000:128), statistical reports provide further grounds for concern regarding sexual offences.

Regarding crime records, the annual reports from the prosecution service and police are commonly used as they are considered to be the most reliable sources in Korea. According to the latest crime statistics provided by the Prosecution Service (SPORK, 2022), there were 32,898 occurrences of sexual violence offences in 2021. While the rates of other types of violent crimes, such as robbery, murder, and arson have all decreased, sexual offences have continued to rise in the opposite direction, steadily increasing over the past decade (an increase of 38.9% over the last decade, more than double the 14,344 cases recorded in 2007). The most significant rise in recorded sexual offences has been attributed to digital-related crimes. The widespread use of smartphones and other digital devices has resulted in a marked increase in related sexual offences, including illicit filming. In 2008, illicit filming made up 3.6% of sexual offences, and this figure rose to 17.3% in 2021.

Police records provide information on single sexual violence offences, including rape, imitative rape, and sexual assault (KNPA, 2022). Among the five major recorded crimes (murder, burglary, rape, theft, and assault), only the number of rape cases more than doubled (from 9,883 in 2008 to 24,106 in 2017). Although the number of rape cases declined between 2018 and 2022, it has started to gradually rise again since 2022. According to the reports from both the police and prosecution, the majority of victims of sexual offences were women (more than 90%).

Statistical reports indicated a rise in recorded sexual offences. The term sexual offences encompasses a broad range of unwanted sexual contacts, varying from minor incidents, such as unwanted touching, to more severe cases like rape, involving penetration with an object (Horvath and Brown, 2009). However, the criminal justice agencies in Korea utilise varying definitions to classify sexual offences, such as sexual violence offences in prosecution reports, and single sexual offences such as rape and sexual assault in police reports. These definitional differences in terms of the categorisation of offences across data sources have impeded empirical research pertaining to sexual offences, as drawing a direct comparison between the collected data may be challenging (Lee, 2018).

It is also important to acknowledge that crime records may not present a complete overview of sexual offences issues. Sexual offences are known to have particularly high dark crime rates, and victims' experiences may not be adequately reflected in these reports (Terry, 2013). According to the national victim survey conducted by the Ministry of Gender, Equality and Family (2016), only 2% of sexual violence victims reported their victimisation to the police. The main reason for the low reporting rates was identified as practitioners' attitudes or responses. Furthermore, obtaining a thorough comprehension of sexual offences presents an extra challenge as minor sexual offences do not usually receive adequate attention. This is because victims are more prone to report more severe types of offences such as rape and sexual assault (KIC, 2012).

Based on these aspects, it is necessary to acknowledge that there may be an inevitable discrepancy between crime records and the actual

experiences of victims, as the records only account for officially reported or recorded incidents. For example, the data indicates that sexual offences are most commonly committed by unfamiliar individuals. In the cases of the prosecution reports, nearly 60% of the offenders were strangers, while the police records show that in rape cases, the percentage was 30%, and in sexual assault cases it was nearly 50% (KNPA, 2022, SPORK, 2022). However, the majority of victim surveys indicate the opposite trend, with almost 90% of sexual offences reportedly occurring in familiar relationships (KIC, 2012).

It is still questionable whether the series of legislative reforms have adequately addressed the issue of sexual offences in terms of crime control and reducing public anxiety. Nevertheless, the criminal justice system, particularly the courts, has recently faced its most arduous period since 2018, despite their efforts (Kim, 2020). The year 2018 could be deemed a crucial juncture in Korea's feminist movement. Prosecutor Seo Ji-hyun was the pioneer of the 'Me Too' movement in Korea in January 2018. Her allegations of sexual harassment against a former bureau director sent shockwaves across the country (Kim, 2022a). The 'Me Too' movement gained an outpouring of support from women across the country and quickly spread to various fields such as culture and the arts, academia, journalism and politics. Boosted by widespread support, the ‘Me Too’ movement has evolved beyond a simple movement and catalysed further cultural transformations in Korea society (Kim, 2023).

While advocating for real change and ensuring that women's perspectives are adequately represented, tens of thousands of women took a step forward to participate in the massive protest in August 2018. The protest was a vehicle to express their anger and frustration, particularly in relation to the country's plague of digital sex crimes involving spy cams (Taylor, 2019). More commonly known as 'Molka' in Korean, illegal filming crimes typically target women. This has developed into a significant social issue in Korea, and a growing number of incidents have undoubtedly amplified public fears (Gunia, 2022). Over a six-year period (2017-2022), 39,957 cases of illicit filming incidents were reported to the police in Korea, equating to approximately

6,000 cases annually (KNPA, 2022). Women are being covertly filmed in common locations such as public toilets, schools, or hotels and the recorded footage is then published and shared on pornographic websites, often without the knowledge or consent of the victims. Protests under the slogan "my life is not your porn" have taken place with thousands of demonstrators calling for justice in these cases. Criticism has also been raised, specifically targeting the lenient sentences given by judges, which is considered to be the main reason for the prevalence of sexual offences in Korea (Kim, 2023).

With regard to sentencing practices, courts in Korea generally boast a high conviction rate for sexual offences. The annual report by the Supreme Court (2023) states that over 90% of rape and sexual assault cases result in convictions. However, academics have argued that the high conviction rate should not be taken at face value as victims' encounters with the criminal justice system tell different stories (Jang, 2012). Besides the low reporting rate and its implications for high hidden crime rates in sexual offences, only 42.9% of reported cases were prosecuted last year (SPORK, 2022). Specifically, 29% of convicted offenders were sentenced to imprisonment for rape and sexual assault, and the rate has steadily decreased over the decade (compared to 25.8% in 2009) (The Supreme Court of Korea, 2023). Even in cases involving minor victims under 13, less than 40% resulted in prison sentences.

Although there has been a decrease in the use of prison sentences, the prevalent use of suspended sentences has shown an opposing trend, resulting in the perception of lenient sentencing outcomes for sexual offences (Park et al., 2014; Park and Lee, 2014). In cases of rape, the proportion of suspended sentences rose from 24.7% in 2010 to 39.1% in 2022 (The Supreme Court of Korea, 2023). A study commissioned by the Supreme Prosecutors' Office found that the use of suspended sentences in sexual offences increased by 23% between 2010 and 2013 (Kim, 2014). This increase was despite the punitive rhetoric in the law, which led to an overall increase in legal punishment.

1.3. The development of the study

Previous sections have highlighted the rising concern about the current situation regarding sentencing practices for sexual offences in Korea. Based on criticisms of the disparity between the punitive rhetoric of legislative amendments and the sentences actually imposed in sexual offence cases, this thesis aims to investigate the gap between the law 'in books' and the law 'in action'. This section will outline the motivation for the thesis and provide an overview of the development of the study.

1.3.1. Motivation for the thesis

This section intends to elaborate on the motivation for the thesis. Although prior sections have extensively discussed the changes in legislation and policies over recent decades that have persistently adopted a harsher approach, fundamental questions remain unanswered as to whether sentencing 'practices' have changed accordingly. Consequently, there has been an increased demand to address the rationale behind the current sentencing practices for sexual offences.

Sentencing has been the subject of much academic attention for a long time due to its impact on offenders, victims and society as a whole (Ashworth and Roberts, 2012; Dingwall, 2013). Examining sentencing practices offers valuable insights into the overarching discourses of criminal justice in a given society, as sentencing frameworks inevitably reflect the legal rhetoric and political concerns (Ashworth and Player, 1998). Furthermore, the process of making sentencing decisions provides a clear picture of how the wide discretion of decision-makers is utilised in practice (Tata, 1997). Even though formal rules or legal and political constraints set limits, the discretion of practitioners inevitably creates a gap between what they are legally entitled to do and what they actually do in their daily work settings (Gottfredson, 1988).

The use of discretion is central to the way in which practitioners apply the sentencing framework, as each stage of the criminal justice process involves their decision-making (Galligan, 1990). However, due to the varying conditions of every case, it is neither feasible nor desirable to completely regulate or restrict discretion (Lovegrove, 1997). Securing an adequate level of discretionary power and accepting disparity as a natural outcome could be considered normal aspects of sentencing (Ashworth, 1984). Nonetheless, it is crucial to recognise that there is always the possibility that the misuse of discretion could lead to miscarriages of justice. Thus, structuring the sentencer's discretion has often been seen as one of the most important goals in the sentencing discourse (Tonry, 1992). The gap between law and practice has received considerable academic attention for this reason, and a number of studies have focused on identifying various influencing factors that potentially shape practitioners' decision-making in the criminal justice process (Hogarth, 1971; Rutherford, 1993; Fielding, 2011; Hilinski-Rosick et al., 2014).

Examining sentencing practices helps to identify common understandings or approaches among practitioners, but more importantly, it can also reveal entrenched biases in the criminal justice system (Bowling and Phillips, 2003; Stanko, 2007). In the context of sexual offences, numerous studies have emphasised the importance of exploring the attitudes or perceptions of practitioners in their decision-making process (Adler, 1987; Brown et al., 2007; Temkin, 2000). Sexual offences are frequently committed in private settings, so the lack of corroborating evidence (such as the existence of a witness or CCTV footage), other than the conflicting words of the victim and the accused, may provide more scope for practitioners to exercise their discretion (Jang, 2012). Consequently, personal perception or belief may inevitably influence how cases are constructed and interpreted (Rhodes, 2011). While Chapter 7 will offer an in-depth discussion, it has long been acknowledged that professionals' pervasive scepticism towards sexual offence victims is a pivotal factor in understanding their decision-making (Jordan, 2004).

Commonly known as the ‘rape myth’, practitioners' widely-held perceptions typically consist of stereotypes or false beliefs regarding rape,

victims and perpetrators (Burt, 1980:217). While highlighting an innocent and vulnerable image of the victim, the rape myth or real rape usually comprises the following elements: stranger rapes, the victim's active resistance, and the use of threat or force by the perpetrators (Horvath and Brown, 2009). There has been extensive research on various examples of these stereotypes in relation to the attitudes of different criminal justice actors involved in the process, including police officers, prosecutors and jurors (Temkin and Krahe, 2008; Lee and Yang, 2012; and McKimmie et al., 2014). It has been argued that these biases may distort practitioners' perceptions of the relevant facts of the case and the credibility of the victim, ultimately leading to miscarriages of justice (Zedner, 2002; Cusack, 2014).

Earlier research focused on how the criminal justice system further victimises women who do not fit the stereotypes of real rape (Estrich, 1987; Orth, 2002). There is a prevalent attitude of scepticism and victim-blaming among practitioners that tends to negatively impact victims' experiences with the criminal justice process (Mackinnon, 1991; Ellison, 2003; Hester, 2013). The insufficient treatment of victims by criminal justice practitioners can result in trauma similar to a second rape (Soothill and Soothill, 1993; Spalek, 2006). For this reason, exploring the factors that shape practitioners' approaches or attitudes will have an overriding impact both academically and practically.

1.3.2. Previous studies

Sentencing studies have been a wasteland of academic research in Korea despite the importance of the subject (Park, 2013). Judicial practitioners, particularly judges, have traditionally been considered prestigious members of society and their discretionary power has rarely been questioned (Kwon, 2011). Additionally, questioning the sentencing decisions of judges has not been encouraged due to the exclusive nature of the Korean judicial culture, (Hong, 2013). Academics have long criticised this defensive judicial culture as one of the primary issues that hinders research on the topic (Choi, 2015; Ki, 2015). Chapter 3 will provide a more in-depth discussion regarding the judicial

culture and judicial practitioners.

Previous studies on sentencing in Korea have mainly focused on three aspects: discussing the sentencing framework based on legislative changes (Choi and Ryu, 2008; Park, 2010; Kim, 2013a), examining or proposing sentencing reforms (Choo, 2009; Kim, 2011a; Park, 2014), and investigating sentencing factors (Tak et al., 2010). Doctrinal research methods have commonly been used, but there are a growing number of empirical studies related to the implementation of sentencing guidelines in 2009.

Early empirical studies tended to have small sample sizes and focused on identifying the relationship between sentencing factors (such as the economic status or age of defendants) and the sentences imposed (Lee, 2006; Lee et al., 2009). In 2010, the Korean Institute of Criminology expanded the scope of the research by examining 901 cases of robbery and theft, and explored the effects of sentencing factors, including defendants' previous criminal records, on sentence length. Furthermore, a study regarding drug-related crimes, which involved the usage of methamphetamine and marijuana and covered 2,485 cases, indicated that the primary factors influencing the duration of sentences were the specifics of the offence committed and the criminal history of the defendants (Lee et al., 2011). Elderly and male defendants tended to receive lengthier sentences, whereas cases handled by public attorneys were more likely to result in slightly longer sentences.

After the implementation of sentencing guidelines, the Criminal Justice agencies, including the Prosecution and Court, commissioned more empirical studies. The studies conducted were more in-depth and aimed to provide comprehensive insights. These studies focused on sentencing factors and their impacts on various types of offences, such as sexual offences (Park and Lee, 2014) and economic crimes, specifically embezzlement (Kim and Ki, 2014). A study of 355 sexual offence cases revealed that attempted cases, the presence of an informal criminal agreement, and the absence of a defendant's criminal history were particularly important in leading to more lenient sentences (Park and Lee, 2014).

The Prosecution has commissioned a number of studies on the impact

of prosecutors' recommendations on judges' sentences in particular (Park et al., 2005, Kim and Choi, 2010). While early studies were based on hypothetical cases by employing surveys, the study of 2,733 cases using regression analysis presented a more detailed analysis (Kim and Chae, 2017). It was suggested that sentences imposed by judges often fall below the level of sentence recommendations made by prosecutors. The severity of the case also causes judges to respond more cautiously to the prosecutor's recommendations.

The findings suggested that there had been an increase in the severity of sentences for cases where the victim was physically injured or harmed. Moreover, it appears that the application of sentencing guidelines had a positive effect on the consistency of sentencing, as the sentencing disparity between different courts was reduced. A recent study (Kim et al., 2020) also analysed various crime types prior to (2003-2011) and after (2011-2016) the implementation of the sentencing guidelines. The findings revealed that economic offences such as embezzlement and theft were subject to less severe penalties, whereas fraud cases tended to receive harsher sentences. Other non-economic crimes including perjury and false accusation received more lenient sentences.

Sentencing research in Korea has made significant advances in recent decades, especially since the introduction of the sentencing guidelines. Researchers have conducted more rigorous empirical studies to identify the factors that influence sentencing decisions. Although the studies have aimed to uncover the reasoning behind sentencing practices, they offered limited insights into actual sentencing practices. All of the previous empirical studies on sentencing have relied on quantitative research methods, thereby excluding the views of judicial practitioners on the subject.

In addition, a majority of the research has been carried out by practitioners (Kim and Choi, 2010, Kim, 2013b) or commissioned by various criminal justice agencies (Kim and Ki, 2014; Park and Lee, 2014). More recently, courts have made efforts to hear diverse views from different actors, including academics, practitioners and the public, by holding academic symposiums on sentencing (Hong, 2013; Moon, 2014; Lee, 2016a). However,

most of the studies and these symposiums have focused on providing one side of the story, without capturing the dynamics between the different criminal justice agencies and practitioners involved as a whole picture. Moreover, it is debatable whether these studies have been able to scrutinise sentencing practices independently of potential organisational pressures.

The lack of opportunities to understand judicial practitioners' views on their practice, as well as the limited access to sentencing data, further hinders more in-depth research on sentencing. This creates a gap in the knowledge regarding how practitioners apply the legal framework and the reasoning behind their decisions (Park, 2013). Without a thorough comprehension of the factors that shape practitioners' work, there is a risk of growing misunderstandings and misperceptions about their role (McConville and Baldwin, 1981).

1.3.3. Theoretical framework

Due to the defensive culture of Korean judicial practitioners, there is a dearth of empirical studies examining their practice. Therefore, most of the existing research in Korea has provided limited insights into the sentencing of sexual offences. The process of sentencing is an outcome of the simultaneous and constant interaction between rules and discretion, and thus sentencing practice may not be fully captured by simply understanding either the law or the activities of practitioners (Tata, 2007; Fielding, 2011). Based on Church's (1982) view that sentencing practices reflect the complex interplay among co urtroom actors, this thesis intends to investigate the cultural factors contributi ng to the discrepancy between law and practice.

A number of studies in common law jurisdictions have highlighted the cultural element, commonly referred to as the 'courtroom workgroup', as a way of explaining the dynamics among practitioners in courtroom settings (Eisenstein and Jacob, 1977; Church, 1982; Farrell et al., 2009). These studies have demonstrated that over time, shared experiences lead to the development of a distinct culture based on established understandings and

norms (Flemming et al., 1992). Judicial practitioners' own customs and traditions will influence not only the way they work, but also the way they construct and interpret the case (McConville et al., 1991; Hartley, 2008). Examining the courtroom workgroup therefore offers an opportunity to explore the rationale behind their sentencing decision-making (Farrell et al., 2009).

Despite its importance, there is little research on sentencing practices in light of the cultural, and the concept of the 'courtroom workgroup' is not well known in Korean sentencing research (Park, 2017a). Recently, one researcher has published two studies that incorporate the concept of a courtroom workgroup in their analysis. Both studies utilised a sample size of 825 attempted murder cases. The first study examined the personal information of courtroom actors and investigated the impacts of the gender of lawyers, judges' age on sentencing and whether the lawyers were private or public (Park, 2017a). The second study analysed the size and location of the courts and concluded that the personal details of defendants had a greater impact on sentencing outcomes (Park, 2017b). These studies are noteworthy for introducing the concept of a courtroom workgroup in Korea. Nevertheless, a limitation remains as they also relied on quantitative research methods using regression analysis, and insights from judicial practitioners were still lacking.

On this basis, this research seeks to explore the rationale underlying the gap between law and practice in the sentencing of sexual offences by focusing on the cultural element. It is argued that a distinctive culture is formed by the combination of individual beliefs, informal norms within organisational settings and working relationships (Fielding, 2011). This study has broadly focused on three categories to examine the cultural aspect: the personal level, the organisational level and the interplay between courtroom actors. Before discussing each concept in more detail, it is important to note that these concepts are closely intertwined, and therefore the boundaries might be blurred. For instance, an individual's working personality is inseparable from the prevailing ethos of organisational pressure. Personal beliefs and attitudes also play a crucial role in reflexively shaping the organisational culture (Galligan, 1990; Rutherford, 1994). Similarly, the organisational culture and individual beliefs can influence the way courtroom actors work, and vice versa.

In this regard, determining the precise impact of each concept in establishing a distinctive culture could be challenging due to potential overlaps.

Based on the aspect that these categories are inevitably inter-connected, this study intends to focus on the following points. First, at the personal level, this study aims to better understand judicial practitioners in Korea by discussing the factors that shape their internal perspectives. As practitioners' ideology, attitudes and personal beliefs are often referred to as 'working credos' or 'working personality' (Rutherford, 1994:4), they shape their perception and performance of tasks (Hogarth, 1971; Doran and Jackson, 2000). A decision-maker's personal disposition undoubtedly plays a decisive role in the process of judgment and assessment within their sphere of autonomy (Galligan, 1990:8). In that sense, understanding practitioners' attitudes and perceptions is crucial in the context of decision-making, as differences in perspectives might lead to divergent outcomes (Horvath and Brown, 2009). To address this issue, scholars have aimed to demystify judicial practitioners and gain a better understanding of their decision-making processes by exploring different legal professions and understanding their day-to-day work settings (Hogarth, 1971; Packer et al., 1989; McConville et al., 2003).

This study considers the term 'judicial practitioner' as an umbrella concept that includes judges, prosecutors and lawyers, rather than highlighting different aspects of different legal professions separately. Limited access and a small sample size have led the study to focus more on the factors that contribute to the formation of an identity as a judicial practitioner. The subsequent chapters will explore the identity, training, and responsibilities of legal professionals within the historical and cultural context (Chapters 2 and 3) of who they are, how they become legal professionals, and what roles and responsibilities they are expected to perform. The influence of Confucianism and patriarchal thinking will also be discussed, particularly in relation to their views on victims of sexual offences.

Secondly, this study focuses at an organisational level on the circumstances surrounding practitioners' daily work, i.e. the organisational culture, as their decisions may not be entirely independent of the professional

training and environment in which they work (Hawkins, 2001). While practitioners' individual beliefs can impact their actions, it is important to recognise that decision-making is also influenced by institutional priorities, as noted by Garland (2012). Previous research has also highlighted that the ‘internal’ organisational context can be just as significant as the legal principles and regulations (Rumgay, 1995).

Due to the significant impact of Confucianism in Korean society, the judicial culture has been heavily influenced by values emphasising compliance with authority within a strict social hierarchy, as discussed previously in this chapter (Choi, 2002). In circumstances where organisation values may outweigh individual preferences, the primary concern is not who the practitioners are but rather their behaviour in a group setting (Fielding, 2011:101). As there is a greater need to understand organisational pressures on practitioners’ decision-making in everyday settings in Korea, a key issue is the degree to which organisations can control the behaviour of their members (Gelsthorpe and Padfield, 2002). More specifically, this study will examine the conflict between the courts and the prosecution office, as this prolonged dispute has important implications for understanding the Korean criminal justice system in its historical context (Hong, 2013). Further details will be provided in Chapter 3.

Finally, the interplay between different groups of practitioners will be explored. Often referred to as the 'courtroom workgroup', it is considered that sentencing decisions are not made in a vacuum, but rather are the product of the interaction between the various criminal justice actors involved (Feeley, 1973; Hucklesby, 1997). Studies have consistently highlighted the existence of informal rules or norms that govern the work of courts, as they help to explain and understand variations in court practice and decisions (Eisenstein and Jacob, 1977; Lipetz, 1980; Leverick and Duff, 2002). Considering court culture as a set of 'shared folk wisdom' developed through the dynamics of participants, different court actors work together to minimise conflict and achieve the common goal (Cole, 1970).

Based on the view that sentencing decision-making is a “constant interplay between provided rules and discretion” (Tata, 2007:428),

understanding the implicit “rules of the game” (Feeley, 1983:413) is crucial to understanding the patterned and routinised way or work among insiders. Previously, studies on Korea's sentencing practices have mainly concentrated on legislative changes, producing limited knowledge (Hong, 2013). Examining sentencing practice through identifying courtroom dynamics will offer a new perspective to better comprehend the complex issue of sexual offence sentencing. Additionally, it could provide valuable insights for future studies in this area.

1.3.4. Methodology and contribution of the study

This study aims to explore the rationale behind the gap between law and practice in the sentencing of sexual offences by focusing on the cultural element. Following the theoretical framework, this study adopted a mixed methods approach. While Chapter 5 contains more detailed information, the quantitative analysis of court decisions aimed to better understand the current state of sexual offence sentencing practice. The study also included qualitative research through interviews with judicial practitioners, including judges, prosecutors and lawyers, in order to gain an insight into their sentencing practices.

Considering the exclusive nature of the judiciary and the lack of empirical studies on the world of practitioners, this research aims to fill the significant knowledge gap in sentencing practice. In particular, the researcher's status as a Ph. D. student added an advantage in terms of being free from potential conflicts of interest or organisational influences, especially when observing the relationship between different criminal justice agencies. Conducting interviews with practitioners provided an opportunity to gain a deeper understanding of insiders' perspectives, and this study aims to improve the comprehension of sentencing practices. Although the sample size and number may not be entirely representative, the insights gathered from senior members significantly increased the depth and credibility of the findings. By triangulating the findings with empirical evidence from court decisions, this

research seeks to shed light on the rationale behind sentencing for sexual offences.

1.3.5. Scope of the research and Terminology

The scope of this study is confined to cases of 'sexual violence' involving some degree of intimidation or violence. Specifically, ‘rape causing bodily injury’ cases were chosen considering the seriousness of the offences (rape) and the harm caused (bodily injury). Focusing on these cases is particularly helpful in examining the use of preventative measures, as these are usually imposed in more serious types of offence. Additionally, the research investigates practitioners' perspectives on the crucial criteria that are frequently considered in sentencing sexual offences. For instance, the victim's level of resistance or consent, and the intimidation experienced are critical components of these criteria and will be further explored in Chapter 7 from the perspective of practitioners with regard to sexual offences and the victims. This thesis focuses on a singular incident of sexual violence involving an adult female victim and an adult male perpetrator as this represents the most common case of the crime (SPORK, 2022). More detailed information regarding the criteria used for the data collection is presented in Chapters 4 and 5.

To provide clarity on the terminology used in this study, the term '(judicial) practitioner' is used to describe the court actors (judges, prosecutors and lawyers) involved in the 'practice' of sentencing. The terms interviewees, practitioners, and participants are utilised to describe all of the legal professionals who were interviewed for the study. When required, the specific profession is mentioned. The terms 'defendants' and 'offenders' are used interchangeably throughout the thesis, depending on the context.

The term 'victim' is used throughout the thesis, rather than alternative terms such as 'complainant'. Some academics have criticised the term 'victim' as implying and reinforcing images of passivity, weakness and vulnerability (Dunn, 2005). Consequently, in feminist discourse during the 1980s, the term

'survivors' emerged as a replacement (Kelly, 1988). By prioritising women's experiences of resistance and survival, Kelly (1988:163) argues that using the term 'active survivors' illuminates women's agency rather than positioning them as passive victims. However, this thesis deliberately employs the term 'victim' to draw attention to women's uncertain legal status during criminal justice proceedings, as will be explored in greater detail in Chapter 7. Furthermore, this term was consistently used by all of the interviewees during the data collection.

1.4. Thesis outline

This section provides an overview of the thesis. Chapter 1 sets the scene for this research by highlighting the gap between the punitive rhetoric in the law and the ongoing criticism of sentencing for sexual offences in Korea. After addressing the need to discuss the gap between law 'in books' and law 'in action' as the rationale for this research, Chapters 2 to 4 provide further background to the study. Chapter 2 examines Korean society by exploring the implications of Confucianism throughout its history. Understanding the Confucian tradition provides a useful background to the thesis.

Chapter 3 explores judicial practitioners in more detail as they are involved in the sentencing decision-making process. The chapter aims to understand the environment in which practitioners work by providing a historical context of how the overall Korean criminal justice system was established and developed. It also explores the cultural aspect to discuss the concept of the 'courtroom workgroup' in the Korean context.

Chapter 4 illustrates the current sentencing framework by discussing the legislation and sentencing guidelines. To better understand the law 'in books', this chapter outlines what sentencing 'tools' are available to judicial practitioners. It then further examines the driving forces behind the punitive rhetoric in the legislative responses to a series of high-profile sexual offences.

Chapter 5 outlines the research design employed in this thesis. The

chapter introduces the rationale for the mixed methods approach by examining the research objectives and questions. It provides an overview of the data collection and analysis methods, access considerations and ethical concerns, including issues around confidentiality, anonymity, consent and data storage.

Chapters 6 to 8 are the substantive analysis chapters that directly address the research questions. These chapters aim to present various facets of the actual sentencing practices, derived from the empirical results of the qualitative interviews and the quantitative examination of court records. Chapter 6 presents an overview of the outcomes from the analysis of court decisions. Together with the interview data, the quantitative findings intend to provide additional insights to the examination of sentencing practices by presenting the use of the sentencing framework. This chapter examines in particular the use of prison and suspended sentences, in order to explore the views of practitioners on the sentencing framework and its application in practice.

Chapter 7 analyses sentencing practice by discussing the use of victim-oriented measures, particularly the use of the ‘Informal Criminal Agreement’ and the victim's lawyer. Additionally, this chapter explores how judicial practitioners' views of sexual offences and victims may influence their decision-making.

Chapter 8 examines sentencing practices in relation to the use of preventative measures. This chapter identifies the implementation of preventive measures and investigates the interplay between various criminal justice agencies regarding the sources of information employed when sentencing sexual offences. This includes discussing precedents, pre-sentence reports, sentencing inquiries conducted by court personnel, and prosecutors’ recommendations.

Lastly, the concluding chapter (Chapter 9) provides summaries and reflections on the research findings. This chapter highlights how the study addresses the issue of sentencing practices in sexual offences, as well as the supporting rationale behind it. Based on the study's initial aims and objectives, this chapter also reflects on the research process. Furthermore, the chapter

outlines the contribution and implications of the study by demonstrating how it aims to address the knowledge gap in sentencing studies in Korea. Finally, the section explores the area that needs further attention in the field.

Chapter 2. Exploring Korea through Confucian influences

2.1. Introduction

This chapter examines Korean society by exploring Confucian influences and their implications over time. For centuries Confucianism has been the foundation that governs various aspects of daily life in Korea (Chung, 2016). More than just an ethical or philosophical ideology, it serves as a set of rules and ways of life (Mitu, 2015). As the Confucian tradition continues to exert significant influence as a cultural heritage, even in the contemporary Korean society, it is crucial to examine Korea through the lens of Confucianism in order to provide contextual understanding to the thesis.

Exploring Confucianism is particularly important for a better understanding of Korea given its pervasive influences. As the following chapters cover a wide range of contexts discussing law, system, members of society and their culture (Chapters 3 and 4), building a more general background knowledge of Korea would provide useful insights to understand a microcosm of society.

This chapter is divided into three sections. The first section explores the fundamental teachings of Confucianism. The second section then examines how Confucianism has shaped and influenced Korean society over time, based on the historical and political context. Finally, how Confucianism continues to influence contemporary Korean society will be discussed.

2.2. Core teachings of Confucianism

This section explores essential aspects of Confucianism. Confucianism encompasses a wide range of ethical, philosophical and religious values and practices based on the ancient Chinese philosopher, Confucius (Littlejohn, 2011). Education was central to his ideology, as he firmly

believed that the improvement of the human condition through a lifelong process of self-cultivation was the foundation of social harmony and integrity (Wei-ming, 1996). In this context, individuals were strongly encouraged to adopt a disciplined lifestyle and diligent work ethic to cultivate both inner morality and external success, with the ultimate goal of contributing to society (Choi, 2010).

This emphasis on self-cultivation in Confucian culture begins with the family, the basic unit of society as mentioned in Chapter 1 (Wei-ming, 1996). Considering the family as a microcosm of society, Confucius developed a series of virtues to emphasise the importance of family values (Zhang and Ryden, 2002). Ethical obligations including commitment to the family, filial piety, and loyalty to the social hierarchy were highlighted based on the premise that happiness starts at home, and a happy family leads to a harmonious society (Sleziak, 2013). These ethical principles provide guidance for individual behaviour and relationships within the wider community, thereby strengthening the social order (Ansell, 2006).

At the family level, filial piety directs individuals to show respect for their parents and commitment to their family. At the societal level, maintaining respect for authority and adherence to social norms are crucial for ensuring social stability and integrity within the Confucian tradition (Choi, 2010). In this sense, loyalty to the social hierarchy and conformity to authority over individuality are strongly promoted and justified (Rozman, 2002).

With self-cultivation and commitment to the wider community as the essential values to be pursued, Confucian ideology was seen as a useful framework for understanding the rapid economic growth and modernisation in many Asian countries (Bell and Hahm, 2003). The prioritisation of frugality and a diligent work ethic was seen as beneficial for both economic productivity and social cohesion (Chan, 1996). As argued in Chapter 1, some scholars have claimed that the Confucian belief in high achievement motivation was the primary force behind the dramatic economic growth and modernisation that overcame the devastation of the colonial period and the Korean War (Kim, 2009; Choi, 2010).

Confucianism has historically played a significant role in fostering social integrity and harmony, underpinned by its emphasis on self-cultivation and commitment to society (Chung, 2015). However, its influence has waned in the 21st century, and it has faced criticism for its perceived adherence to traditional views of patriarchy, authority and social hierarchy (Robinson, 1991). A focus on the collective mindset over individuality and conformity to authority can also lead to the possibility of Confucian ideologies being used by authoritarian regimes, as seen in a number of Asian countries, including Korea (Chan, 1996).

Despite criticism of Confucianism's negative aspects, the tradition still persists in various aspects of society across many countries. In particular, family dynamics, emphasis on educational qualifications, hierarchical structures in workplaces and social norms continue to be largely influenced by its legacy (Wei-ming, 1996; Bell and Hahm, 2003).

2.3. Confucian influences in Korea over time based on historical and political context

The previous section discussed the core principles of Confucianism. By emphasising the values of education and societal contributions, Confucianism has been acknowledged for its significant impact on the economic growth of many East Asian countries in general (Bell and Hahm, 2003). Despite its declining status as a governing ideology due to its strict focus on social hierarchy, Confucianism's legacy continues to influence many aspects of daily life. Based on this context, this section will focus on how Confucianism was introduced into Korea and how it has evolved over time, in order to find out whether it has had a distinctive impact on Korean society, particularly in relation to historical and political aspects.

2.3.1. Confucianism as ruling ideologies before the 20th century

There is no written record of when Confucianism was introduced to Korea. However, some scholars have speculated that it may have been introduced along with Chinese characters as part of the philosophy of education (Choi, 2010). The first record containing information about Confucianism was around the so-called ‘Three Kingdoms Period (57BCE-668CE)’, when the Korean peninsula was divided into three countries (Koguryo, Baekche and Silla). Confucianism was initially introduced as part of Chinese learning, among other ideologies such as Daoism and Buddhism (Chung, 2015).

Since the Koryo dynasty (918-1392), Confucianism has become the dominant ideology in governance. Government officials were appointed from among Confucian scholars, and the moral and political ideologies of the Confucian tradition became the new intellectual and spiritual guide for maintaining socio-political order (Haboush, 1991). During the dynastic and ideological transition from Koryo to Chosun dynasty, the newly established Confucian-based elite class, 'Yangban' utilised Confucianism as a means to institutionalise their aristocratic power (Deuchler, 1992).

In this context, the Confucian tradition began to exert more influence on various aspects of life as the state religion and ideology, and more importantly, it became the foundation of the socio-political system in the Chosun dynasty (Chung, 2015). The Yangban, a gentry class, represented the two privileged orders of civil and military officials, and the state examination system played a more central role as a means of recruiting these government officials (Haboush, 1991).

As an elite gentry society based on the Confucian normative values, education served as the primary means to achieve personal and familial success in maintaining the power of noble families and hereditary aristocrats (Hong, 2008). Appointments to the civil service were given to those who passed the state examination, and being a government official guaranteed more power and security (Zeng, 1999). In this regard, the importance of educational qualifications and the merit-based approach to recruitment has persisted to date, leading to an intense competition for education, which presents a significant social challenge in Korean society (Chung, 2015).

Further discussion will be provided later in this chapter.

2.3.2. Confucianism amid political turmoil in Korea

Confucian influences have shaped and impacted various facets of life, including the regulation of ritual practices such as ancestor worship and the development of political philosophy. Although Confucianism governed as the prevailing ideology during the Chosun dynasty, Korea experienced another significant transitional period towards the end of the 19th century, based on the influx of Western influences (Chung, 2015). During the tumultuous end of the Chosun dynasty, Confucian scholars received criticism for being solely focused on theoretical study of orthodox Confucian principles and not being prepared to adapt to the rapidly changing global climate (Choi, 2010). The exclusive and conservative nature of Confucian tradition was later considered to be one of the main reasons for the tragedy of Japanese colonisation and the Korean War in the 20th century (Shin and Robinson, 1999).

During the period of Japanese colonisation and political turmoil, the Japanese government attempted to eradicate Korean culture through a policy of cultural assimilation (Lee, 1985). Education became a useful source to facilitate assimilation while Korean students were discriminated by receiving fewer years of schooling (Dittrich and Neuhaus, 2023). Confucianism was strictly used as a tool to effectively rule the country during the colonial period, so the principles of loyalty to the authorities and strict hierarchy were further promoted by the Japanese government (Choi, 2010).

Political upheaval continued in Korea throughout the 20th century due to the Korean War, US intervention and the subsequent authoritarian regime until the late 1980s. The Western influence, rooted in US influences, began to permeate Korean society in the late 19th century and spread rapidly after the Korean War (Yim, 2002). During the modernisation and industrialisation process since the 1960s, Western popular culture, based on capitalism and commercialism, has penetrated the country and, as a result, has significantly affected the way of life of the people, replacing traditional Confucian values

(Kim, 2005).

Although Confucian tradition may no longer hold its former position as a ruling ideology, the emphasis on self-improvement and societal contribution through high-achievement, grounded in Confucian principles, has been regarded as the primary impetus for Korea's swift recovery and economic development (Sleziak, 2013). However, despite the positive side of Confucian influences, especially on the development of the country, some scholars have also argued that loyalty to authority based on the Confucian emphasis on hierarchy was used by the authoritarian political regime in the name of contributing to social integrity (Chan, 1996).

2.4. Implications of Confucianism in contemporary Korean society

The previous section briefly illustrated how Confucianism was introduced and developed in Korea throughout history. For centuries, Confucianism has served as an intellectual discourse, a code of family values, and a system of social ethics, in addition to functioning as a political ideology in Korea. However, it differs from other religious and philosophical traditions in its persistent integration as a set of “cultural grammars”, even to this day (Choi, 2010: ix). This section aims to examine the legacies of the Confucian tradition in contemporary Korean society.

2.4.1. Family values and social hierarchy

Confucian emphasis on family values would be one of the most enduring aspects of its legacies in Korea (Park and Cho, 1995). As family virtues were considered indispensable for human survival and flourishing (Tu, 1996), Confucianism not only persists in family rituals, but more importantly, family values and ethics that emphasise social stability and integration continue to structure important aspects of the society. Based on the idea that

family as a microcosm of society, the extended family-like interconnected is easily find in various social relations (Ansell, 2006).

Confucian family values and structures in the workplace, also known as ‘corporate familism’, can be readily observed in the sociocultural infrastructure of Korean companies (Choi, 1999). A prime example is the distinctive 'Chaebol' structure that emerged in Korea in the 1960s (Park et al., 2008). A Chaebol is a large-scale conglomerate run by a single family that typically owns, controls and/or manages the group, often founded by the same family member (Hong, 2008). Samsung, Hyundai, and LG Group are well-known instances of Chaebols.

Additionally, workplace social dynamics demonstrate the influence of Confucianism, manifested in age, gender, and social status hierarchies (Zeng, 1999). Higher-ranking managers take on the role of father figures, motivating employees to defer to authority (Chung, 2015). In return, managers are supposed to treat their employees as family members and they work as a collective unit (Choi, 1999). Emphasising frugality, diligent work ethic and interdependence, the focus on community spirit and group harmony would certainly help to foster a sense of loyalty. Yet, it is also argued that these Confucian influences could be the reason why individual creativity and innovative ideas are hindered in the community (Kim, 2008a).

2.4.2. Education fever and elitism

This section will explore the implications of the Confucian emphasis on education and the pursuit of knowledge. As discussed in earlier sections, Confucianism has stressed the importance of education to ultimately achieve social harmony and integrity (Chung, 2015). This focus on self-cultivation has proven to be a crucial foundation for the economic growth of numerous Asian countries, as previously noted in Chapter 1 (Kim, 2009). Despite the devastation caused by the Korean War, literacy campaigns were promoted in the 1950s, followed by the introduction of compulsory secondary education in the 1960s (Dittrich and Neuhaus, 2023). As the authoritarian regime

encouraged education as a powerful instrument to achieve economic development, the emphasis on academic education was even considered “a major Confucian influence on the character of the modern blue-and white-collar work force in Korea” (Mason et al, 1980:378). These developments demonstrate that education was the driving force behind the rapid national growth.

In addition, the Confucian state examination for civil servants has deeply rooted in the meritocratic principle, which still prevails or even reinforces in modern Korean society. Due to the competitiveness of the education system, elitism concerning educational qualifications has become increasingly pervasive. The intensive entrance examination system in Korea mirrors a social realm marked by academic authority (Kim et al., 2005). Since Koryo and Chosun dynasty, when the knowledge of Confucianism was the only prerequisite for social promotion, passing the state examination qualifies an individual for a government official position by achieving the status of a meritocratic elite (Choi, 1999). This aspect is closely related to the prestigious status of judicial practitioners in Korea which will be further explored later in the thesis. As education credentials are considered a useful tool for climbing the ladder of success to attain power and security, this significant rewards as an outcome of the academic achievement have become a strong motivation behind the high enrolment rate in higher education (over 70% in 2022) in Korea (Bang, 2022).

The emphasis on academic excellence and personal development in Confucianism may have contributed to Korean students' high academic achievement in various fields. Nevertheless, it has also caused some negative consequences and has become a serious concern within society (Robinson, 1991). Education fever, which refers to an obsession with schooling, is a universal social phenomenon (Seth, 2002). In Korea, the passion of parents to enhance their children's prospects of getting into prestigious universities has aggravated the situation (Lee, 2005). The promotion of higher education has resulted in a more competitive entrance system, and there is nationwide concern about high spending on private tutoring and increased school hours (Bang, 2022). Moreover, the highest rate of suicide among young children in

OECD nations is primarily caused by the strain from the fiercely competitive education system (Park et al., 2017).

2.4.3. Challenging Confucianism and Patriarchal tradition

Confucian perspectives on women, rooted in patriarchal beliefs, have long been regarded as a 'dark side of Confucianism' (Koh, 2008). By maintaining a rigid tradition of Patriarchy, authority and strict hierarchy, Confucian emphasis on men over women has been criticised being responsible for a pervasive sexism and gender-defined society (Chung, 2015). As Korean society has modernised and globalised, in line with democratic ideals, there have been challenges to Confucian values regarding gender issues (Yim, 2002). Traditionally, Confucianism placed great emphasis on the three core virtues of the faithful minister, the filial son, and the chaste woman (Shim, 2001). Traditional Confucian values attributed to women included diligence, discipline and deference (Han and Ling, 1998). Given obligations to be a good mother and a wife, women were obligated to submit to male authority figures; unmarried women were required to obey their fathers, while married women were expected to respect their husbands, perpetuating the submissive role of women within a strict gender hierarchy (Deuchler, 1992).

Each family member was assigned specific roles and responsibilities based on Confucian family values as a microcosm of society (Kim and Finch, 2002). Society expects each member to adhere to social norms and interests. The subordination of women's status based on patriarchal tradition has made women more invisible to society by assigning them to care for their family members and bearing a son to main the family’s lineage while staying at home (Chung, 1995). Chapter 1 has more extensively illustrated how Korean women were excluded in the sectors of education and workplaces due to this deeply rooted traditional gender views.

As South Korean society becomes increasingly globalised, societal attitudes and the social climate are evolving, challenging longstanding Confucian values (Yim, 2002). In particular, traditional norms relating to

gender roles and patriarchal family structures are now being scrutinised in light of a growing recognition of gender equality and more balanced family dynamics (Chung, 2016). It is also argued that the traditional way of assigning specific roles based on gender and age is largely due to the fact that Confucianism was constructed for an agricultural-based society and economic structure (Wei-ming, 2000). In this sense, this Confucian tradition may not resonate well with the more mobile and dynamic industrial structure of modern times (Chung, 2016).

Despite facing criticisms and challenges regarding its traditional gender views, some studies have shown that gender equality and Confucianism can co-exist. These studies insisted that the tension between gender issues and Confucianism is often due to misinterpretations of Confucius teachings and there are still spaces for Confucianism in modern days considering its resilience and versatile aspects (Koh, 2008 and Jiang, 2009). Based on this ground, it is noteworthy that Confucianism has exhibited exceptional adaptability and versatility throughout history. It is undeniable that fundamental teachings and principles of Confucianism continue to echo in different facets of modern-day Korean society.

2.5. Concluding comments

This chapter has discussed Confucian influences and their implications in Korea over time. Confucianism has long been considered as a vital foundation that has shaped various aspects of the society. Its emphasis on education and self-improvement was the main driving force behind the development of the country and Confucian principles still influence social norms, moral attitudes and regarded as upholding a set of distinctive Korean values and ways of life (Choi, 2010).

Confucianism has undergone fluctuations alongside the evolution of Korean society. Particularly in modern-day Korea, it is regarded as a double-edged sword because of its emphasis on strict hierarchy and traditional

gender roles. Additionally, its heavy focus on education and self-cultivation has been criticised as being responsible for education fever by creating an extremely competitive social climate. Although it may have lost its status as an official ideology due to setbacks, it remains an essential cultural heritage that serves as the backbone of Korean society (Haboush, 1991).

Chapter 3. Uncovering Korean judicial practitioners and their culture

3.1. Introduction

This chapter aims to understand the environment in which practitioners work by providing a historical context of how the overall Korean criminal justice system was established and developed. While the previous chapter focused on providing background knowledge of Korean society in general, this chapter aims to narrow the scope by focusing on the Korean criminal justice system in the context of exploring judicial culture.

In the first part of this chapter, factors that may influence the work of practitioners are outlined in relation to two aspects: the history and development of the Korean criminal justice system. This section concentrates on the measures taken by the Korean criminal justice system to attain judicial independence, in light of various phases of historical turmoil, including the influence of the Japanese colonial period, the US intervention after the Korean War, and the dictatorship regime. This section provides an understanding of the overall judicial culture and operation of the Korean criminal justice system.

The second part of this chapter discusses more specific influences behind practitioners' sentencing decision-making by examining cultural aspects. Three distinct influences are considered in particular. At a personal level, the individual practitioner's personal beliefs, ideology or values are discussed in terms of a broad concept of 'working credos' (Rutherford, 1994). This section also delves into shared viewpoints and experiences among judicial practitioners. At an organisational level, professional or organisational culture is discussed, focusing on two criminal justice agencies: the Courts and the Prosecution Service. Although lawyers are relatively free from organisational influences because, unlike the other two, they belong to the private sphere, their professional culture is briefly discussed as part of the overall justice culture. As previously discussed, understanding organisational culture is particularly important as organisational or community values have

long been thought to outweigh personal dispositions due to the influence of Confucian ideology in Korea (Choi, 2002). Lastly, to gain insight into the relationship between practitioners or criminal justice agencies in trial settings, the concept of the 'courtroom workgroup' will be explored (Church, 1982).

3.2. Understanding historical context of the Korean criminal justice system

This section provides an overview of the history and development of the Korean criminal justice system. The term criminal justice system encompasses institutions and agencies that are officially responsible for dealing with crime (Gelsthorpe, 2013). It is crucial to comprehend the impact of politics on the criminal justice system since political forces influence the policies that shape it and are also executed within it (Marion, 2007).

The ongoing development of the Korean criminal justice system has aimed to establish a fair and just system by prioritising judicial independence, procedural rights, and the public's confidence. Based on this context, the first section describes how the Korean criminal justice system has gone through several political difficulties to achieve judicial independence. For the purpose of this historical analysis, the current study examines three distinct time periods: Japanese colonial times; the post-Korean War era and the time of dictatorial regimes until the late 1980s; and the recent allegations of the so-called the ‘Judiciary Blacklist’ scandal. After examining the systematic progression in a historical context, the chapter details how the adversarial elements, particularly in procedural rules, were integrated into the system to enhance protection of the defendants' and victims' rights. Finally, the chapter provides an in-depth explanation of how the system put an effort to boost public confidence and transparency in the criminal justice process by encouraging public involvement. By outlining the history of the Korean criminal justice system, this section examines how the system and the criminal justice process have been shaped and transformed by political tides and social changes.

3.2.1. The history of the quest for judicial independence

The Korean legal system in the past was based on monarchy. The ideology of Confucianism was considered to be the mainstay that supported the Cho-sun dynasty, which was the last monarchy in Korean history (1392-1897) (Kwon, 2011). Though Western legal theories were introduced in the early 17th century, many scholars were hesitant to accept them as they conflicted with the values of Confucianism (Hahm, 2003). Following an influx of Western culture, the Gap-O Modernising Reformation (Gap-O Gae-Hyuk) in 1895 marked the initial introduction of the modern legal system in Korea (The Supreme Court of Korea, 2009). Nevertheless, this voluntary reform movement that aimed to separate the judiciary from the executive failed to achieve its goal due to the Japanese colonisation of the Korean peninsula (1910-1946).

Japan meticulously transplanted its political and legal system to better regulate the Korean legal system, resulting in significant modifications (Miah, 2012). The legal integration process replaced the legislation established by the Cho-sun government with Japanese codes (Kwon, 2011). The Korean legal system was indirectly influenced by Western legal traditions, such as Germany, France and Anglo-America, through the Japanese legal system (Ju, 2006).

Modern legal concepts and systems were introduced, but their application was superficial, with the law functioning as a mere instrument (Han, 2016). Furthermore, the modernisation of the system and operational methods were undemocratic (Cha, 2006). The Japanese Governor, who oversaw the colonial government, had unrestricted discretion over both the executive and legislative branches (Kwon, 2011). The judiciary was classified as a subordinate branch of the government, resulting in potential disregard for the human rights of the citizens due to the lack of constitutional law (Choi, 1980). For instance, a three-level system of courts was put into place in 1912, yet it failed to ensure a just trial or the safeguarding of human rights (Cha, 2006). Korean judiciaries were mostly replaced by Japanese professionals in the investigation and trial stages. However, there was a scarcity of interpretation

services provided during these phases (Choe, 2012). Due to the language barrier, defendants could not understand what was happening during the criminal justice procedures, which means their voices were not properly represented. Based on the written evidence, court trials were essentially procedures for validating dossiers that had already been produced by the police, thus rendering them mere paper hearings. As the Prosecution Service and police were merged under the chief of the colonial government, a strict hierarchy within the system justified their misuse of power by employing physical abuse to present or falsify dossiers so as to create the outcome they desired (Shin, 2001). Based on this historical context, the use of dossiers and statements prior to trial has been a controversial issue due to their impact on court decisions (Lee, 2008). This issue will be further explored later in this chapter.

Another important aspect is the authority of the prosecutor's office after the colonial era. In 1945, Korean judicial practitioners were scarce, numbering around 40 (comprising 30 judges and 10 prosecutors) as Japanese practitioners were predominant (Moon, 2010). The public had little confidence in the police force due to the maltreatment of the colonial government, including acts of torture (The Supreme Court of Korea, 2009). It proved challenging for the recently established Korean government to recruit local professionals amidst political turbulence in the aftermath of the Korean War. As a result, the government resorted to rehiring a considerable number of practitioners, including former Japanese police officers who were involved in apprehending nationalists (Choi, 1980). Due to public concern and the German system's influence, the National Assembly Committee on Legislation and Judiciary decided to augment the authority of prosecutors over the police and investigation procedures through the Korean Criminal Procedure Act (1954) (Shin, 2001). Consequently, a persistent discord has arisen between the prosecution service and police department concerning their jurisdiction over investigation processes, which will be further discussed later in this chapter.

The establishment of the modern legal system truly began in the post-colonial period, since there was no Constitution under the colonial government.

Despite the political turmoil following the Korean War and US intervention (US Military Government, 1945-1948), the first Constitution (1948) was written by legislators elected in the first general election (Kwon, 2011). Direct Western influences, including the Weimar Constitution of Germany, as well as the English and French Constitutions, were evident in the Korean Constitution. The Constitution also drew inspiration from the American Constitution, particularly in the form of its tripartite division of power within the legal system (Ahn, 1997). The Constitution of 1948 was a significant landmark in Korean history, being the first to explicitly establish liberal democratic values, balance of power, and fundamental human rights (Miah, 2012). Article 103 serves as the foundation for judicial independence as it mandates that judges must adhere to the Constitution, laws, regulations, and conscience to maintain their independence. The Court Organisation Act of 1949 further paved the way for the establishment of a modern legal system based on the three-tier court concept.

During the establishment of the Korean legal system, the intervention of the United States led to the adoption of American legal concepts and values without adequate consideration of Korean tradition (Moon, 2010). Due to the effects of colonialism and political instability, democracy, sovereignty, equality and justice were not widely practiced, leading to inconsistencies between the established laws and their implementation (Kim, 2018). The Criminal Procedure Act, for example, clearly stipulated in its procedural rules that the police should inform suspects of their right to remain silent during interrogation (Article 200-2) and of their right to retain a lawyer at the time of arrest (Article 88, 200-5). Despite these regulations, such protocols were commonly disregarded in actual practice, resulting in suspects being unaware of their legal rights (Shin, 2001). The disparity between legal theory and practical application reduced the effectiveness of the law, particularly during times of dictatorship where law frequently served as a tool to justify judicial malpractice and abuse of political power (Moon, 2010; Kim, 2018).

Under these circumstances, judges endeavoured to safeguard judicial independence by challenging political power. Their opposition towards the government stemmed from the president's attempt to manipulate the judiciary

by abusing his power to appoint the chief judge and interfering in political trials under the military dictatorship (Han, 2016). During the authoritarian and military regimes of the 1970s and 1980s, the judiciary's independence was severely compromised, despite the judges' efforts (Chisholm, 2014). The oppressive government manipulated both the legislation and legal system to persecute or eliminate their political adversaries, under the pretense of legitimacy. As fifty senior judges who actively participated in criticising the government were forced to leave their positions, the courts demeaned themselves by ruling in favour of the government in a series of politically sensitive cases (Kim, 2018). Furthermore, the government declared martial law nine times under tight scrutiny, leading to neglect of procedural rules for defendants' and victims' rights (Moon, 2010). This period is often identified as 'the dark age of Korean judicial history' by a number of professionals due to the occurrence of a series of 'political murders' carried out under the pretext of law (The Supreme Court of Korea, 2009; Han, 2016).

One of the most infamous instances exemplifying miscarriages of justice is the case of the ‘In-hyuk party (People’s Revolutionary Party)’ (1975). The National Intelligence Service arrested around 40 people on suspicion of subversion on secret orders from North Korea (Moon, 2010). People from various backgrounds, from journalists to university students, were investigated for violating the Anti-Communist Security Law and the National Security Law. At the outset of the investigation, police brutality, including the torture of the defendants, occurred. The defendants were falsely accused of attempting to overthrow the government by forming an undisclosed communist group, based on coerced confessions and manipulated evidence. Subsequently, eight defendants received the death penalty, and within a mere 18 hours of the Supreme Court's verdict, were executed. Furthermore, 25 defendants were sentenced to imprisonment, seven of them to life imprisonment (Oh, 2008). This verdict was strongly condemned as the most shameful 'judicial murder' and later acknowledged as the most dishonourable case in Korean judicial history by judges (Ha and Kang, 2018). In a similar context, the ideological rivalry of the Cold War era led to a series of political murders, and the dictatorship further destabilised Korean society politically by misusing the law to eliminate political opponents (Ahn, 1997). The progress of

judicial examination and compensation for victims of political trials from that time are still ongoing (Kim, 2018).

During the period of dictatorship (1961-1993), the courts faced accusations of collusion with the government by issuing decisions in its favour (Han, 2016). Since the late 1990s, the Korean Judiciary has endeavoured to regain its credibility, by making official apologies for past miscarriages of justice and acknowledging it as a ‘history full of regret and shame’ (The Supreme Court of Korea, 2009). As judicial independence was attained through a democratic uprising by the public against dictatorship, without the judiciary's active contribution, some scholars have raised concerns about the extent to which self-reform is limited within the courts (Moon, 2010; Han, 2016).

Although the judiciary has focused on properly scrutinising past abuses of power, the notion of judicial independence has often acted as a powerful political and rhetorical shield to defend the courts and allow judges to remain exclusive or even untouchable by rejecting external scrutiny (Chisholm, 2014). Unlike in the past, when the courts were forced to be subservient to the dictatorial government, their close ties to the powerful - both political and economic influences - have changed as the judiciary has also played an active role (Moon, 2010). As the judiciary has profited from their connection with those in power, they have willingly cooperated with the government, or even actively led the charge in some cases, in order to secure a better bargaining position in the pursuit of climbing the ladder of success; in fact, some media reports have portrayed it as the judiciary becoming the monsters themselves (Choi, 2017).

The recent case known as the ‘Judiciary Blacklist’ exemplifies the active compliance of courts with political rhetoric (Kim, 2017). In this case, the National Court Administration, which operates under the Supreme Court, covertly gathered extensive information, including long reports exceeding 200 pages, regarding the ‘disposition’ of individual judges, primarily focused on their political position during the previous government (Lee, 2018). Following their impeachment in 2017 on the grounds of a considerable corruption scandal, abuse of power and a criminal complaint made against a number of previous top judges and Supreme Court Chiefs, the former government's

alleged actions have elicited an immediate controversy amongst judges and the general public. The Court's internal investigation has found that the judiciary under the previous administration engaged in illegal surveillance of judges by maintaining a secret blacklist. They also attempted to negotiate with the presidential office regarding various high-profile political cases, such as the formal trial of National Intelligence Service Chief Se-hoon, Won. This secret cooperation was mainly to secure the support of the office in establishing a new Appellate Court. (Jo, 2018). Although the investigation's conclusion acknowledged the judicial administration's power abuse, it argued that no instances were verified where judges suffered from political disadvantages due to the so-called blacklist based on their affiliations (Bak, 2018)

The response from the judiciary was split according to their positions and age. Senior judges, including 13 Justices of the Supreme Court and chief judges, contended that the accusation held no grounds and insisted that an external investigation, especially by prosecutors, into this extremely sensitive issue could possibly lead to the leak of some confidential information, thereby threatening the maintenance of the organisation (Kim, 2018). However, some lower-ranking judges heavily criticised the internal probe team's conclusion by arguing that the court's collection of information was a significant threat to judicial independence (Jo, 2018). Consequently, they welcomed the decision of the Chief Justice of the Supreme Court to initiate a prosecutorial probe, a special counsel investigation, in the case, since the internal probe of the Court had already demonstrated its limitations (Bak, 2018). Therefore, this case has become a struggle between conservative and senior-level judges seeking to safeguard their institution by maintaining this exclusive strategy, and younger and junior-level judges advocating for essential changes to build public confidence (Cho, 2017). While undergoing the first-ever prosecutorial investigation of the courts in the history of the Korean judiciary, the recent struggles for judicial independence seem to have entered a different phase, as these struggles are more closely linked to pressures within the judiciary.

3.2.2. Legal tradition and the development of criminal justice system in Korea

The preceding section described how the Korean criminal justice system sought to achieve judicial independence in the midst of political turmoil. In accordance with political and social transformations, the Korean legal and criminal justice systems have undergone substantial reforms throughout the years. This section aims to explore the influence of legal tradition on the procedures, a hierarchy of the sources of law and the role of the criminal justice actors involved in the criminal justice system (Dubber, 2006). There are several methods for categorising criminal justice systems globally (for more details, see Dammer and Albanese, 2014). However, this thesis will concentrate on the classic dichotomy of the common law system (known as the 'Anglo-American' system) and the civil law system (known as the 'continental' system) due to its relevance to the Korean criminal justice system.

One of the most notable differences between the common law system and the civil law system pertains to the methods employed for fact-finding in each system (Sanders et al., 2010). Although both aim to establish the truth of a case or otherwise of an accusation, they differ in the manner in which the truth is established (Johnson and Wolfe, 2003). The common law tradition is founded on the adversarial principle, also known as the 'accusatorial' system (O'Reilly, 1994:419). Adversarial theory posits that the truth is best uncovered through a contested system, which typically arrives at a decision by holding a dispute between the parties involved (Freedman, 1998). Furthermore, a fairly passive decision-maker listens to the evidence presented by the involved parties, ensures procedural justice, and determines the outcome based on the facts presented during the trial (Cammiss, 2013). Hence, a judge's impartiality allows for the presentation of multiple perspectives by the parties, facilitating the emergence of truth (Sanders et al., 2010).

The adversarial system is grounded on the principles of burden of proof and standard of proof. Under this system, the state bears the burden of proof, and the evidence must be adequate and surpass reasonable doubt to prove guilt, while ensuring the presumption of innocence for the accused

(Davies et al., 2015). This adversarial principle has prevailed in many English-speaking nations, including England, Wales, the United States, Canada, and Australia (Sanders et al., 2010).

In contrast, the civil law system follows the inquisitorial model, which involves the court in actively researching the facts of the case (Dammer and Albanese, 2014). Unlike the adversarial system, where two opposing parties control most procedural actions, the judge takes on a dominant role as the fact-finder under the inquisitorial system (King, 2001). A typical inquisitorial trial comprises a dossier that enables the judge to have sufficient information about the case. The judge supervises the procedural process on the basis of the prepared dossier, while the prosecution and defence lawyers are regarded as relatively secondary participants (Damaška, 1986). Some European countries, including France and Germany, are purported to operate under the inquisitorial system (Cole et al., 1987).

One of the main contrasting features of the adversarial and inquisitorial systems is the source of the law. The common law system builds upon case law, while the civil law system relies on codified law. Non-statutory rules, which are formed through judicial decision-making, are also part of the common law system. Therefore, it is vital for the judiciary to construe and employ the written law in determining sentences under civil law jurisdictions, while common law countries concentrate on court precedents (McEwan, 2004).

Both systems possess their unique merits and shortcomings, and there is no definitive proof of which system is superior. It is also crucial to acknowledge that the operation of the system is inevitably influenced by distinct local circumstances (Cole et al., 1987). Therefore, it is rare for any country to rely solely on either adversarial or inquisitorial systems, and the differentiation between them is less discernible (Dripps, 2011).

Academics have argued that the current Korean legal system is a hybrid, with its basis in an inquisitorial system but incorporating adversarial elements in the field of criminal procedure (Ju, 2006). During the first half of the 20th century, the Japanese colonial government significantly influenced the Korean criminal justice system, adopting key foundations from systems in place in Germany and France (Hahm, 2003). After gaining independence and

following the Korean War, the US legal system heavily influenced the introduction of more adversarial-based system and procedural rules.

One of the most significant changes in procedural rights is the shift from dossier-oriented to court-oriented trials (Lee, 2016a). As discussed earlier, dossier-oriented trials have several drawbacks that have emerged since colonial times. The dossier, constructed by investigation agencies, could potentially reflect their prejudiced views on the matter (McEwan, 2004). The use of a dossier could significantly influence the initial impression made by judges in a case. Moreover, challenging the persuasive force of written evidence presented in such a document during the trial may pose as a considerable hurdle. During the colonial period, Japanese judges heavily relied on the dossier. As a result, defendant's rights were easily neglected as the truth-finding process depended on the interrogation dossiers rather than cross-examination in an open courtroom setting (Korean Women Lawyers Association, 2014). Coercion and torture frequently occurred during the investigation stage due to the lack of procedural rules and constitutional rights, which were not followed. Providing a proper interpretation service during the trial stage is vital to ensure procedural fairness. This practice was also perpetuated during the dictatorship, as achieving effective crime control was one of the government's primary propaganda objectives (Kim, 2018). To apprehend the 'wrongdoers', exploitative investigative methods, such as torture, were commonly used to coerce confessions from the accused, as it was a useful tactic for ensuring a conviction (Moon, 2010).

To address the limitations of dossier-oriented trials, the principle of court-oriented trials emphasises that fact-finding should be based on the debate between the prosecution and the defence; in this sense, it is closely related to the essence of the adversarial legal tradition (Kuk, 2006). Moreover, the court-focused strategy relies on the fundamental values of criminal processes that stress the effectiveness of the trial's preparatory processes, a more rigorous examination of evidence investigation procedures, and a chance for satisfactory cross-examination (Ju, 2006).

By emphasising the advantages, trial-oriented procedures have long been a basic principle that is well reflected in the Constitution (such as the

principle of open and public trial in Article 27-3) and the Criminal Procedure Act (for example, "a judgement shall be rendered on the basis of oral proceedings, unless otherwise provided in codes"). Despite efforts to reform, there is a longstanding tradition of using dossiers in the pursuit of efficient and speedy trials (Moon, 2010). Consequently, the role of courts in such cases is frequently limited to examining and validating investigation reports (Ju, 2006). Prosecutors have faced criticism for including self-incriminating statements from defendants in their interrogation dossiers in order to secure convictions. This has put defendants in a more challenging position to prove their innocence. Despite the clear stipulation of the presumption of innocence in the Constitution (Article 27-4), there remains a significant gap between principle and practice. Due to the culture that prioritises convictions, there is a widespread assumption of guilt. Consequently, the defendant is obligated to carry a heavier burden of proof to demonstrate their innocence (Kuk, 2006).

Practitioners and legislators have attempted to establish the principle of court-oriented trials by emphasising the realisation of principles in practice (Ju, 2006). Nonetheless, the dossier-oriented tradition still appears to significantly impact the functioning of the process. Particularly in sexual offence trials, the significance of pre-trial documents is evident when examining the role of informal criminal agreements, as these agreements appear to reinforce dependence on a legacy of dossier-oriented approaches. As previously mentioned in Chapter 1, such agreements represent a resolution reached between the defendant and the victim, where a key component is the defendant's demonstration of genuine remorse and efforts to make appropriate reparations. The settlement outcome incorporates the victim's disinclination to penalise the defendant, rendering this arrangement a crucial mitigating component (Lee, 2013). As indicated by the term 'informal', this agreement is not legally prescribed, and thus, the settlement process often occurs extrajudicially. Although judges and prosecutors conduct a thorough assessment of the agreement's authenticity in terms of a genuine intention of reparations to the victim, they tend to place greater emphasis on cases involving vulnerable victims who lack decision-making capacity (Han and Jeong, 2013). In most cases involving adult victims, practitioners tend to focus on the existence of an agreement rather than carefully examining the

process and content of the settlement (Chang, 2012). Further issues related to informal criminal agreements will be discussed in subsequent chapters.

In the Korean criminal justice process, victims only attend court in two situations. Firstly, as stated in Article 27-5 of the Constitutional Law, victims are entitled to present a statement during trial proceedings under conditions regulated by the Act. Furthermore, Article 294-2 of the Criminal Procedure Act provides for "the right of the victim to make a statement" and stipulates that the victim "shall have the opportunity to make a statement on the extent and result of the damage, his/her opinion on the punishment of the accused and other matters related to the case in question". It is imperative for the victim to attend the court proceedings and participate in the trial process if the defendant disagrees with the victim's statement. Therefore, the voice of the victim is encouraged to be reflected throughout the process in accordance with the law, and a number of special measures exist to support the victim's participation while removing or reducing their contact with the defendant (Lee, 2016b).

As sexual offences have a huge impact on victims, the Korean criminal justice system has made great efforts to ensure that victims' voices are properly heard during the trial (Chang, 2012). Nevertheless, some studies have revealed practitioners' apprehensions regarding the participation of victims in the trial process, as emotionally overwhelmed victims may consider the trial as a means of personal vengeance, ultimately impeding the efficiency of the trial (Jeong and Park, 2013). Therefore, in order to provide more effective support for victims, the 'Act on special cases concerning the punishment of sexual crimes' specifies the appointment of counsel for victims of sexual offences (commonly referred to as the 'victim's public lawyer') (Article 27). The legal representative is entitled to take part in the investigation process (Article 27-2) and to express the victim's perspective before the court. They possess the full authority to act on the victim's behalf throughout the criminal proceedings (27-5). The significance of victim lawyers is especially emphasised in the settlement of informal criminal agreements between the accused and the victim, as this is an important mitigating factor in cases of sexual offences (Ahn and Choi, 2015). Further examination into this issue will

be conducted in Chapter 7.

3.2.3. The Emergence of Public Participation in the System

The previous section addressed the pursuit of adversarial values in the Korean criminal justice process to establish public confidence in the system, specifically by advocating for defendants' and victims' rights. In addition to the introduction of these adversarial procedural rules, one of the significant changes in the Korean criminal justice system in recent decades has been the emergence of public participation in the system (Park, 2013). One clear example of this transition is the implementation of a jury trial system, known as a 'citizen participatory' trial, in Korea.

The Presidential Committee on Judicial Reform, a presidential advisory body from 2005-2006, facilitated the introduction of this judicial reform. The organisation aimed to encourage public participation in judicial proceedings, based on prior discussions regarding jury trial implementation since 2000 (Gwang-ju District Court, 2014). Consequently, the jury trial system was introduced in 2008, as part of the sentencing reform.

The introduction of the jury trial system may be in line with the introduction of adversarial elements in the system as it aims to "enhance democratic legitimacy and confidence in the judicial process" (Article 1 of the Law on Citizen Participation in Criminal Trials). Nonetheless, its implementation exhibits some limitations as it is not employed in all criminal cases, and it does not entirely acknowledge the jurors' discretion, as their verdicts are merely advisory. During the discussion of implementing jury trials in Korea, judges expressed concerns about relying on verdicts made by untrained individuals (Hong, 2013). Therefore, judges are not obliged to follow the jury's decision despite objections from academics and other practitioners, although it may serve as a guide for the judge's decision-making process. Judges are required to provide a detailed explanation when deviating from the verdict recommended by jurors; however, academics have criticised that the practical application of jury trials only achieves limited success by failing to fully recognise the discretion of the jurors (Kim, 2009).

Jury trials can be seen as a way to incorporate lay opinion into sentencing, but they also have significant drawbacks, particularly in cases of sexual crimes. There exists a significant risk of abuse by defendants who may seek to exploit jurors' emotions in order to secure a more lenient sentence. (Korean Women Lawyers Association, 2014). The views of defendants' lawyers may differ from the general public's preconceptions about sexual offenders; and this may have a negative impact on their judgement (Yoon et al., 2014). Nonetheless, certain law firms promote their ability to secure acquittal verdicts by targeting jurors in sexual offence cases due to higher overall acquittal rates (more than double) in jury trials (Kim, 2023). Based on this, some academics and practitioners have expressed concerns that sexual offences are viewed as ‘blind spots’ in jury trials (Park, 2015).

In summary, the development of the Korean criminal justice system can be described in terms of two aspects: internally, it has focused on achieving judicial independence from political power while the process is still ongoing. Secondly, the system sought to improve internal stability by integrating adversarial elements. The relevant procedural rules are well-established in legislation, however, further improvements are required in their practical application.

3.3. Factors behind practitioner’s sentencing decision-making in Korea

The previous section elaborated on an overview of how the Korean criminal justice system was developed to provide the background knowledge to the study. This aimed to help in understanding the historical context and provide an overall picture of the system. This section focuses more on potential factors that might influence practitioners’ every day decision-making. Various factors might have impacts on practitioners’ decisions as they can be informed by existing rationales, different objectives, priorities, or ways of working within their organisation (McConville et al., 1991). Therefore, this section examines the factors that might affect the reality of decision-making

on three levels: the personal level, organisational level, and the interplay between different agencies.

3.3.1. Working credos

Previous studies on sentencing have often highlighted the discretionary power of individual judges because they are expected to make independent decisions without external interference (Hogarth, 1971). Consequently, their practices reflect the cumulative outcomes influenced by their personal beliefs and values to some degree. This is crucial because personal values help to guide decision-makers in their understanding of a case (Cusack, 2014). Differences in perspectives may result in varied decision outcomes. Although practitioners' decisions may not be entirely free from their professional training and the environment in which they work (i.e. occupational culture), the personal disposition of the decision-maker may lead to a specific decision in each case (Hawkins, 2001).

Shared ideas and beliefs have a considerable impact on shaping practitioners' work in practice (Church, 1982). Based on Packer's models of criminal justice (Packer, 1968), due process and crime control approaches have often been used to examine the working personality of practitioners and, more broadly, the way in which the criminal justice system operates (Rutherford, 1994). Although these two models may not represent reality, they can be viewed as competing values on opposite ends, providing a broader understanding of how the system operates.

The essence of crime control models is the suppression of criminal behaviour and the maintenance of order. They can be compared to an 'assembly-line conveyor belt,' moving quickly and uniformly through the process (Packer, 1968:159). Efficiency in caseload management is the primary concern of this model, which assumes that the 'probably innocent' will be removed from the process at an early stage. The presumption of guilt is strengthened when the legal process is more likely to handle those who are probably guilty. Furthermore, prioritising crime prevention by achieving

efficiency and speed can receive support from informal procedures and a great level of confidence in the possibility of capturing and convicting the criminals.

On the other hand, the due process model is frequently characterised as an "obstacle course" (Packer, 1968: 163), with its main objective being to ensure the accused is treated fairly throughout the process by disregarding informal fact-finding. Consequently, if the accused's rights have been infringed, the prosecution should be dismissed, as the underlying argument of this model focuses on the protection of procedural rights.

As Packer's dichotomised models have long been dominant in understanding the criminal justice system, the development of the system is often characterised as a dynamic struggle between the ideal principles, such as equality and fairness, from the due-process model, and a more informal yet practical emphasis on the crime control model (Rutherford, 1994). Regarding the development of Korea's criminal justice system, there has been a shift from a focus on convicting criminals towards securing procedural rights for defendants and victims. This shift reflects an adherence to due-process values (Kuk, 2006).

Based on Packer's model, several concepts have been employed to scrutinise practitioners' everyday lives. For instance, Rutherford (1994) explored the notion of working credos in his study on prison governors by assessing their managerial approaches and perspectives on inmates. As a result, he recognised three working credos: the punishment, efficiency, and caring credos. The philosophy of punishment is rooted in the degradation of offenders, and the constraints on offenders can be understood through a punitive approach based on moral condemnation of them (Rutherford, 1994:11). The ethos of efficiency is strongly related to the management of workloads through pragmatism, efficiency, and expediency (Rutherford, 1994:13). Finally, the essence of the caring credo lies in the need for reform based on humanitarian values. Using the typologies as a framework, the author examined the impact of the prison governors' emphasis on efficiency over compassion, leading to a lack of concern for the well-being of the inmates (Rutherford, 1994:18).

In the context of sexual offences, practitioners' personal views of victims and gender sensitivity can significantly impact their approach. It is argued that the patriarchal and Confucian ideologies that have long influenced Korea continue to heavily affect the way practitioners handle sexual offence cases (Chang, 2012). The criticism of low indictment rates and lenient sentencing was a frequent issue (Korean Women Lawyers Association, 2014). A recent report revealed that out of 27,000 reported sexual offence cases in 2017, only 40% resulted in indictment and that imprisonment was imposed in merely 20% of the total indicted cases (SPORK, 2021). There is a common argument that practitioners' personal interpretation of cases, particularly regarding consensual sexual relationships and sexual offences, can result in some cases being recognised as rape while others are not, despite similarities in the cases (Choo, 2014).

The significance of personal beliefs or values in the daily work of practitioners cannot be ignored as it could provide a lens through which to constitute the case. Nonetheless, in Korean society, communal or organisational values have traditionally held more weight than individual differences or personal disposition (Choi, 2010). Therefore, it is crucial to comprehend the impact of organisational pressure on an individual's approach. Especially in the wider Korean judicial culture, maintaining consistency and upholding tradition within each organisation is highly valued, with diverse perspectives not actively encouraged (Hong, 2013). It is unsurprising that the courts also exert organisational pressure on their members by offering incentives or punishments and monitoring members' behaviour to ensure conformity (Gelsthorpe and Padfield, 2003). Based on this aspect, the following section explores the potential impact of organisational culture on the work of judicial practitioners in Korea.

3.3.2. Organisational and occupational culture

A number of previous studies have focused on individual cases and the practitioner when analysing decision-making behaviour in the criminal justice system (Hogarth, 1971; McConville et al., 1991). Nevertheless, it's noteworthy

that organisational influences cannot be removed from decision-making since institutionally defined priorities form the core of specific objectives and constraints on the decision-maker's actions (Garland, 2012). The key issue would be the extent to which organisations can control the behaviour of their members (Gelsthorpe and Padfield, 2003). Prior research on occupational roles and work philosophies has suggested that this 'internal' organisational context is just as vital as the principles and regulations mandated by law (Fielding, 2011). Hence, it is crucial to comprehend the significance of environmental factors, encompassing the culture within the organisation and practitioners' comprehension of implementing prescribed regulations within this milieu. This understanding is imperative to gain insight into the decision-making approach in practice (Hawkins, 2001; McConville et al., 2013).

Organisational culture is particularly important in Korea due to the influences of the community-based tradition in the past, as previously discussed (Choi, 2002). While Article 103 of the Constitution stipulates that judges should follow the Constitution, laws, regulations and their conscience to declare judicial independence, the judiciary is considered to be one of the most conservative and exclusive in nature with a strict hierarchy (Choe, 2012). Each criminal justice agency may have varying priorities and regulations whereas lawyers tend to have more organisational freedom compared to judges and prosecutors. Despite these differences, the legal profession in Korea can be categorised by three key qualities: 'homogeneity, scarcity and prestige' (Hong, 2013).

Ultimately, these concepts are all intertwined on the basis of the elitism of the judicial practitioners. By sharing a similar upbringing, educational background and career path, the high entry requirements for the legal professions have ensured their prestigious social status (Flemming et al., 1992). Judges and prosecutors are particularly considered to be more reputable professions due to the long-standing tradition of respect for public officials based on Confucian influences (Kwon, 2011). Judicial practitioners usually enjoy privileges in many areas due to their highly respected status; and the sense of exclusivity is supported by a strict hierarchy within the organisation in the case of judges and prosecutors. Under this hierarchical

structure, junior members are obligated to defer to their elders and superiors to honour their wisdom and experience (Kim, 2012). Furthermore, it is possible for an individual judge's viewpoint to be suppressed, and anyone expressing a differing opinion runs the risk of being labelled as a potential problem (Kim, 2008a). This observation was evident from a survey of judges conducted by the Courts in 2016 (Judicial Policy Research Institute, 2016). The survey results showed that out of 502 participants in total, 443 judges (88.2%) argued that they believed there could be disadvantages if they disagreed with the policies proposed by the Chief Justice or the judges of the Court. Furthermore, 89% of participants argued that the paramount task to guarantee judicial independence is to reform current personnel management.

Promoting conformity within a court can protect its members and possibly ensure consistent sentencing outcomes. High compliance rates with sentencing guidelines have been advertised by courts as evidence of successful implementation of guideline schemes and consistency in outcomes (Kim, 2014). In the last five years, courts complied with the sentencing guidelines on average 90% of the time. For sexual offences cases, this figure drops to 87%. Some practitioners and academics raised concerns that the high rate might stem from judges being unwilling to deviate from established sentencing practices (Kim and Ki, 2016).

The conservative and exclusive nature of judicial practitioners, along with their perceived elitism, sometimes raises concerns. The issue of the so-called ‘revolving door’ also frequently arises - a term that refers to the favourable treatment given to former judges or prosecutors. As judges and prosecutors can also practice law after retiring, it is frequently contended that employing ex-practitioners as defence lawyers, particularly those from elevated positions like High Courts or Supreme Courts judges, would guarantee more lenient sentences (Kim, 2017).

Additionally, it is frequently argued that judges are kept in their 'ivory towers', so it may be questionable whether they can well grasp the daily lives of ordinary people and reflect this in their decision-making (Han, 2016). For this reason, a number of scholars have criticised that the process of conducting jury trials clearly shows the reluctance of judicial practitioners

towards public participation in order to secure their prestigious status in society (Kwon, 2011; Choi, 2015).

Another issue frequently raised regarding the exclusive nature of the judiciary is the courts' reluctance to make court decision records publicly available (Kim and Ki, 2016). The courts have argued that safeguarding the privacy of the defendant and victim is the primary reason for their hesitancy in disclosing sentencing decisions to the public (Gwang-ju District Court, 2014). However, a number of academics and practitioners insisted that open access to court decisions would be a useful way to promote public confidence in the court system (Hong, 2013; Ki, 2015). Moreover, academics have also criticised the courts' exclusive attitude as hindering the development of research on sentencing, as the courts seem to be sensitive to external opinions and consider them as an attack on their authority (Korean Women Lawyers Association, 2014). Despite the appeals made, the courts remain resolute in their position and attempt to address the issue by organising symposiums on sentencing to provide more opportunities for public opinion to be heard.

Regarding sexual offences, a crucial factor is the prevalent male-dominated culture in criminal justice agencies. Despite an increase in female professionals compared to the past, female judges constituted less than 30% of the total population in 2017 (KOSIS, 2018). The gender imbalance and male-centred culture of the court system have long been considered reasons for criticisms of lenient sentencing outcomes due to the possibility of disparity in interpretation based on the practitioner's gender (Korean Women Lawyers Association, 2014). Practitioners may exhibit benevolent attitudes towards the defendant if they lack understanding and sympathy towards the victims, as they may be more understanding of the defendant's position (Chang, 2012). In particular, criticism has been directed towards the male-dominated and patriarchal influence that may hinder practitioners from fully comprehending the experiences of victims throughout the process (Yoon et al., 2014). It is worth noting that the organisation's rigid hierarchy can suppress individual voices and lead to a lack of female representation, making it challenging for female practitioners to assert themselves in practice.

3.3.3. Interplay between different criminal justice agencies

The previous section analysed the impact of organisational culture on sentencing studies. By focusing on the actual operation, Bottomley (1973) highlighted the tensions between structural influences and conflicting values and goals. Judges' norms and values may stem from their personal values and court culture. However, when considering court culture as a collection of informal norms formed by the dynamics of participants (Hucklesby, 1997), it is crucial to observe the relationship between practitioners and other sectors involved in the criminal justice process (Doran and Jackson, 2000).

Additionally, a commonly employed theoretical perspective when investigating the daily practices of judicial practitioners is the idea of the courtroom workgroup, which highlights the collaborative nature of the participants. This notion has been extensively utilised to apprehend differences and deviations in the criminal justice system in prior sentencing research (Church, 1982). It was founded upon the cooperation of practitioners in the interest of efficiency in their daily work (Eisenstein and Jacob, 1977). Concentrating on the interactions of diverse participants present in a courtroom environment, the courtroom workgroup identified numerous shared principles to aid their procedures (Lipetz, 1980). Previous research conducted in both the UK and US has consistently demonstrated that professionals tend to collaborate in a cooperative and cohesive fashion, rather than in an adversarial manner (McConville and Baldwin, 1981; Rumgay, 1995).

This section aims to examine the relationship among Korean justice practitioners in the criminal trial setting. According to previous discussions and reports on sentencing (Korean Women’s Lawyers Association, 2014), a distinctive feature of the relationship among practitioners within the court setting is the clear tension among various criminal justice agencies. The study will centre on the relationship between the Courts and Prosecution Service, focusing on prosecutors’ recommendations and the practical use of court personnel. Furthermore, probation officers’ pre-sentence reports will also be investigated in relation to the conflicts between the Ministry of Justice and the Prosecution Service.

As explained above, prosecutors can make recommendations on sentencing outcomes based on their investigation reports, and judges can take these into account in their decision-making. However, practitioners have long criticised judges for not taking prosecutors' recommendations seriously, as evidenced by the lenient sentencing outcomes (Ryu, 2010). Although there are no specific regulations or rules regarding the use of prosecutors' recommendations, judges commonly acknowledge that such recommendations establish upper limits in the process of judicial decision-making (Kim, 2009). Several judges have contended that prosecutors tend to impose harsher sentences than judges do, owing to their emphasis on conviction (Hong, 2013). Some experts argued that due to prosecutors' significant involvement in the investigation process, it may be challenging for them to remain impartial and not lean towards a punitive approach while maintaining objectivity (Choi, 2014). Therefore, in practice, it is frequently observed that judges impose sentences that are about half of what is recommended by the prosecutor (Han, 2012). Whilst it appears that the implementation of sentencing guidelines has reduced the difference between the recommendations of prosecutors and the actual outcomes (Kim, 2014), prosecutors argue that a significant difference in outcomes still exists, and that it is the result of judges abusing their discretion.

Furthermore, the use of court personnel for sentencing inquiries has exacerbated tensions between the Judiciary and Prosecution Service. The courts have announced that, based on the Courts Organisation Act, they can use court staff to collect sentencing data for trials in 2009. The Prosecution Service, however, strongly opposed this approach, stating that the law only recognises court personnel's existence and does not permit them to be involved in sentencing matters (Choi, 2017). Prosecutors argued that the ambiguous status of court personnel may breach investigations conducted by prosecutors, which is a clear misuse of judicial power (Kim, 2009). They recommended that Courts should instruct probation officers to obtain required data for further sentencing inquiry instead of hiring new staff, given that probation officers are already accountable for pre-sentence reports. However, courts are hesitant to obtain information from external sources as probation officers are accountable to the Ministry of Justice to ensure the principle of fair

trials (Han, 2016). While various criminal justice agencies presented logical arguments in the debate, scholars mainly contend that the underlying reason for this tension is closely linked to the exclusive nature of these agencies, as they are unwilling to disclose information to outsiders (Hong, 2013). Since 2009, the Courts have endeavoured to incorporate the use of court officials for sentencing inquiries into the law. However, opposition from the Prosecution Service, Ministry of Justice and other agencies has prevented their success.

While the practice is not officially institutionalised, the courts have been engaging their personnel to gather additional information in regards to decision-making with regard to sentencing. The use of such personnel has seen an increase from 1,258 to 3,312 cases between 2010 and 2012 (Choi, 2015). Despite the limited availability of the system, which is currently only accessible in large cities within seven courts due to financial constraints, judges have called for greater use of court staff to facilitate sentencing investigations for their convenience (Song, 2011). However, the reduction in pre-sentence report requests (Choi, 2015) has resulted in unresolved tensions between criminal agencies. Although pre-sentence reports will be further explored in Chapter 4, their use in practice is another clear example of the conflict between different agencies.

According to a previous study, judges and prosecutors have responded favourably to the use of the pre-sentence report in sentencing decisions, but they have also shown a pessimistic and rather dismissive attitude due to concerns that probation officers may expand their role in the process (Gwang-ju District Court, 2014). In this regard, the Korean criminal trial system employs a fragmented and exclusive approach in order to safeguard the individual interests of each agency, rather than fostering cooperation in a harmonious manner.

3.4. Concluding comments

This chapter provided background knowledge for understanding the Korean criminal justice system and its practitioners. The chapter began by

discussing the ongoing struggle for judicial independence. Based on the historical context, it outlined the tumultuous history of the quest for judicial independence free from the abuse of political power. In terms of the development of the overall system and process, the chapter also examined how the emphasis was placed on the pursuit of adversarial values in relation to seeking the rights of the accused and the victim during the trial. Additionally, the efforts to promote public participation in the system and gain public trust were discussed. Although various attempts have been made to ensure the fairness and justice of the overall system, the chapter argued that it is still questionable whether the content of the law is fully realised in practice.

After providing an overview of the system's development to set the scene for the study, three factors that might influence practitioners' work were discussed. The personal beliefs and values held by practitioners were explored on an individual level, while the organisational culture of the courts and the prosecution service was discussed. Based on tradition, which highly values a community-based approach, organisational culture has a particularly strong influence on the daily practice of justice practitioners in Korea. The chapter highlights the exclusive nature of this culture, which is based on a strict hierarchy and male dominance. This structure discourages individual voices in the name of maintaining tradition and conformity within the organisation. Finally, the interplay between different criminal justice agencies was explored in relation to the notion of the courtroom workgroup. Unlike prior sentencing studies in the UK and US, criminal justice agencies in Korea have not worked in harmony, and tensions between agencies have been more common according to previous reports and studies. Based on the background knowledge of law in practice, the following chapter is aimed at examining the law in theory to understand what practitioners are required to do in practice.

Chapter 4. Understanding legislative responses to sexual offences in Korea

4.1. Introduction

The previous chapters provided the background context for understanding Korean society in general. After discussing the influence of Confucianism on Korea over time and examining the culture and practices of judicial practitioners, this chapter will focus on the sentencing framework for sexual offences in Korea. Understanding the legal framework is essential for sentencing studies from a number of perspectives. First, a sentencing framework outlines what practitioners can do by specifying the available sentencing options and relevant procedural rules (Packer et al., 1989; Tonry and Rex, 2002). As a guide and basic standard for practitioners to work with, an examination of the sentencing framework provides a useful background context for the following chapters of this thesis in terms of exploring what practitioners are legally required to do and what they actually do in reality.

In addition, as the law is considered as a mirror of society by reflecting its customs and morals, (Tamanaha, 2010), it contains useful information about a given society. For example, the range and types of sentences available are likely to reflect the political and social perspectives of society (Ashworth and Player, 1998). As a means of reflecting the purposes of sentencing, penal theories and discourses (Frase, 2001), legislative changes are inevitably based on societal changes and shifts in thinking. Therefore, a sentencing framework encompasses the broader development of rhetoric that shapes criminal justice over time.

In the case of sexual offence legislation, it also reveals the perception of gender issues and approaches to dealing with sexual offences within a particular society (Han and Lee, 2011). In this regard, an analysis of the law, policy and general discourse would be the first step in understanding the rationale behind the sentencing process for sexual offences and the specific factors that influence sentencing decisions.

This chapter offers an overview of the sentencing framework for sexual offences. Firstly, it presents the main features of the legal framework for sentencing sexual offences, focusing on the Criminal Act, relevant Special Acts and sentencing guidelines. It also examines the range of sentences available and what practitioners are required to do in practice. The chapter also provides a brief history of the changing rhetoric and discourse surrounding the sexual offences legislation. Finally, the chapter discusses the implications of the changes to the sexual offences legislation.

4.2. Legal framework for sentencing sexual offences

This section presents an overview of the legislation on sexual offences in Korea. What constitutes a sexual offence may vary depending on the social and cultural norms of a particular society (Cobley, 2000). Political and societal discourses, mirrored in sexual offences legislation, offer valuable insights for discussions about a given society. In addition, a thorough examination of the sentencing mechanisms provides further in-depth knowledge to better understand sentencing practices.

4.2.1. Sexual offence legislation in Korea

The sexual offences legislation in Korea can be divided into two main sources: the Criminal Act and the Special Acts. The Criminal Act 2020, initially enacted in 1953, serves as the basic law in criminal cases, and regulates broader and general areas related to various issues in the criminal justice system. It sets out the basic guidelines for various types of offences, their definitions and statutory penalties, and the general principles of criminal justice (Jeong and Park, 2013).

In Korea, the Constitutional Act, the Civil Act, and the Criminal Act are widely regarded as the three foundational laws, and their contents are rarely amended, as is the case with the European Constitution or the US Constitution.

These three laws establish general principles and initial guidance instead of providing detailed regulations. In the case of sexual offences, the legislative response has generally been to maintain the content of the Criminal Act and instead to make amendments through Special Acts whenever necessary in order to make changes more quickly. Thus, the Criminal Act has only been revised twice to date, in 1995 and 2012. This aspect will be further discussed later in this chapter.

The Criminal Act encompasses a wide range of sexual offences, such as rape (i.e. non-consensual sexual intercourse by force or intimidation as per Article 297), imitative rape (i.e. any non-vaginal sexual penetration by body parts as defined under Article 297-2), and forceful commission of indecent acts (under Article 298). These offences encapsulate a broad spectrum of sexual offences in which the perpetrator uses violence or intimidation to commit an indecent act against another person.

While the Criminal Act provides rather basic and general provisions, more specific categories of offences, primarily those that are aggravated (i.e., involving higher levels of violence or intimidation towards the victim or resulting in more severe damage), are governed by a variety of ‘Special Acts’. The Special Acts related to sexual offences include ‘The Act on the Electronic Monitoring of Specific Criminal Offenders', 'The Act on Pharmacological Treatment of Sex Offenders' Sexual Impulses', 'The Act on Special Cases Concerning the Punishment of Sexual Crimes', 'The Act on the Protection of Children and Juveniles from Sexual Abuse', and 'The Act on the Prevention of Sexual Assault and Protection of Victims'.

More detailed information about crime types and related regulations can be found in different Special Acts. The purpose of these Acts is to address gaps in the existing legislation and tackle newly emerging issues promptly and effectively (Kim, 2012). These Acts also cover emerging offences such as digital sex crimes (article 14-4 of the ‘Act on special cases concerning the punishment of sexual crimes’), or modify penalties in the Criminal Act by applying aggravated penalties. Table 4.1. below illustrates how the Special Acts regulate more detailed or aggravated versions of rape cases based on the nature of the offence or the victims.

Table 4.1. **Rape in different Legislation**

Legislation	Article	Nature of the offence
Criminal Act	297 rape	use of violence or intimidation
Act on special cases concerning the punishment of sexual crimes	3 special robbery and rape	A person who commits a crime prescribed in article 297 of the Criminal Act in the course of committing following offences: intrusion of house, larceny, stealing someone's property by trespassing upon residence or occupied room at night
	4 aggravated rape	carrying any weapon or other dangerous object or jointly with any other person(s)
	5 rape through abuse of consanguineous or marital relationship	use of violence or intimidation in a consanguineous or marital relationship
	6 rape by compulsion on persons with disabilities	A person who commits a crime prescribed in Article 297 of the Criminal Act on another person with a physical or mental disability
	7 rape by compulsion on minors under the age	A person who commits a crime prescribed in Article 297 of the

	of 13	Criminal Act on a minor under the age of 13

As the term 'special' suggests, these Special Acts are designed for specific purposes to address particular issues in a more effective manner, and each Act has a unique scope and objective. For example, certain Special Acts are directly related to the introduction of preventive measures, such as ‘The Act on the Electronic Monitoring of Specific Criminal Offenders' and 'The Act on Pharmacological Treatment of Sex Offenders' Sexual Impulses'.

Other Special Acts have also been enacted to reflect specific objectives or policy considerations. For instance, 'The Act on Special Cases Concerning the Punishment of Sexual Crimes' regulates more severe forms of offences depending on their gravity. 'The Act on the Protection of Children and Juveniles from Sexual Abuse' was introduced in response to the increasing need to safeguard more vulnerable groups such as children and juveniles. 'The introduction of the 'Act on the Prevention of Sexual Assault and Protection of Victims' aimed to enhance the protection provided to victims throughout the criminal justice process.

Although it will be discussed in more detail later in this chapter, the frequent revisions to various Special Acts, mostly focusing on specific types of sexual offences, have led to concerns among scholars and practitioners (Kim, 2008b; Kim, 2012). Legislative responses have mainly concentrated on increasing the statutory punishment and introducing new measures to address public concerns, resulting in similar or overlapping regulations being dispersed throughout various Special Acts. In that sense, the present sexual offences legislation has been criticised for its complex and fragmented nature, and is often referred to as 'mosaic' or 'patchwork' legislation (Lee, 2014; Seon, 2014).

Sexual violence offences are regulated in articles 297 to 303 of the Criminal Act. These include rape (297), imitative rape (297-2), indecent act by compulsion (298), quasi-rape (i.e. committing offences by using the victims’ state of unconsciousness or inability to resist), quasi-indecent act by compulsion (299), attempts of prescribed sexual violence offences (300),

inflicting or causing another’s bodily injury by rape (301), killing another or causing death of another by rape (301-2), sexual intercourse with a minor (302), and sexual intercourse by abuse of occupational authority (303). These basic types of sexual violence offences are further divided by the characteristics of the victims such as minors under the age of 13, minors older than 13, persons with disabilities, and sexual offences committed in a consanguineous or marital relationship. These offences can also be categorised based on their nature, including attempted offences, habitual offences, those that result in bodily injury to the victim, and those causing death through sexual violence. These types of sexual violence offences are distributed throughout laws including the Criminal Act, the ‘Act on special cases concerning the punishment of sexual crimes' and the ‘Act on the protection of children and juveniles from sexual abuse'.

If there is a conflict between the provisions of the Criminal Act and the Special Acts, the latter will be applied first, as the Criminal Act regulates only common types of offences (Han and Lee, 2011). Because of this aspect, some scholars have argued that the function of the Criminal Act has become nominal, as the basic types of offences set out in the Criminal Act cannot adequately capture the diversity of sexual offences in reality (Kim, 2022c). This issue will be discussed in more detail later in Chapter 6.

4.2.2. Sentencing guidelines for sexual offences

The previous section discussed the legislation on sexual offences and its complexities. This section further explores another vital sentencing framework, the sentencing guidelines. As part of the Ministry of Justice's judicial reform efforts, the Sentencing Commission was established in 2007 as a Supreme Court-affiliated organisation. The Commission's utmost responsibility is to maintain and scrutinise the sentencing guidelines in South Korea. Following the establishment of general guidelines for eight different categories of crimes by the first Sentencing Commission, the 8th Sentencing Commission is currently working on the issuance of sentencing guidelines for

the 46 categories of crimes currently in force (Sentencing Commission, 2021).

Over the past two decades, a number of countries have explored or implemented changes to sentencing practices with the aim of regulating the discretion of judges in sentencing. Most of the existing research has concentrated on the situation in the United States, where guidelines have been developed since the 1970s, which was relatively early compared to other countries (Park, 2010). Furthermore, a comprehensive sentencing guidance system has been successfully developed and implemented in England and Wales in addition to the generic guidelines (Ashworth, 2015).

The Korean government and the Ministry of Justice introduced the sentencing guideline scheme primarily to increase public trust in the sentencing system and reduce the issues arising from sentencing disparities (Hong, 2013). By restricting judges' discretionary power and providing guidance on sentencing decision-making, the implementation of the sentencing guidelines aimed to regain the public's trust and make the sentencing decision-making process more transparent and consistent (Choo, 2009).

The Sentencing Commission has focused particularly on addressing public concerns regarding sexual offences, which has led to frequent updates to the sentencing guidelines for these crimes based on a more severe approach. Since the initial introduction of the sentencing guidelines for sexual offences in 2009, there have been seven subsequent revisions, all of which have focused on expanding the range of sentences (Kim, 2014).

The sentencing guidelines outline different types of sexual offences and the range of sentencing periods. The types of categories are divided into three parts based on their gravity: the first section includes general types of sexual offences outlined in the Criminal Act. The second section presents prescribed offences resulting in bodily injury. Then, those cases resulting in death are outlined in the last section. Each section is categorised based on the nature of the offences and the characteristics of the victim, similar to the Criminal Act. Table 4.2. below gives an overview of the categorisation of general types of sexual offences in the sentencing guidelines.

Table 4.2. The overview of general types of sexual offences in sentencing guidelines

Sexual offences	Classification
Rape	Standard rape
	Rape by relatives, rape after intrusion upon habitation, special rape
	Rape after robbery
Indecent act by compulsion (victim of 13 years of age or older)	Indecent acts by compulsion (standard)
	Indecent acts by compulsion by relative, indecent acts by compulsion after intrusion upon habitation, special indecent acts by compulsion
	Indecent acts by compulsion after robbery
Sexual crimes against a disabled victim (13 years of age or older)	Statutory indecent acts by compulsion
	Statutory rape, indecent acts by compulsion
	Imitative rape
	Rape
Sexual crimes against a victim under 13 years of age	Statutory indecent acts by compulsion
	Statutory rape, indecent acts by compulsion
	Imitative rape
	Rape
Sexual crimes under the military act	Indecent acts by compulsion committed against military personnel
	Imitative rape committed against military personnel
	Rape committed against military personnel

The sentencing guidelines also provide three different ranges of punishment based on the seriousness of the case. The table below presents the range of sentences for the scope of this thesis, cases of rape causing bodily injury (Table 4.3.).

Table 4.3. Sentencing Guidelines for rape resulting in bodily injury

	Mitigated sentencing range	**Standard sentencing range**	**Aggravated sentencing range**
Rape resulting in bodily injury	2 years 6 months - 5 years	4 years- 7 years	6 years-9 years

Lastly, the sentencing guidelines outline sentencing factors to consider during the decision-making process. These sentencing factors are divided into two main categories: aggravating factors and mitigating factors. Then, these two types of factors are divided once again into special determinants and general determinants based on the impacts on decision-making. Special determinants are the most important sentencing factors to consider and they can influence the 'range' of advisory sentences. General determinants are considered when making decisions regarding a declaratory punishment within the determined advisory sentencing range. In that sense, general determinants are not taken into consideration when judges decide on the range of sentences. These determinants are further classified based on the factors related to the nature of the offence and the defendant, the victim and additional sentencing factors. More specific details and definitions of each sentencing factor are also given in the sentencing guidelines. Table 4.4. below presents the sentencing factors for rape cases.

Table 4.4. Sentencing factors in rape

Classification	**Mitigating factors**	**Aggravating factors**

Special sentencing determinant	**Conduct**	•Cases where the extent of indecent acts is slight	•Sadistic, perverse conduct or with extreme level of sexual humiliation •Constant and repeated offense against multiple victims •Offence committed with special robbery prescribed in Special Sexual Crime Act •Gang-rape
	Actor	•Those with hearing and speaking impairments •Those with mental incapacity (Cases where the offender cannot be held liable) •Voluntary surrender to investigative agencies •Offender expresses remorse and the victim opposes punishment (the existence of the informal criminal agreement)	•Repeated offenses of same type under the Criminal Act •Offences committed by the person under legal obligation to report or by employee of protection facilities •Habitual offenders
General sentencing determinant	**Conduct**	•Passive participation •Participation as a result of duress or threat of another	•Premeditated crime •Multiple acts of rape in commission of the same offence

			•Condemnable motives •Falls within offense prescribed in Special Acts •Offense committed by causing diminished physical or mental capacity to the victim
	Actor	•Deposited significant amounts of money (restitution) •Expresses sincere remorse •No prior criminal history	•Abuse of relationships of trust •Repeated offenses •Harm caused in the course of reaching the informal criminal agreement

The primary aim of introducing sentencing guidelines in Korea was to guarantee the transparency of sentencing through providing clear and systematic guidance (Hong, 2013). Judges, in particular, were initially hesitant to adopt the guidelines as their discretionary power could have been severely curtailed (Choi, 2009). After an extensive debate, the Sentencing Commission determined that the guidelines would serve as a reference for judges to consider and function as an advisory recommendation rather than a legally binding rule to be followed (Choi, 2015). However, judges are obligated to respect the guidelines and when they deviate from the sentencing range provided by the guidelines, they must explain their reasoning in their judicial opinions (Court Organisation Act, Article 81-7).

The courts have highlighted high levels of compliance with the sentencing guidelines, which demonstrates successful implementation of the guideline schemes (Ha and Kang, 2018). The courts reported that the average compliance rate for the sentencing guidelines (i.e. the sentencing outcome falling within the prescribed range of sentencing guidelines) from 2013 to 2018 was almost 90%, and 87% in cases involving sexual offences. The courts have argued that this high rate of guideline compliance means that the implementation of the sentencing guidelines has helped to promote consistency and transparency in sentencing by reducing sentencing disparities. However, a number of academics and practitioners have stated that this high compliance rate may be attributed to a court culture that is hesitant to diverge from precedents (Kim et al., 2020). This aspect will be further discussed later in this thesis.

Furthermore, it is questionable whether the sentencing guidelines have sufficiently addressed the public's demand for harsher sentences in cases of sexual offences as the 60% of the contents of the guidelines were based on precedents (Park, 2010). Since the previous sentences imposed in sexual offence cases were criticised for being lenient, the guidelines' heavy reliance on precedents has led to question whether there would be significant differences from the outset (Choi, 2015).

4.2.3. The process of sentencing decision-making

The previous sections have explored the legal framework for sentencing sexual offences. By discussing the sexual offences legislation and sentencing guidelines, the study has illustrated the complex nature of the current sentencing framework. As similar and overlapping content is dispersed throughout various parts of the legislation and sentencing guidelines, this section intends to explain how the final sentencing outcome is reached.

The determination of the sentencing outcome involves the consideration of two aspects: the appropriate sentencing range and the sentence. Firstly, the law sets out the prescribed sentence (statutory

punishment), and then the sentencing guidelines are applied. Once the type of offence and sentence length, as well as any aggravating or mitigating factors mentioned in guidelines, have been considered, the judges receive an advisory sentence. Finally, the declaratory punishment is presented, which takes into account both the statutory punishment and the advisory punishment based on the sentencing guidelines.

The sentencing guidelines further provide a detailed explanation of the determination of sentences in the general application of the guidelines section. For the appropriate sentencing range, the court only takes into consideration the special sentencing determinants. After considering mitigating and aggravating special sentencing determinants, judges decide the sentencing range or, otherwise, the standard sentencing range is recommended. Then, the court should consider both the general and special sentencing determinant to decide on the sentence within the selected sentencing range. In cases in which the maximum sentencing range exceeds 25 years, the court may impose life imprisonment instead.

The Criminal Act also provides some principles regarding sentencing in articles 51 to 56. Article 54 provides statutory mitigation and Article 56 stipulates the order of aggravation and mitigation. Article 53 is particularly controversial as it regulates ‘discretionary mitigation’ by stipulating that “when there are extenuating circumstances in relation to the commission of a crime, the punishment may be mitigated”. Since the sentencing guidelines have already set out the mitigating factors to be considered, some academics have argued that article 53 almost functions as a double mitigation in practice (Lee, 2013). This discretionary mitigation in the Criminal Act is often criticised as the main reason behind the lenient sentencing outcomes and the gap between prosecutors’ recommendation and judges’ sentences (Roh and Kang, 2010; Park, 2014).

Based on this brief explanation, this section will illustrate the general process for reaching a decision regarding the final sentence in rape causing bodily injury cases as an example. The range of the statutory punishment for rape causing bodily injury is between a minimum of five years’ imprisonment and a life sentence, according to Article 301 of the Criminal Act. After applying

the statutory mitigation (Articles 51 to 56 of the Criminal act) and the relevant mitigating factors mentioned in the sentencing guidelines, the range of the advisory sentence might be decreased to between 30 and 60 months of imprisonment. As there is a significant gap between the original statutory punishment and the range of advisory sentences, there is a constant question regarding sentencing practices.

4.3. Additional sources for sentencing sexual offences

The previous sections explored the legal framework for sentencing sexual offences, focusing on the sexual offence legislation and sentencing guidelines. This section further examines other sources of information available for sentencing sexual offences. These sources include the pre-sentence reports, sentencing inquiry reports, prosecutors' recommendations, jury trials and most importantly, the informal criminal agreement. Lastly, the use of the software programme by courts and prosecution services will be discussed.

First, the pre-sentence reports are widely used to provide more detailed information and assessment of the likelihood of future reoffending. At the request of prosecutors, the pre-sentence reports contain a range of information, including a summary of the case and the overall investigation process, the probation officer's opinion and a proposal for the defendant's treatment in relation to the use of preventive measures. More importantly, it aims to provide more detailed personal information about the defendant. The defendant's educational background, career and family relationships are examined in detail. Furthermore, relevant reference reports are attached to the pre-sentence report. These encompass an existing criminal history report, a medical report and other assessment reports relating to the offender's mental state, such as the result of the PCL-R (The Psychopathy Checklist-Revised). Additionally, if necessary, the results of an assessment on the future risk of reoffending (K-SORAS: Korean Sex Offender Risk Assessment) are also taken into consideration (Han and Lee, 2011). The pre-sentence reports

are intended to aid prosecutors and judges in their decision-making process by providing a comprehensive evaluation of the accused, primarily concerning the implementation of preventative measures.

While the pre-sentence reports focus on providing information about the defendant, the sentencing inquiry report written by court personnel aims to gather more information about the victim. Based on Article 54-3 of the Courts Organisation Act, the courts have appointed junior court assistants as sentencing investigation officers since 2009. During the trial stage, the victim or her/his lawyers can be contacted to verify the victim’s status and the settlement of the informal criminal agreement. The use of court personnel to gather sentencing data has led to a conflict with the Prosecution Service as it may interfere with the boundaries of their work as previously discussed in Chapter 3.

The prosecutor's recommendation is a crucial aspect of a judge's sentencing decision. The Korean criminal justice system has a distinctive feature related to the extensive powers of prosecutors (Choe, 2012). Prosecutors exclusively exercise the majority of investigative and prosecutorial powers. Moreover, based on their investigation results, prosecutors have the authority to make sentencing recommendations. Although judges are not obliged to follow this, it still serves as a useful source for judges as they respect this recommendation as an investigation result (Choi, 2014). Therefore, the prosecutor's recommendations are seen as setting the upper limit for sentencing (Kim and Chae, 2017). As previously discussed in Chapter 3, prosecutors have frequently criticised the discrepancy between their recommendation and the actual sentencing outcomes. They argue that this is a clear example of the judge's discretionary mitigation, which in practice results in lenient sentences (Ryu, 2010).

Jury trials (officially referred to as Citizen Participatory Trial in Korea) can be another influential source of sentencing in sexual offence cases. To combat the widespread mistrust of the judicial system, the Presidential Committee on Judicial Reform (2005-2006), a presidential advisory body, facilitated the implementation of judicial reform (Choi, 2014). The jury trial system was established in 2008 to encourage public involvement in the

judicial process and enhance its transparency. The initial purpose of the system, as outlined in Article 1 of the 'Act on Citizen Participation in Criminal Trials', was to "enhance democratic legitimacy and confidence in the judicial process." Jurors are able to participate in both the determination of guilt and the decision on the appropriate punishment (Article 46(2)). However, judicial practitioners have expressed negative views about lay involvement in sentencing, criticising the public's lack of legal expertise and experience (Hong, 2013). By reflecting on these concerns, the role of the jury trial remains advisory similar to the use of sentencing guidelines (see more in Chapter 3).

Another crucial source of information in determining a sentence would be the informal criminal agreement, which is considered the most significant mitigating factor in sexual offences (Chang, 2012). Essentially, this agreement results from a settlement between the victim and the defendant, based on the defendant's sincere efforts towards restitution. The informal criminal agreement is frequently compared to the victim impact statement (VIS) utilised in other jurisdictions, as it also has the role of giving victims an opportunity to speak. The VIS aims to provide criminal justice agencies with more information about the impact of a crime by providing space for victims (Walklate, 2007). In that sense, it could be perceived as a positive step in improving victim participation in the Criminal Justice Process.

While the victim impact statement was not designed to influence sentencing outcomes for Criminal Justice Agencies (unlike the informal sentencing agreement in Korea), it has sparked controversy over the more fundamental question of whether the victim's opinion should have any impact on sentencing at all, as it may be inconsistent with the rights of the defendant (Edwards, 2004). It would be unjust to base an offender's sentence on the disposition of a particular victim - whether vindictive or forgiving (Matravers, 2010). In addition, this approach could lead to disparities in sentencing based on unforeseen harm suffered by the victim, as the degree of recovery from harm may vary from person to person, and this has the potential to result in injustice for certain offenders (Erez, 2000). Some studies have also suggested that there is considerable local variation in the use of VIS, which could imply the possibility of disparities in sentencing outcomes (Roberts and Manikis,

2013).

Despite causing heated debates in other countries, the use of the informal criminal agreement in Korea has long been taken for granted as an essential part of the sentencing process, although it plays a similar role. While widely used in practice, there is a dearth of in-depth studies regarding its use and impacts. Therefore, it is unclear when and why the informal criminal agreement has been implemented in practice. Studies have suggested a possible link between the implementation of this measure and the overall emphasis on the concept of community in Korea (Robinson, 1991; Chung, 1995). Historically, Korea has been significantly influenced by a community-based ideology due to Confucian influences as discussed in Chapter 3. The prevailing belief was that the collective mindset was prioritised over individual values or voices, in order to preserve social harmony. Based on the historical context, this kind of informal settlement among community members has long been used as a legal custom in practice (Wei-ming, 1996).

Furthermore, an additional justification for employing the informal criminal agreement is that it provides an opportunity for defendants to demonstrate their efforts at restitution. It is closely linked to article 51 of the Criminal Act, which lists factors that should be taken into account in the sentencing process. The factors to consider include the age, conduct, character, intelligence, and environment of the offender (51-1), the relationship between the offender and the victim (51-2), the motive, means, and outcome of the crime (51-3), and the circumstances that arise following the commission of the crime (51-4). As stated in article 51-4 of the law, it was generally argued that the defendant's efforts to make amends by participating in the settlement should certainly be taken into account as part of the circumstances after the commission of the crime (Chang, 2012).

The police and the prosecution have respectively started to implement the victim impact statement scheme (Lee, 2018). Although they have different names (victim impact assessment report for the police and victim impact sentencing report for the prosecution), the purpose of this document remains the same: to more effectively convey victims' views throughout the investigation and trial process, and to ultimately influencing the sentencing

outcomes. The use of two separate victim impact statement schemes across different agencies raises concerns, as the informal criminal agreements with the same purpose and function have already been widely employed. This approach may impose an undue burden on victims, increasing the risk of secondary victimisation, as they may have to answer the same questions multiple times. More in-depth discussion on the use of informal criminal agreement will be provided in Chapter 7.

Finally, the use of software programmes in sentencing practices is discussed. These sentencing software programmes typically combine relevant legislation, sentencing guidelines and sentencing outcomes in similar cases (precedents), thereby helping practitioners to arrive at a result once they have entered all the necessary details of the case. The Prosecution Service employs their own software programme, the Prosecutorial Guideline System (PGS), when deciding on the recommendation (Kim and Ki, 2016). In the case of the courts, it was reported that one judge developed a programme specifically tailored for sentencing eight major offences, including sexual crimes (Choi, 2009). In some instances, practitioners are required to consider over 30 sentencing factors. As a result, various programmes are commonly implemented to reduce the amount of time and workload involved in sentencing. In a recent news report, the courts have developed a more specific programme for judges on sexual offences (Jeong, 2012). Although there is currently no academic research available on the use of software programmes for sentencing in Korea, some insights on this issue based on interview findings are provided in Chapter 6.

4.4. Newly implemented preventive measures to tackle sexual offences

The previous sections have examined the legal framework for sentencing sexual offences. In this section, newly adopted preventive measures are discussed on the basis of recent legislative responses. Irrespective of jurisdiction, a prominent aspect of recent legislative revisions

in relation to sexual offences is the introduction of a range of legislation to increase criminal sanctions for sex offenders and to improve community supervision and monitoring of sex offenders (Terry, 2013). Sex offender registration, community notification, and electronic monitoring will be discussed as examples of the new measures.

4.4.1. Sex offender registration and community notification

The sex offender registration and notification system were first established in Korea in 2000 through the enactment of the ‘Act on the Protection of Children and Juveniles from Sexual Abuse’. It was specifically targeted at cases of sexual offences where the victims were children and juveniles, as they were the focus of legislative attention at the time due to some high-profile sexual offences involving children (which will be discussed later in this chapter). 'The Act on Special Cases Concerning the Punishment of Sexual Offences' governs the types of sexual offences applicable.

Eight countries have sex offender registries, including the United States, England and Wales, and South Korea (Australia, Canada, France, Japan, and the Republic of Ireland also have sex offender registries maintained by the police) (Vess et al., 2013). However, only the United States and South Korea have comprehensive community notification provisions that allow for a greater degree of public disclosure of information about sex offenders (Thomas, 2003).

In case of Korea, any individual required to register must provide their personal details within 30 days of the judgment date (article 42 of the Act on Special Cases Concerning the Punishment of Sexual Offences). This information includes name, resident registration number, address of actual residence, occupation and place of work, physical information (height and weight) and the registration number of their vehicle. In addition to personal information, the relevant details of sexual offences that require registration are retained for 20 years as stated in Article 45-1. This data may be shared with other criminal justice organisations for research purposes (article 46); and the

head of educational institutions, such as day-care centres and schools, will also be notified if the residence of the registered offender is within their boundaries. This information on specific categories of sexual offenders is also available to the public through the government website.

The introduction of registration and notification measures has sparked controversy due to the significant burden they impose on offenders' privacy. In many respects, disclosing personal information can have destructive effects on the lives of the offender's family members as well as on the offender's own life, especially in a society such as Korea where family ties are highly valued (Park, 2010). The notification, which acts as a shame penalty, may impede the offender's successful re-entry and integration into society (Ko, 2013). Additionally, if the sexual offence was committed by a relative or family member, the victim may be put at risk of having their identity revealed. Therefore, community notification orders are rarely imposed on sex offenders in intra-familial cases by courts (Korean Women Lawyers Association, 2014).

4.4.2. The electronic monitoring system

Another important preventive measure is the electronic monitoring system. In South Korea, a research group organised by the Ministry of Justice began discussing the implementation of this system in 1999 (Yeon and Yu, 2015). The enactment was delayed until 2007 due to the concerns about the human rights issues; however, following a series of serious sexual offences against children and resulting strong public outcry, the situation changed dramatically (Jeong and Park, 2013). The legislation stipulates that if a public prosecutor files a request for an electronic monitoring order with the court, the court can issue an electronic monitoring order against a sex offender for a maximum of ten years, as long as certain conditions are met (Article 9-1 of the Act on the Electronic Monitoring of Specific Criminal Offenders). Since it is not an administrative decision, the prosecutor’s request is a prerequisite.

The Act has been revised four times following a series of sexual offences against child victims, mostly on the basis of a punitive orientation.

The initial minimum period for electronic monitoring was increased from five to ten years even prior to its first implementation (Kim, 2013a). Additionally, the scope of the Act was broadened, as it was originally intended to apply only to sex offenders, with a maximum implementation period of five years. However, following just one year, the maximum duration was extended to ten years and, after the 2010 revision, the maximum duration of the attachment of an electronic device was increased to 30 years.

This Act allows the imposition of the attachment of an electronic device on the offender's ankle, through the use of GPS systems to track the location and movements of an offender (Han and Lee, 2011). The range available under the law is broad within each category as shown in the Table 4.5 below. With a wide choice of imposition periods ranging from one to thirty years while there is a lack of detail within the legislation regarding the implementation of the measure, there has been constant questions regarding the rationale behind sentencing decision-making (Kim, 2013a)

Table 4.5. Categories of crime and their period of electronic monitoring in legislation

Sentencing Decisions	Applicable duration
1. Specific crimes, the maximum legal penalty for death penalty or life imprisonment.	From 10 to 30 years
2. Specific crimes, the minimal sentence of legal penalty for which is imprisonment for a term of at least three years	From 3 to 20 years
3. Specific crimes, the minimal sentence of legal penalty is	From 1 to 10 years

imprisonment for a term of less than three years	

4.5. Issues of the current sentencing framework for sexual offences

The prior sections discussed the sentencing framework for sexual offences. By examining the 'law in books', this chapter has outlined the available sentences and what practitioners are required to do by law. This section further delves into the sentencing framework by examining some of the key features of the legislative responses to sexual offences. The punitive orientation of the legislative changes and the reflection of changing societal perspectives in sexual offence legislation will be discussed in more detail.

4.5.1. Punitive approach in sexual offence legislation

As previously noted, the legislative response to sexual offences was largely influenced by a series of high-profile sexual offences cases against vulnerable victim groups (Seon, 2014). Increased public concern and a better acknowledgement of the sexual offence issues led to swift legislative and policy changes (Yoon et al., 2014). The severity of cases involving child victims immediately caught the attention of the public and the media, especially on the sentences given to the offenders (Byun, 2011). Based on this public demand for harsher sentences and preventive measures to effectively tackle future crimes resulted in a more punitive approach in the overall sexual offence legislation (Yoon, 2014). Within this context, this section aims to illustrate how the implementation of various preventive measures or the increase in statutory penalties in the sexual offence legislation in recent years has been closely linked to some high-profile sexual offence cases following the public outcry.

Since the late 1980s, sexual offence issues have received increased

attention, as stated in Chapter 1. Domestic violence and sexual offences have emerged as significant social problems after two specific cases where victims of domestic violence, Bu-nam Kim and Bo-eun Kim, killed their perpetrators, in both cases their stepfathers (Shim, 2002). Following an unprecedented public outcry, the ‘Punishment of sexual crimes and protection of victims Act’ was enacted in 1994 to better protect sexual offence victims.

The early 2000s witnessed a major turning point in Korea's legislation on sexual offences as a result of a number of high-profile sexual offences against children. For instance, the electronic monitoring system emerged as an effective solution after the rape and murder of an elementary school girl by a previously convicted sex offender in 2006 (Byun, 2011). After further sexual offenses committed against children in 2007 and 2008, the 'Act on electronic monitoring of specific criminal offenders' was promptly introduced in 2008 (Shim, 2002).

The increasing focus on sentences imposed in specific sexual offence cases has further fuelled the general punitive rhetoric in legislative responses. The case of Du-sun Cho in 2008 caused a national shock not only for its brutality, but also for the controversial debates surrounding the sentences handed down (Park, 2013). After committing the rape of an 8-year-old girl, resulting in permanent physical damage, the offender was sentenced to 12 years of imprisonment, 7 years of electronic monitoring, and 5 years of sex offender registration and notification. The focal point of controversy surrounding this case was the consideration of mitigating factors. The decision was based on the reflection of statutory mitigating factors, which included the age of the offender (57 years old) and insanity resulting from alcohol influence (Kim, 2013a).

Following this case, legislative changes were made to improve the effectiveness of dealing with sexual offenders and to protect the public from sexual offences. The ‘Punishment of Sexual Offences and Protection of Victims Act’ was restructured into two separate Acts, namely ‘The Act on the prevention of sexual assault and protection’ and ‘The Act on special cases concerning the punishment of sexual crimes’, each serving different purposes. The former is mainly concerned with the protection of victims' rights, while the

latter covers the area of punishment and procedural rules (Byun, 2011).

Further changes were followed by the introduction of new preventive measures such as the offender notification system. Special attention was given to various procedural rules that support victims throughout the investigation and trial process, influenced by the common law system (Kang et al., 2009). Existing measures and sentences have also been amended to reflect a more punitive approach. For example, the maximum period of electronic monitoring has been significantly increased from ten to thirty years. Additionally, the range of statutory penalties in the Special Acts was generally increased. Insanity based on alcohol influence faced intense scrutiny and was abolished for cases involving minors (under 13 years old) and disabled victims.

There was also a heightened awareness of sexual offences against disabled people. These groups are particularly problematic, as there is a reduced likelihood of such offences being reported due to the victim's inability to express themselves or understand the concept of sexual violence (Shim, 2002). In institutional settings, it can be even more challenging to identify sexual offences against vulnerable victims. The film 'Silenced' (2011), which is based on a real sexual crime case involving disabled students in a special school, raised concerns about this issue (Jang, 2012). While the public and the media expressed anger over the sentences given in this case (most of the perpetrators received suspended sentences or less than 5 years' imprisonment), another rape case against an 8-year-old girl in 2010 led to further public outcry. In response to concerns about sexual offences, the Special Cases Concerning the Punishment of Sexual Offences Act, often referred to as the "Silence Act" after the film (Choo, 2014), was amended in 2011. The amendment includes a further increase in statutory penalties and the abolition of the statute of limitations for sexual offences against children under 13 and disabled persons.

To summarise, this section has demonstrated how recent changes in sexual offence legislation have been based on a punitive approach to the specific sexual offence cases. Table 4.6. below highlights a clear correlation between these cases and the surge in punitive legislation. The majority of these cases are named after the sexual offenders, with the exception of the

Kim Bu-nam and Kim Bo-eun cases, which involved domestic violence victims.

Table 4.6. Legislative responses and changes after specific sexual offences

Time	Details/victims of sexual offences	Following changes
1991, 1992	Bu-nam, Kim and Bo-eun, Kim cases /domestic violence victims	● Enactment of 'The Punishment of sexual crimes and protection of victims Act' in 1994
2006	Rape and murder /elementary school student	● Discussion of implementing the electronic monitoring system first emerged.
2007, 2008	Rape and murder (3 cases) /elementary school students	● Enactment of 'The Act on the electronic monitoring of specific criminal offenders' in 2008
2008	Rape (Du-sun, Cho case) /elementary school student	● Abolition of the mitigating factor under the influence of alcohol. ● Increase in the maximum imprisonment.
2010	Rape, murder (Gil-tae, Kim case) /middle school student	● Extension of the sex offender notification. ● Discussion on implementing the chemical castration.
2010	Rape, abduction (Su-cheol, Kim case) /elementary school student	● Enactment of 'The Act on pharmacologic treatment of sex offenders' sexual impulses' in 2010
2011	Rape in institutional setting (the so-called 'Silenced' case)	● Increase in statutory punishment. ● Abolition of the statute of li

	/disabled students	mitation in sexual offences against minors and disable d people

The continuous punitive rhetoric raises a number of issues in many respects. Firstly, academics and practitioners have raised concerns about the distorted focus on certain types of sexual offences (Kim, 2012; Park, 2013). Additionally, some academics have also criticised this rapid legislative change as the result of a populist approach without specific sentencing philosophies and a clear direction or implications of the changes (Jeong and Park, 2013; Seon, 2014). Furthermore, the implementation of more severe sentences for specific sexual offences also prompts a consideration of proportionality in the wider legislative framework (Han and Lee, 2011).

The response of the Korean criminal justice system towards sexual offences has been partly positive due to continuous efforts to consider public opinions. However, the susceptibility towards public and media attention raises concerns as the concept of public opinion can be quite abstract and broad (Roberts, 2003). Some academics have argued that the Korean sexual offence legislation includes everything the public has asked for, potentially widening the gap between law and practice (Byun, 2011; Hong, 2013). This concern arises as it is unclear whether sentencing practices can meet public demands for a more punitive approach. In this regard, changing the framework to alleviate public outcry may only serve as a temporary remedy if the underlying problem lies in sentencing practices.

The punitive focus of the sexual offences legislation has also caused some issues in practice. In relation to criminal trials, a panel of three judges, similar to the Crown Court in England and Wales, handles cases where the statutory sentence is life imprisonment, the death penalty, or a minimum of one year's imprisonment (as stipulated by the Court Organisation Act 32-1). By prioritising more serious offences and employing careful examination with three judges, courts aim to effectively allocate their limited resources. However, an increase in the minimum statutory punishment for sexual offences means that most sexual offence cases are now examined by a panel

of three judges, as many of these offences carry a minimum sentence of over one year. This places an additional burden on practitioners' workload. (Hong, 2013).

In summary, the development of sexual offence legislation and legal responses following high-profile sexual offences in Korea has made the overall system more complex with a more punitive approach. This tendency to make changes in response to public outcry without sufficient time and in-depth consideration has already led to some problems as previously mentioned. However, public demands based on a more punitive approach still appear to be ongoing and continued criticism that sentencing practices are not in line with legislative trends has become the main impetus for further changes (Yoon, 2014).

4.5.2. The reflection of changing societal views in sexual offence legislation

While the previous sections discussed some concerns about the punitive approach of sexual offence legislation, this section will examine how changing social perspectives have been reflected in recent legislative changes. One of the most important changes was the revision of the Criminal Act in 1995. Prior to this amendment, the regulations pertaining to sexual offences in the Criminal Act were under a chapter entitled 'Crimes against Chastity' (Shim, 2001). As noted in Chapter 1, the Confucian ideology placed great emphasis on women's chastity, and being a victim of sexual offences was considered more shameful than the crime itself (Yoon, 2014). Given this background, the revision took an important step forward by recognising sexual offences as crimes against 'sexual autonomy' rather than 'chastity'. Sexual autonomy or self-determination is grounded on the belief that women should have the right to their own bodies (Jang, 2012). As the revision reflected changing perspectives on gender roles and increasing societal recognition of women's rights, it was seen as a milestone in the development of the Korean criminal justice system (Choo, 2014).

Following this, another crucial revision on the Criminal Act was made

in 2012. These include a regulation of new offence types such as imitative rape, abolition of complaint in sexual offences, and the change in the object of sexual offences from a woman to a person. Changes in the object of sexual offences from a ‘woman’ to a ‘person’ is also the reflection of social perspective as it considers sexual offences as a crime against sexual determination, not a woman’s chastity based on the 1995 revision of the Criminal Act (Kim, 2013a).

The elimination of complaints for sexual offences (Article 306 of the Criminal Act) was one of the most significant changes in sexual offence legislation. This issue has been the subject of ongoing and contentious debate, particularly regarding the protection of victims (Jeong, 2016). Previously, the law placed the responsibility of making a complaint solely on the individual victim in sexual offence cases, under the guise of safeguarding their reputation (Lee, 2013). This article on mandatory self-reporting reflects the chastity ideology, wherein sexual matters are viewed as intimate and personal affairs that the public sector should not intervene in, as explained in Chapter 1 (Yoon, 2014). Due to concerns regarding victim-blaming culture and potential social stigma towards sexual offence victims rooted in patriarchal thinking, self-reporting was implemented to protect victims' reputations, although this article has been criticised for leading to underreporting of sexual offences (Shim, 2001).

Court decisions in general presented a similar view, arguing that 'the process of prosecuting a crime may have a more negative impact on the victim, and therefore the victim's complaint is essential in this case, otherwise it is an exceptional case when the harm caused by the crime outweighs the victim's privacy' (Lee et al., 2014). However, due to the recognition of sexual offences as a significant social problem with potential harm to society, the article was abolished to ensure public safety by reflecting changes in societal views (Byun, 2011).

4.5.3. Growing awareness on the victim and limitations

In addition, the revision of procedural rules and the introduction of

specific measures to assist victims during the trial process have been influenced by a general increased recognition of the status of victims (Choo, 2014). New measures, largely influenced by the common law system, have been introduced to enhance victims' experience during the trial process. These include the provision of a separate room for victims, the use of video cross-examination in cases involving child victims, and the recent introduction of victim impact statements during police and prosecutor investigations (Kang et al., 2009).

The most significant change is the emphasis on the role of the victim's public lawyer. To better assist victims of sexual offences, the 'Act on Special Cases Concerning the Punishment of Sexual Crimes' mandates the appointment of counsel for victims (Article 27). The appointed counsel may be present during the investigation phase (Article 27-2) and may represent the victim in court to express their perspective (27-3), serving as the victim's advocate throughout the entire legal process (27-5) (See more for Chapter 3 and 7). The role of victims' lawyers is considered to be particularly important in the process of reaching an informal criminal agreement between a defendant and a victim, as this is one of the most important mitigating factors in cases of sexual offences (Chang, 2012). Victims' lawyers represent the victim's side and present the victim's opinion on the settlement. They also provide information on the victim's condition during the trial.

The general direction of the victim-centred approach has been reflected in legislation by providing more support for victims. Despite a number of transitions in terms of better recognition of the status of the victim, current legislation still has some limitations in terms of the definition of sexual violence offences. For example, the definition of rape in the Criminal Act is an act committed by "a person who has sexual intercourse with another by means of violence or intimidation" (Article 297). The centre of the heated debate is judges' interpretation of 'means of violence or intimidation' as rape is an offence committed by a violent act and 'the degree of that violence' is certainly a key factor in sentencing decisions (Han and Lee, 2011).

The concept of consent is not explicitly stated in Korean sexual offences legislation. Therefore, the standard for judging the presence of

violence and intimidation is based on the concept generally accepted by academics and precedents (Korean Women Lawyers Association, 2014). Specifically, court decisions stated that whether resistance to violence was actually impossible or significantly difficult in rape cases should be judged based on a comprehensive examination of factors such as the reason for the violence, the relationship between the perpetrator and the victim, and the circumstances at the time and after the crime (Yoon et al., 2014). Academics have long expressed concern about this narrow judicial interpretation in sexual offence cases (Cho, 2014). This strict interpretation of violence and intimidation is based on the victim's 'utmost resistance' and has emerged due to the difficulty in distinguishing between real rape and false accusations based on the presence of consent (Han and Lee, 2011).

The notion of 'utmost resistance' has been heavily criticised for its underlying assumption that rape is impossible if the victim displays this level of extreme resistance (Cobley, 2000). By indirectly blaming victims for not resisting enough to prevent a sexual crime from occurring, it is based on the typical rape myth scenario that innocent victims must refuse sexual intercourse no matter the circumstances (Burt, 1980). It also underestimates the extremely frightening situation that the victim faces during the assault in rape cases and places the burden on the victim that she did not resist strongly enough (Kim, 2012). Unless the perpetrator has used excessive force and intimidation - which hinders the victim's ability to resist - rape cannot be acknowledged on the basis of this distorted underlying assumption, and it may result in the victim being blamed for not resisting strongly enough (Jang, 2012).

While this strict standard has been mitigated to 'earnest resistance' or 'reasonable resistance' in most common law jurisdictions out of concern for the protection of the victim (Horvath and Brown, 2009), the Korean judicial approach has not changed, even after long and intense debate. The Supreme Court also firmly adheres to this view, stating that 'when the victim is assaulted, mere refusal by words or mere action is not enough to meet the standard required to be accepted as a rape case. Victims should express extremely strong resistance" (90Do 2224). This will be further explored in Chapter 7 in relation to stereotypes about victims of sexual offences.

4.6. Concluding comments

This chapter examined the legal framework for sentencing sexual offences. The discussion of the sentencing framework was based on two key considerations. Firstly, it provided an opportunity to explore the sentencing 'tools' that provide a fundamental basis for this research. Secondly, it aimed to capture how the 'law in books' has changed over time, and what has caused this change, by discussing recent legislative responses. The study examined the rationale and driving forces behind this punitive rhetoric, as the overall shift was based on an emphasis on a tougher approach to sexual offences.

Secondly, this chapter aimed to identify some key issues regarding the current framework. The most notable issues were that similar content was spread across different Special Acts, making the overall system of legislation on sexual offences more complicated and fragmented. This has been exacerbated by recent revisions based on a more punitive approach, and the introduction of several new preventive measures in a short period of time. In this regard, academic concerns have also been discussed regarding the rapid legislative changes based on a populist approach (Yoon, 2014).

In summary, this chapter aimed to provide a more in-depth background context by examining the legal framework. Examining what sentences are available and what is available to practitioners not only provides a stepping stone for research, but also leads to further discussion for later chapters in relation to sentencing practices for sexual offences in Korea.

Chapter 5. Methodology

5.1. Introduction

This chapter presents the research design adopted for this study. The purpose of this chapter is twofold: to justify the choice of the research methods employed and to reflect on the process of conducting empirical research. By comparing the original study plans and the actual methods ultimately used, this chapter also discusses the advantages and limitations of the research design.

The first section of this chapter examines the research design based on the research objectives. After providing a summary of the data collected for this research, the chapter further explains the reasons for choosing a mixed-methods approach. Then, the specific methods are discussed in more detail. First, the quantitative aspect of this study, the analysis of court decisions, is explored. This section includes the sampling of court decisions, data collection and analysis. The qualitative aspect of the research is then examined in more depth. It provides detailed information on preparing the interviews, the sampling strategies, negotiating access, the data collection and analysis. In addition, ethical issues including confidentiality, anonymity, obtaining informed consent, data storage and potential risks of the research are extensively discussed. Finally, the chapter concludes by providing some reflections on the research process.

5.2. Research objectives and a brief summary of data collected

The aim of the study was to examine the gap between the rhetoric in law and actual sentences imposed in sexual offence cases. To address this main objective more effectively, the following questions were examined. Firstly, the legal framework for sentencing sexual offences was explored to

understand what is available to judges (in terms of sentencing 'tools') when they make sentencing decisions. Secondly, court decisions were analysed to examine how the sentencing framework provided has been applied in practice. Thirdly, interview data provided judicial practitioners' (judges, prosecutors and lawyers) perspectives on sentencing practices in sexual offence cases. Lastly, the empirical findings were triangulated with the intention of identifying the factors that might shape the sentencing decision-making process.

Based on these research objectives, the study focused particularly on exploring judicial practitioners' views on sentencing sexual offences; and how they exercised their discretion in reality. In that sense, conducting empirical research was crucial as it intended to unravel the rationale behind sentencing practices. The research adopted a mixed-methods approach that combined a quantitative analysis of court decisions and qualitative semi-structured interviews with judicial practitioners. These two methods aimed to examine sentencing practices from diverse angles, and thereby to supplement the findings by filling the gap. To identify how the sentencing framework provided is applied in practice, 76 court decisions of 'rape causing bodily injury' cases were examined. The analysis of court decisions intended to focus on the factors taken into consideration, and sentencing outcomes such as the use of prison sentences and preventive measures. The qualitative part of the research aimed to add practitioners' explanations on their work based on interview findings. In total, 42 interviewees (17 judges; 11 prosecutors and 14 lawyers) shared their expertise and perspectives on sentencing sexual offences. A more detailed explanation on the research design will be given in the next section.

5.3. Research design

Designing research is vital as it is a process of turning conceptual and abstract ideas into a feasible project (Epstein and Martin, 2014). The motive for conducting research significantly influences the choice of a specific research strategy, and this strategic plan functions as a framework for all of

the methodological decisions during the process (Crow and Semmens, 2008). As this study intended to identify the rationale behind sentencing sexual offences, the inherent nature of the study was exploratory. Exploratory research typically seeks to investigate social phenomena by identifying the interaction among various actors in a certain setting, interpreting their actions, and understanding the issues they share (Bachmann and Schutt, 2007). By drawing on epistemology, previous studies examining operations of criminal justice agencies have also focused on identifying the interaction between organisational structure and the agents involved within a specific setting (Eisenstein and Jacob 1977; McBarnet, 1981; McConville et al. 1991).

Formal rules and informal norms within organisations guide the way actors exercise their discretion and the way they interpret the given rules further shapes their everyday decisions in practice (Gelsthorpe and Padfield, 2002; Mawby and Worrall, 2011). Thus, the methodological strategy used for this study focused on disentangling the interplay between the organisational culture and the interpretation/actions of courtroom actors during the trial process. Based on these aspects, this thesis chose the notion of a ‘courtroom workgroup’ as a useful framework to explore sentencing practices in Korea. Judicial practitioners’ own customs and traditions will not only influence the way they work, but also the way they construct and interpret the cases (McConville et al., 1991; Hartley, 2008). In that sense, exploring a courtroom workgroup would help to examine the rationale behind their sentencing decision-making (Farrell et al., 2009).

This study combined quantitative and qualitative methods as each had different goals. Quantitative research usually aims to understand a phenomenon by collecting numerical data (Crow and Semmens, 2008). In contrast, qualitative researchers are more involved with the subjects of the study in order to gain an in-depth understanding of a social process or social setting (Hammersley, 1992; Gubrium and Holstein, 1997). Due to a number of practical benefits, a mixed-methods approach is increasingly used, particularly in social sciences and criminology (King and Wincup, 2007). Combining quantitative and qualitative methods can contribute to enhancing the understanding of the findings of one method by adding the strengths of the other (Creswell, 2014). Triangulating different methods is also expected

to offset the possible weakness found in a single method and thereby improve the quality and validity of the findings (Bryman, 2006).

This study also chose a mixed-methods approach as it helped to examine the rationale behind sentencing practices by supplementing the findings from diverse angles. Quantitative research usually seeks to obtain knowledge based on the natural science experiment, such as looking for patterns of regularities or repetition in content (Ericson et al., 1991; Hammersley, 1993). For this study, quantitative analysis of court decisions was employed to get a sense of the differences between the law 'in books' and the law 'in action'. Understanding the legal framework for sentencing sexual offences (in Chapter 4) provided background knowledge of the law 'in books' in terms of what is available to judges when they make sentencing decisions. Then, the analysis of court decisions aimed to identify how the sentencing framework is applied in reality, i.e. the law 'in action'. It also helped to identify the specific criteria considered in each case. More specifically, the analysis process focused on the specific sentencing outcomes in each case (such as the duration of the prison sentence, and the use of suspended sentences or preventive measures). In addition, common characteristics of factors or influences that might have contributed to sentencing decision-making were also discussed. Identifying missing data provided some further insights to understand what was considered more important or less significant among the various sentencing factors.

The quantitative analysis of court decisions intended to show how the sentencing framework is applied in practice. However, the size of the sample (76 cases) might not have been sufficient enough to draw a concrete conclusion. In addition, there are important issues to acknowledge when conducting document-based research. As the outcomes of human activities, any document sources are produced by a series of decisions in particular circumstances and potentially shaped by distinctive organisational constraints (Finnegan, 2006). In that sense, it is vital to note that what people decide to record, and to include or exclude, might be implicitly and explicitly influenced by the environment where the sources are made (May, 2011). Considering the conservative court culture described in Chapter 3, it might be plausible to acknowledge the possibility that court decisions might be recorded according

to the way that courts want to present themselves. As the nature of the document sources is subjective, they should be interpreted based on the assumption that they are merely informants' version of the world, and do not necessarily reflect the true nature of the subject (Bryman, 2006). Therefore, risks of distortion, bias and omission in written records should not be ruled out in any document analysis. To fully grasp the complexities of how document sources are made, it is vital to have additional sources to unravel the indirect and implicit meanings behind the surface messages of the documents (Platt, 1981; Finnegan, 2006).

In that sense, a qualitative approach is frequently used by researchers in the criminal justice area since it helps to examine and to reconstruct the reality by engaging with participants (Flick, 2009). By sharing insiders' views, qualitative methods contribute to a better understanding of features of organisational settings or processes in people's lives (Miller, 1997). Qualitative data analysis focuses on interpreting meanings rather than identifying regular patterns or repetition in quantifiable phenomena, as in quantitative research (Patton, 2002). Among the various types of research medium, qualitative interviewing was chosen for this study as this was the best way to get practitioners' views on their work in more depth. More importantly, interviewees, particularly judges, could provide first-hand knowledge about sentencing practices as they are the ultimate decision-makers in sentencing. By providing a justification or explanation, the interview findings offered some answers to the questions raised by the quantitative analysis (Hesse-Biber and Leavy, 2011).

Qualitative methods are considered to be useful in reconstructing the reality by using participants' own words (Bachman and Schutt, 2007). However, it is also important to acknowledge that the findings are inevitably based on the interviewees' subjective version of stories and do not necessarily reflect the true state of the reality (Rubin and Rubin, 2005). In that sense, there is always the possibility of distortions, exaggerations or omissions based on interviewees' own interpretation. More importantly, interviewees might feel obliged to provide a formalistic reply due to their role or organisational pressure (Brinkmann and Kvale, 2015). Police and court employees are often mentioned as a group of interviewees who are more likely to give formulaic

answers due to their strict organisational culture (Rubin and Rubin, 2005). In particular, it might not be easy to distinguish whether interviewees are telling the truth or just trying to defend their positions or organisations by stating what they should do ideally (Brinkmann and Kvale, 2015). Furthermore, as interviews are based on the recollection of participants' experiences, there could be some differences between what they say they do and what they actually do in practice (Dexter, 2006).

In that sense, adding the analysis of court decisions might offer some evidence of what practitioners do in practice. By compensating the weakness of a single method, and supplementing findings from different sources, a mixed-methods approach helped to reconcile contradictory information and to fill in gaps in the findings (Rubin and Rubin, 2005). Simply combining two different types of methods does not always guarantee fruitful research findings. However, cumulative information about aspects of a phenomenon from different angles help to present a clearer picture by supplementing the drawbacks of using a single method (Silverman, 2000). A more in-depth explanation and summary of the data collected will be given in the next section.

5.4. Quantitative methods: analysis of court decisions

This section provides an overview of the methodology used to collect and analyse the quantitative aspect of the study. It begins by explaining the scope of the research, sampling and access. Then, the section further discusses the process of data analysis, and the advantages and limitations of the study.

5.4.1. Scope, sampling and access strategy

The main purpose of analysing court decisions was to identify how the legal framework, i.e. the law and sentencing guidelines, is applied in sentencing sexual offence cases. Based on this objective, several criteria were considered to collect the court decisions. One of the reasons for

examining court decisions was to discuss the use of punishment such as prison sentences and preventive measures. Preventive measures, in particular, are usually imposed in more serious types of offences based on the harm caused or the nature of the offences. Therefore, the scope of the research was confined to more serious types of sexual offences involving ‘violence’. Specifically, ‘rape causing bodily injury’ cases were chosen considering the seriousness of the offences (rape) and the harm caused (bodily injury). This also allowed for examining the victims’ involvement during the trial stage.

The study focused strictly on sexual offence cases by ruling out combined crimes. As this study intended to capture practitioners’ distinctive approaches in sexual offences, sexual offences jointly committed with other types of crime (such as robbery) were excluded even though this might have resulted in the research sample constituting only a small portion in terms of its representativeness. Previous literature has often argued that sexual offences (particularly rape) are treated almost as a unique category, as they not only violate the intimate and psychological boundaries of the victim, but also have significant social impacts (Richardson, 2000; Kelly, 2008). Considering the cultural context, which is influenced by patriarchal beliefs and the Confucian tradition in Korea as mentioned in previous chapters, it was vital to explore legal professionals’ stereotypes in regard to sexual offences and the victims and how their views might affect sentencing outcomes.

Lastly, all of the cases considered for the study included an adult female victim and an adult male defendant, as this is the most frequently occurring scenario in sexual offences (SPORK, 2021). Previous studies have argued that practitioners tend to have a harsher approach when they are dealing with emotionally charged cases involving vulnerable victim groups and that more ordinary sexual offences might be overshadowed by the emphasis on these rather exceptional cases (Jang, 2012). Based on this ground, this study aimed to examine more ‘ordinary’ sexual offence cases involving adult victims to capture practitioners’ general approach in sentencing sexual offences.

One of the biggest challenges when conducting the quantitative research was obtaining access to court decision files. Previous studies have also described this issue as complex and lengthy and possibly the greatest obstacle in sentencing studies (Dhami and Belton, 2015). In the case of Korea, court decisions are supposed to be accessible via court websites; however, in reality, less than 1% of court decisions are publicly available (Baek, 2017). According to the Supreme Court website, either the name of the relevant party of the case or the case number is required to request the court decisions files on the court website. As there is no feasible way to get this personal information, unless one is directly involved in the case, this access issue has long been considered a barrier that hinders the development of the empirical research on sentencing in Korea (Kim and Ki, 2016).

The only possible way to access court decisions is to visit the Supreme Court library in person following a pre-booking request, which should be made about a month before the visit. Even after the reservation has been guaranteed, only limited time (about two hours) is allowed for each person as anyone can access non-anonymised court decision files with the computers in the court library. With permission, people are allowed to take notes on specially provided paper, and these paper notes are carefully checked when leaving the room to prevent the leak of any personal data recorded in the files. Although it is strictly prohibited to write down any personal information (such as their name or address) about the relevant party of the case, it is allowed to note the case number, which is essential to request further access to the files. After collecting the case numbers, the researcher requested court decision files via each district court website. Upon the approval of each court, the court decision files were delivered either via post or by email depending on the request. It took a couple of days to a few weeks based on the circumstances of each court. All of the personal data in the files were anonymised when distributed. In some cases, access was denied based on a request from the relevant party of the case in relation to protecting their privacy.

In any empirical studies, frequently raised issues are the size and the representativeness of the sampling (Silverman, 2000). A sample should be representative of the population as this allows the research to make a broader inference (Bryman, 2006). Therefore, it is often argued that the bigger the

sample size, the better, in terms of its representativeness (May, 2011). This thesis did not include publicly available court decisions as they did not fit within the scope of the research. With the criteria mentioned for collecting court decisions and the restrictions on access, this research also acknowledges the fact that the findings might only reveal a partial picture of sentencing practices in sexual offences. More importantly, it should be noted that the courts might have intentionally approved the release of the particular cases used for this study to avoid criticism and to provide desirable responses (Paulhus, 1991). Despite these potential weaknesses, the chosen cases were the best available sample to address the research objectives. To further secure the validity of the findings, the researcher also compared the findings to other statistical reports provided by different criminal justice agencies or research institutes (Yoon et al., 2014; Korean Women Lawyers Association, 2014).

In total, 76 court decisions were collected from 14 district courts (there are 18 district courts in Korea). To be more specific, the files were from five courts in Seoul and nine courts in other cities: Chang-won, Cheong-ju, Chun-cheon, Dae-gu, Gwang-ju, In-cheon, Jeon-ju, Su-won and Uijeongbu (the court districts are presented in alphabetical order). To better reflect on more up to date sources, the most recent data available during the data collection period was chosen. All of the decisions collected were sentenced between the 16th of January, 2014 and the 30th of August in 2017 (31 cases in 2014; 14 cases in 2015; 10 cases in 2016 and 21 cases in 2017).

Among the 76 files, 51 cases of ‘attempted’ rape causing bodily injury were also included, as article 300 of the Criminal Code includes attempts at the crime in the same offence category. By including these cases, this study was also able to examine whether there were any noticeable differences in the sentencing outcomes between attempted rape and rape cases.

5.4.2. Data analysis strategy

The analysis of court decisions focused on following aspects: the nature of the offence, the characteristics of the victim and the defendant, and the sentencing outcomes. These criteria were chosen as they are commonly

recorded in all court decisions. The nature of the offence included the use of violence or intimidation, evidence of physical injuries and the relationship between the victim and the defendant. The characteristics of the victims included their occupation, age band, severity of injury, evidence of resistance and whether they gave testimony during the trial. In addition, the existence of an informal criminal agreement and the amount of financial compensation (when specified) were also examined. The characteristics of the defendant involved their occupation, age band, signs of remorse and family background. The existence of other sources of information such as the pre-sentence report was also considered when they were mentioned. All of these factors are discussed based on the assumption that they might have influenced the sentencing outcomes to some extent.

The sentencing outcomes were examined, even though court decisions do not elaborate detailed reasons behind the choice of a specific punishment in each case. However, this helped to understand how practitioners use the sentencing framework, and more importantly, it was crucial to investigate the frequently raised controversy surrounding whether sentencing outcomes in sexual offences are lenient. Therefore, factors such as what kinds of punishment or preventive measures were imposed under what circumstances, and the duration of prison sentences were carefully examined. Also, the use of suspended sentences was explored as its frequent use in sexual offences has contributed to the criticism of sentencing outcomes (Kim, 2013a; Park, 2014).

The data was organised based on the four categories mentioned (the nature of the offence, the sentencing outcomes, and the characteristics of the victim and the offender). To assist in the analysis process, the SPSS (the Statistics Package for the Social Sciences) software program was used. Computer-assisted software tools are widely used due to their convenience in numerical quantitative analysis (Bryman, 2006). As the sample for this study was relatively small, SPSS was mainly used to organise the data to make the overall analysis process easier.

The data analysis was conducted based on what was recorded in the decisions. Therefore, the study was only able to capture what was mentioned

rather than what might have actually happened in reality. In that sense, the findings cannot be regarded as an accurate picture of sentencing practices in sexual offences. However, identifying missing data or examining the way the data was recorded also offered some useful implications. For example, frequently observed sentencing factors in other jurisdictions such as race, religion and ethnicity (Spohn, 2000; Feldmeyer and Ulmer, 2011; Wang et al., 2013) were not recorded in the decisions in Korea. As Korea has long been a homogeneous nation, foreigners account for 3.4% of the entire population (KDI, 2022). Based on this ground, the significance of these factors has not yet been fully acknowledged (Yoon et al., 2014). Instead, academics have argued that socio-economic aspects (such as the background of the defendant) are vital to examine considering the rapid social changes over the past few decades in Korea (Jeong and Park, 2013). Another frequently mentioned aspect of sentencing disparity, i.e. disparity based on geographic variations (Tarling, 2006; Mason et al., 2007), was also not considered in this study due to the small sample size.

The main strength of analysing the court decisions was to fill the gaps in interview findings as the specific criteria considered in each case might not be easy to get from interviews due to the sensitive nature of the information. Although some limitations of conducting empirical studies using document sources were mentioned earlier in this chapter, there are further issues to acknowledge in terms of the content. The court decisions briefly summarised the nature of the offence and relevant legislation rather than providing a detailed explanation or reasons for the decision-making. Similar expressions were frequently found and no personal views behind the court decision were clearly identified unless the judges reached a verdict of ‘not guilty’. That might be because the judges need to provide more detailed information on why they have different views from the prosecutors in these cases. This tendency is closely connected to the high conviction rate in Korea (over 90%) as prosecutors only press charges when they are fairly certain about the possibility of getting a conviction, as mentioned in Chapter 1 (Supreme Court of Korea, 2022).

Identifying practitioners’ perceptions on sexual offence victims was paramount as this shapes the way they understand the case and eventually

influences the sentencing outcomes (Jordan, 2004; and Kelly et al., 2005). However, little data about the victims was recorded, and victims' occupations and even ages were not recorded in the court decisions. As the court decisions did not provide sufficient information to capture the impact of victim-related information on the sentencing decision-making, conducting interviews was essential to supplement the findings from a different angle.

5.5. Qualitative methods: semi-structured face-to-face interviews

This section elaborates the qualitative aspect of the study. After providing reasons for selecting semi-structured interviews, the section further discusses the preparation process, sampling strategy, data collection and analysis. Lastly, the potential risks of conducting qualitative interviews are considered.

5.5.1. The structure of interviews

There is no single best way to conduct empirical studies, since the selected method should closely reflect the research questions (Sapsford, 2006). This study intentionally adopted a mixed-methods approach to examine the research topic from diverse angles. As quantitative and qualitative methods respectively served different roles, the main objective of the qualitative aspect of the study was to understand judicial practitioners' views on sentencing sexual offence cases. One of the inherent aspects of qualitative methodologies is their ability to generate in-depth information by investigating the perspectives of the research participants (Flick, 2009). Based on this strength, a qualitative approach was considered the most appropriate medium to address the research aim. Qualitative interviews were particularly beneficial for this study as insider knowledge was the key to 'demythologise' sentencing practices (Baldwin, 2007). By interviewing courtroom actors,

directly involved in the sentencing decision-making process, the study intended to capture insightful first-hand knowledge.

Interviews can have various formats from a minimal structure to highly structured interviews using a questionnaire (Bryman, 2006). Highly structured methods are often considered inappropriate to study the attitudes or beliefs of interviewees due to their artificial procedures (Sapsford, 2006).

In semi-structured interview settings, however, only a basic outline or broad ideas are prepared by the researcher. Often regarded as a hybrid of structured and unstructured interviewing (King and Wincup, 2007), semi-structured interviews have various methodological advantages. Semi-structured interviewing is much less rigid than structured interviewing as it allows interviewees to express their views more freely based on a conversational setting (Chui, 2007). At the same time, it also allows the researcher to control and guide the situation, unlike unstructured interviewing (Bryman, 2012). The responses from interviewees are fundamental in shaping the structure or the order of the interviews, and thus, each interview is tailored to the interviewee (Silverman, 2000). Based on their flexible nature, semi-structured interviews are also useful as they help to compare the quality of the information from each interview (May, 2011). Unexpected turns during the interviews might also contribute to the discovery of important aspects of the topic. To ensure the quality of the data, the interviewer needs to skilfully probe participants with further questions whenever necessary and to clarify the meanings of responses during the interview (Brinkmann and Kvale, 2015). In that sense, interviews are described as “analytic induction” (Crow and Semmens, 2008:122) because the analysis begins during the course of the interviews as the interviewer needs to interpret the answers in order to ask follow-up questions.

Based on these methodological benefits, semi-structured interviews have been widely used to examine practitioners and the operation of criminal justice agencies (Hogarth, 1971; Rutherford, 1994; Mawby and Worrall, 2011). In particular, as previous studies on sentencing have often emphasised individual practitioners’ views and attitudes on sentencing decisions (Rumgay, 1995; Flood-Page and Mackie, 1998), it was noteworthy to uncover their

worlds to better understand the research topic. Parker et al. (1989:39) also described interviewing sentencing decision makers (in his study, magistrates) as a process of “getting to the heart of the sentencing decision directly and immediately”. Semi-structured interviews also have particular benefits in elite interview settings as elite cohorts (in this study, judicial practitioners) are known to prefer open-ended questions with freedom and space during interviews (Marshall and Rossman, 1999). More detailed aspects of elite interviews will be discussed in the next section.

5.5.2. Preparation for elite interviews: pilot studies

Before the interviews were conducted, the researcher carefully planned and prepared in order to get the best information possible. Specifically, court observations and pilot studies were conducted before the interviews. Due to the time limitation, court observations were only conducted intermittently during the field work. This was mainly to enhance the understanding of criminal trial procedures and to get ideas for the interview questions that better reflected the current practice. Pilot studies, on the other hand, were an essential part of the preparation due to the various practical advantages that they have.

A pilot study usually refers to a small-sized trial process that is carried out before the main investigation (Sapsford, 2006). It usually aims to assess whether the research design is appropriate for the data collection. For this study, piloting helped to test the adequacy of the interview questions and to get a better sense of anticipating possible responses in the actual interviews. It was conducted via telephone conversations or face-to-face meetings. Participants included former judicial practitioners (judges and prosecutors) and probation officers. In particular, probation officers provided insightful knowledge on the use of pre-sentence reports. Considering the fact that interviews are based on communication skills through exchanging information and ideas via questions and responses, having sufficient background knowledge on the research topic and participants was beneficial in many aspects.

Pilot studies contribute to being better prepared for interviewing ‘elites’. Elites are well known and/or influential figures, generally in powerful positions, such as leaders or experts in certain areas (Sarantakos, 1993). The researcher is usually the expert in the area in normal interview settings, whereas elite interviews are the opposite due to the imbalance in the power dynamics (Bartels and Richards, 2011). Based on this nature, elite interviews are normally a specifically designed hierarchical form of conversation rather than an open and free dialogue (Kvale, 2007:49).

Often referred to as ‘expert interviews’, even a small number of elite interviews are considered to have more importance due to the rare opportunity to conduct empirical studies involving elite members of the society (Harvey, 2011). By sharing first-hand knowledge on the topic, elite interviews provide authority on the information; thus, the research data can also be considered more reliable (Froschauer and Lueger, 2009).

As elite interviews focus on getting interviewees’ expertise, this often makes the data collection more difficult in many aspects. First of all, elite interviewees often judge the quality of the questions or check out whether the interviewer has done their background work (Hertz and Imber, 1995). In particular, research suggests that judicial practitioners expect to be interviewed by an interviewer who is well-informed about legal work as they feel more comfortable speaking to someone with a similar status or background (Fielding, 2011). In elite interview settings, therefore, the interviewer should be knowledgeable about the research topic and terminology, as well as familiar with the social situation and biography of the interviewees. As the researcher could not intentionally play an ignorant role to get more information in this setting (Rubin and Rubin, 2005), having some capacity to catch interviewees’ subtle nuanced contexts or technical language that they used during the interviews was vital. In this respect, the piloting played a vital role in building up background knowledge.

Language was also a crucial issue as the Korean language has an honorific language, which is used in official settings or when having a conversation with someone older or in a more senior position. To direct some sensitive questions in a more appropriate way, expressions and the wording

of the interview schedule were also carefully checked with the pilot participants. Unlike a normal interview setting, where the interviewer sets the stage in accordance with the research interests, the tone of the questions and the way they were phrased were thoroughly examined several times to express a certain level of appropriate respect and courtesy. Based on the feedback from the piloting, the researcher often intentionally mixed a formal approach and a more relaxed conversational style during the interviews. As a conversational style was useful to extract information due to it providing a more comfortable ambience (Brinkmann and Kvale, 2015), it was more frequently used in the interviews with relatively younger participants.

The quality of interviewing is judged by the value of the knowledge extracted in the interaction between the interviewee and the interviewer (Bachman and Schutt, 2007). Drafting a good interview schedule was the key first step to ensure convincing results from the interview findings. Courts are closed setting and previous studies in other jurisdictions have also commonly described courts' general reluctance to participate in academic research (Ashworth, 1984; Baldwin, 2007; Fielding, 2011). Considering the sensitive research topic and conservative nature of the Korean judiciary, moderating the subtle nuances in the contexts was essential. To ease any potential anxiety and concerns, the interview schedule was carefully made and revised reflecting on the feedback from pilot studies. Also, the interview questions were phrased in ways that avoided formalistic replies as much as possible.

Based on the literature on interviews, a 'funnel-shaped' questioning technique was used for this research (Brinkmann and Kvale, 2015). Therefore, the order of the questions was such that they started with more general and broad questions and then gradually narrowed down to more specific and detailed questions. This technique is particularly useful as it helps to obtain interviewees' spontaneous views on a topic rather than leading in a specific direction from the beginning of the interviews. After starting with more general questions such as demographic information of the participant, more specific questions followed based on an order that was carefully planned following the piloting (see Appendix C for the interview schedule).

The interview schedule aimed to reflect on how practitioners reached decisions in sexual offence cases. Therefore, the questions were designed to explore how they viewed the overall sentencing decision-making process. After starting with more abstract and broad questions such as their views on penological objectives, specific questions about their perspectives on the legal framework or other influences on their decision-making process were addressed. More specifically, their use of specific preventive measures and their perspectives on the victim and the defendant were also included. In order to take into account ethical issues, the questions were designed to avoid the discussion of any information about specific cases. In terms of the validity of findings, the researcher made sure to check contradictory or inconsistent information, and to fill in gaps in case of missing points based on other sources of information such as the literature. By including some questions related to sentencing outcomes, the researcher tried to compare practitioners' answers to the findings from the court decisions. Triangulating the court decision analysis data was particularly helpful in that sense as it provided a certain level of objectivity as a data source.

Key questions (including their perspectives on the legal framework or sexual offence victims) were asked to all of the interviewees in order to maintain consistency even though some questions were different due to their roles during the process. Having clear visions on the main themes helped when drafting the questions. The overall style of the questions, as far as possible, was open questions such as 'to what extent' or 'in what way', in order to offer more room for the participants. Also, a hypothetical question format was used such as 'if you had more discretion', instead of addressing sensitive issues in a direct way.

After asking the broad questions, probing questions were used to clarify interviewees' stance, attitudes or views based on their replies. Under the broad categories, several potential follow-up questions were prepared in advance. As the piloting was a good opportunity to rehearse the interview process, the researcher focused on testing the appropriateness of the probing questions. In particular, the level of questions in terms of the sensitivity was carefully checked with the pilot participants to ensure that these questions were asked in a moderate manner, yet were sharp enough to get in-depth

information. As the interviewees might have had different levels of openness during the interviews, the researcher tried to make sure that they would have sufficient room for flexibility. Based on each interview condition, pre-arranged follow-up questions were replaced by more spontaneous questions. Even after the pilot stage, the researcher also consulted with her supervisors after conducting the first two interviews to ensure the reliability of the interview schedule in general.

5.5.3. Sampling strategy and negotiating access

Sampling is vital to enhance the credibility of research as interview findings can gain reliability through the choice of the right target population (Gubrium and Holstein, 1997). Frequently raised concerns regarding qualitative research methods are related to the possibility of generalising the findings. In other words, it is questionable whether the original data can be representative of a larger population in qualitative studies (Silvermann, 2000). As sampling involves deliberately selecting the sample to represent a range of characteristics and perspectives, the research findings might not be always applicable to the general population (Bryman, 2012). In terms of the sample size, there is no definitive ideal size, and the number of interviewees does not always guarantee the credibility of the research (Bryman, 2006). Instead, securing the ‘right’ target population in line with the research objectives is essential to getting first-hand knowledge on the topic.

To find the appropriate participants for a study, sampling begins by understanding the characteristics of the target population (Epstein and Martin, 2014). Due to the nature of elite participants and the limited empirical research experience of the interviewer, it was critical to recruit the best possible informants. Based on this ground, this researcher chose a ‘purposive’ or ‘judgmental’ sampling technique at the beginning on the basis that participants’ expertise would add depth to the research findings (Marshall and Rossman, 1999). In addition, a purposive sampling technique is also appropriate to resolve the issue of representativeness of the sample by controlling extraneous variables to achieve wider resonance (Mason, 2002).

The key criteria considered for the recruitment was that the participants had sufficient experience and knowledge of the subject as the main aim of conducting the interviews in this study was to unravel the rationale behind sentencing practices. A group of courtroom actors (judges, prosecutors and lawyers) directly involved in the sentencing decision-making process was chosen based on their expertise. It was planned to recruit judges from a sexual offence-specialised court that is supposed to handle sexual offence cases exclusively, as mentioned in Chapter 3. During the pilot stage, however, it was found that practitioners working in these types of courts also work on other types of cases due to the limited resources and heavy workload; and sexual offences consist of 30-60% of all of the cases they deal with. Despite the situation, judges currently working at these courts were considered as the priority participants, since they were anticipated to have more specialised experiences and up to date information. Furthermore, interviews with judges from these courts were expected to have another advantage of potentially recruiting participants with a variety of backgrounds. As sexual offence-specialised courts consist of a bench of three judges (typically 1 presiding judge at a senior level and 2 junior level judges, as previously explained in Chapter 3), it was considered that the interview findings might also provide useful insights in terms of examining the dynamics within a bench. By balancing participants' differences in terms of age, gender, and experiences, the research aimed to capture diverse views on the topic to reduce any potential bias in the selection.

According to the information gathered during the preparation process, most judges and prosecutors work on a rotation-based system. As they often move to different departments and/or locations every one or two years, participants with at least more than one year of experience in dealing with sexual offences were chosen.

Once the sampling frame had been determined, the researcher began negotiating access. Similar to the quantitative aspect of the study, gaining access was the most challenging part as there is no official route to negotiate access to judicial practitioners in Korea. As explained in previous chapters, empirical studies involving judicial practitioners are scarce, especially in sentencing area, due to the sensitivity of the topic and closed nature of the

judiciary. Most of the studies have been conducted by the research institute within the Ministry of Justice, the Supreme Court or the Prosecution Service, i.e. by ‘insiders’. As there is no publicly available official channel to negotiate access, even for conducting academic research, the researcher tried to make an approach through as many different routes as possible by contacting different organisations such as the Ministry of Justice, the Sentencing Council, individual courts and the Lawyers’ association.

Pilot participants were also pessimistic about gaining access through the official channels. Based on the exclusive nature of judicial practitioners, they strongly recommended snowball sampling as an alternative. Snowball sampling is based on the introduction of new participants recommended by existing participants in the study. This ‘insider’ recommendation helps participants to be less defensive and more cooperative during the interviews; therefore, it is particularly beneficial in elite interview settings (Rubin and Rubin, 2005). Although there is a possibility that the initial contact might shape the entire sample, snowball sampling helps to access “hard-to-reach interconnected populations” (Gubrium and Holstein, 1997: 100).

As the researcher did not get any reply from the initial contacts to the organisations mentioned, the sampling plan was changed from purposive to snowball sampling. For judges and lawyers, the recruitment was solely based on a snowball sampling strategy. Once the initial contact had been made based on the recommendation, some participants provided the researcher with the contact details of potential interviewees or the ‘gate keeper’ in other courts or law firms. Then, emails including the information sheet and the consent form were sent to get volunteer participants.

In the case of prosecutors, a mix of purposive and snowball sampling techniques were used. The initial contact with the gate keeper was based on the introduction from an insider and interview participants were allocated by the gate keeper according to the criteria provided the researcher. Although the gatekeeper said that the recruitment process was based on the availability of prosecutors, the researcher was aware of the possibility that particular interviewees might be chosen to represent a certain image of the Prosecution Service. During the interview process, the connection with the gate keeper

was lost due to the local circumstances of the Prosecutor's office. Therefore, three prosecutors from another office were further recruited using snowball sampling.

Overall, the snowball sampling technique contributed to recruiting the best available target population for the study as all of the interviewees were courtroom actors with first-hand knowledge on the research topic. In total, 42 participants (17 judges; 11 prosecutors and 14 lawyers) with diverse backgrounds were interviewed in terms of age (30-51) and work experience (1.5 years to 23 years).

Judges were considered to be the main target participants due to their status as the ultimate decision-makers in sentencing. As the researcher was fortunately introduced to senior-level judges working in sexual offence-specialised courts at the early stage of negotiating access, this enabled further insider recommendations of similar level interviewees. Five senior-level judges (including prosecutors, eight senior level participants in total) added a wealth of information and this is one of the key strengths of the study.

This research also acknowledges some potential pitfalls of using snowball sampling despite the benefits described. For example, it is not known how many interviewees were directly encouraged to participate during the recruitment process. To resolve this issue, the information sheet provided prior to each interview highlighted the fact that the interviews were based on the voluntary participation. In addition, only practitioners who presented themselves to the researcher, having agreed to participate, were interviewed. Despite this effort, it should be noted that indirect suggestion, especially from seniors to juniors, might have been involved considering the differing positions of the interviewees in the social hierarchy. As the inherent nature of snowball sampling involves insider recommendation, the issue of anonymity of the participants could also be raised. Despite these drawbacks, employing this sampling strategy was the only available option to target the priority population based on the exclusive nature of the interviewees.

In the case of the prosecutors, the interview participants included prosecutors involved in both the investigation and trial stages. Three public victim lawyers were also recruited and they shared vital insights regarding the

status of the victims and their involvement during the process. By recruiting participants with different backgrounds, the researcher aimed to examine sentencing

The research also intended to consider the location of courts in relation to sentencing disparity. However, this was not achieved due to the small size of the sample and the limitations on access. In addition, the number of female interviewees (10 female participants in total: 4 judges; 5 prosecutors and 1 lawyer) might not be sufficient to draw a conclusion with regard to exploring the influence of gender dynamics in sentencing decision-making.

5.5.4. Data collection, analysis and potential risks

Originally, qualitative interviews were planned to be conducted after finishing the quantitative analysis. As the analysis of court decisions would possibly reveal how practitioners apply the sentencing framework, the interview findings aimed to focus more on filling the missing gaps by providing explanations. Unfortunately, it was not possible to obtain court decisions from abroad and due to the limitation of time, the researcher had to conduct interviews while collecting the court decisions concurrently. Therefore, the quantitative analysis process was conducted after the interviews. Although the interview questions did include practitioners' views on sentencing outcomes and some important factors that influence their sentencing decision-making, having the court decision findings prior to the interviews would have contributed to enhancing the depth of the questions.

The interviews generally lasted about an hour (40 minutes to 2 hours depending on the interviewees' schedule). Recording the interviews was beneficial to bolster the credibility of the findings as it helped to capture the exact words, tone or pauses during the interviews (Brinkmann and Kvale, 2015). Face-to-face interviews allowed for observing the body language of the interviewees during the interviews, whereas the playback of the recorded interviews further contributed to capturing more subtle contexts (Bauer et al., 2000). Permission to record the interviews also entirely depended on participants' decisions. In fact, three interviewees did not agree to their

interviews being recorded. Therefore, the researcher had to take detailed notes during the interviews in these cases. Also, taking more notes immediately after the interviews helped in recollecting the interview details more vividly.

The data analysis process began with transcribing the interviews. During this stage, the conversational interaction during the interview was transformed to written discourse (Brinkmann and Kvale, 2015). Most of the transcribing was carried out immediately after each interview so that the researcher could obtain more vivid data and understand the interviewee's narrative more clearly. Although it might have been time consuming, the reflection from this process helped the researcher to be better prepared for the next interviews (Rubin and Rubin, 2005). As a result, some questions were better phrased or reordered to address the questions in a more effective manner. All of the interviews, including the interviewee's original form of expression and exact words, were transcribed in Korean by the researcher. To capture not only the meaning of the text but more importantly the implied meanings behind it, subtle nuances from interviewees' tone of the voice or pauses were also carefully examined. Further ideas for probing questions also emerged during this process. By catching important concepts or themes, the transcribing process also allowed for recognising and identifying certain patterns in readiness for the next stage, coding (Chui, 2007).

Coding is about identifying and labelling commonalities, differences or patterns in the data (Brinkmann and Kvale, 2015). The identification of initial broad categories stemmed from reading the transcripts several times. As the interview schedules had already been prepared based on broad themes, the coding process was conducted manually and mostly focused on finding specific concepts that were classified into each category. Therefore, the data analysis focused on identifying practitioners' views on the broad categories of the interview schedule. Based on the research objectives, the categories were divided into four: practitioners' views on the sentencing framework; the way they use it in practice; any potential factors they take into consideration; and their views on sexual offence victims. More specifically, practitioners' views on the legal framework (legislation and sentencing guidelines) and sentencing outcomes in sexual offences were examined. How they use their discretion

was extensively discussed to provide insights for understanding sentencing practice. In addition, factors that might influence their decision-making process were also examined. Therefore, practitioners' perspectives on the media and public opinion were also included. Most importantly, their views on sexual offence victims were analysed in-depth as this seemed to play a crucial role in sentencing sexual offences according to the interviews.

The goal of qualitative analysis depends on finding the potential meanings by generating ideas about certain concepts or patterns (Chui, 2007). Based on the examination of the concepts, themes or patterns across different interviews, the analysis focuses on what happened and what it means (Rubin and Rubin, 2005). In terms of identifying patterns, searching for key phrases or frequency, there are a number of qualitative data analysis software program tools that facilitate the process (May, 2011). By helping the process of comparing different categories and enabling exploration of the data, these software tools support the overall analysis process. This is considered to be desirable in terms of handling a large volume of data in a speedy way and improving the rigor of research by identifying deviant cases (Seale, 2000). Despite the numerous advantages of the computer-assisted software tools, the data analysis was conducted manually for this study. One of the main reasons was based on the fact that the interviews were conducted and transcribed in Korean. To best capture subtle nuances and hidden implications, the researcher aimed to use a manual approach that typically involved re-reading the transcripts several times and categorising different themes. The relatively small size of the sample for this research made manual analysis workable. Therefore, the researcher transcribed all of the interviews in Korean and translated some data that was necessary for the analysis into English during the process of coding.

During the analysis process, the researcher focused on interpreting the narratives in the light of the research aims (King and Wincup, 2007). For each data element, the interviewee's responses were classified into different categories. By breaking down a set of long narrative data generated through the transcription, coding helped to revisit important concepts in a meaningful way (Bryman, 2012). The analysis began with classifying, comparing and combining materials from the interviews to retrieve the meaning and

implications (Coffy and Atkinson, 1996). When necessary, the researcher examined different interviews to clarify certain concepts and to synthesise different versions of perspectives to combine them into a coherent narrative. The analysis process also focused on identifying repetitive expressions commonly found in the interviews to figure out the views that were shared among the interviewees. At the same time, different views were also carefully examined to see whether there was any correlation between their perspectives and various factors such as their gender or occupational differences.

5.6. Ethical concerns

This section will discuss ethical issues and offer some reflections on conducting the empirical study for this thesis. Research methods involving human participation consider various issues to protect the participants. Based on this aspect, conducting empirical research often creates tension between the wish to obtain knowledge and ethical concerns (Brinkmann and Kvale, 2015). Particularly in qualitative research settings, there are not always clear boundaries due to the open-ended nature of the interviews (Rubin and Rubin, 2005). Therefore, the line between data collection for research purposes and the invasion of interview participants' privacy might be blurred. Based on this ground, relevant codes of ethics provide guidance to protect participants, institutions and the researcher both during and after the research (Bryman, 2012). In this study, ethical concerns and responsibilities were continually checked throughout the process considering the status of the participants. As mentioned, the exclusive and closed Korean judicial culture makes empirical research by an outsider (non-practitioners) particularly difficult. Based on the sensitive nature of the research topic and the status of elite participants, it was crucial to build up a better understanding of the judicial culture prior to conducting the interviews. In that sense, piloting was helpful to get more information about appropriate behaviours during the interviews in terms of cultural sensitivity. To ensure high quality and integrity, this research was

conducted in accordance with the British Society of Criminology Code of Ethics and the University of Leeds research ethics (see Appendix D for the ethics approval). In regard to any procedural issues or other ethical concerns, the study referred to these Codes of ethics for assistance as there is no clear set of ethical guidelines for conducting research in Korea.

The important responsibilities when conducting empirical studies not only include producing credible findings, but also protecting the confidentiality and anonymity of the participants (Bachman and Schutt, 2007). Maintaining confidentiality and anonymity was paramount in this study considering the high-profile position of the participants (Odendahl and Shaw, 2001). For this aspect, the University of Leeds Information Security Management System provided relevant guidance. Practitioners' personal details that might have identified them directly or indirectly were all removed. Instead, they were referred to only as their occupation such as judge 1 and prosecutor 1. Sometimes, when the position or gender of practitioners was relevant, they were mentioned as a senior judge or a female prosecutor. The specific location of the organisation or specific cases were also excluded as this would potentially make interviewees identifiable.

For the quantitative part of the study, all personal information was removed or anonymised when the court decision files were distributed by the courts. The interview recordings and transcription files were all saved in the encrypted university computer following the University of Leeds code of ethics. The printed transcripts and signed consent forms were stored in a locked cabinet, which was securely protected in the university Ph.D research suite.

It is also important to note that research techniques involving an interview strategy might include information on the characteristics and behaviour of the research participants (Esterberg, 2000). In particular, the nature of face-to-face interview settings makes true anonymity impossible to achieve. Also, anonymity had to be compromised in this study due to the use of a snowball sampling strategy. As it was based on insiders' introduction, some interviewees might inevitably have known who else had been interviewed. Considering the fact that some interviews were conducted consecutively, there was also a possibility that the participants might have run

into the next scheduled participant. Finally, the involvement of gate keepers from various organisations was another barrier to achieving true anonymity, as they made decisions about the sample and arranged schedules for the interviews.

Based on this ground, obtaining informed consent was vital when conducting the empirical study, as this is often regarded as the most essential way to ensure that research is ethically sound (Noaks and Wincup, 2004). To address this issue, the researcher provided an information sheet and a consent from in Korean to each participant before each interview. The information sheet included sufficient details of the research including the topic, objectives, methodology, and more importantly what to expect during the interviews. After the participants had been fully informed about the purpose of the research, and the methods and their role, the information regarding how the data would be used and managed was also explained in detail. Before each interview, they were assured that any dialogue during the interview process would be kept confidential. After allowing some time for consideration, a consent form was given. A verbal explanation was also provided to enhance their understanding. They were advised that they could ask any questions about the research before making a decision and they were asked to read and sign the consent form only if they agreed to take part in the research. Details of these two documents are attached in appendices and B.

A potential risk of the research might have been related to the sensitivity of the research topic as some practitioners refused to participate and expressed concerns. In case the participants might have felt uneasy explaining their views explicitly, more careful preparation was made to reorder questions or rephrase possibly sensitive questions in a more nuanced way. The safety or security of the researcher and participants during the empirical stage was also considered. In terms of the interview setting, the interviews were conducted mostly in their offices or in a quiet area within the building (courts and prosecutors' offices). Therefore, no specific safety issues were involved and the participants were able to express their opinions freely without exterior interference. Although the researcher had to travel to different parts of Korea to conduct the interviews, safety was not found to be an issue.

5.7. Reflections on the research process

This section provides some reflections on the methodological aspect of the research process. More specifically, it discusses the challenges of conducting elite interviews, negotiating access and making the interview schedule appropriate for the interviewees.

Firstly, one of the biggest barriers to conducting the empirical research for this study was closely linked to the inherent nature of elite cohorts. Commonly known for their exclusiveness, six judges refused to participate during the access negotiation process. Although most of them expressed general uneasiness about being interviewed, two female junior level judges explicitly mentioned that they did not want to cause any trouble. One senior judge also showed strong reluctance, arguing that he did not need to be interviewed as court decisions speak for themselves. He and another senior judge further described the topic of this research as ‘too sensitive’ and even ‘dangerous’. This unenthusiastic attitude of the judiciary has frequently been mentioned in previous studies, as the judges, especially members of the senior judiciary, tend to consider academic research on the sentencing subject to be an ‘unwarranted intrusion’ (Baldwin, 2007).

During the pilot stage, former judge participants also commonly stated that judges would normally be unwilling to participate as they are afraid of a situation where their words might bring disgrace to the reputation of the court. Possibly due to the concern that this study might have caused trouble or disgrace to their organisations, some senior level judges showed discomfort and asked whether there was any hidden intention behind the study during the interviews. They were also more defensive and tried to justify what they did by stating that they were the representatives of the court. To ease their concern and lead the conversation, the researcher tried to create a professional impression by keeping a more objective stance. Also, the researcher tried to emphasise the academic purpose of the thesis and the benefit of the research in order to encourage their active participation.

Building a rapport with participants is frequently considered a significant key to easing any concerns during interviews (May, 2011).

However, this is not easy in elite interview settings due to the imbalance of power. As mentioned, the general role of the interviewer is to lead and control the conversation during the interviews (Bryman, 2012). However, as the interviewees were the main informants and experts in their field, the researcher had to deal with power struggles. During the interview process, the researcher was often challenged, especially by senior male judges. They often questioned whether the researcher had sufficient background knowledge on the research topic or they criticised some of the questions related to the theories of punishment as ‘abstract’ or ‘too academic’. To make the questions less vague and abstract, the researcher sometimes had to provide some explanations or examples related to the questions. Even so, the researcher tried to minimise this type of assistance as it might have shaped the way the interviewees answered by leading the conversation in a specific direction.

Furthermore, in regard to the content of the interview schedule, the difficulty of gaining access to judicial practitioners and the sensitivity of the topic also influenced the way the questions were made and phrased. In that sense, the questions were relatively broad and general. As the interviews started by asking more general questions, interviewees often showed disinterest at the beginning. In particular, they disliked some of the demographic information-related questions, such as the reason behind the choice of their occupation, stating that this was ‘too personal’. In terms of their age, a broad category of age band was asked instead of asking their specific age. Furthermore, the questions regarding the sentencing factors considered were asked in an open-ended way so that the interviewees would have more freedom to talk. Any sensitive questions related to the tension between different criminal justice agencies or any potential organisational or peer pressure were addressed in a careful manner. Regardless of their openness or enthusiasm about some questions, the researcher tried to ask all of the key questions in order to ensure consistency. Based on the interviewees’ reactions, the tone of the questions was adjusted and sensitive questions were asked in a more indirect way.

The status of the researcher also functioned as a double-edged sword. According to the specific circumstances of each interview setting, the researcher had to play a role between a ‘complete outsider’ and a ‘partly

insider'. To point out the disadvantages of being an outsider, one of the biggest challenges was obviously negotiating access. Due to the overall exclusive nature of judicial practitioners, asking for their participation was particularly difficult, especially as there is no official channel even for academic research. Also, building a rapport with participants, as an outsider, within a brief period of time (usually about an hour) was not easy. Therefore, the interviewer often had to show that she had a certain level of understanding of their work and organisational culture to prevent them from simply 'providing lectures' on basic knowledge. Before the interviews began, most interviewees asked about the researcher's educational background. When some of them found out that the researcher had graduated from the same university or they were acquainted with someone from the university, the interviews clearly went more smoothly. The snowball sampling strategy also helped to ease the tension as the participants knew that the interviews had been requested by 'one of them'. By reassuring them that the researcher was not a complete stranger to the Korean criminal justice system, culture and language, the researcher tried to capture participants' subtle nuanced contexts more easily while providing them with a level of comfort.

The ambivalent status of the researcher also had a number of benefits despite the difficulties previously mentioned. As an outsider, the status of the researcher made it possible to remain as objective as possible without any pressure from the organisational culture or conflicts of interest. It was particularly helpful when asking questions regarding the interplay between different organisations (such as courts and prosecution offices).

The fact that the researcher was conducting the research in a foreign institution ironically put less pressure on the interview participants. They tended to feel relieved about the fact that the thesis would be written in English as they were concerned about the impact of the research. In addition, some of them were very enthusiastic as this was an opportunity to discuss their work and be interviewed for the first time. Ironically, a lack of interview experience often made them more open during the interviews.

In terms of the sampling, it cannot be claimed that the sample size, both for the quantitative and qualitative aspects of the research, constitutes a

fully representative sample. The study could have produced more useful insights if the researcher had recruited more participants and obtained more court decision files from various locations. As the researcher did not have much freedom during the sampling stage, it was difficult to get information on some issues in sentencing studies such as disparities based on location or geographical size (such as a comparison between Seoul and other small cities) or the way that a specific organisational setting influences sentencing practices.

Another important aspect that the study originally intended to cover was related to female practitioners' experiences and the impact of gender bias in male-dominant courtroom settings based on previous studies (Zimmer, 1986; Gellis, 1991; Rosenberg et al., 1993). As this research aimed to understand practitioners' views on sexual offences and the victims, it would have been more insightful to have added more female voices. Due to the small size of the sample, the participation of female interviewees was not sufficient to present a concrete finding. However, the researcher tried to ask more in-depth questions regarding their experiences or challenges as female practitioners, and their views on sexual offences to capture any noticeable differences compared to the male participants.

5.8. Concluding comments

This chapter examined the methodological implications of the study. As the first Ph.D. research employing a mixed-methods approach to understand the rationale behind sentencing in sexual offences, the chapter illustrated the advantages and pitfalls of the research design used. By serving different roles, the quantitative analysis of court decisions and qualitative interviews added depth to the findings by supplementing each other. Interviewing courtroom actors, particularly senior members, contributed to enhancing the credibility of the research findings. Although there are some elements that could have been improved, such as using a bigger sample or a

more rigorous sampling strategy, the following chapters intend to demonstrate the wealth of data produced despite these methodological challenges.

Chapter 6. Sentencing reality 1: Compromised outcomes

6.1. Introduction

Previous chapters have aimed to offer a contextual foundation for the thesis by exploring historical and cultural insights to enhance the understanding of Korean society in general, as well as judicial practitioners and their culture. To gain a deeper understanding of the current sentencing framework, the driving force behind the punitive rhetoric in sexual offence legislation has been examined; and the ongoing controversy regarding the dissonance between the legislative efforts to increase sentences for sexual offences and sentencing practices has been discussed.

As the first analysis chapter, this chapter provides an overview of the analysis of the court decisions and interview findings. Examining the court decisions provides an opportunity to understand how the legal framework is applied in sentencing practices, while the qualitative data from the interview findings offer a different perspective to explore the views of judicial practitioners on sentencing practices. The first part of the chapter presents sentencing outcomes in cases of ‘rape causing bodily injury’. Following this, practitioners’ viewpoints are explored through the interview findings. Their perspectives are addressed in relation to recent legislative amendments, and the chapter proceeds to study how they use the current sentencing framework. In particular, it considers the impact of the application of sentencing guidelines in their practice. To explore the rationale behind sentencing decisions, the chapter examines the impact of organisational influence (as an internal factor) and public and media influence (as an external factor). Finally, the chapter concludes by drawing implications from the findings.

6.2. The analysis of court decisions

This section examines the quantitative analysis of sentencing

outcomes in 76 court decisions regarding ‘rape causing bodily injury’. First, a general description of court decision files will be provided before presenting the findings. The Criminal Procedure Act, specifically Articles 38 to 43, provides regulations concerning the contents of court decisions. The number of the case, the date of the decision, the demographic data of the defendant (name, age and address) (Article 39) and the names of the prosecutors and defence lawyers (Article 40) should be included. Additionally, the signatures and names of all of the participating judges should be listed at the end of the decision (Article 41). The presiding judge writes the decision and delivers the judgment by reading out the main findings and summarising the reasons for it in court (Article 43).

Court decisions tend to follow a similar format. After outlining the information mentioned in the previous section, the main content begins with the presentation of the final sentencing outcome. This is followed by the reasoning section, which gives details of the process by which the decision regarding the sentence was reached. It includes a brief summary of the nature of the offence, a list of the evidence presented, the relevant article of the legislation, an assessment of the arguments of both parties and the reasons for the sentence.

The process of making a sentencing decision typically consists of three stages, as outlined in Chapter 4. Firstly, the law sets out the statutory sentence, and then the sentencing guidelines are applied. Once the type of offence and sentence length, as well as any aggravating or mitigating factors mentioned in the guidelines, have been considered, the judges receive an advisory sentence. Finally, the declaratory sentence is presented, which takes into account both the statutory and advisory sentences. This section is typically presented as a brief list rather than elaborating on the detailed process leading to the final sentence, as explained in Chapter 5.

The court decisions collected for this thesis were decisions on 76 cases of ‘rape causing bodily injury’. Article 301 of the Criminal Act stipulates that “anyone who commits the offences referred to in Articles 297 (rape), 297-2 (imitation rape) and 298 (indecent acts by force) to 300 (attempts), thereby causing injury to the victim, shall be punished by imprisonment with labour for

an indefinite period or for at least five years”. In this thesis, the cases of ‘rape’ causing bodily injury were specifically selected from the various types of sexual offences listed in Article 301 in order to take into account both the seriousness of the offence and the harm caused. Further details on the sampling method and ethical considerations were provided in Chapter 5.

In the 76 court decision files, 51 cases of ‘attempted’ rape with bodily injury were also included, as Article 300 stipulates that attempts to commit any of the offences mentioned in these articles shall be punished accordingly. Sentencing on attempted cases is mentioned in the sentencing guidelines in the ‘guidance on suspending a sentence' section. The occurrence of bodily harm resulting from the attempted offence is included in a list of additional affirmative factors to be considered, although these guidelines are only advisory. This research aimed to investigate if any significant differences in sentencing outcomes exist between attempted rape and rape cases, particularly in relation to the use of suspended sentences, by including these cases.

The court decision analysis concentrated on three aspects of sentencing outcomes in sexual offences. Firstly, the study analysed the use of prison sentences and suspended sentences by investigating their frequency of use and determining the factors that lead to the varying outcomes. Secondly, the study explored the length of prison sentences and their relation to leniency in sentencing outcomes. Lastly, the use of preventive measures was investigated including the sexual offender treatment programme, community service, the notification, and the electronic monitoring system.

6.2.1. The use of punishment in sexual offence cases

This section discusses the sentences imposed in 76 cases. There were three types of sentencing outcome: prison sentences, suspended sentences and acquittals. Of the 76 cases examined for this study, defendants were convicted (23 cases were rape, and 49 cases were attempted rape), and four were acquitted. The acquitted cases will be further discussed in Chapter 7 as they provide useful insights to better understand practitioners' views on

victims of sexual offences.

As prison sentences are perceived as the primary punishment in Korea (see Chapter 4), the so-called ‘in or out’ decision, whether or not to imprison the offender (by giving suspended sentence), is considered to be a particularly crucial feature when discussing the severity of the sentences imposed (Park et al., 2014). One of the most notable features of the court decisions was the significant use of suspended sentences in sexual offence cases. Of the 72 cases where the defendant was convicted, suspended sentences were used in more than half of them (39 cases; 54%), while prison sentences were imposed in 33 cases (46%). Given that previous studies have commonly argued that the frequent use of suspended sentences has contributed to the criticism of lenient sentences (Yoon et al., 2014; Korean Women Lawyers Association, 2014), this study also found similar results, although the sample size examined was relatively small.

There was a slight difference in the use of suspended sentences by type of sexual offence. Table 6.1 shows that suspended sentences were used more often for attempted rape than for rape. Specifically, suspended sentences were imposed in 57% of the attempted rape cases compared to 48% of the rape cases. These differences may not be significant enough to draw a definitive conclusion. However, there was a slightly greater difference between the number of suspended sentences and the number of prison sentences for attempted rape than for rape. This suggests that the seriousness of the offence may have played a significant role in the decision to imprison or suspend. Furthermore, suspended sentences may have been more common in these cases because the sentencing guidelines mention attempted rape as one of the positive factors to be taken into account, notwithstanding the advisory role of the guidelines.

Table 6.1. Sentencing outcomes in rape and attempted rape cases

Rape (23)	Attempted Rape (49)

Prison sentences	12	**Prison sentences**	21
Suspended sentences	11	**Suspended sentences**	28
Total: 72			

To examine the sentencing outcomes in more detail, the court decisions were categorised into four groups according to the type of sexual offence and sentencing outcome: rape and prison sentence (group 1: R&P); rape and suspended sentence (group 2: R&SS); attempted rape and prison sentence (group 3: AR&P); and attempted rape and suspended sentence (group 4: AR&SS).

The study aims to determine the impact of three factors on sentencing out of a range of potential factors: the defendant's previous criminal record, the victim's testimony at the trial and the existence of an informal criminal agreement. In the sentencing guidelines, a previous criminal history is considered an aggravating factor while an informal agreement to commit a crime is considered a mitigating factor. However, there is no mention of the victim's testimony during the trial. These three factors were selected due to their frequent documentation in most cases. Table 6.2 provides a summary of the four categories of cases (sexual offences - sentencing outcomes) and the number of cases in relation to the three sentencing factors discussed above.

Table 6.2. Sexual offence cases in relation to three sentencing factors

	Sexual offence records	**Victim's testimony in court**	**Informal criminal agreement**
Group1 (R&P)		8	1
Group2 (R&SS)		1	10

Group3 (AR&P)	6	4	6
Group4(AR&SS)		4	24
Total	**6**	**17**	**41**

Firstly, only six cases mentioned the defendant's previous record of 'sexual offences'. Despite having attempted their offences for these cases, they were all sentenced to imprisonment. While the limited number of cases may be inadequate to draw a definitive conclusion, it may indicate that the seriousness of the offender (represented by the defendant's previous sexual offence record) appears to have been considered an important factor in the sentencing.

The defendants' previous criminal records for non-sexual offences were also examined. A total of 22 cases documented the defendant's criminal history. Except for the six prior sexual offence records mentioned above, the defendant's previous convictions were disclosed in twelve cases, and fines for other offences were given in four cases. The research showed that defendants with previous convictions for non-sexual offences were more likely to be given prison sentences (7 cases: 21%) than suspended sentences (5 cases: 13%). This indicates that a person's criminal record, irrespective of the type of offence, may influence the decision to impose a prison sentence.

It is worth mentioning that a majority of offenders (11 cases) who had past convictions for other crimes (total of 12 cases) engaged in sexual offences during the suspended period of their previous conviction. Consequently, judges were legally prevented from imposing suspended sentences in such cases under Article 63 of the Criminal Act. Therefore, no conclusive relationship was found between overall criminal records and the use of prison sentences. Moreover, fines seem to have a minimal impact on sentencing outcomes as it is common for court decisions to state that, 'this defendant has no previous criminal record except for a fine for previous offences' when imposing suspended sentences.

Secondly, the victim's testimony in court was examined to consider the victim's participation during the trial and how this may have affected the sentencing outcome. There were only 18 cases where it was clear that the

victim had testified in court. The results revealed that these cases were more inclined towards prison sentences (12 cases, approximately 70%) than suspended sentences (five cases). Chapter 7 will provide a more comprehensive discussion of the victim's role in the criminal justice process and its impact on outcomes.

Lastly, the impact of the informal criminal agreement appeared to play a decisive role in the use of suspended sentences. A total of 41 cases involved an informal criminal agreement, and of those, more than 80% (34 cases) of the defendants were given suspended sentences. Specifically, in the 11 rape cases where an agreement was reached, the majority of the defendants (10 cases, 90%) received suspended sentences. In the 30 attempted rape cases where an agreement was reached, suspended sentences were imposed in 24 cases, accounting for 80%. The informal criminal agreement is not merely associated with decreasing the sentence length, but plays a particularly vital role in influencing the decision to suspend the prison sentence as a mitigating factor. The consequences of informal criminal agreements in cases of sexual offences and the potential impact of practitioners' perceptions of sexual offence victims on their application will be examined in detail in Chapter 7.

In addition to these frequently recorded factors, the absence of certain information may offer valuable insights into potential sentencing considerations. For example, most of the court decisions provided demographic details of the victims and defendants, such as their age and occupation or the relationship between the defendant and the victim. However, the age of the defendant was rarely mentioned, although the age of the victim was recorded in the majority of cases. There was only one instance where the defendant's age of 73 was cited as a mitigating factor, while the age of the victim at 71 was not taken into account. This raises concerns regarding the consistency of sentencing, given that a previous court ruling acknowledged the vulnerability of an 82-year-old victim as a special aggravating factor.

Occupation or other background information was rarely mentioned unless it was closely related to the crime. For instance, the victim’s or defendant's profession was only mentioned concerning the location of the offence, such as at a company or restaurant where they both worked. On rare

occasions, additional information about the defendant was given in relation to the preventative measures imposed. When the defendant appeared to have a respectable or distinguished career, it was described as an important mitigating factor. Consequently, it was more probable that the defendant would be exempted from preventive measures in such instances. For example, there was a case where the decision described the defendant's career in detail, such as where he had worked and how much he had helped various charities after his retirement, in order to justify the exemption from notification. This will be examined in more detail later in this chapter.

To summarise, this section has discussed the use of sentences in sentencing for sexual offences. The findings revealed the frequent use of suspended sentences, particularly in attempted rape cases. The study also identified commonly recorded sentencing factors and found that the defendant's previous criminal record in sexual offences acted as a significant aggravating factor. The victim's testimony at trial also had some impact on increasing the severity of the sentence. Most importantly, the existence of the informal criminal agreement appeared to be crucial as a mitigating factor, not only in terms of reducing the length of imprisonment, but more importantly in the imposition of suspended sentences.

6.2.2. Sentencing outcomes: the length of prison sentences

The previous section has focused on the use of punishment in rape causing bodily injury cases. More specific details of the sentencing outcomes in terms of the length of prison sentences will be discussed in this section. The range of the statutory punishment for rape causing bodily injury is between a minimum of five years of imprisonment and a life sentence, according to Article 301 of the Criminal Act. After applying the statutory mitigation (Articles 51 to 56 of the Criminal Act) and the relevant mitigating factors mentioned in the sentencing guidelines, the range of the advisory sentence decreases to between 30 months and 60 months of imprisonment (see more details in Chapter 4).

The analysis of the court decisions showed that more than 60% of the

defendants were sentenced either to the minimum term of imprisonment (30 months in 42 cases) or to an even shorter term of imprisonment (in three cases). This tendency was more pronounced in cases of attempted rape (see Table 6.3). In almost 70% of the attempted rape cases (31 out of 49) the defendants were sentenced to the minimum term. In three cases, the sentence was less than the recommended minimum of 30 months, 19 months in two cases and 24 months in one case.

Table 6.3. The length of prison sentences in attempted rape cases

The length of prison sentences	Prison sentences	Suspended
less than 30 months	1	2
30 months (suggested min)	8	23
over 30 months	12	3
Total: 49	**21**	**28**

Table 6.4 indicates that the defendants did not receive less than the minimum sentence in any of the rape cases. Nevertheless, in almost half of the cases (11 out of 23) the defendant received the minimum sentence possible. Only three cases resulted in the maximum sentence of 60 months (5 years), which is still significantly less than what is legally permitted.

Table 6.4. The length of prison sentences in rape cases

The length of prison sentences	Prison sentences	Suspended
less than 30 months	0	0
30 months (suggested min)	3	8
over 30 months	9	3
Total: 23	**12**	**11**

The findings indicate the prevalent use of suspended sentences and minimum sentences in sexual offence cases and this result aligns with ongoing criticism of sentencing outcomes being lenient (Park et al., 2014; Youn et al., 2014). However, it is also noteworthy that longer prison sentences were more frequently given in rape cases. For instance, in more than half of the rape cases the defendants received prison sentences surpassing the suggested minimum (12 out of 23 cases), while the defendants were sentenced to more than 30 months' imprisonment in only 30% of the attempted rape cases (15 out of 49 cases). Moreover, when a prison sentence was imposed, the duration of the sentences tended to be lengthier. In over 60% of the cases in which prison sentences were given, the sentences surpassed the recommended minimum. However, when suspended sentences were issued, only approximately 15% of those convicted received prison sentences exceeding 30 months.

In this respect, the judges did differentiate cases according to the seriousness of the offence, treating serious cases (rape cases or those involving imprisonment) more seriously (with prison sentences or harsher sentences). However, what defined a 'serious' case was not always immediately apparent. Some court decisions explicitly stated that the damage caused was serious or that the offender's behaviour was considered dangerous, but this did not automatically increase the severity of the sentence. Unless corroborating evidence explicitly provided a rationale for an elevated sentence (such as a history of previous sexual offences), it was not clear whether the nature of the offence itself played a decisive role in the sentencing decision.

In order to identify commonalities between cases with different lengths of imprisonment, the convicted cases were divided into three groups: Group 1 - cases with sentences of less than 30 months; Group 2 - sentences of 30 months (proposed minimum); and Group 3 - sentences of over 30 months, as shown in Table 6.5.

Table 6.5. The length of prison sentences in all convicted cases

The length of prison sentences	Prison sentences	Suspended
Group 1: less than 30 months	1	2
Group 2: 30 months (suggested min)	11	31
Group 3: over 30 months	21	6
Total: 72	**33**	**39**

Firstly, all of the cases in Group 1 sentenced to less than 30 months' imprisonment were attempted rapes. In these cases, none of the defendants had committed previous sexual offences or had previous convictions. Suspended sentences were imposed in the other two cases, except for one case without an informal criminal agreement. In two cases where the agreements were presented, it was noted that one of the defendants was unrepentant and denied the allegation throughout the trial. However, the judges appeared to prioritise the defendant's mental illness (paranoid schizophrenia) and familial connections as more significant mitigating factors, rather than disregarding the impact of the informal criminal agreement (which should have been based on the defendant's genuine remorse).

The recommended minimum sentence of 30 months was the most common sentence imposed within Group 2 (over 60%, 42 out of 72 cases in total). Of the 42 cases within this group, there were 11 cases of rape and only 3 cases of rape were sentenced to imprisonment. The remaining eight cases were all given suspended sentences. Thus, it remains unclear whether the severity of the offence had a direct impact on the sentence received.

In terms of the defendant's criminal history, two defendants had previous convictions for sexual offences (both suspended at the time). Despite the informal criminal agreement, they were all sentenced to imprisonment. Another defendant with a previous conviction for a non-sexual offence was also sentenced to imprisonment as he was still on a suspended sentence at the time of the sexual offence.

The informal criminal agreement appeared to be crucial once again. Agreements were not presented in two out of the three rape cases in which

prison sentences were given, whereas in seven out of the eight rape cases that led to suspended sentences, agreements were present. The impact of the informal criminal agreement was more significant when discussing the relationship between attempted rape cases and sentencing outcomes. For example, of the eight attempted rape cases sentenced to 30 months' imprisonment, only five did not have the agreement. Even with the agreement present in the remaining three cases, it was not seen as a mitigating factor in their sentencing. In two cases, suspended sentences were unlawful because both offenders had committed sexual offences during the period of suspension for a previous conviction.

One case was exceptional in that the judges explicitly stated that they would not consider the agreement as a valid mitigating factor. The defendant had no previous convictions and a substantial sum of almost £70,000 was offered in compensation as part of the agreement process. Notwithstanding the potential mitigating circumstances, the judges clearly stated that they would disregard all of these factors on the following grounds: although the physical harm caused was relatively minor (less than 2 weeks’ treatment was required), the defendant denied the allegation throughout the trial. It was also noted that the defendant had attempted to undermine the victim's credibility by fabricating evidence.

Taking these aspects into consideration, the judges emphasised that they would not accept the agreement at face value, stating that "it was not based on the defendant's genuine remorse but rather a last resort for mitigation". It is noteworthy that all three attempted rape cases resulted in prison sentences when the impact of the informal criminal agreement was disregarded, suggesting the critical role of the agreement in sentencing. Of the 31 cases where 30-month prison sentences were suspended, the impact of the informal criminal agreement appears to have been decisive, as in all of the remaining cases, except four, the agreement was presented.

In more than half of the cases the defendants received either the minimum sentence or a shorter sentence, but in a significant number of cases (27) the defendants also received a sentence of more than 30 months (group 3). To specify, 4 categories of sentences were used: 36 months (18 cases); 42

months (1 case); 48 months (4 cases) and 60 months (4 cases). It was challenging to determine a correlation between the nature of the offences and the sentence imposed. While it is worth noting that the entirety of the information was not documented in the court decisions, the fact that similar cases resulted in significantly different sentences could raise questions about the consistency of sentencing.

The impact of the informal criminal agreement was again quite evident. The agreement was not reached in the majority of the 21 cases where imprisonment was imposed (18 cases: 86%). However, in the 6 cases where suspended sentences were imposed, the agreement was reached in 5 cases. Nevertheless, there seemed to be a clearer correlation between the defendant's previous sexual offences and the severity of the sentence, as the four defendants with previous sexual offences were all included in Group 3. In these cases, the impact of the informal criminal agreement seemed to be minimised and three defendants were sentenced to imprisonment even though they had settled the agreement; and the previous sexual offences were committed more than a decade ago.

The findings also suggest that the relationship between the length of the prison sentences and the length of the suspended sentences appears to be directly proportional. In the first category (less than 30 months), the suspended periods were either two or three years. For the second category (30-month prison sentences), 15 defendants received suspended sentences of three years while 16 were given four years. In group 3, whereby the prison sentences exceeded 30 months, the duration of their suspended sentences was extended to four years in four cases and five years in two cases.

In summary, this section has analysed the sentencing outcomes of the court decisions by considering two aspects: the use of imprisonment and suspended sentences, and the length of the prison sentences. Despite the limited sample size, the results revealed some useful insights. Firstly, the frequent use of suspended sentences and the minimum sentence may have contributed to the continuing criticism that sentencing outcomes for sexual offences are lenient. More than half of the cases received suspended sentences, while a substantial number of cases (over 60%) resulted in the

minimum prison sentence.

Nonetheless, it is essential to acknowledge that the judges appeared to be more severe in more serious cases, using fewer suspended sentences and imposing relatively harsher prison sentences. While it was not feasible to establish a link between the type of offences committed and the resulting sentences, the offender's prior history of committing sexual offences as well as the use of the informal criminal agreement emerged as key factors influencing sentencing outcomes. In instances where the agreement was unsettled, the defendant was more likely to receive a prison sentence. Furthermore, in cases where the defendant had a history of committing sexual offences, it was clear that he was more likely to receive a harsher sentence.

6.2.3. Sentencing outcomes: the use of preventive measures

The previous sections focused on the use of punishment and the severity of sentences. This section concentrates on the use of preventive measures in sentencing, based on the analysis of the court decisions. As illustrated earlier in Chapter 4, preventive measures are supplementary to primary punishment, and thus the sentencing guidelines do not provide specific guidance on the imposition of these measures. In this context, the application of such measures can only be justified with reference to legal precedents and the sexual offence legislation. This is the area in which the discretion of individual judges and the influence of legal precedents seems to be most evident. The study examined the use of the sex offender treatment programme, community service, notification and electronic monitoring. Registration was not included in the analysis as it is automatically imposed upon a defendant's conviction, in accordance with the legislation.

The key findings indicate a frequent use of preventative measures in sexual offences, as the majority of cases (70 out of 72) involved the imposition of a range of measures. In the two cases (both attempted rape) where no preventative measures were imposed, the court decisions gave clear reasons for exempting the offender from these measures. In the first case, where a

prison sentence was imposed, the possibility of secondary victimisation due to notification was taken into account. In the second case, where a suspended sentence was imposed, the health problem of the defendant was considered. Beyond these two cases, a variety of preventative measures were frequently employed in conjunction with each other. In 29 cases, at least two measures were imposed. A common combination consisted of a treatment programme and community service; this combination was used in 15 instances. Alternatively, a treatment programme and notification were also employed together, in 12 cases.

In the majority of the 70 cases where preventive measures were taken, a treatment programme was enforced (in 68 cases). However, there was no clear explanation as to why it was not implemented in the other two cases. Community service was only used alongside suspended sentences (13 out of 39 cases: 33%) and was not imposed on its own. Notification and electronic monitoring were scarcely used (16 and 3 cases, respectively), potentially due to their potential impacts on the defendants (refer to Chapter 4).

In order to expand on the implementation of preventive measures, this section will first examine the sexual offender treatment programme, as it was the most frequently imposed measure (in 68 cases: 97%), based on Article 16-2 of the 'Law on Special Cases Concerning the Punishment of Sexual Offences 2016'. The outcomes varied slightly depending on the severity of the crime and the court's decision. The programme of treatment was enforced in all 23 rape cases, and was also employed in more than 90% of the attempted rape cases (45 cases). Examining the given sentencing results, the treatment programme was enforced in 94% of the cases with prison sentences (31 out of 33 cases) and in 76% of the cases with suspended sentences (37 out of 49 cases).

With regard to the specific hours imposed, it should be noted that only four types of duration were used repeatedly: 40 hours (43 cases), 80 hours (18 cases), 120 hours (6 cases) and 240 hours (1 case). Although the legislation provides for quite a wide range of periods (within 500 hours in the case of conviction and within the suspended period in the case of a suspended sentence), the findings suggest that there may be an informal rule that

practitioners tend to follow.

Secondly, community service was imposed in 13 cases (in all of which the defendants were given suspended sentences). It was never used alone and was always imposed in conjunction with the sexual offender treatment programme. There seemed to be no clear pattern in its use, but where it was used, relatively longer periods seemed to be imposed. Similar to the use of the treatment programme, only certain hours were used repeatedly: 40, 80, 120, 160, 200 and 240 hours.

The sexual offender notification system is imposed on the basis of Article 50 of the Act on the Protection of Children and Adolescents against Sexual Abuse 2022. The notification order is considered a mandatory principle, although it can be exempted in exceptional circumstances ("...the court shall issue an order to notify the persons...information...in concurrence with a judgement on a sex offence case subject to registration. Provided that the same shall not apply where the accused is a child or juvenile or where there are other special circumstances against the disclosure of personal information").

On the basis of this legislation, the potential risk to the defendant (invasion of privacy and humanitarian issues, mentioned in Chapter 4) has been emphasised in court decisions when imposing this measure. Unless the benefits of its use appeared to outweigh its negative impact on the defendant, notification was rarely used. Out of 70 court decisions where preventive measures were imposed, notification was used in only 16 cases (30%). It was used more often when a prison sentence was imposed (in 14 cases). Although the criteria used to assess the defendant's potential risk were not always clearly stated in the court decisions, defendants with a history of committing sexual offences were more likely to be notified. In fact, five out of six defendants with a previous sexual offence history were given notification. Based on this factor, some decisions exempted notification by explicitly stating that "as the defendant has no history of sexual offences, the prevention of reoffending can be achieved by other measures and notification would not be necessary".

Some court decisions referred to the risk of reoffending as a "potential

threat to the general public". Sexual offences committed by an unknown stranger are considered to be more dangerous and therefore more likely to receive notification due to their potential risk. Additionally, the defendant's age, occupation, family background, and social ties were noted as factors influencing the decision to exempt notification. For instance, one court ruling provided a detailed account of the defendant's social connections and family background to emphasise the impulsive nature of the offence and therefore the lack of a risk of reoffending. Although the offence was explicitly described as serious – with the defendant having attempted to force the victim into a car and rape her at a motel – the court decision also included detailed information regarding the defendant's career. Specifically, it was noted that he had worked diligently for 30 years at the National Agricultural Cooperative Federation and that he had spent his retirement years contributing to volunteer work. As he had clear social ties, the court decision stated that there was "a greater need for him to be reintegrated into society" and therefore no notification was imposed as it could have hindered the reintegration process.

Finally, electronic monitoring was the least used preventive measure (in three cases). According to the 2016 ‘Act on the Probation and Electronic Monitoring of Specific Criminal Offenders’, prosecutors may apply for an order to attach electronic devices to the defendant on the grounds that ‘it has been established that they have a tendency to repeat sexual offences because they have committed sexual offences at least twice (including when they have been found guilty in a final and conclusive judgment)’ (Article 5-3). Similar to cases involving the use of notification, electronic monitoring was only imposed in exceptional cases. Common elements were identified among the cases where electronic monitoring was used. In all three cases, the defendants received a 10-year electronic monitoring order, which was longer than other preventive measures. Moreover, it was consistently combined with a treatment programme and notification. Even the duration of the other imposed measures was longer than usual, with notifications lasting for 5, 8, and 10 years, and sexual offender treatment programmes for 40, 80, and 240 hours.

Only half of the six defendants with previous sexual offence records were put on electronic monitoring. The remaining three defendants had over

two conviction records for sexual offences, and two of them had already been subjected to electronic monitoring for their earlier offences. Although all of the cases involved attempted rape, the defendants received relatively lengthy prison sentences (two cases of five years each and one case of three years), possibly reflecting the seriousness of the defendants' offences. The influence of informal criminal agreements seemed insignificant, given the potential dangers posed by the offenders. As previously discussed, it appears that judges have a tendency to treat serious cases more harshly (in these cases because of the potential danger of the offenders).

Another important aspect to consider is the implementation of risk assessment tools during sentencing. Chapter 4 mentioned that the results of the K-SORAS (Korean Sex Offender Risk Assessment Scale) test are often used to assess the potential risk of defendants in relation to the use of preventive measures. Unfortunately, the court decisions rarely revealed how often the test is actually used, as only three cases explicitly mentioned the results. Of the three instances where electronic monitoring was enforced, only one exhibited a high level of danger. It could be contended that, given the defendants' noteworthy previous sexual offence records, an additional test may not have been essential. However, it is questionable how judges would determine which preventive measures to impose and their duration, as the objectives of such measures are inevitably related to assessing the potential risk of the defendants. This may raise concerns regarding the reliability of the use of preventive measures, as practitioners' beliefs about the effectiveness of certain measures may influence their decision-making.

To summarise, the court decisions provided some useful insights for understanding sentencing practices in relation to the use of preventive measures. It was observed that the informal criminal agreement had a less significant impact on the use of preventive measures than on the use of imprisonment and suspended sentences.

A previous history of committing sexual offences was cited as a significant factor, notably when employing notification and electronic monitoring. It also appeared to play a vital function in demonstrating the defendant's potential risk. When assessing the likelihood of reoffending, a few

court judgments clearly stated that the crucial consideration in their decision-making was the potential risk to the broader public.

However, establishing a clear correlation between the nature of the offences and the use of preventive measures was challenging. In some cases, more measures were imposed, or there was a longer period of imposition than in others, despite similarities between the cases. Due to the lack of recorded information and details on the court decisions, it was difficult to identify clear factors influencing judges' decisions on preventive measures, and further research may be needed to gain a more in-depth understanding. Moreover, the lack of information on the application of these preventive measures in the legislation and sentencing guidelines, yet the widespread use of these preventive measures in actual practice makes it even more imperative to explore practitioners' views to fill this knowledge gap.

6.3. Understanding practitioners’ perspectives on the recent legislative changes

Previous sections have discussed the findings from analysing the court decisions. The frequent use of suspended sentences and minimum sentences was notable, and some commonly cited sentencing factors were also examined. While the analysis of the court decisions provided valuable insights into how the sentencing framework is applied in practice, there were some gaps in terms of judicial practitioners' views on how they work.

On this basis, this section discusses practitioners' perspectives on sentencing practices through an analysis of the interview findings. Firstly, it explores their views on the series of recent changes in the sexual offence legislation. It is crucial to understand their perception of the overall direction of the legislative change, as this will inevitably influence the way in which they apply the law. The interview participants, particularly the judges, expressed worries about the punitive approach of the current sexual offence legislation. Regardless of their positions, most of the interviewees contended that the legislative amendments seemed to be motivated by a de facto national

agreement to penalise sexual offenders more severely, as a result of a number of emotionally charged sexual offence cases. Whether or not the interviewees viewed the change positively, most seemed to comprehend the public outcry over the punitive approach. As one senior judge said:

> Compared to the impact of sexual offences on both the victim and society as a whole, it appears that sentencing outcomes and general practice may have fallen short of the public's expectations. The recent increase in punitive actions sends a clear message that we must take the public's concerns about this matter more seriously [J.6.P.28].

All of the judges involved in this research recognised that the recent modifications made to the sexual offence legislation aimed to impose more severe penalties. Nonetheless, there were concerns over the 'overall' increase in statutory penalties for sexual offences, as one senior judge mentioned:

> There appears to be a general consensus that we need to punish sexual offenders harshly, and this is clearly reflected in the law. I am not saying that this direction is wrong, but in some cases the statutory punishment has been increased so much without in-depth consideration of how to reflect the gravity of the offences [J.1.P.2].

The judges who took part in the interviews generally argued that a distorted focus on a few exceptional cases of sexual offences may have led to a worrying situation. Their main concern about the increase in statutory penalties for sexual offences was closely linked to proportionality in sentencing, based on two aspects: a comparison with other types of crime, and within different types of sexual offences.

Proportionality in sentencing, or in other words 'making the punishment fit the crime' (Zimring, 1976), has long been one of the key objectives of sentencing practices in many jurisdictions. In relation to the idea that the severity of punishment should be proportionate to the seriousness of the offence, the relative severity of punishment should reflect the level of seriousness of the offence in terms of ordinal proportionality (Von Hirsch et al.,

2009). All of the interviewees also stressed the need to look at the overall picture of the legal system. Therefore, an over-emphasis on specific types of sexual violence offences could interfere with proportionate sentencing, as one judge argued:

> Legislation on sexual offences is generally excessively punitive, even when compared to other types of serious violent crime. For some sexual offences involving children, the statutory minimum sentence is even higher than for murder. Murder should be treated as the most serious crime because it is a matter of life and death [J.7.P.2].

The Criminal Act specifies that individuals convicted of murder can receive death penalty or imprisonment with labour for an indefinite period or for a minimum of five years (Article 250 of the Criminal Act). For rape against a minor under the age of 13, imprisonment with labour for an indefinite term or for at least 10 years is the range of the statutory penalty (Article 7-1 of the 'Act on special cases concerning the punishment of sexual crimes'). As Korea has been classified as a de facto death penalty abolitionist country for almost 25 years (Kim, 2022b), following the suspension of the execution of 23 death row inmates since 1997, the judge's above-mentioned concern about the disproportionality of the statutory minimum sentence seems reasonable.

Even within different types of sexual offences, this proportionality issue exists. As a result, judges questioned whether the severity of the sentences in the law adequately reflects the seriousness of the various sexual offences. One judge said:

> I think that the general increase in legislation on sexual offences makes sentencing particularly difficult. For example, even within sexual assault cases, the nature of the offence can vary considerably depending on the degree of violation or intimidation used. In some cases, however, we feel that the statutory minimum sentence is too high in relation to the defendant's criminal behaviour [J.4.P.13].

As the series of the legislative changes were mainly influenced by

sexual offences against children and disabled victims (as illustrated in Chapter 4), judges expressed particular difficulties in sentencing sexual offences involving these vulnerable victims. As one judge stated:

> The statutory punishment for sexual offences against children or juveniles is too high, regardless of the specific circumstances of each case. Even brief touching or simply holding hands can sometimes lead to harsh sentences just because the victim is a child. I think this is really problematic. [J.5.P.2].

During the interviews, most participants raised serious concerns about the so-called 'surprise attack'. This is not a legal term, but a common term that was used to describe a particular type of sexual assault during the interviews. As the words 'surprise' and 'attack' imply, a surprise attack describes a brief, unwanted physical contact or touching that does not involve force or intent. Article 298 of the Criminal Act defines sexual assault as an indecent act committed through the use of force or intimidation. 'Indecent act' is a broad concept that includes behaviour of 'sexual harassment that causes feelings of sexual shame or disgust to the victim; or violates the victim's sexual freedom' (The Supreme Court of Korea, 2002).

In a surprise attack case where the offender briefly touched the victim's breast while dancing, the Supreme Court ruled that this was an act of violence against the victim's will, even if it was brief. The court also stated that as long as there is an act that violates the victim's will, it can be understood as sexual assault, regardless of the seriousness of the criminal behaviour.

Recently, the Supreme Court further stated that even an attempted surprise attack could be considered an attempted indecent act 'by force' (The Supreme Court of Korea, 2015b). In this case, the offender approached the 17-year-old victim from behind to hug her in the street at night. Although the attempt did not achieve the desired result, as the victim noticed it before it happened and called for help, the court considered his behaviour as an attempt to violate the victim's sexual freedom. These decisions could be understood as a change in the court's attitude and efforts towards the protection of the victim's sexual freedom (Youn et al., 2014). However, most practitioners criticised these decisions for ignoring the reality of the difficulty

of sentencing sexual offences. As one judge explained:

> The Criminal Act clearly requires the use of 'violence or intimidation' to constitute a case of sexual assault. However, these Supreme Court decisions completely ignored the law. If these surprise attacks were treated as equivalent to sexual assault, it would cause so many problems in practice as the punishment would definitely not fit his criminal behaviour. [J.4.P.3].

According to the aforementioned decision, an act of violence does not necessarily mean that it must be strong enough to overcome the victim's resistance (as is usually required in rape cases in Korea). Moreover, as long as there is an act that violates the victim's will, it can be recognised as sexual assault, regardless of the degree of force involved. As the requirement of 'violation or intimidation' in the Criminal Act has become almost meaningless in these cases, the judges were particularly concerned about cases involving child victims:

> If the victim is a child, the case becomes a nightmare. If the victim cried because a stranger briefly touched her cheek and the mother filed a complaint, the minimum sentence was three years? Even more, I think. That is nonsense. I really think the law should be changed [J.4.P.3].

Judges' concerns about the increase in the sentencing range were based on practical issues of applying the law in reality. They argued that the increase in sentences, which does not sufficiently reflect the seriousness of the offences, is unfair as it leads to disproportionate sentences. As shown by the analysis of the court decisions in the previous section, the frequent use of suspended sentences and minimum sentences seemed to be in line with their concerns about the punitive rhetoric in the law.

The prosecutors and lawyers also contributed useful insights to the research on sentencing practices, as they are closely involved in sentencing decision-making. In general, the prosecutors and lawyers seemed to agree with the direction of the legislative change. Most prosecutors, in particular,

criticised judges for being responsible for the punitive orientation of the law. One prosecutor argued:

> I think the series of legislative changes simply proves that the previous sentences for sexual offences were not severe enough. In this sense, the current legislation on sexual offences shows the legislator's firm decision to take a tougher approach, reflecting the public's demand [P.5.P.2].

On this basis, the majority of the prosecutors (8 out of 11) considered the intention of the legislative changes to be positive. As the punitive rhetoric in the law could lead to a greater awareness of the seriousness of sexual offences, the prosecutors argued that it could also contribute to a general deterrence of sexual offences. However, all of the prosecutors were pessimistic about whether the current sentencing practices reflected the change in the law. One prosecutor noted:

> In general, legislation on sexual offences is very responsive to public opinion. When high-profile sexual offences have been committed, this has almost always led to an increase in the statutory penalty. However, the change in the law does not fundamentally affect sentencing practice. The change is only in the law in books [P.10.P.3].

Similarly, the prosecutors expressed concern about the high level of statutory punishment for sexual offences. As mentioned by the judges, the issue of proportionality in sentencing was seen as a serious drawback of the recent legislative changes, and the prosecutors also emphasised the same point:

> Our system has tried to solve the problem by simply increasing the legal penalty, when the real problem is that judges' sentences are not harsh enough. Because legislators have only focused on increasing sentences, I think the whole legal system has been thrown off balance [P.8.P.2].

More importantly, the prosecutors indicated that high levels of statutory punishment also influenced their decision to prosecute. As one prosecutor

argued:

> A high statutory sentence can create pressure in practice. Because it is much higher than other offences, we tend to be more cautious in assessing the admissibility of evidence to prosecute. For example, if it is 90% for other offences, in terms of rigour and standards to prosecute, it has to be 99% for sexual offences [P.9.P.2].

Concerns about a punitive rhetoric in the legislation are not new in the history of the development of legal systems, regardless of the jurisdiction, and one of the best-known examples is the so-called 'Bloody Code'. This refers to the period between 1688 and 1820, when laws in England and Wales were designed to punish the majority of property criminals with the death penalty (King and Ward, 2015). As Phillips (1857:4) described, "every page of our statute book smelt of blood"; the Bloody Code was at the centre of a heated debate (Wallis, 2018).

In practice, however, it proved to be far less brutal than critics suggested. This was because judges, prosecutors and juries focused on mitigating or even nullifying the harsh law (Beattie, 1986). Because the way they exercised their discretion was based on identifying only the worst offenders for execution (Langbein, 1983), the majority of people convicted of less serious offences were pardoned.

Although the focus of this thesis is primarily on sentencing, similar attitudes can be found in the prosecution rates for sexual offences and in the results of the interviews with the prosecutors. As mentioned in Chapter 1, the prosecution rate for sexual offences has been steadily decreasing and in 2022 only 42.9% of reported cases were prosecuted (SPORK 2022). The judges and prosecutors also frequently stated in the interviews that the high statutory penalties in the sexual offence legislation seemed to put pressure on their decision-making. Similar views were expressed by the lawyers, particularly defendants' lawyers, who criticised the current sexual offences legislation as being the result of a political decision. As one lawyer said:

> It seems that whoever is caught will become a scapegoat. He

> could be used as an example to teach others a lesson by getting a harsher punishment. I think this is unfair and I doubt that it would have a significant deterrent effect [L.3.P.5-6].

The lawyers also argued that this punitive trend could also have a negative impact on victims, as judges could be more cautious in assessing the reliability of victims, which will be discussed further in Chapter 7. They also criticised the fact that the high level of statutory punishment has tended to place the focus of sentencing practices on mitigation, which is contrary to the aim of the legislative changes.

In summary, practitioners were fully aware that the intention behind the recent changes was to introduce a tougher approach to sentencing for sexual offences. However, they also expressed concerns about the increase in statutory penalties as the law does not fit the offence in terms of the proportionality of sentencing. Based on their perception that the law is too harsh, the aim of the legislative changes may not be well reflected in the way they work.

6.4. Practitioners' views on legal framework in sentencing sexual offences

The previous section focused on practitioners' views on the direction of the legislative changes based on a punitive rhetoric. In particular, they argued that the high levels of statutory punishment were one of the reasons for the growing gap between law and practice. Based on their concerns, this section focuses on their perspectives on the law and sentencing guidelines in order to better understand how they are applied in practice.

6.4.1. Practitioners' views on sexual offence legislation

The sexual offence legislation can be divided into two categories: the Criminal Act and Special Acts, as discussed in Chapter 4. In terms of

practitioners' views on the sexual offence legislation, Ashworth's (2015:21) description of two striking features of recent criminal law - 'frequency and complexity' - captures their concerns well. The interviewees frequently criticised the overall legal system governing sexual offences for being too complicated, due to the frequent changes. They also indicated that it was sometimes difficult to keep track of all of the changes. The judges criticised these fragmented changes because, as one judge argued:

> Special Acts have often been amended after some high-profile cases of sexual offences have attracted attention. As a result, revisions have tended to focus on specific types of offence, rather than the bigger picture. As these changes have been made without considering sexual offence legislation as a whole, the overall system can be complex and confusing [J.3.P.1].

Practitioners also pointed out that overlapping content is scattered across different Special Acts, as if the sexual offences legislation were a 'patchwork' of different pieces of legislation. The way in which the special legislation has developed has been to reflect current issues more quickly, as discussed in Chapter 4. For example, some special laws have been created to deal with specific issues, such as the protection of children and vulnerable victims of sexual offences (e.g. the Act on the Protection of Children and Juveniles from Sexual Abuse). In addition, there have been cases where special laws have been enacted to implement certain preventive measures to deal with sexual offenders (such as the Act on the Electronic Monitoring of Certain Offenders). As these special laws cover a wide range of more specifically classified or aggravated versions of sexual offences, based on different objectives, the same provisions are scattered in different special laws related to sexual offences. As one judge noted:

> I think there seems to be some unnecessary overlapping of content in different special Acts. For example, the "Law on the Protection of Children and Juveniles from Sexual Abuse" and the "Law on Special Cases Concerning the Punishment of Sexual Crimes" cover a lot of similar content. It is just that they are divided into separate acts based on the criminal behaviour

> and the victims, which makes the whole system much more complicated [J.4.P.35].

As this issue seemed to affect their practice, practitioners also expressed their concerns. As one prosecutor noted:

> Because these special Acts have been fragmented based on the age of the victim or the way the crime was committed, it takes us a while to even think about which special Act to apply. Even in some cases, judges made mistakes by applying a different special Act [P.5.P.2].

Due to this 'fragmented mosaic of legislation on sexual offences', practitioners often argued that they had to be particularly careful when considering the imposition of preventive measures or in cases involving children and adolescents. They said that they had to go through all of the relevant articles scattered in the specific laws in order to find the most appropriate law to apply. The lawyers in particular seemed to have a lot to say about the complicated legal system. As one lawyer mentioned:

> Sometimes there is a grey area where it is not really clear which law should be applied. In these cases, the police and prosecutors basically use their discretion during the investigation to decide which law to apply. This is really important because if the defendant is not co-operating well or is basically on the wrong side of them, they would just go for the law with harsher sentences [L.13.P.7].

As most of the amendments were focused on specific Acts, another issue arose in relation to the use of the Criminal Act, which has remained largely unchanged since it was first enacted in 1953. Although it regulates a wide range of sexual offences in a broader sense, it mostly regulates general and basic types of offences. The interviewees all pointed out that these general changes seemed to make the Criminal Act nominal. As most of aggravated and detailed cases are regulated in special Acts, the Criminal Act mostly stipulates quite general nature of offences. In that sense,

practitioners argued that the Criminal Act is rarely used in practice. One prosecutor provided an explanation:

> With a bit of exaggeration, the Criminal Act could hardly be applied in practice, unless rape is committed on the street in the middle of the day. Most offences are regulated by Special Acts [P.2.P.4].

The interviewees generally agreed on these issues regarding the sexual offences legislation and most argued that they should be addressed. However, they were not clear about the extent and nature of the reform. In addition, they were generally reluctant to make specific proposals, arguing that this was a matter for the legislature. Although most of the interviewees broadly agreed that there should be a unified single law on sexual offences, their opinions were broadly divided into two groups. The first group argued that all of the provisions in the special Acts should be included in the Criminal Act and that special Acts should only be used when absolutely necessary. As one senior judge said:

> I think that most types of offences should be regulated in the Criminal Act, as it is the fundamental law in criminal matters. Special Acts should only be used in limited cases where it is difficult to include them in the Criminal Act due to their exceptional nature [J.6.P.7].

On the other hand, the second group argued that it may not be realistic to include all of the details of different types of offences only in the Criminal Act. Since the Criminal Act only provides general guidance, the special laws should function in a way that complements the Criminal Act. Therefore, this group insisted that the Criminal Act and at least one special act should co-exist, as they have different roles to play.

6.4.2. Practitioners' perspectives on sentencing guidelines

The previous section explored practitioners' views on sexual offences legislation. They expressed concerns about the recent punitive rhetoric in the

legislation and, more importantly, argued that the current sexual offences legislation is too complex, with similar content overlapping and scattered across different specific Acts.

This section explores practitioners' views on the sentencing guidelines in Korea. These guidelines were introduced to enhance the public's trust in the criminal justice system by addressing the issues caused by differences in terms of sentence disparity between judges (Hong, 2013). As a result, they were designed to be a central part of practice by providing clear guidance on sentencing (Park, 2014). To better reflect the serious concern surrounding sexual offences, the sentencing guidelines have undergone four revisions since their initial introduction in 2009. These revisions reflect a more punitive approach to sentencing (Park and Choi, 2016).

Based on the results of the interviews, practitioners generally found the sentencing guidelines to be a useful tool in their decision-making. Despite the guidelines being only advisory, all of the interviewees were positive about the fact that judges are required to give reasons when they depart from the guideline range. While practitioners indicated that the sentencing guidelines provide a general framework for sentencing decision-making, they also acknowledged that the guidelines may have an impact on improving predictability in sentencing outcomes.

Nevertheless, interviewees had varied perspectives on the actual impact of the sentencing guidelines in practice. Despite recognising the advantages of the guidelines, the judges largely contended that their work had not been substantially affected. As one judge stated:

> To some extent, sentencing guidelines offer a useful framework to start with. Having more sources would obviously be useful for our decision-making, but that is all [J.13.P.9].

Most of the judges argued that since the guidelines were given, they had tried to follow them as closely as possible. The guidelines' wide range of prescribed penalties allows for ample discretion, and therefore the judges did not feel significantly constrained in their sentencing discretion. One senior judge provided a more detailed explanation:

> Because the range provided in the sentencing guidelines is wide enough, we still have plenty of room for discretion, and I think that is essential. If my decision is somehow different from the guideline range, it just makes me think twice, nothing more [J.12.P.13].

It may be challenging to draw general conclusions from the limited sample size; however, less experienced junior judges were inclined towards finding the guidelines more beneficial compared to their senior counterparts. One judge with less than two years' experience stated:

> Sentence factors are generally specific, and it is helpful to have clear guidance. Legal precedents in similar cases are not always sufficient, and having guidance can provide a rough idea of what to expect [J.14.P.10].

The judges held mixed views on the impact of the sentencing guidelines in practice, depending on their working experience. One senior judge explained how he initially understood the role of the guidelines:

> When guidelines were initially introduced, it was anticipated that the Sentencing Commission would prescribe mandatory regulations to follow. This caused considerable concern because it sounded as if the guidelines would significantly restrict the way we worked, but it turned out not to be so different from the old tradition [J.8.P.8].

Some judges described the sentencing guidelines as a tool for safeguarding their sentencing decisions. As one judge stated:

> Guidelines are helpful for providing objective guidance. However, they have not led to significant changes in the way judges work. Rather, their purpose is to convince the public. For instance, adhering to the guidelines implies that utmost efforts are being made to minimize differences in sentencing [J.5.P.5].

As examined in Chapter 3, the judges were hesitant to allow external intrusion in their practice due to their exclusive position. They

have great pride in their area of expertise, and thus they initially opposed the implementation of the sentencing guidelines. However, they appeared to be relieved that the guidelines only serve as advisory, minimally affecting their discretionary power.

The lawyers also shared similar views on the benefits of using the guidelines as a starting point. They specifically appreciated the obligation upon judges to justify any deviations from the sentencing guidelines. Consequently, the lawyers contended that judges may exercise greater caution when using their discretionary powers since the implementation of the guidelines. Nevertheless, the lawyers were not fully convinced with regard to the role of the guidelines as a tool to constrain judges' discretion, as one lawyer pointed out:

> The range of sentences is overall too wide. Judges still have so much discretion in sentencing, even though they claim that their discretion is significantly reduced by the guidelines. Their behaviour is simply burying their heads in the sand [L.13.P.14].

Other lawyers expressed concern that the tendency of judges to follow the given guidelines could lead to negative outcomes in some cases. One lawyer mentioned:

> Judges have the right to offer an explanation when their decisions deviate from the range suggested in the guidelines. It is unlikely that they would desire additional work, thus they may simply pretend that their decisions were within the range, regardless of what their decision-making process actually was [L.5.P.3].

To some extent, enhancing the predictability of sentencing would be beneficial. Nonetheless, the majority of lawyers voiced their concerns about judges predominantly adhering to the stipulated range of guidelines. This growing tendency was thought to devalue the impact of lawyers' arguments during the trial. Despite presenting effective arguments, the lawyers contended that judges would not substantially diverge from the given range when determining sentence outcomes.

Prosecutors also raised issues about the gap between their recommendations and actual sentencing outcomes. This issue was a major research focus of the Prosecution Services even before the introduction of the sentencing guidelines, as noted in Chapter 1. The Prosecution Service and Courts use different sentencing database systems to facilitate their work, which is further explored in Chapter 8. Similar to judges utilising a sentencing database system that includes guidelines and precedents, prosecutors have a separate system. They use the Prosecutorial Guideline System (PGS) to provide recommended sentences for cases, including an accumulated 'sentencing data process tool'. The PGS and this tool are based on past sentencing decisions and guidelines, and prosecutors have often questioned the reasons for the gap between their recommendations and judges' sentencing.

The prosecutors claimed that in order to maintain consistency in their recommendation in similar cases, they should follow the PGS in the same way that judges are required to follow guidelines. The influence of various organisational cultures on the implementation of these database tools was explained by one prosecutor:

> Courts and the Prosecution service exhibit different cultures, primarily in terms of their decision-making approaches. In the Prosecution service, collective decision-making is maintained through a strict organisational culture. In contrast, the Courts operate similarly, but each judge has independent power in decision-making, even if they might not openly admit it. I believe judges have more freedom in this aspect [P.10.P.7].

Some prosecutors also criticised the exclusive nature of the courts in sentencing and questioned the validity of the guidelines:

> Judges usually do not give detailed reasons for sentencing factors. It may be beneficial to record and make these explanations accessible for future reference, as they can serve as valuable sentencing data. Courts may feel that they are fulfilling their duty by adhering to guidelines, but a more detailed explanation of their reasoning would enhance transparency and

> promote a clearer understanding of their decision-making process [P.7.P.4].

The interviewees generally agreed that the sentencing guidelines provided valuable guidance in their decision-making, although they had different views on the impact of the guidelines in practice. Nevertheless, interviewees frequently struggled to articulate their perceptions of the sentencing framework and general legislative changes during the interviews, labelling these topics as 'too academic' or more closely related to 'policy' than their practical work. They highlighted that their focus was solely on the application of the law, and not on subjective evaluations of its righteousness, usefulness or effectiveness. The judges mentioned that their only concern regarding legislative modifications was the degree of severity of the statutory penalty, as this would affect their decision to impose a suspended sentence.

In the case of the judges, they also contended that their work had not been markedly affected, notwithstanding various legislative modifications. Their somewhat apathetic disposition towards the legal framework for sentencing suggested that other significant factors may be more important in practice than legislation. To identify any other potential factors shaping their practice, the next section examines the use of precedents and the influence of organisational culture.

6.5. Influence of organisational culture in sentencing sexual offences

This section aims to examine the influence of organisational culture in sentencing sexual offences. As previously noted, most of the prosecutors and lawyers argued that legislative changes might have had little impact on the sentencing practice of judges due to their exclusive and conservative organisational culture. One lawyer expressed a similar view:

> Legislative change is not the main issue. The real problem is that judges persist in falling back on their lenient precedents,

> rather than adhering to the public's demands. What needs to be changed is the application of the sentencing framework by judges, not the legislation itself [L.8.P.15].

One senior judge also held the opinion that legislative changes would not be enough to influence their work:

> We can still sentence harshly within the guideline range if we think the case requires it. A rise in the minimum statutory punishment does not necessarily result in tougher penalties. Instead, it simply gives the judges the opportunity to listen to the demands of the public and the media. We can still reduce sentencing outcomes in various ways regardless of circumstances [J.11.P.2].

As the majority of the judges involved in this study considered the current legislation on sexual offences to be harsh, the findings regarding judges' approach to minimum sentencing in court decisions could be seen as a conservative form of 'judicial activism' (Fielding, 2011). By expressing resistance towards the legislative and policy modifications from external sources, judges' approach to sentencing could be comprehended as their intentional effort to moderate the punitive law, as shown in the Bloody Code (Galanter et al., 1979). Nonetheless, this may not be the situation in Korea as one judge clarified the contrast between the law and the actual implementation:

> Under sexual offence legislation, there appears to be a broad range of discretion with a fixed minimum and basically no maximum. However, in practice, I feel that there are almost formulaic rules that have to be followed. For instance, if a first-time offender with no criminal history commits rape without criminal agreement, they are likely to receive between x to y years of imprisonment. Therefore, the range used is relatively narrow [J.7.P.11-12].

One prosecutor cited these "formulaic rules" as precedents and criticised judge's inclination to adhere to them. The prosecutor provided an example of video voyeurism, which falls under the category of digital sexual

offences, such as taking photographs of women's legs in a subway using a concealed camera:

> In the case of video voyeurism, for example, the court sentences are so obvious. A first-time offender would likely receive a fine, a suspended sentence for a second offence, and imprisonment for a third offence. According to the media, this leniency in sentencing is the cause of high recidivism rates in these offences. However, judges remain consistent in their adherence to precedents, regardless of legislative changes [P.7.P.9].

Based on the interview findings, two main factors appeared to influence judges' tendency to follow precedents: consistency in sentencing and the influence of court culture. When facing criticisms of their heavy reliance on precedents, judges primarily justified their position by stressing the importance of maintaining consistency in sentencing. They argued for the importance of paying close attention to precedents within their court districts, their panels of three judges, and similar cases to maintain consistency in sentencing outcomes. One judge explained.

> I examine sentencing outcomes in comparable cases. Although guidelines offer a framework, their range is excessively broad. Slight differences in sentences can have considerable consequences for the defendant. There are reports that some offenders share information about courts that are more likely to sentence harshly. Hence, I strive to rely on precedents to ensure consistency [J.5.P.5].

> Another judge further added how he defined consistency in sentencing:

> I heard one academic describe a judge as an author who contributes to a relay story, and that court decisions must appear as if they were written by a single author. This approach appears to be upheld in practice [J.11.P.14].

Furthermore, another judge argued that precedent helps to address the issue of sentencing disparity:

> Sentencing decisions inevitably involve individual judgment. If we rely solely on discretionary power, there can be no consistency. In this sense, referring to precedents in comparable cases can help us to get an idea of the appropriate sentence for a particular case [J.1.P.5].

However, the prosecutors and lawyers heavily criticised the practice of judges for completely overlooking the intention of the legislative changes. They further argued that the judges' adherence to precedents is not primarily about maintaining consistency, but rather reflects a conservative court culture. As Chapter 3 discusses, comprehending organisational influence is vital in the Korean context, as the community-based approach has had a longstanding impact on society as a whole (Jang, 2012). Decision-making cannot be divorced from an organisation's values or pressures as priorities that are institutionally defined are bound to affect the way in which members of the organisation operate (Gelsthorpe and Padfield, 2003). In this study, particularly with junior judges, organisational pressure was observed in decision-making as judges were often concerned about 'sentencing noticeably different outcomes'. As one judge who had been working for less than two years put it:

> Before searching for precedents, I believed the defendant deserved a sentence of life imprisonment. However, previous decisions were not severe. I could not impose a harsh sentence solely on this case based on my opinion. I agree that sentences should be increased in general, but it has to be all together, not just this case. It is challenging not to be influenced by prior outcomes [J.7.P.14].

Another judge argued that she deliberately avoided relying on precedents, considering their potential impact. As previously mentioned, judges and prosecutors utilise their own sentencing database system, which simplifies the search for relevant prior rulings.

Previous studies on computer-supported frameworks for judicial decision-making have shown some positive aspects (Hutton, 2013). It was found that the software tools did not influence discretionary decision-making,

but served to create a system for consistency. In contrast, in this study, one senior judge expressed a belief that the adoption of database systems may be causing lenient sentencing outcomes based on his personal experience:

> It is perhaps a little dangerous to conclude, but the sentencing database system is very well developed and this may ironically contribute to lenient sentencing outcomes. Psychologically, people would feel pressured to sentence harshly compared to other similar cases. similar, but may feel less stressed when imposing similar or slightly more lenient sentences [J.8.P.7-8].

The lawyers also agreed that judges seem to be heavily influenced by accumulated past sentencing decisions and that this was the main reason for the lack of significant change in judicial practice.

To obtain a more comprehensive picture of sentencing practices, another important aspect to consider is the Korean legal culture. As discussed in Chapter 3, sentencing practices in Korea are strongly influenced by the continental legal tradition. To improve adversarial aspects during the trial stage, the development of the Korean criminal system introduced procedural rules from the common law system with a special focus on safeguarding the rights of defendants and victims. One reason for the change in the criminal justice process was the criticism that the trial stage prioritised conviction outcomes, influenced by pressure to conduct speedy trials and the heavy workload of practitioners. During the interviews, it became clear that the current sentencing practices still focus on securing a conviction as the centre of sentencing decision-making, and all of the interviewees unanimously agreed on this. It was also clearly observed during an interview with a senior judge:

> Our primary concern is determining the guilt or innocence of the defendant. The concept of an "appropriate sentencing outcome" is highly subjective and cannot be definitively classified as right or wrong. Judges possess superior training in discerning correct from incorrect [J.2.P.6].

Based on this context, the process of making a sentencing decision is

primarily aimed at finding reliable evidence to demonstrate the defendant's guilt or innocence, from the investigation phase through to the trial stage. Some prosecutors acknowledged the need to address the disproportionate emphasis on securing convictions by introducing a 'focused trial' in some courts. There have been frequent criticisms regarding the blurred lines between the conviction and sentencing stages, and a focused trial allows for allocating sufficient time for each phase separately, allowing practitioners to concentrate on determining suitable sentences for each case. Despite the apparent progress, prosecutors contended that their efforts are still primarily geared towards presenting more data for convictions, rather than aiming for more positive sentencing outcomes.

The way prosecutors work appears to reinforce a conviction-centric culture. One prosecutor asserted their authority to press charges, stating that, "We (prosecutors) believe the defendant is guilty as long as we press charges". This statement implies that they will not pursue a case unless there is a considerable level of certainty about the outcome. In Chapter 3, it was discussed that prosecutors hold significant power from the investigative to trial stages, granting them a "semi-judge" status. Additionally, prosecutors take pride in their work, as noted by one prosecutor:

> Judges determine the final sentencing outcomes; however, we hold the right to press charges. Our role involves investigating the case and identifying suspects. They lack the authority to initiate the process, making it our duty to provide them with the necessary evidence. The system grants prosecutors with this power for a reason, and we should take pride in actively identifying allegations [P.6.P.1].

Most judges and lawyers expressed concern about this over-focus on conviction. One senior judge contended that prosecutors' attitude could lead to an erroneous understanding of the case:

> I occasionally sense that prosecutors purposefully exclude potentially advantageous evidence for the defendant. This may not be a significant concern as defendant's lawyers are doing their job in many cases. However, this raises doubts regarding

the trustworthiness of the prosecutor's dossier [J.8.P.15].

This issue is further discussed in Chapter 8 with specific regard to the use of sources of information. The prosecutors defended their position by arguing their role in the process. One prosecutor said:

> As representatives of the victim, we may display some degree of empathy towards them. However, it is important to maintain objectivity in our representation. The defendant may present additional mitigating factors during the trial, including the existence of a criminal agreement [P.11.P.6].

However, the lawyers criticised the prevailing atmosphere in the criminal justice system, noting that it is based on a 'presumption of guilt' rather than a 'presumption of innocence'. One particular lawyer pointed this out:

> Whilst the law upholds the presumption of innocence as a fundamental right of the accused, I do not believe that this is the case in practice. In reality, prosecutors seem to focus more on confirming their pre-existing beliefs of conviction. For example, they may ask the defendant, "You agree that you committed this, don't you?" rather than questioning their actual innocence [L.2.P.23].

In addition, the lawyers pointed out the characteristics of sexual offences in relation to this conviction-focused setting. One lawyer elaborated:

> Without legal representation, it is doubtful that the accused will receive impartial treatment, given the deep-rooted presumption of guilt in practice. Practitioners appeared to be fixated on producing or finding whatever evidence they could to secure a conviction [L.6.P.1].

The lawyers also discussed the challenges involved in handling sexual offences due to their nature. Since most sexual offences take place in private, finding concrete evidence like CCTV footage is difficult - placing greater emphasis on the victim's testimony. The lawyers flagged this issue when discussing the conviction-focused context. One of the lawyers commented:

> In many sexual offence cases, it is not clear whether the defendant is guilty or not. It appears that judges tend to navigate this dilemma through the sentencing process. Usually, if the victim alleges wrongdoing and the prosecutor brings charges, imprisonment is the standard sentence. However, as certainty is lacking, the incarceration is frequently suspended or reduced to the minimum [L.1.P.10].

Another lawyer elaborated on similar arguments, arguing that judges seldom acquit defendants:

> When there is insufficient evidence and the defendant strongly insists on his innocence, he is usually given a suspended sentence. The court decision makes an illogical statement, asserting “although the defendant did not display remorse and maintained their innocence, we have decided to impose a suspended sentence based on x and y.” [L.14.P.23].

He argued that admitting guilt in sexual offences may not be beneficial, particularly where there is no clear evidence, as it may only make judges feel comfortable giving a sentence of imprisonment. Drawing on his own experiences, he presented his own perspective on this practice:

> I think the judges were not sure about the case because of the lack of evidence. Had they sentenced acquittal, the media would have caused a stir. Judges, who generally avoid the spotlight, simply mediate the sentencing decision in their own way and give the defendant a suspended sentence. We call these cases as ‘compromised outcomes’ [L.14.P.24].

Based on the interview findings, it is evident that judges face a dilemma in their sentencing decisions between a tough law driven by societal pressure and a conviction-focused trial setting. The notion of compromised outcomes implies that the rationale behind sentencing practices tends to inevitably prioritise mitigating outcomes, as corroborated by the findings from the court decisions.

6.6. The role of the media and public opinion in sentencing

This section examines practitioners' views on the public and media influence in sentencing. Overall, practitioners generally agreed that the public and media have an influence on sentencing. However, the extent of this impact and practitioners' opinions varied. In general, their perspectives can be divided into two main categories.

Firstly, it was argued that judicial practitioners must consider public opinion when making sentencing decisions as they are a part of society, and thus, decisions should not be made in isolation. In this regard, the media and public opinion can offer valuable insights from outsiders. However, the concept of 'public sentiment' or 'public opinion' was called into question. Concerns were raised by practitioners regarding the potential influence of the abstract and imprecise notion of public opinion on their practice. One prosecutor also expressed his concerns:

> I believe judicial practitioners should not be swayed by the ambiguous terms 'public opinion' or 'public sentiment'. Therefore, it is crucial that judicial practitioners disregard this unhelpfully vague concept. There is uncertainty regarding who determines these concepts, as well as whether there is a solid consensus amongst the general populace on certain cases. It remains unclear where a definitive 'true' public opinion can be derived from [P.5.P.18].

Practitioners, especially judges, criticised the media's portrayal of their work and sentencing outcomes for being unbalanced. In this context, judges frequently encounter situations where they are accused of delivering lenient sentences, leading them to voice their concerns on this matter.

During the research interviews, most of the judges cited the 'Du-sun Cho case' as an example of how the media and public opinion influenced their work (refer to Chapter 4 for details of the resulting legislative changes). Initially, this case remained unknown to the public when it was first decided on in 2008 (Yoon et al., 2014). However, following its broadcast on a television

programme about the use of electronic monitoring of sex offenders, the situation changed. The perpetrator received a sentence of twelve years' imprisonment for the brutal rape of an eight-year-old girl that resulted in permanent bodily injury. This case sparked an unparalleled public outcry (Seon, 2014). It was particularly notable, as it not only led to a significant rise in punitive measures in the sexual offence legislation but also caused swift changes in the overall sentencing approach employed by practitioners (Kim, 2012). Following this, an extensive discussion ensued regarding the use of alcohol as a mitigating factor in light of the existing guidelines. As a result of the public outcry, the lawmakers amended the legislation to exclude this factor in cases concerning victims who are children or have disabilities. One judge explained:

> This case was sensational in many ways. Although the criminal behaviour and harm inflicted on the victim were incredibly brutal, a sentence of twelve years of imprisonment cannot be considered lenient, given that the killing of two individuals was generally punished with ten years at the time. The sentence was certainly above average by the standards of that era. It is unlikely that the judge expected to be criticised so harshly [J.1.P.12].

The case brought about unprecedented turmoil, as explained above, and the judge further explained about the aftermath of the case:

> The judge presiding over the case almost faced social exclusion as a result of the media and public reaction. I heard that he was completely shocked by all the criticism he received, so he did not take part in any criminal trials for a long time after that case. Perhaps, he deemed the outcome less lenient than the prevalent sentencing practice of that time and based on his own sense of sentencing. However, the general public might have viewed it incomprehensible [J.1.P.12-13].

During the interviews, most of the judges also referred to the phrase 'sentencing sense' as cited in the above interview. Prior to the implementation of a specific direction and guidelines to limit judges' discretionary power in

sentencing, the decision-making process was frequently subject to criticism for relying heavily on the judge's intuition or so-called 'gut feeling' (Kim et al., 2020). Although the concept of ‘sentencing sense’ may appear vague and abstract, and resemblant of the term ‘intuition’, it was frequently used by judges in the past (Ashworth, 1984). Some judges contended that it distinguished their sentencing judgments from the perspective of laypeople, who lack a full understanding and experience of sentencing. In this context, the notion of sentencing encompasses the integration of practitioners’ experiences, knowledge and discretion.

Judges specifically criticised the media as the primary factor that adversely impacted public opinion. One judge even described the media as “the main cause that hinders the independence of the judiciary”. Additionally, the judges criticised the media’s general approach when reporting cases of sexual offences:

> Sexual offences tend to receive significant attention from both the public and the media. However, media coverage seems to be biased towards portraying judges as lenient in such cases. This bias is reflected by an overemphasis on mitigating factors, which often provides an incomplete picture of the reasons behind sentencing decisions. Such coverage creates the implication that judges misuse their discretion [J.11.P.10].

Therefore, some judges argued that they tried not to pay any attention to the media and public pressure because they felt that public opinion might have been manipulated by distorted media coverage. However, they acknowledged that it was challenging to disregard the reaction from the media and the public, particularly when reporters and members of the public were present in the gallery during the trial. One judge explained their potential susceptibility to the influence of the public and the media:

> Clearly, judges would not say, ‘I think this ruling is suitable, but I will alter it due to media pressure’. Regardless, they are inclined to hold onto their initial opinions. However, this would produce significant internal psychological turmoil. Knowing that the public will be very critical of the outcome of the sentence, but should I

still stick to my initial decision? [J.2.P.12].

However, some judges did not view the pressure as wholly negative. The younger judges, in particular, admitted that they often used the public and media opinion as a means of persuading senior judges to hand down harsh sentences. As one judge put it:

> I personally think that judges tend to soften as they gain more experience. In particular, senior judges may be more lenient in their sentencing. To address cases where our opinions differ significantly, I sometimes cite criticisms of sentencing outcomes in similar cases from the media to persuade him to impose harsher sentences [J10.P.14].

Prosecutors also often face media attention during the investigation phase of high-profile cases. However, they tend to view it more favourably than judges. Prosecutors recognise that the media and public opinion play a critical role in sentencing practices, as is evident from the legislative changes. They contended that on occasion, it may be necessary to employ public opinion to alter customary practices by presenting a precedent-setting case grounded in societal shifts. One prosecutor contributed his perspective on this matter:

> I find it useful that the media conveys the public's opinion to the judiciary in a direct manner. Often, practitioners apply a mechanical approach to the sentencing framework. The attention from the public and media can help to mediate this tendency, in certain instances [P.12.P.18].

On the other hand, some prosecutors expressed concern about the way the media influences judges' sentencing decision-making. One prosecutor argued:

> I personally think that prosecutors do not really get much pressure from the media, but judges seem to take it quite seriously. Perhaps this is because our recommendations often accurately reflect public concern, as we follow the statutory sentence. The evidence demonstrates that our recommended

> sentences are more severe than those ultimately determined by judges, suggesting that judges may exercise greater caution when considering mitigating factors in high-profile cases [P.1.P.7].

This argument was also supported by the interviews with the lawyers. All of them stressed that judges seemed to be strongly influenced by the media and public opinion. One lawyer provided their own perspective, linking it to the courts' organisational culture:

> I think it would be a lie for judges to say that they do not care about public opinion. In nature, judges seek to blend in with the conservative atmosphere of the courts and prefer to maintain anonymity within the justice system. However, if a case attracts media attention and their names are all over the internet, I bet they cannot stand it [L.14.P.25].

Another lawyer gave an example of a previous case that he experienced that involved a huge media outcry after the victim killed herself during the trial stage:

> During the initial trial, the defendant was released on bail...the situation changed completely when the victim killed herself after leaving a suicide note...releasing the defendant on bail during the sexual offence trial usually means that the judge was pretty sure that he was not guilty. However, after media scrutiny, the defendant was ultimately sentenced to imprisonment. This phenomenon of sentencing outcomes being influenced by the media and public opinion occurs, and unfortunately there is not much we can do about it [L.1. P.23].

This section primarily explored practitioners' perspectives on the impact of the media and the public on sentencing practices. Specifically, practitioners criticised the lack of balance in media portrayals of sexual offences, which may result in the dissemination of prejudiced information to the public. While laypersons’ views may offer valuable input, practitioners often expressed concerns about the potential for pressure to have an impact.

6.7. Concluding comments

This chapter explored practitioners' viewpoints on the legal framework and sentencing practices for sexual offences. The findings of the interviews indicate that the majority of participants, particularly judges, appeared to view the current sentencing framework for sexual offences as overly punitive. Consequently, the sentencing practices lean towards mitigating sentencing outcomes. Although practitioners acknowledged the concerns regarding sexual offences and the need for stricter legal measures, they perceived the recent changes as a manifestation of populism rather than a result of in-depth analysis.

By understanding their overall views on the sentencing framework, this chapter has also shown how practitioners' application of the law in practice appears to be significantly influenced by their organisational culture, which is based on a conservative and strict hierarchy among its members. Due to their tendency to respect their organisational values and the opinions of their seniors, practitioners rely heavily on precedents in their sentencing practices. This has resulted in criticism that these practices do not reflect public concerns and legislative changes. The study also examined the influence of the media and public opinion on practitioners and the pressure they face from these sources.

To provide a more in-depth understanding of sentencing practices in sexual offences, the next chapter focuses on practitioners’ views on sexual offences and the victims and how their perspectives might shape their decision-making.

Chapter 7. Sentencing reality 2: Mitigation: the irony of victim-oriented measures

7.1. Introduction

This chapter examines sentencing practices in sexual offence cases by exploring practitioners' views on victims of sexual offences. Previous chapters investigated the dissonance between legislative efforts to increase sentences for sexual offence cases and the reality of the imposed sentences. The analysis of court decisions aimed to understand the current sentencing practice and the interview findings focused on exploring how practitioners viewed the given sentencing framework and how they applied it in practice. Due to their varying roles and influences from their respective organisations, the interview findings revealed a diversity in views among practitioners. Nonetheless, practitioners across different occupations exhibit similar attitudes towards victims of sexual offences.

It is often argued that the concept of sexual offences has a special status in modern society, and what distinguishes sexual offences from other types of crime is the significance of the victims (Terry, 2013). Severe emotional distress and psychological damage, as well as physical harm, can result from sexual crimes and this is of great concern (Shapland et al., 1985; Palaudi, 1999). As a result, there have been increasing calls for victims' perspectives to be adequately incorporated into the criminal justice process (Walklate, 2007).

Furthermore, sexual offences usually take place in a private setting where only the victim and the perpetrator are present. Consequently, practitioners face the challenge of selecting between two conflicting accounts of what happened (Wolhuter et al., 2008). The absence of corroborating evidence or witnesses further distinguishes sexual offences from other types of crime, as practitioners' perspectives may inevitably play a more significant role in their decision-making process (McGregor, 2012). Chapter 6 discussed how the recent increase in statutory sentences for sexual offences has led to

more pressure being placed on practitioners in practice. The process of sentencing entails determining the guilt or innocence of defendants and deciding on an appropriate punishment. In this regard, having a credible victim, referred to as the 'real victim', can ease the burden on practitioners by alleviating doubts about the possibility of a false accusation.

The purpose of this chapter is to examine the stereotypes that practitioners hold about victims of sexual offences, which will be referred to as the 'real victim' frame. After outlining the issues with this frame, the chapter proceeds to explore the characteristics of the 'real victim'. To better understand practitioners' deeply embedded stereotypes regarding sexual offences, this chapter delves into the informal criminal agreement and its role and impact in practice. The chapter aims to demonstrate how the stereotypes prevalent in sexual offence trials may exclude or silence victims' voices throughout the trial. After a thorough discussion about the implications of the real victim frame in the sentencing of sexual offences, the chapter concludes by rethinking the status of victims.

7.2. The 'real victim' frame

The interview findings indicated that all of the participants held shared stereotypes regarding typical sexual offence victims. These stereotypes were constructed around the portrayal of victims as vulnerable and innocent, based on the image of an 'ideal' victim who played no role in their victimisation (Spalek, 2006). Similar to the fairy tale character of 'Little Red Riding Hood', the depiction of the 'real victim' as a young and innocent girl attacked by an unknown stranger also resonates with rape myths (Christie, 1986). Rape myths are defined as prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists (Burt, 1980: 217).

Despite social and cultural variations, there appears to be some uniformity in the way that rape myths are constructed. Previous studies have also argued that there is a profound issue of victim credibility, which revolves

around the extent to which victims fit the stereotypes of rape myths (Temkin and Krahe, 2008; Hester, 2013; Lewis et al., 2014). Common elements of widely accepted rape myths include a victim-blaming culture such as 'she asked for it' and the idea that only certain types of women are raped.

Additionally, there is a general sense of scepticism towards rape allegations such as 'it was not rape', 'she should have resisted', and 'she liked it'. Furthermore, there are justifications of the perpetrator, such as 'rapists are sex-starved, insane, or both' (Burt, 1980; Payne et al., 1999; Grubb and Turner, 2012). These deeply entrenched prejudices have long been criticised by academics as providing the underlying rationale for justifying male sexual aggression against women by perpetuating the culture of victim blaming (Lonsway and Fitzgerald, 1994; Bohner et al., 2006).

7.2.1. Issues of the ‘real victim’ frame

With typical images of devastated and distressed victims of sexual offences in mind, the participants in this study all argued that they carefully examined the victim's behaviour, reactions, attitudes and, most importantly, how the victim had responded to their experience of victimisation. Practitioners' views of sexual offence victims were frequently linked to vulnerability and insecurity in their behaviour. Based on these profound stereotypes, the victim's credibility was easily questioned if they did not respond in an 'acceptable' or 'expected' way. In regard to rape cases, one female judge also cast doubt on victims’ credibility due to their lack of 'typical' reactions:

> I was uncertain how to evaluate the impact of the sexual offence on her. She appeared to behave normally, and did not demonstrate an overwhelming concern about the incident. She described the experience simply as a minor irritant. It was necessary for me to clarify with her several times if she understood the gravity of the situation [J.6. P.12].

On this basis, a sexual offence trial inevitably centres on identifying

the actual victim by emphasising vulnerable and distressed portrayals of victims. Having certain images of the typical sexual offence victim raises a serious issue, as it inevitably divides victims into two groups: deserving and undeserving victims (Walklate, 2007). The concept of a ‘hierarchy of victimisation’ (Carrabine et al., 2004:117) has prompted academics to pay attention to the differentiation of victim categories. The influence of victim stereotypes on case interpretation and construction by practitioners, as well as the treatment of victims themselves, is a crucial factor to consider. This may result in varied experiences of the criminal justice system depending on one's status as a victim. To clarify, individuals who are truly deserving of protection will benefit from the integrity and innocence they demonstrate, which establishes their status as the actual victim.

However, 'undeserving' victims whose characteristics deviate from the narrow category of genuine victims (Randall, 2010) will be seen as less deserving of protection and portrayed as 'unworthy' victims in the criminal justice process (Hall, 2013). Thus, this dichotomy is more likely to result in genuine victims securing what they deserve, whereas victims who do not conform to the stereotypical expectations of such a discretionary process of identifying the true victim will potentially be excluded or marginalised during the process (Mawby, 1988).

The concept of the ‘real victim’ frame emphasises the innocence and insecurity of the victim, such that vulnerable victims, such as children and people with disabilities, are more likely to be believed as real victims (Jang, 2012). Conversely, practitioners may exhibit less sympathy towards victims who do not conform to their preconceived notions of a victim, potentially leading to ‘secondary victimisation’ (Goodey, 2005). Secondary victimisation refers to the conduct or mindset of criminal justice professionals founded on victim-blaming attitudes, insensitive responses, or deficient procedures (Orth, 2002; Hall, 2013). Consequently, the suffering caused by the way victims are treated within the criminal justice system is of great concern to practitioners and academics.

The inadequate response of practitioners and the biased criminal justice system, founded on stereotypes of social and cultural perceptions, can

lead to secondary victimisation. A recent study even described the encounter of sexual offence victims with the criminal justice system as a process of 're-victimisation' (Kim, 2023). The re-victimisation process differs slightly from the concept of secondary victimisation, as it implies the victim's voluntary performance in order to be accepted as a real victim. The re-victimisation process reflects the victim's willingness to secure her status as a legally genuine victim by showing what she should show, as there are typical reactions and emotions that real victims should show during the process based on practitioners' stereotypes (Kim, 2022a)

According to the interview findings, the practitioners all acknowledged the need to protect victims from secondary victimisation. The judges and prosecutors expressed similar sentiments, underlining the importance of safeguarding victims whilst maintaining objectivity towards the case. However, the lawyers were more cynical about victims' credibility. As one lawyer argued:

> Victims’ testimonies cannot be taken at face value. It would come as a surprise to discover how frequently they change their story. What they say in front of me and during the investigation can be completely different stories. If you trust them easily, you will feel really betrayed [L.2.P.3].

Based on stereotypical representations of devastated and distressed victims of sexual offences, practitioners tended to doubt the credibility of any victim who did not conform to their expectations. Unless victims exhibit typical reactions or behaviours, practitioners typically assume that there is an increased likelihood of victims being untruthful. In particular, the judges contended that their suspicions in such cases were reasonable, as they must maintain an objective standpoint. As one judge explained:

> We must consider both perspectives to make an objective and fair decision. I remain vigilant towards the possibility of unfounded allegations, as it appears to be common in cases of sexual offences [J.4. P.3].

Practitioners justified their stance of being alert and aware of the possibility of false accusations by stating that it was due to the potential for

victims to fabricate stories for their own benefit. This attitude is not uncommon and has been noted in previous studies where sexual offence victims are often labelled as liars or exaggerators if they do not exhibit standard ideal victim reactions (Jordan, 2004).

7.2.2. Practitioners' stereotypes of the 'real victim'

The previous section explored the concept of the 'real victim' frame and concerns about the implications of this frame, such as secondary victimisation. This section provides a more detailed discussion of practitioners' stereotypes by exploring examples of real victim images based on interview analysis. During the interviews, the following issues commonly emerged as crucial aspects to examine in relation to the credibility of sexual offence victims: the victim's general reactions to the victimisation, the consistency of the testimony and the relationship between the victim and the defendant.

Firstly, practitioners often mentioned devastated and distressed images of victims in terms of the expected reaction or behaviour of a typical victim of sexual offences. Some practitioners suggested that returning to normality would be a challenge for victims of sexual offences, based on the belief that they may struggle to move on or forget their experiences. Consequently, these practitioners seemed to pay more attention to evidence of mental distress and psychological harm. As one judge noted:

> Considering the healing process, mental distress might be a more serious issue than bodily injury. Psychological damage might not be visible but it might completely destroy her life. That is why we need to examine this issue more carefully [J.2. P.2].

Therefore, if the victim requires medical assistance for mental support and is unable to attend work or education, this is more likely to correspond with what practitioners would expect in typical sexual offence cases. Furthermore, the victim's physical and mental condition also serves as a valuable resource for evaluating the consequences of the sexual offence for the victim. Although examining a victim's mental condition after a crime can

be challenging in comparison to visible physical harm, some judges stated that they can determine the severity of the victim's damage by observing their behaviour. Practitioners commonly provided examples of typical behaviours expressed or displayed by victims of sexual offences, which included severe anxiety, depression, or suicidal tendencies. One female judge described a situation in which she felt the victim's pain deeply:

> She remained in a state of shock, covering all the mirrors and windows in her house because she could not see herself. Even during the trial, she avoided lifting her head, visibly disturbed [J.8. P.19].

Although practitioners' perceptions of sexual offence victims were often based on vulnerable images, they held different views on some issues. For instance, practitioners had mixed opinions about the time of reporting by victims of sexual offences. In particular, judges avoided interpreting the time gap between the offence and the report as a factor undermining the victim's credibility. Given the experience of victims, some judges explained that it is comprehensible that they may not seek any further involvement in matters pertaining to the case.

However, over half of the participants expressed the need for a closer examination in cases where there is a significant time gap between the crime occurring and the victim reporting it. One lawyer, for instance, raised doubts regarding the authenticity of victims due to the changing societal attitudes towards gender and sexuality:

> Society has undergone significant changes whereby we are considerably more open to issues of gender and sexuality. Compared to the past, victims can now report crimes much more easily via diverse routes, particularly in cases of sexual offences. If reporting is significantly delayed, then their credibility may be questionable [L.1. P.14].

Another typical behaviour exhibited by victims of sexual offences is whether or not they want to contact the offender after the incident. According to most practitioners, victims will not want to get in touch with the offender.

This led the lawyers to argue that they should always check if the defendant has received any messages from the victim since the offence, as this will undermine the victim's credibility. In addition, if the offence was committed in a pre-existing relationship, lawyers also carefully monitor victims' social media, on the assumption that real victims will not be able to go on with their normal lives as if nothing has happened. The messages and posts on social media subsequent to the incident are valuable pieces of evidence that the defendant’s lawyers can use to challenge the credibility of the victim during the trial process. One lawyer referred to a situation where he had strong doubts about the victim's credibility in regard to this point:

> She went on a trip with her friends just a few days after the crime and posted many photos of herself smiling with her friends on the beach. How can you consider her as the real victim? [L.3. P.11].

Based on similar grounds, the Supreme Court recently overturned the High Court's decision in a sexual offence case, sparking much controversy (The Supreme Court of Korea, 2015a). The case involved a 47-year-old man accused of raping a 15-year-old girl by exploiting his authority as a company owner. According to the Supreme Court judges, who cited the victim's behaviour following the incident, the offender and victim had romantic feelings for each other. As the victim wrote more than 100 letters to the offender stating that she still loved him and continued to try to contact him, the judges insisted that it was unlikely that the sexual relationship had taken place without her consent. Several academics and practitioners strongly criticised this verdict, stating that it completely ignored what the victim went through as a result of the horrific situation of rape, and that the judges should have more carefully considered the hierarchy arising from the social position and age gap in their relationship (Kim, 2016; Jeong, 2016).

Previous studies have generally argued that victims of sexual crimes are more afraid of people finding out about the crime than the crime itself, as was also discussed in Chapter 1 (Chang, 2012; Korean Women Lawyers Association, 2014). In this study, practitioners also stated that victims are often reluctant to participate in the legal process because they do not want anyone

to know what has happened to them. Consequently, they may present themselves as unaffected in order to avoid revealing what has happened to them (Byun, 2004). In this respect, practitioners' stereotypes of sexual offence victims do not adequately capture the fear of social stigma and, more importantly, overlook the reality of what sexual offence victims often go through.

Moreover, the practitioners all highlighted the consistency of the victim's testimony as one of the key factors they consider in sexual offence cases. The court decision analysis indicated that only 18 out of 72 convicted cases explicitly stated that the victims had testified in court. Although the sample size may be limited, prison sentences were more commonly given to offenders (12 cases: 70%) than suspended sentences (5 cases: 29%) when the victim's testimony was mentioned during the trial. This indicates the significance of the victim's testimony in sexual offence cases, as it may be the only available evidence (Ahn and Choi, 2015). Although practitioners may describe ‘consistency’ in different ways when evaluating a victim’s testimony, the assessment of its credibility ultimately relies on their own discretion. One judge offered additional clarification on this:

> The consistency of the testimony from the investigation to the trial is key. This involves determining whether the victim's argument follows a logical structure and can be deemed credible. If the victim's account appears believable, then it is more likely to be truthful [J.1. P.30].

Practitioners inevitably have to examine and interpret the victim's testimony on the basis of their existing knowledge or experience (Ellison and Munro, 2010). It is doubtful whether they can completely comprehend the profoundly disturbing circumstances leading up to the crime and its aftermath. While some previous research suggests that sexual offence victims sometimes benefit from forgetting what happened in order to cope with their lives, this aspect is not commonly acknowledged during the process (Temkin, 2000; Jang, 2012). Instead, inconsistencies in the victim's testimony may be interpreted as indicating the possibility of fabrication, which discredits the victim's status as the true victim.

Finally, the interview findings suggested that practitioners focused on the relationship between the victim and the offender in sexual offence cases. Additionally, crucial information for assessing the victim's reliability included whether they were acquainted with the perpetrator, and the nature of their meeting. A problematic scenario that often arises is when the perpetrator is the victim's spouse or partner. Several interviewees referred to the escalating number of sexual offences in romantic relationships, and they had diverse opinions on this. Some practitioners argued that they tried to focus solely on the case and ignore previous histories in order to make an objective judgement:

> I focus solely on the case, as a sexual relationship prior to the case does not guarantee consent for this case. History is merely history [J.3. P.20].

However, most practitioners argued that they pay more attention to these cases because, if there was no problem before, there is a greater chance of mutual consent for the case being transferred. One judge offered his perspective:

> If two individuals are in a romantic relationship, and have previously engaged in sexual activity without any issue, it is reasonable to assume that any subsequent sexual encounter was consensual, provided there are no clear indications to the contrary [J.1.P.23].

This sceptical attitude was more prevalent among the lawyers, who viewed these cases as minor incidents or brief commotions caused by miscommunication or even women's unpredictability. One lawyer provided a similar view:

> I once worked on a case in which an ex-girlfriend made an accusation of rape against the defendant after the couple had broken up. This was because he broke up with her and out of revenge she just brought a case to basically ruin his reputation. My prior experiences have led me to be wary and doubtful of these kinds of sexual offences [L.10. P.23].

Furthermore, the connection between the victim and the defendant may be linked to the victim's personal details, such as how they first met. Due to the prevalence of victim blaming and scepticism among practitioners, if a particular victim's occupation, conduct or behaviour does not conform to stereotypes of ideal victims, they may face negative attitudes from practitioners (Jordan, 2008). Most judges stated that they endeavour to avoid being influenced by personal bias, particularly in cases involving victims who work in the sex industry. In contrast, the lawyers asserted that they are more inclined to scrutinise the credibility of these victim groups. One lawyer expressed a comparable perception of sex worker victims:

> She was working in the sex industry. They met at a karaoke. She was there because he chose her. What more do you need? In the past, it would have been impossible to even bring this case to the court stage [L.12. P.21].

As discussed above, the use of stereotypes about victims of sexual offences can have a detrimental effect on their interaction with the criminal justice system, as these stereotypes are often used to discredit the credibility of the victim. Practitioners aim to prioritise the protection of individuals who could be considered 'real' victims. Unfortunately, if a victim does not conform to the narrow definition of a 'real' victim, they may be further excluded from the process. The victim's experience of cross-examination is often described as a humiliating and degrading process (Wright, 1995). Although secondary victimisation may occur, most lawyers admitted to using cross-examination as their primary tactic to undermine the prosecution. One lawyer even boasted about asking tough questions during cross-examination:

> I often adopt an aggressive approach towards the victim during cross-examination. Obviously, prosecutors and judges stop me if I go too far, but it is often the most powerful weapon to attack the victim's credibility [L.11. P.17].

A number of practitioners, particularly judges, were reluctant to reveal what made them suspicious of the victim's credibility, although they did have specific ideas about what victims would or would not do. These perceptions tended to be linked to the possibility that victims might have other motivations

behind the accusation, such as financial issues or personal revenge. Based on this context, the following section will discuss the informal criminal agreement in detail as the financial compensation aspect of such agreements is often used as a factor that undermines the victim.

7.3. The informal criminal agreement in sexual offence cases

Previous sections demonstrated the stereotypes of sexual offence victims that are commonly held by practitioners. While perceptions can vary depending on occupation, many interviewees held specific ideas about what real victims do or do not do during the process. Detailed examples that may lead practitioners to question the credibility of the victim were discussed and in this section one of the most influential mitigating factors, the informal criminal agreement, is examined in more detail.

The informal criminal agreement in Korea is the result of an agreement between the victim and the defendant, as explained in previous chapters (Chapters 1 and 4). This agreement is referred to as 'the victim's unwillingness to punish the defendant' and is an important mitigating factor in the sentencing of sexual offences (Kim and Ki, 2014). Based on its practical application and impact, this section examines how practitioners' stereotypes of victims of sexual offences affect its use.

7.3.1. The rationale behind the informal criminal agreement

The interview findings indicated that all of the practitioners considered the informal criminal agreement to be an essential element to consider in sentencing sexual offences. Notably, the judges stated that as sexual offences are a violation of the victim's sexual determination, it is fundamental to take the victim's voice into account, as one judge explained:

> Victims' opinions are a key element in the sentencing of sexual offences. The role of informal criminal agreements is likely to be

> crucial, given the impact of sexual offences on victims. We focus on their stories and whether victimisation has been restored [J.4.P.5].

The informal plea bargain is a crucial source for understanding the victim's situation in relation to the impact of the sexual offence on them. As explained by one judge.:

> Sexual offences can have a detrimental impact on the victim's education, profession, and overall well-being. An essential aspect is to investigate the extent of victimisation, physical and psychological harm, coping mechanisms, and the adequacy of compensation to address the damage caused. The agreement comprehensively covers these points [J.9.P.28].

As the informal criminal agreement offers victims the chance to describe their victimisation, the rationale behind it is similar to that behind the introduction of Victim Impact Statements (VIS) in the US and Victim Personal Statements (VPS) in England and Wales, as discussed in Chapter 4. These sources commonly highlight the harm caused to victims, aiding criminal justice agencies in comprehending the offence (McBarnet, 1981; Goodey, 2005). Within the adversarial system, the application of VIS and VPS has attracted controversy as to whether the victim's opinion should have any impact on the sentencing decision at all (Edwards, 2004; Walklate, 2007). There is a concern regarding a fair trial, as it would be unjust for an offender's sentence to be affected by the victim's disposition, whether they are seeking retribution or forgiveness (Matravers, 2010).

Unlike the use of VPS and VIS, which have generated heated debates, the informal criminal agreement has long been taken for granted as an essential element of sentencing in Korea, despite playing a similar role. While it has gained significant use across the country, there is a distinct lack of research into its implications and effects, as noted by Jang (2012). Thus, precisely when and why it was initially developed and implemented remains unclear. A previous study suggested that the implementation of this measure may be related to the general emphasis on the concept of community in Korea in the past (An and Yoon, 2014). Drawing on the influence of Confucius, there

appears to be a widespread recognition that communal values may take precedence over individual values to ensure social stability, as previously discussed in Chapters 1 and 2 (Hahm, 2003; Chung, 2016). Given the historical context, it could be argued that informal settlements among community members have been used as a customary and legal practice for a long time (An and Yoon, 2014). One senior judge expressed a similar view with regard to the importance of considering the notion of the community:

> The development of Western societies centres around the idea of ‘contract’, while many Eastern countries foster the concept of ‘community’ or ‘we-ness’. Family is a fundamental building block on a small scale, with the nation being the largest expression of this principle [J.5.P.4].

He additionally contended that the emphasis on community could have played a role in fostering a general culture of respecting the viewpoints of community members in sentencing:

> …excluding a member from the community may have been viewed as the most severe punishment, which is why community members attempt to resolve issues within their own boundaries. This community-centred way of thinking continues to influence many aspects of our current systems [J.5. P.4].

7.3.2. Identifying the true intention of the victim in the agreement

The interview findings showed that practitioners focus on two specific aspects of the informal criminal agreement to ensure that it truly reflects the victim's genuine views: the defendant's efforts to restore the victim (the premise of the agreement) and the victim's true intention behind her unwillingness to punish the defendant (the outcome of the agreement). One senior judge provided more details of what they consider from the agreement:

> Mainly, the examination focuses on how and why the parties involved reached an agreement. It's essential to establish whether the victim genuinely intends not to punish the offender.

> With regard to restoration, we check whether she was physically harmed, how serious the harm was, whether she received additional psychological treatment, and so on [J.11. P.7].

With regard to the defendant's restorative efforts, the practitioners' approach seemed straightforward. Since restoration usually takes the form of financial compensation, practitioners consider whether the amount of compensation is sufficient to repair the harm caused by the offence. Consequently, they commonly review medical reports to evaluate the extent of the harm, as the compensation typically encompasses the medical expenses related to the victim's physical and psychological injury. There does not appear to be any specific guidance on the amount of money to be awarded and practitioners must take into account all of the other relevant circumstances, including the economic status of the defendant. Nevertheless, practitioners seem to have established their own standards based on their experience, as illustrated by one judge's comments regarding the amount of compensation to be awarded in sexual offence cases:

> What we need to determine is whether the compensation granted is adequate to repair the damage caused. Regarding rape cases, the typical amount of compensation paid is approximately 30 million won (about £20,000), with some cases even awarding as much as 80 million won (about £55,000) [J.1.P.19].

The amount he gave was just an example based on his own experience and this may not be a representative average. However, practitioners had a general standard for an acceptable level of compensation for sexual offences, although they did not specify the exact amount during the interviews.

All of the practitioners argued that the genuine intention of the victim behind the unwillingness to punish the defendant is the most important element to consider in the informal criminal agreement. As it functions as a vital mitigating factor for the defendant, all of the judges and prosecutors assertively stated that they focus in particular on the process of reaching the agreement. In the past, judicial practitioners have faced significant criticism

for their tendency to view agreements merely as formalities, leading them to overlook the complex circumstances surrounding them (Chang, 2012).

The interview findings indicated that practitioners were well aware of the criticism regarding the misuse of the agreement in the past. Thus, they emphasised that they do not view agreements solely at face value or as mere formalities. One senior judge explained a modification of judicial practice in regard to the impact of the informal criminal agreement:

> I believe there have been significant changes in the way we deal with the agreement. Nowadays, we focus more intently on the agreement's particulars and seek to uncover the victim's true intentions. This is particularly relevant when dealing with disabled victims or minors. It is imperative that we move away from the time when the agreement was almost the only factor in criminal proceedings [J.5. P.24].

He further argued that the power of the informal criminal agreement is less significant in ‘serious’ cases, which is also supported by the analysis of court decisions in Chapter 6. The findings from the court decisions showed that the impact of the agreement was less significant in rape cases than in attempted rape cases. Moreover, if a defendant had a previous sexual offence conviction, it was not deemed a significant mitigating factor. Likewise, all of the judges clarified that the agreement had little impact on their decision making in cases involving vulnerable victims.

7.3.3. The role of victim’s lawyers and the informal criminal agreement

The previous section discussed practitioners’ focus on identifying the true intention of the victim in relation to her willingness to punish the defendant. To find out the victim's real opinion on the outcome of the informal criminal agreement, practitioners usually contact the victim or the victim's lawyers. They seem to carry out this process in writing in order to avoid unnecessary secondary victimisation, but ask for further verification if necessary. In such

instances, practitioners commonly reach out to the victim through telephone calls or by calling them into the office. Over 50% of the judges and prosecutors stated a preference for contacting the lawyers of the victim to ensure the victim's protection. In the majority of cases, the audit process appeared to be carried out by personnel from the investigation team at the Prosecution Service (for prosecutors) or by sentencing investigation officers (for judges). However, some prosecutors and judges argued that they try to check it themselves, just to be sure, and the majority of the interviewees argued that they always check directly with vulnerable victim groups. One senior judge explained the importance of this further check:

> With respect to the victim's reluctance to penalise the offender, it is risky to take the outcome of the agreement at face value. We aim to encourage officers to engage in detailed discussions with the victim, to go beyond superficial enquiries into her feelings, and to fully assess her circumstances to determine whether the details of the agreement are in keeping with her reality [J.4. P.15].

When the offence is committed by a family member, the situation becomes significantly more intricate for practitioners. Judges and prosecutors commonly stress the importance of exploring these cases from multiple perspectives to gain a comprehensive understanding. Despite paying close attention to the agreement details, they frequently encounter obstacles in identifying the true opinion of the victim due to the complicated dynamics between the defendant and the victim. One judge shared her experience in a case where the defendant was the father of the victim:

> The victim sometimes even came to the trial several times to insist that she had already forgiven her father and did not want him to be punished. Her expressions of forgiveness seemed sincere and genuine, making it difficult to discern her true intentions. It was so difficult to tell even after a thorough examination [J.2.P.8-9].

As it is almost impossible for practitioners to fully grasp all of the subtle and complicated dynamics within a family, they all argued that these cases

are very difficult to deal with. One senior judge explained the dilemma he faced in regard to his decision-making in a particular case:

> It is challenging to handle cases where the victim is a minor and the defendant is the only carer. The victim desperately asked that her father not be punished for her sake, because she did not want to be sent to foster care. I sometimes wonder if sending him to prison was the best solution for her future [J.7.P.12].

Victims' lawyers play a crucial role in conveying their clients' opinions to the defendant, thereby preventing any further secondary victimisation during the process of reaching an agreement. Although it will be mentioned in Chapter 8, judges were particularly satisfied with the role of victims' lawyers as representatives of victims. Judges placed high value on the fact that victims' lawyers are 'one of them' with legal knowledge, as this means that they are able to communicate more effectively with each other. The victim's ambiguous status often removes them from the process as the criminal justice agencies replace their voices (Edwards, 2004). By taking away the victim's direct platform to speak, their role may be reduced to the symbolic (Hope, 2007). This aspect will be further discussed later in this chapter.

According to the findings, however, victims' lawyers also complained about their status and the way they are treated during the process. One lawyer shared her experience:

> I believe that judges and prosecutors perceive victims' lawyers as a kind of carer who does all the chores. The court even reprimanded me for insufficiently aiding a disabled victim to attend court, although this was their responsibility. Since the criminal justice system instituted this role (victim's lawyer) to safeguard victims in a more effective manner, the court appears to think that they have done their part [L.14.P.20].

Furthermore, it was found that the extent to which victims' lawyers are involved in the trial varies. There are instances where the victim's lawyers do not attend the trial at all, according to some judges. One prosecutor provided his view on this aspect:

> Simply put, in trials, the victim's lawyer has no place to sit. They usually sit in the public gallery. Additionally, judges may allow them to speak but it is not obligatory. With phases such as 'If you have something to add, you may speak', appearing to grant preferential treatment [P.10.P14].

As it is not always guaranteed that the victim will be well represented by their lawyer due to lawyers' varying levels of involvement and ambiguous status, the judges and prosecutors all argued that they pay more attention to cases involving vulnerable victims. Practitioners must focus on vulnerable victims who are incapable of making rational decisions as it is crucial to establish whether the agreement was based on the victim's true intentions.

Most practitioners also acknowledged that they could not devote the same level of effort and attention to all victim groups due to limited time and resources. Therefore, they tend to focus on scrutinising the circumstances of vulnerable groups, such as children or disabled victims. The prosecutors and judges claimed that they try to contact the victim or the victim's lawyer directly to verify the victim's true views and current circumstances. However, in ordinary cases of sexual offences involving non-vulnerable victims, practitioners tended to think that it was not necessary to check with victims unless there were exceptional circumstances. Therefore, these typical cases, including those with adult victims, which form the majority of sexual offences, could be marginalised from the process. One judge provided a further explanation, and all of the practitioners concurred in a similar manner:

> We prioritise vulnerable victims as they may not be able to make rational decisions on their own. With adult victims, we only apply extra scrutiny if there are exceptional circumstances. Since they are grown-ups, we assume that their opinions are clearly represented in the agreement [J.3. P.27].

In this sense, judges and prosecutors are more likely to take the informal criminal agreement at face value or as a mere formality when cases involve adult victims. Unless there are particular circumstances that make these adult victims vulnerable, such as mental distress, the involvement of their lawyers might also be limited as these victims are more likely to be

capable of making their own decisions. However, it should be noted that adult victims may encounter greater scrutiny in proving their status as a real victim in relation to their motivation for reporting the crime. This is related in particular to the economic aspect of the informal criminal agreement.

7.3.4. Economic compensation and the ‘real victim’ frame

Since the victim's unwillingness to punish, which is the result of the informal criminal agreement, acts as a mitigating factor, the agreement should reflect the defendant's sincere remorse, as expressed by his or her efforts to make a restoration (Chang, 2012). According to the interview findings, all of the practitioners argued that they consider the amount of compensation money to be an essential standard for judging the defendant’s sincere remorse and efforts. These findings align with previous research indicating that practitioners consider sufficient monetary compensation crucial for achieving a successful agreement.

However, the focus on the economic aspect of the agreement appears to raise concerns as, in reality, there are limited restoration options for victims (Korean Women Lawyers Association, 2014). Previous research has shown that practitioners consider financial compensation, speedy restoration and resolution of the case to be the main benefits of the agreement (Chang, 2012; An and Yoon, 2014).

During the interviews, certain lawyers also argued that they try to 'get the best deal' during the settlement process, as they believe this is the only way to help the victims. Unless victims file a separate civil lawsuit, which is time-consuming and costly, there are not many options available to them other than receiving compensation as a result of the informal agreement. In this context, victims are required to decide whether to settle the agreement to achieve appropriate and prompt compensation, or reject it to penalise the offender. Notably, a victim may have to settle the agreement even if she wants the offender punished, particularly when she is in desperate need of financial compensation (Kim et al., 2002). It is important to acknowledge that victims often settle agreements to avoid social stigma or secondary victimisation that

may result from participating in the court process (Chang, 2012).

Additionally, practitioners seemed to consider the aspect of financial compensation an essential source to examine the credibility of the victim. For instance, some practitioners mentioned that if the victim contacted the offender first in order to reach an agreement, then there was an element of suspicion about the real intention behind her reporting the incident in the first place. One female judge shared a comparable viewpoint on what would raise suspicions of a false allegation:

> A typical example would be when a victim first brings up the issue of agreement. If the victim proposes a particular sum of money and actively engages in negotiation, I would be really suspicious [J.1. P.10].

The prejudice of practitioners towards the real victim and the financial aspect of the agreement reinforces the notion of a 'real victim'. This frame is further strengthened by the fact that the dichotomy between 'real victims' and 'gold diggers' (undeserving victims) is commonly portrayed in the media (Lee, 2016b). More precisely, real victims present images of vulnerability and innocence, whereas gold diggers falsely accuse the defendant in order to receive financial compensation from the agreement.

As practitioners are highly concerned about the possibility of false accusations, this stereotypical dichotomy is often used to undermine the victim's credibility. Consequently, as noted by several interviewees, victims of sexual offences are compelled to confront questions that challenge their credibility, such as 'If you were truly injured, why would you consent to participating in the agreement process?'. Given the potential for compensation to undermine a victim’s status, they may be hesitant to engage in the agreement process or refuse compensation in order to assert their innocence (Chang, 2012).

Given this context, this stereotypical view has long raised serious issues that have been discussed by numerous scholars and practitioners (Jang, 2012; Gwang-ju District Court, 2014; Gender Law Research Association, 2014; Korean Women Lawyers' Association, 2014). However, it

appears that this bias remains firmly entrenched in practitioners' perspectives, and the use of informal criminal agreements seems to reinforce their stereotypical views.

In the interviews, victims' lawyers argued that in many cases what victims expect from the informal criminal agreement is more about the psychological and emotional aspect of reparation, based on the defendant's genuine remorse throughout the process. As discussed above, practitioners value the importance of the informal criminal agreement as a detailed record of the victim's views. The primary objective of using this agreement is to reflect the voices of victims during the process. The achievement of a settlement and compensation shares many similarities with the principles of restorative justice. As it aims to enhance the healing of victims, it could be regarded as ‘therapeutic jurisprudence’ (Erez, 2000:167). The initial intention of adopting this agreement appeared to focus on placing victims at the heart of the approach.

In practice, however, the way it is used seems to be more focused on the interests of the defendant, as practitioners consider its impact an important mitigating factor. Interestingly, interviewees frequently referred to the informal criminal agreement as the ‘victim’s opinion not to punish’, which underscores their focus on that aspect of the agreement.

As previously discussed, the judges and prosecutors argued that the impact of the informal criminal agreement is not crucial in serious cases, as they try to focus more on the specific circumstances of each case. Nonetheless, all of the lawyers interviewed for this study strongly stated that this agreement still plays a central role in practice, and they considered it the most critical factor in sentencing. For instance, one lawyer explained that:

> Having an agreement is more powerful than any other factors. Possessing it means you have attained 99 points out of 100. Although it is only one of the mitigating factors mentioned in the sentencing guidelines, its impact is unbeatable [L.1. P.2].

Given the agreement's primary purpose in practice of mitigating sentencing outcomes, defendants become desperate to secure such

agreements. Accordingly, practitioners encourage defendants to try to reach an agreement during the criminal trial. Furthermore, judges commonly provide a grace period of a few weeks before the final sentencing decision to reach the agreement (Chang, 2012). This appears to be a common procedure in criminal courts, as was observed multiple times during this study's court observation. The judges often inquired as to whether the agreement had been reached on the first day of the trial; they also delayed the trial process by encouraging the defendant to make efforts to reach such as agreement. The practitioners seemed to relate this to the defendant's fundamental rights, as the outcome of the agreement is an essential mitigating factor (An and Yoon, 2014).

However, this raises a concern as the original intention of the informal criminal agreement, which was based on a victim-oriented approach, appears to have vanished in practice. It is now less about inquiring about the desires of the victim and more about the defendant's right to defend himself in order to obtain a lenient sentence. Although the agreement is intended to be based on the defendant's sincere remorse and willingness to make reparations, some lawyers have criticised the notion of 'sincere remorse' as vague, implying that the agreement might be a mere formality that primarily benefits the defendant.

Since practitioners tend to evaluate defendants' efforts based primarily on their financial compensation, the views of victims may become less significant. In this regard, the informal criminal agreement, which is supposed to be a victim-oriented measure, may better represent the defendant's point of view. It is also questionable whether the agreement's intended purpose can be achieved if the economic component overshadows the actual assessment of the compensation, neglecting the victim's perspective. This defendant-oriented approach and disparity in agreement expectations between the victim and defendant may lead to secondary victimisation of the victim during the process (Chang, 2012). Moreover, the extensive application of this agreement could potentially strengthen criticisms of lenient sentencing outcomes.

7.4. The implications of the ‘real victim’ frame in practice

Previous sections have demonstrated that judicial practitioners appear to have stereotypical images of devastated victims of sexual offences. By illustrating how practitioners' biases affect their decision-making in relation to sexual offences, this chapter has argued that sexual offence trials inevitably focus on identifying the real victim.

Against this background, this section aims to examine how the real victim frame affects practitioners' approaches. Potential contributing factors behind practitioners' stereotypes will also be discussed by focusing on influences from the patriarchal way of thinking, Confucianism and the male-dominant judicial culture.

The interview findings show that practitioners' stereotypes of victims of sexual offences are based on the real victim frame. This stereotype has particular implications for the victim's participation in the process. Within the criminal justice system, victims are present in court during two specific stages. Firstly, article 27-5 of the Constitutional Act establishes that victims have the right to make a statement during the trial proceedings under the conditions specified by the Act. Furthermore, article 294-2 of the Criminal Procedure Act declares that victims have the right to provide a statement. They will be given the chance to state their opinion on the degree and outcome of the damage, their view on the punishment imposed on the criminal defendant, and other matters linked to the relevant case.

Secondly, if the defendant disagrees with the victim's statement, the victim must attend court and participate in the trial. Victims' voices are encouraged to be reflected upon throughout the legal process in accordance with the law. Special measures, including the use of video-links or screens, are available to assist their participation. This means that there are no technical barriers preventing victims from taking part in the criminal justice system.

While it is generally agreed amongst practitioners that victim participation in trials should be encouraged, some exhibit a negative attitude

towards calling victims to court in order to protect them from further victimisation. In fact, the majority of judges and prosecutors mentioned that careful consideration should be given before calling victims to court, as they considered the prevention of secondary victimisation to be the main concern in sexual offence trials. Therefore, they seemed to prefer to contact the victim's lawyer rather than the victim directly. Since most practitioners base their perceptions on images of devastated victims, they seem to believe that the best thing they can do is not to call victims to court. One prosecutor strongly argued that practitioners must exercise extra caution in sexual offence cases:

> I try not to call victims to the prosecutor's office unless it is absolutely necessary. On the rare occasion that I do, I am very careful because it can be another form of torture for the victims to be involved in the judicial process [P.3. P.5].

Defendants' lawyers tended to have mixed views on this particular point. While they all agreed on the need to protect these vulnerable victims, they also expressed concern that this often conflicted with the rights of the defendant. Given that judges generally hesitate to summon victims to trial, the lawyers also perceived it as a last resort, with one lawyer stating that:

> Theoretically, there is no problem in practice with calling victims to court if the defendant disagrees with the victim's testimony. However, the whole process has to be planned very carefully. Unless there is absolute certainty, it is not worth trying [L.4. P.25].

The degree of reluctance varied among the individual interviewees, although the judges and prosecutors mostly adhered to the approach of avoiding disruption to victims unless their direct involvement in the trial was indispensable.

However, ironically, most of the judges considered the victim's testimony during the trial to be one of the most reliable sources for their decision-making, as discussed in previous chapters. While the police investigation report is likely to capture more reliable facts about the incident since it was written shortly after it occurred, judges contended that a better

comprehension of the case and the victim's experience of victimisation could be obtained if the victim were involved in the trial. One judge explained what she would look for in a victim's testimony:

> We would gather information regarding the case from the investigation report and compare it with the statements made by the victims during the trial. Additionally, we must take into account her communication style, overall attitude and behaviour. She does not need to remember all the details, what matters is the main story of her testimony [J.2. P.34].

This protective stance among practitioners shares similarities with the conventional paternalistic or chivalrous approach that has been extensively studied in discussions on gender and sentencing (Daly, 1989; Franklin and Fearn, 2008). It has been advocated that women, both as offenders and victims, need greater protection during the criminal justice process due to their inherent biological weakness (Rodriguez et al., 2006). The paternalistic approach is founded on the portrayal of victims as vulnerable. By prioritising the protection of victims, the paternalistic approach taken by practitioners presents practical concerns regarding the representation of victims.

First of all, the paternalistic attitudes of practitioners based on real victim stereotypes seems to ironically but inevitably diminish the status of the victim in the criminal justice process. Practitioners are eager to identify the true victim and those who conform to the real victim stereotype are recognised as deserving. However, being acknowledged as a genuine victim ironically results in victims' disappearance from the criminal justice process due to their need for protection against secondary victimisation. Due to an overprotective approach taken by practitioners, victims paradoxically become 'forgotten actors' (Hall, 2013:202). Their voices are often excluded from the trial as practitioners aim to protect them, leaving them to exist only on paper in investigation reports. As discussed previously, the victim's lawyers represent them, and direct contact with practitioners is avoided. Moreover, this excessively cautious strategy solely applies to those victims who fit the narrow definition of the 'real victim' and there is a greater risk that an 'unworthy victim' will be further marginalised during the trial.

Practitioners acknowledged the limitations of determining the extent of the victim's harm by simply reading the investigation reports. It was unanimously agreed that there is a clear difference between getting information solely from the document and getting it from the victim's testimony in court. One female prosecutor also expressed concerns regarding sentencing outcomes in relation to this matter:

> I often think that judges tend to be lenient because they get to know more about the defendant during the course of the trial. This can include details of the defendant's personal story and past struggles. The defendant may also express genuine remorse in front of the judge. People tend to soften when we have more contact [P.4.P.28].

This statement from the prosecutor pertains to the second concern. According to KOSIS (Korean Statistical Information Service, 2018), women make up less than 30% of the entire group of judicial practitioners. In light of this male-dominant judicial culture, one must question how well victims' voices can be reflected. Gender is a crucial aspect of social institutions (Acker, 1992). Research has widely documented gender bias in the criminal justice system (Bernat, 1992; Epstein, 1983; Rosenberg et al.,1993), including the challenges female practitioners face in the workplace.

For instance, female practitioners may be excluded from the informal culture due to the male-dominated judicial culture (Martin and Jurik, 1996). It is crucial that women exhibit their job competency through adhering to culturally accepted 'masculine' ideals (Zimmer, 1986). The strict hierarchy in the Korean context – influenced by Confucianism – could result in the suppression of female practitioners' voices in their profession (Kim, 2008a). As judges, individuals may find it difficult to express opposing viewpoints, causing female practitioners, a minority within the group, to feel compelled to conform to the mainstream or behave more similarly to their male colleagues. Two female practitioners revealed that they occasionally self-censored their gender-sensitive comments. As one female prosecutor explained:

> As a woman, I may become more emotionally invested in the victim. Consequently, I make a conscious effort to avoid

> excessive sympathy towards them. It could be the reason why female prosecutors appear to impose stricter standards [P.2.P.13].

In such situations, women may need to suppress their femininity in order to prove that they belong to the organisation (Rhode, 1988). Despite the limited number of respondents, the insights provided by some practitioners were useful. It was often suggested by female practitioners that gender-related disparities in opinions frequently arose. As one female judge explained:

> I do not see a direct correlation between the severity of sentences and the gender of the judges. However, gender does seem to play a role in judging what constitutes a sexual offence. I think that is why it would be crucial to have a female judge in every trial, as she can better empathise with the victims [J.6.P.14].

According to her experience, gender did not play a significant role in determining the appropriate sentence for the case, but it did seem to have more of an impact on sentencing, as male and female practitioners had different views on appropriate gender roles or behaviour. Male practitioners, following patriarchal views and the influence of Confucianism, are more likely to adhere to traditionalist and conservative gender roles.

The findings from the court decisions also provided useful insights. Of the 76 court decisions examined in this study, only four led to acquittals. These cases offered a highly detailed rationale for the use of violence or intimidation and the victim's perceived resistance, thereby exposing widespread stereotypes about sexual offence victims.

In three of the four cases, the offence was committed in an acquainted relationship, and in one case the defendant and the victim were in a dating relationship. In the latter case, the judges concluded that there was insufficient evidence to prove the victim's 'utmost resistance', which is considered essential in rape cases. As outlined in Chapter 4, according to article 297 of the Criminal Act 2020, rape is defined as an act committed by a person who, through the use of violence or intimidation, engages in sexual intercourse with

another individual.

The interpretation of violent and intimidating behaviour is determined by the victim's level of resistance and is closely linked to practitioners' concerns regarding distinguishing between genuine rape and false accusations based on the presence of consent (Han and Lee, 2011). The notion of 'utmost resistance' was widely used in Western legal systems until the 1970s. However, this approach came under heavy criticism due to its underlying assumption that rape cannot occur when the victim exhibits such high levels of resistance (Cobley, 2000). Consequently, some countries have now replaced this stringent standard with 'earnest resistance' or 'reasonable resistance' in order to better safeguard the interests of the victim (Horvath and Brown, 2009).

However, the approach taken by Korean judicial practitioners appears to remain consistent. The Supreme Court, in a court decision, asserted that a rape case cannot be established on the grounds of a victim merely refusing or taking passive action when under attack. Victims are expected to show an extremely strong level of resistance (The Supreme Court of Korea, 1990). According to this approach, a rape allegation can be acknowledged when the offender uses excessive violence and intimidation, preventing the victim from resisting, or when there is credible proof of the victim's utmost resistance. Essentially, barring any clear evidence to the contrary, victims should refuse consent in order to demonstrate that a sex offence has taken place rather than consensual relations. In this context, victims may be criticised for not displaying adequate resistance, resulting in their lack of credibility (Kuk, 2002)

While a victim's resistance is strictly considered, male practitioners tended to have a more generous standard of acceptable behaviour for the defendant, based on more conventional images. Female judges frequently argued that male judges are more likely to assume mutual consent. Other female judges added similar views, as did one victim’s lawyer:

> Among the lawyers, there is one notorious judge (male). No matter what we argue, he hardly acknowledges any case as sexual offences. For him, anything would be acceptable and

understandable [L.14.P.23].

Additionally, practitioners distinguished sexual offences from other types of offences in terms of the motivation behind them. This could clarify why criminal histories for other offences have less of an impact on the sentencing of sexual offenders. Regardless of their profession, the majority of practitioners tended to associate sexual offences with specific mental and psychological problems or perceptions of the defendant. Commonly cited reasons for sexual offences were 'problems controlling sexual urges', 'a momentary loss of control', 'distorted perceptions of sexuality' or 'hatred of women'. Such expressions frequently featured in the court decisions, emphasising the impulsive nature of the offence. As a result, the defendant's behaviour is perceived as a temporary loss of impulse, whereas victims must display the utmost resistance to prove their innocence. Male professionals mentioned the possibility of false accusations more often during their interviews, suggesting underlying victim-blaming attitudes. Although there is no data to clearly indicate the number of false accusations in sexual offences, the emphasis on the possibility of false accusations seems to raise concerns.

Another important aspect is the use of violence or intimidation. Traditionally, these have been seen as key elements in many sexual offence cases (Byun, 2011). However, during the interviews, practitioners mentioned a change in practice. Most judges expressed concerns over convicting defendants of sexual offences without clear evidence of significant violence or intimidation being used. Practitioners appeared hesitant to impose severe punishments for sexual offences where no violence or intimidation was used, owing to the high minimum statutory penalty. According to one lawyer:

> Fortunately, rape is a bit different as it is still considered as more serious type of offences. However, in less serious sexual assault cases, the use of violence or intimidation does not really matter anymore. It is quite scary considering the minimum statutory punishment for these cases. It is almost as if “no means no” [L.4.P.1].

In the acquittal court decisions, expressions such as, 'there was no clear evidence that a significant degree of force or intimidation was used' were

common. Such phrasing implies that if a threat is not unmistakably identified, practitioners may question if the victim gave their consent in the sexual encounter. Due to the punitive approach to sexual offences legislation, as noted above, practitioners appeared to be more cautious in their decision-making.

Some lawyers argued that the increase in legislation could have a negative impact on victims because practitioners will be more cautious and strict in applying the legislation and standards in assessing victims' credibility. Based on this premise, some lawyers mentioned the possibility of more acquittals in sexual offences due to the stricter decision-making process. The majority of the interviewees, particularly male practitioners, seemed to hold a traditional stance by denouncing the change in practice.

Nonetheless, some practitioners argued that they could see some meaningful changes in practice. More and more practitioners are striving to determine the genuine needs of the victim, rather than relying on present factors. One senior judge offered additional clarification:

> It appears that the current approach to sentencing is undergoing a transitional period or paradigm shift. Some people say that we may be living in a society where no means no. But this clearly shows that we are moving from the traditional and narrow interpretation of sexual offences to the realisation of the true victim-centred approach in practice [J.7.P.13]

Lastly, the real victim stereotypes influence the way in which victim-oriented measures work in practice. The interviews revealed that the purpose behind the use of these measures was primarily to enhance procedural efficiency. As noted previously, the role of victims' lawyers was highly regarded by judges and prosecutors as they are able to communicate effectively and understand legal terminology. Victims may often be emotionally unstable due to the trauma they have experienced and may not have a strong grasp of legal terms. As it has been argued that the criminal justice system does not like uncertainty caused by outsiders (Young, 2013), victims' lawyers can effectively substitute the direct voice of victims based on their legal knowledge

and deep understanding of the judicial culture. By reducing uncertainty in the process, practitioners can obtain their desired outcomes, but this may not necessarily align with the original intent of the victims (Ahn and Choi, 2015).

Furthermore, the police and prosecutors announced in 2016 that the victim impact statement scheme would be introduced in cases of violent assault and domestic violence as examples of informal criminal agreements (Kim and Park, 2017). However, as the informal criminal agreement already exists and fulfils a similar role, the introduction of other types of similar measures may add further unnecessary layers to the process. Instead of exploring ways to enhance the victim-oriented measures already in place, implementing additional formalities to the investigative process could lead to undue hardships for victims. In this respect, the way in which practitioners implement victim-focused measures seemed to raise some concerns, as these measures ironically exclude victims from the investigation process by introducing an extra layer.

Fortunately, an increasing number of practitioners are now more aware of these issues and are considering how they can effectively support victims in sexual offence cases. It would undoubtedly improve the response of judicial experts to such cases if they were to remain alert to the potential for a justice gap and take measures to combat stereotypes. In the end, opting to prevent victims from appearing in court may not always be the best answer. An interview with a victim's lawyer provided a useful lesson on the involvement of victims of sexual offences in the process:

> Sometimes, I purposefully ask victims to attend court as it can provide a chance for healing. While this may not always be the case, seeing justice being served in court can help victims gain the strength they need to move on after experiencing trauma. This is why the attitude and approach of the judicial practitioners is crucial. If victims feel that judges are actively listening to their experiences, it can make it easier for them to move on [L.13. P.30].

7.5. Concluding comments

This chapter discussed practitioners' common views of victims of sexual offences. It argued that practitioners' stereotypes, based on the 'real victim' frame, reinforce the dichotomy between the real victim and the undeserving victim; and negatively affect the victim's encounter with the criminal justice system. It also illustrated how the combination of the use of the informal criminal agreement and practitioners' stereotypes ironically makes the victim invisible during the process. As the use of the informal criminal agreement tends to focus on its role as a mitigating factor, this appears to be closely linked to the perception that sentencing outcomes for sexual offences are lenient. The chapter also highlighted the disparity between the anticipated and actual usage of victim-oriented measures, thereby exposing concerns pertaining to effective victim representation.

Chapter 8. Sentencing reality 3: The old customs and practice

8.1. Introduction

The previous chapters analysed the perspectives of judicial practitioners on the sentencing framework and sexual offences in Korea. The interview findings revealed practitioners' concerns that the punitive rhetoric in the law is disproportionate and populist. The analysis of court decisions showed that practitioners are reluctant to implement the current sentencing framework, frequently relying on suspended sentences and minimum sentences. Furthermore, the punitive direction of legislative responses makes the whole process of sentencing decisions about identifying the real victim. Paradoxically, recently implemented victim-oriented measures worsen the victim's status by adding more layers to the system.

Based on this context, this chapter aims to investigate the dynamics of judicial practitioners within courtroom settings, exploring their relationship and organisational culture. Understanding the use of different sources of information provides particularly useful insights not only into disentangling sentencing practices, but also into the implications of the interplay between practitioners in sentencing.

This chapter will focus on the relationship between the courts and the Prosecution Service by considering the use of the prosecutor's recommendation and the sentencing inquiry reports. Then, the following section explores the use of pre-sentence reports and their influence on the imposition of preventative measures. By considering practitioners' perceptions of these diverse sentencing sources, this chapter aims to understand the notion of the 'courtroom workgroup' in the context of the Korean criminal justice system.

8.2. The relationship between the Courts and the Prosecution Service

This section examines how the relationship between judges and prosecutors might affect the sentencing of sexual offences in Korea by exploring the use of prosecutors' recommendations and sentencing inquiry reports. Previous chapters have discussed the different approaches of these two groups of practitioners to the sentencing of sexual offences. Judges were reluctant to apply the current legal framework, perceiving it as punitive. The court's conservative and exclusive nature further justified judges' tendency to sentence to the minimum possible by relying on precedent. Prosecutors were highly critical of the judges' overall sentencing practices, which they perceived as ignoring the voice of the general public by misusing discretionary mitigation in sentencing. In this context, this section discusses how this tension between courtroom actors contributes to the heated debate over the use of prosecutors' recommendations and sentencing inquiry reports.

8.2.1. Prosecutors’ recommendations in sentencing sexual offences

Prosecutors make their sentencing recommendations at the end of the trial phase, as explained in Chapter 3. Despite having no legal effect, as these recommendations are based on the prosecutors' investigation results, they provide useful insights into how prosecutors view a case. Most significantly, the discrepancy in prosecutors' recommendations and judges' sentencing decisions presents an opportunity to better understand judges' practices.

According to the interview findings, judges seemed to consider prosecutors' recommendations as a useful source to be taken into account in their decision-making process. Given that prosecutors are involved in investigations, judges tended to respect their recommendations. One judge said:

The prosecutor's recommendation provides insight into their

> perspective on the case. As they were part of the investigation process, we acknowledge their recommendation as potentially being more informed. Using the same sentencing framework, there is no valid reason to ignore their opinion [J.3.P.4].

However, prosecutors' recommendations appeared to have little impact on sentencing outcomes, as judges typically viewed them as a means of understanding what the maximum penalty could be. As one judge noted:

> Their recommendation can be a helpful reference in our decision-making. Nevertheless, we recognise that they are often unduly severe, and therefore offer only a vague indication of the possible maximum sentence [J.5.P.7].

Overall, judges appeared to be little influenced by prosecutors' recommendations, believing that prosecutors generally favoured a more punitive approach. Nonetheless, judges did take the recommendations into consideration when there was a substantial discrepancy between the sentencing outcomes and prosecutors' suggestion. For instance, one judge stated:

> I would rarely be influenced by the prosecutor's recommendation, except in cases where it is significantly higher than the outcome I propose. In such situations, I would endeavour to discern the reasoning behind their decision [J.2.P.5].

Regarding judges’ perception of prosecutors’ recommendations as setting the maximum sentence, some prosecutors also agreed. One prosecutor mentioned:

> I think we suggest the harshest sentence possible as a proper sentence for the case. It is more like I want you, judges, to consider this limit when sentencing. As the minimum statutory punishment for sexual offences is already quite high, our recommendation provides a standard for the maximum [P.4.P.11].

Moreover, some prosecutors acknowledged potential bias towards

more punitive sentencing compared to judges due to their representative role of the victim. Additionally, they tended to develop greater emotional attachment to the case, which contributed to the discrepancy in opinions on appropriate sentencing. A prosecutor explained this in more detail:

> Prosecutors do not solely rely on written investigation reports of others, but judges may do so. In the course of the trial, both the defendant and the victim are given an opportunity to express their views. Still, we devote significantly more time to listen to their perspectives and to seek out any relevant evidence. Based on our own investigation and all the data collected, we follow a thorough process of making an appropriate recommendation for the case [P.1.P.12].

Another prosecutor offered additional explanations for the differences between sentencing outcomes and the prosecutor's recommendations:

> If an informal criminal agreement is made during the trial stage, then further mitigation in sentencing outcomes may be considered. Additionally, newly discovered evidence presented during the trial may also impact the sentencing outcome [P.6.P.5].

During the interviews, the majority of interview participants highlighted the traditional sentencing practices of judges, who typically sentenced to about half the extent of a prosecutor's recommendation. Most judges contended that this trend has become less prevalent today, particularly following the implementation of sentencing guidelines. Some judges also posited that this could be attributed to the fact that prosecutor’s recommendations have become more ‘realistic’ and therefore more reliable than in the past. A senior judge explained in detail:

> I believe that prosecutors are striving to enhance the reliability of their recommendations to align with our standards. Recently, their suggested outcomes have mirrored our own judgments. So we often joke about it, saying: 'Now we have nothing to do, because they are doing exactly what we should be doing [J.2.P.10].

Prosecutors also shared their perspective on this matter, with one prosecutor describing the traditional sentencing practices of the judges:

> I heard that people used to make a joke about the prosecutor's recommendation in prison. If the prosecutor suggested ten years of imprisonment and the judge sentenced him to seven years, the defendant would definitely appeal because the sentence seems too harsh (because he should get about five years) [P.2.P.6].

Some prosecutors criticised judges' sentencing approach; one prosecutor stated:

> I fail to understand the noted difference in outcomes when we all abide by the same guidelines and legislation. If the mandatory minimum sentence was five years and increased to seven years, then are we not supposed to sentence a minimum of seven years? Judges clearly do not adhere to the statutory range [P.10.P.3].

He additionally criticised judges' inclination to concentrate on mitigation when compared to the practices of prosecutors:

> Prosecutors base their recommendations strictly on the statutory range of punishment provided by the law. Any suggestion below the minimum requires clear reasons, such as the presence of a criminal agreement or an offence for which the victim is responsible. While the general public may consider a statutory minimum of seven years as the norm, judges do not. For them, mitigation appears to be the default mode [P.10.P.4].

In order to narrow the disparity in outcomes, prosecutors endeavoured to decrease their range, thereby aligning themselves with the judges' standards. One prosecutor articulated her frustration, highlighting the fact that judges have not significantly modified their approach to assessing the recommendation made by the Prosecution Service, in spite of their efforts:

> I guess there used to be almost a mechanical way of halving the prosecutor's recommendation. Approximately a decade ago, a

> movement was initiated by the Prosecution Service to render our recommendation more fitting and realistic in order to reduce the disparity in outcomes. Once we adjusted the recommendation to align with the judges' standards, their verdicts were also lowered accordingly [P.2.P.7].

While the majority of interviewees agreed that the disparity was less pronounced than in the past, some prosecutors and lawyers (in total of five practitioners) argued that it still seemed to be the norm in sentencing practice. One lawyer mentioned that judges in his district still tend to impose sentences amounting to only half of the prosecutors' recommendations. They also questioned whether the public could understand this gap caused by judges' focus on mitigation.

Lawyers also provided useful insights into the use of prosecutors' recommendations in practice. They focused on the fact that these evaluations are based on the nature and severity of the offence as determined by the investigation. As such, they understood why prosecutor's recommendations are seen as the standard for maximum punishment. However, they also agreed that judges' decision-making is not significantly influenced by these recommendations. They highlighted judges' reliance on their previous decisions to be the main reason behind the gap in results. As one lawyer stated:

> Regardless of changes to sentencing guidelines or statutory punishment in legislation, judges appear to rely heavily on their previous decisions. Although sentences have become a little harsher, they do not want to take the risk of sentencing something significantly different [L.2.P.10].

Additionally, another lawyer provided a new angle to examine how judges seemed to use the prosecutor's recommendation in practice:

> It appears that judges may make use of the recommendations to assess the defendant. For instance, if the prosecutor's recommendation appears to be not too harsh, judges tend to take this as a sign that the defendant may have cooperated well

> during the investigation. Then, this could be related to the defendant's sincere remorse, which is a mitigating factor [L.14.P.10].

While most lawyers agreed that the tendency of judges to focus more on mitigation contributed to the gap between law and practice, some criticised the conviction-oriented approach of prosecutors. In support of this perspective, one lawyer highlighted their role in practice:

> Without us, the defence lawyers, a legitimate investigation process would not exist. Although the law endorses the principle of ‘presumption of innocence’, investigation agencies tend to assume guilt as the norm. Their main objective is to obtain evidence for conviction, hence their retributive approach. Consequently, their recommendations tend to be unrealistically high [L.6.P.1].

Another lawyer also expressed a similar view, showing his distrust of the results of the prosecution's investigations:

> I believe that prosecutors focus primarily on obtaining convictions, rather than considering appropriate sentencing. Because they lack objectivity, they cannot be trusted. When I read their investigation reports, I get the feeling that they often deliberately exclude mitigating factors that would benefit the defendant in sentencing [L.2.P.23].

In this sense, some lawyers have taken a positive view of the judges' seemingly indifferent attitude towards the prosecutor's recommendations. They argued that such attitudes indicate a lack of bias in the prosecutor's investigation reports. In fact, two senior judges raised similar concerns, stating that they often perceived prosecutors to present primarily conviction-relevant information. As one senior judge explained:

> I would request that prosecutors provide more information for appropriate sentencing, not just focus on conviction. If the prosecutors executed their duty properly, we would not have to ask for further sentencing inquiry reports [J.1.P.11].

In summary, the recommendations provided by the prosecutor seemed to provide a rough indication of what the maximum sentence should be. While there are varying opinions on the practical implications of these recommendations, there appears to be a discernible tension between judges and prosecutors in determining appropriate sentencing outcomes. Moreover, the use of sentencing inquiry reports, as previously noted, has exacerbated this conflict. This will be discussed further in the next section.

8.2.2. The use of sentencing inquiry reports

Since 2009, courts have employed assistant junior officials as sentencing investigation officials (Gwang-ju District Court, 2014). These officials are called upon by judges to conduct additional sentencing inquiries when needed. One insider of the judiciary provided a background context during the interview preparation process as there were rumours about the history of using sentencing inquiry reports in practice. According to him, senior judges in high-ranking positions met and drew up a list of essential criteria for their sentencing decisions, consisting of more than 40 elements, which should be included in the sentencing inquiry reports. This suggests that there was previously a scarcity of information presented to the courts, and the development of sentencing inquiry reports aimed to fill these gaps.

Based on the interviews, it appears that judges have a clear division between the roles of pre-sentence reports and sentencing inquiry reports. Pre-sentence reports provide in-depth information about the defendant, such as their family background, education, and social connections. Alternatively, sentencing inquiry reports prioritise extensive data about the victim, which judges aim to obtain. Judges argued that they typically request more updated information about the victim's condition during the trial stage due to the time gap between the investigation and the trial stage. As part of their duties, investigating officers contact the victim to obtain details about their recovery process. One judge offered an explanation of this aspect:

> We typically require details about the victim's condition, such as the severity of her injury, whether she experiences any ongoing

> effects or receives psychiatric therapy, and if she has returned to school and resumed her normal routine [J.7.P.7].

When carrying out this sentencing inquiry, judges aimed to place more emphasis on the victim's perspective in their decision-making. In cases where the defendant has admitted guilt and the informal agreement was in place, the victim may not have to attend the trial. Moreover, judges generally appear hesitant to summon victims to court unless it is absolutely necessary (as discussed further in Chapter 7). Therefore, in some instances, the informal criminal agreement may serve as the sole means of expressing the victim's perspective. Consequently, the primary objective of this investigation was to determine whether the informal criminal agreement accurately reflected the victim's actual intentions. As the agreement involves the victim's reluctance to punish the defendant as a result of his genuine remorse, the judges aimed to ensure that the victim comprehended the agreement's implications and made the decision willingly. A senior judge provided further information on this aspect:

> When the victim and defendant reached the agreement, we need to ensure that she was free from any pressure, such as financial difficulties or coercion from relatives, especially if the defendant was a family member. The victim may have simply sought to escape a stressful environment by agreeing to the settlement, so we need to make sure that the victim's decision was not influenced [J.8.P.13].

Judges particularly focused more on young victims as they had to consider whether the victim had the capacity to make a rational decision. In this context, a senior judge highlighted the benefits of using sentencing investigation officials:

> When dealing with offences committed by family members, it is advantageous to supplement investigation agencies with sentencing investigation officials. This approach enables extra consideration for the victim by providing a more reassuring and less distressing setting, while safeguarding them from external interference, such as from their mother or anyone else who

> could potentially influence their ability to express themselves freely. Investigation agencies have not adequately dealt with such issues in a sensitive manner [J.6.P.4]

Some judges have argued that appointing more sentencing investigation officers to provide case-specific requests would be beneficial. However, the usage of such personnel varies between courts, as they are only available in certain locations - notably in Seoul and central areas. Four judges who frequently use these officers appeared highly satisfied, whereas a majority of judges who have limited access to such services displayed more pessimistic attitudes. One judge stated:

> These officers are not exclusively employed to work on the sentencing task; rather, it is an additional responsibility alongside their regular duties. Consequently, there is a shortage of staffs, and due to limited resources, it may take longer than usual to obtain sentencing inquiry reports [J.4.P.25-26].

He elaborated that there was a shortage of sentencing investigation officers in his court and consequently, he had to request inquiry reports from another court. In these circumstances, he made the requests only when it was absolutely necessary, which was about once or twice. Other judges shared similar perspectives and highlighted the significance of victim's lawyers. As one judge explained:

> I rarely used sentencing inquiry reports. It is not so different from questioning the victim directly during the trial. If the victim is absent from court, their lawyers are commonly involved nowadays. Therefore, I fail to understand the benefit of burdening court personnel with an additional task when there is nothing unique about it. Victim's lawyers are more helpful as they usually have a closer relationship with the victim [J.7.P.8-9].

Although the practical impact of sentencing investigation officers may not be significant, prosecutors hold a different view as they see it as an intrusion into the boundaries of their work. The tension between judges and prosecutors regarding the use of sentencing inquiry reports was previously

outlined in Chapter 3 and was also evident during the interviews. One prosecutor expressed their opinion on this matter:

> Judges say that they need further investigation to thoroughly examine the case, but I wonder whether this is really objective data or not. Using their own personnel raises concerns about impartiality [P.2.P.12].

Another prosecutor also questioned the necessity of employing sentencing inquiry officers:

> I believe that the position appears unnecessary. Why must the court have an additional position solely for further sentencing inquiries? If they require further information, they could inquire with us or probation officers. I assume that sentencing inquiry reports serve mainly as a formality, with nothing significant included. If the reports contain vital information, we should be able to utilise it as a reference when issuing sentencing recommendations [P.10.P.11-12].

The majority of prosecutors raised concerns regarding the use of court personnel to gather supplementary sentencing data, as they were uncertain about the nature of the information that would be shared with the judges. As prosecutors lacked clarity regarding the requests made by judges and had no authority over the court personnel, they perceived this approach as a threat to their roles. Due to the exclusive nature of the courts, judges seemed reluctant to openly ask for what they needed more to make their decisions. Prosecutors may have perceived that judges were intentionally excluding them by using the court's own staff to gather additional information.

Additionally, prosecutors criticised the underlying trial culture as an obstacle to obtaining more recent information about the victim. They suggested that contacting the victim after the trial began must be approached with great caution. A prosecutor highlighted the challenges she encountered during the trial:

> There appears to be a prevalent sentiment that it is inappropriate for prosecutors to contact the victim separately after the trial has

> started. Such communication may be perceived as coaching the victim. Additionally, certain defence lawyers ask questions such as "Have you heard anything from the prosecutor?" as if we are deliberately leaking information [P.4.P.15-16].

Lawyers also provided useful insights into the use of sentencing investigation officers. As many judges argued, the majority of lawyers (with the exception of five lawyers) also said that they had little experience of the cases in which sentencing investigation reports were submitted. Lawyers working outside of Seoul emphasised that these officers exclusively existed in the central region of Seoul. In this regard, there may be a potential for injustice in terms of representativeness of victims' voices throughout the legal proceedings, depending on the location of the courts.

In addition, lawyers suggested that the use of sentencing inquiry reports seemed to be relatively more common when child victims were involved. One lawyer offered an explanation in this regard:

> I heard that some judges do use sentencing inquiry reports when they need to find out whether the agreement accurately reflects what the victim wanted. However, this is only the case in certain special circumstances. In the absence of child involvement, it is rarely employed. Requesting sentencing inquiry reports would merely lead to trial delays and adding to judges' workload, so judges do not like that [L.5.P.5].

While the majority of lawyers had no definite stance on the use of the sentencing investigation officers, as they were rarely used in practice, some were positive about their use. As one lawyer argued:

> As these sentencing investigation officers are asked to obtain specific information based on clear requests from judges, it could be quite helpful. We may inadvertently overlook certain information given the many obligations we have to manage as lawyers. However, these officers are only given very specific tasks that are necessary for the judges' sentencing decisions. Their role appears to be helpful [L.12.P.5].

Furthermore, some lawyers argued that, unlike prosecutors, inquiry reports could provide more objective data for sentencing. One lawyer provided a further explanation on this aspect:

> Judges appear to exercise considerable discretion in cases of sexual offences. When they have so much discretionary power, it would be dangerous to rely only on investigation reports. Because these reports often do not contain all the information needed to make a sentencing decision [L.14.P.7].

He explained that in some cases, the information provided by inquiry reports for sentencing differed significantly from prosecutors' investigation results. While unexpected changes made during the trial stage may have accounted for this, some judges and lawyers also raised concerns about the reliability of prosecutor's investigation reports. As prosecutors appeared to prioritise obtaining convictions, some interviewees raised concerns that prosecutors may favour evidence that secures a conviction over other important information.

Based on the interview findings, it was apparent that judges and prosecutors were operating in a manner that resembled a rivalry. Additionally, the use of court staff as sentencing investigation officers may have added to the tension, as prosecutors saw this as a violation of their role. During the interview process, prosecutors were also keen to find out how judges used these officers in practice. To protect their respective boundaries, some prosecutors mentioned that the Prosecution Service was also planning to introduce a similar system of appointing investigators for sentencing within their offices. Ultimately, the dispute over the utilisation of sentencing inquiry reports appeared to be more of a struggle for power between agencies, rather than a move towards enhancing sentencing practices. Moreover, the power struggle was frequently noticed in how practitioners utilised other sources of information to make sentencing decisions.

8.3. Imposing preventive measures and pre-sentence reports

This section will examine the role of pre-sentence reports in imposing preventive measures by understanding practitioners' perspectives. As outlined in Chapter 4, the Sentencing Guidelines do not provide precise instructions for the application of these measures, making this an area where personal discretion appears to be widely used. In order to grasp individual rationales for imposing preventive measures, this section explores practitioners' attitudes towards these measures.

Preventive measures are imposed based on the potential risk of reoffending. Judges and prosecutors have faced challenges in using these measures in practice, according to interview findings. The main concern among judges was uncertainty about the effectiveness of the measures. Many judges admitted lacking detailed information about them. As one judge stated:

> I consider preventative measures as potentially effective, although their specific operational details remain unclear to me. As defendants have reported feeling pressured by such measures, it is possible that they may have deterrent effects [J.5.P.3-4].

Judges frequently encounter ironic dilemmas when they impose such measures to prevent reoffending, without being entirely confident of their effectiveness. Additionally, a senior judge offered his perspective on preventative measures:

> I believe that preventive measures were implemented primarily to ease the public outcry. I do not believe that it would stop re-offending. Repeat offenders are largely unaffected by these measures, and whether they are electronically tagged or not is of little consequence to them [J.2.P.2].

Moreover, considering that these measures were primarily implemented post-release, three judges questioned the justification for imposing them at the sentencing stage. One judge highlighted certain downsides of implementing them at this stage:

> As a sentencer, preventive measures are particularly difficult to apply. While we possess general background information on how these measures work in practice, we do not know the details. More importantly, we do not know the extent to which offenders are reformed after their imprisonment. This makes decision-making much harder [J.5.P.22].

One senior judge, who was particularly enthusiastic about preventive measures, suggested a solution by emphasising an integrated approach to sentencing:

> It would be beneficial to receive constructive feedback on successful and unsuccessful elements. Improved outcomes could have been achievable if each organisation collaborated effectively and ensured consistency throughout the process [J.9.P.18].

Although the majority of judges did not want to increase their workload, they all acknowledged that having more knowledge about the operation and effectiveness of these measures would certainly benefit their decision-making process. Consequently, they delegated responsibility to probation officers, who are responsible for such measures. A previous study in the UK found a similar trend, where the expansion of sentencing options led to an increase in the options available to judges, resulting in the widespread implementation of these measures in the courts (Mair, 2011). However, the introduction of these new measures has ironically increased the workload of probation officers, thus reducing the direct contact time with offenders.

Prosecutors raised concerns about their workload following the introduction of various preventative measures. Specifically, one prosecutor argued that these measures had doubled their workload, prompting complaints about an excessive amount of work:

> Extensively detailed supporting data is necessary to justify the measures required for the defendant, including information about their family background and academic achievements. In the past, the whole process was rather straightforward. More like

> "Do you know this person or not?", "did you do it or not?", but now we also have to think about the possibility of reoffending [P.10.P.5].

She described the process of gathering data to request preventative measures as "the extension of interests to people", as prosecutors were required to conduct extensive research on the defendant. They had no choice but to undertake this process whenever required. As the performance records of prosecutors appeared to be influenced by whether judges implemented preventive measures based on the prosecutors' requests, they made an effort to persuade judges. One prosecutor elaborated on this point:

> In certain instances, the law mandates specific measures. Nevertheless, where there is scope for discretion, we are inclined to implement preventive measures to the fullest extent possible. We have our own rules to follow (within the Public Prosecutor's Office) ... sort of obligatory in a way [P.4.P.3].

While judges and prosecutors held uncertain views regarding the effectiveness of deterrence measures, most lawyers expressed positive opinions based on their personal experiences. One lawyer provided an explanation for their view on this matter:

> From my experience, defendants exhibited greater reluctance in accepting these measures as compared to imprisonment. They were apprehensive that the implementation of these measures would result in detrimental impacts on their resocialisation. As they mostly saw it as almost a stigma, I believe it would at least psychologically deter further offending [L.13.P.7-8].

Considering the impact of these measures on a defendant's resocialisation, judges and prosecutors were particularly cautious in applying them in practice. Accordingly, they implemented the measures with varying levels of scrutiny. For instance, notification and electronic monitoring were used with extreme caution and therefore rarely. Conversely, sexual offender registration was commonly imposed in most sexual offence cases in accordance with the law. Furthermore, practitioners frequently used the sex

offender treatment programme, as they found it to be positive. When imposing such measures, the most critical consideration was assessing the risk of reoffending. Since practitioners had a wide discretion in assessing whether or not the defendant would reoffend, some practitioners expressed difficulty in making decisions on this aspect:

> Sexual offence legislation provides only vague guidance. It states that if an individual is found guilty of a sexual offence, a measure could be imposed for up to x years. However, it does not provide clear instructions on how this measure should be used. Therefore, we must consider the possibility of reoffending on our own [J.2.P.10].

As the law did not provide precise guidelines, practitioners appeared to create their own. One judge further explained this:

> It [the risk of reoffending] is up to our own judgement... It is not as if we impose electronic monitoring on anyone who has committed sexual offences against a child. We consider it very strictly. While the law does not mention prior criminal records, we do consider it as one of the key factors that indicates a higher likelihood of reoffending [J.4.P.12].

According to the interview findings, practitioners considered the nature of the offence and criminal conduct, previous criminal history and pre-sentence reports together to assess the risk of reoffending. In particular, they consider pre-sentence reports to be an effective way of understanding the defendant. Pre-sentence reports contain a wide range of personal information about the defendant, including their educational background, employment history and family relationships. One judge explained the benefits of using pre-sentence reports as follows:

> Pre-sentence reports offer a fairly comprehensive picture of the defendant. It is particularly useful to find out, on the basis of relatively clear and objective data, whether the defendant has mental health problems or a high risk of reoffending. Without this, it is all about our discretion, so I think we should use this kind of

more objective data [J.6.P.9].

In regards to providing more information to take into account in their decision-making, practitioners generally found pre-sentence reports quite helpful. The majority argued that these reports give a comprehensive overview of the defendant and help to gain a closer understanding of them. Practitioners mostly agreed that having more information about the defendant was essential when making sentencing decisions, given the impact of sentencing outcomes on the defendant's life.

They also considered pre-sentence reports to be impartial and unbiased. One judge offered her perspective on this matter:

> Pre-sentence reports provide quite reasonable grounds. They tend to suggest appropriate preventive measures according to the specific circumstances of the defendant. Not biased, quite objective [J.12.P.14-15].

Judges particularly argued that pre-sentence reports provided more comprehensive information, whereas most investigation reports focused on providing evidence to decide whether the defendant was guilty or not. Judges appear to view pre-sentence reports as a means of acquiring general information about the defendant with ease. A senior judge has explained the rationale behind this aspect:

> Pre-sentence reports were primarily intended to determine if the offender requires additional probation or specific preventive measures for the purposes of resocialisation. The aim is not merely to obtain general information about the offender. However, it is not easy for sentencing investigation officers to contact the defendant to get this information directly, because the Ministry of Justice and the courts do not really cooperate well [J.1.P.4-5].

As probation officers are employed by the Ministry of Justice and are free to contact an imprisoned defendant, judges often used pre-sentence reports as a way of obtaining more information about the defendant, even if they did not necessarily intend to impose any preventative measures.

Pre-sentence reports largely consist of two parts: the defendant's personal background and the results of the risk assessment. Concerning the provision of personal background information, most practitioners were positive. One judge gave a more detailed explanation:

> Pre-sentence reports can offer extensive information, more like a brief history of the defendant. This can include information about how he grew up and what may have led him to commit these types of offences. By providing background information on who he is, pre-sentence reports essentially allow us to understand him better as a person [J.13.P.7].

However, five practitioners stated they disregard demographic details of the defendant unless they are crucial to understand the case. In particular, they viewed the defendant's upbringing as possibly irrelevant to the motivation behind sexual offences.

During the interview preparation stage, a probation officer expressed interest in the influence of K-SORAS (‘K-SORAS: Korean Sex offender risk assessment’) on judges' decision-making (Kim, 2013a). It is important to note that probation officers solely provide the documents and are unaware of how prosecutors and judges reach their decisions. Generally, the provision of an additional assessment regarding the risk of reoffending is based on the requests of prosecutors, particularly in relation to the use of electronic monitoring. While pre-sentence reports are seen by most interviewees as a useful source for understanding the defendant, they also argued that these reports are only one of the sources of information they take into account when making decisions and do not necessarily have a decisive impact. Specifically, interviewees also questioned the reliability of the risk assessment tool employed in pre-sentence reports. As one judge explained:

> While this source proves useful, it should be noted that judges are aware that such tools are created by quantifying simple elements. Without an exceptionally high result, it is doubtful that we would seriously consider it [J.3.P.3].

As she argued, the risk of reoffending score seemed to fall mostly in

the middle group, which signified an 'average' level of risk. Only one prosecutor had contacted probation officers for further clarification regarding the results, despite them being situated in an ambiguous area between two categories, such as being higher than average but not equally as dangerous.

Most practitioners tended to undermine the credibility of this risk assessment tool as "the result of a turf war" or "a way for probation officers to survive in sentencing practice". As a result, they have considered it to be "better than nothing, but not entirely reliable". They have argued that unless the outcomes pose a serious risk and are substantially different, the tool will not make a significant difference in practice. Furthermore, they insisted that they could rely on other sources of higher risk, such as previous convictions for sexual offences and criminal behaviour. As one senior judge noted:

> It is difficult to measure an individual's internal state, so we tend to rely on external indicators. These could include past convictions for sexual offences or the manner in which the offence was carried out [J.8.P.6].

He also pointed out the limitations of risk assessment tools, which do not provide a sufficient picture of the defendant's true condition:

> When we examine the content of the result carefully, I am not sure that it reflects the true status of the defendant. The concept of reoffending risk is inherently subjective and may be closely tied to the offender's inclinations. While I appreciate that probation officers have quantified the findings based on multiple factors, I am uncertain whether these figures can provide a comprehensive understanding of the intricate human nature [J.8.P.7-8].

Other practitioners also criticised this tool for focusing primarily on the offence committed. As one judge provided a further explanation:

> I think most of the questions for the risk assessment tool seemed to focus on the offence already committed. Therefore, it is uncertain if the tool is useful in predicting the likelihood of future offending [J.13.P.14].

In addition, none of the judges or prosecutors gave clear answers as to their choice of specific hours imposed for measures. As the statutory range suggested by the legislation is also wide in the case of preventive measures, they seemed to rely more on precedents. As one judge explained:

> For specific duration of preventive measures, I think I search for past cases quite a lot. There seems to be a typical outcome for specific measure. For instance, the treatment programme generally commences at around 80 hours. In less severe cases around 40 hours may be necessary, but more serious cases require a greater duration [J.13.P.7-8].

To summarise, pre-sentence reports and the risk assessment tool were considered to be useful sources of information to be taken into account when making sentencing decisions, in terms of the amount of information they provided. Nevertheless, practitioners seemed to use them as a source of general information, undermining their reliability, particularly in the case of the risk assessment tool. As explored in the use of prosecutor's recommendations and sentencing investigation reports in previous sections, the relationship between criminal justice agencies seemed to influence the way these sources of information were used. In this context, the next section explores sentencing practices further through the notion of the ‘courtroom group’.

8.4. The ‘Courtroom workgroup’ in Korean context

This section aims to summarise the way in which practitioners viewed and used different sources of information in their decision-making through the concept of a 'courtroom workgroup'. As detailed in Chapter 3, this notion was commonly employed to describe the interactions between the different players in a courtroom setting (Lipetz, 1980). Previous research has identified that practitioners operated cohesively to promote efficiency in their daily work (Eisentein and Jacob, 1977; Rumgay, 1995).

Unlike previous studies, this chapter revealed that the key players in

Korean courtroom workgroups operate based on rivalry. The use of prosecutors' recommendations and sentencing inquiry reports highlighted the power struggle between the courts and the Prosecution Service. The reliability of pre-sentence reports, particularly the risk assessment tool, also appeared to be frequently undermined by judges and prosecutors as their approach also reflected the tensions between different agencies: Courts, the Prosecution Service, and the Ministry of Justice. The conflict between different groups involved in sentencing may not be entirely uncommon, as judges may be reluctant to be influenced by even softer persuasion of information provided by different agencies (Fielding, 2011). The conflict among practitioners was primarily due to the power struggle over the ownership of sentencing. Therefore, this phenomenon offers valuable insights in comprehending the practices of sentencing.

In summary, the interplay among key players involved in sentencing sexual offences in Korea can be summarised as follows: First, practitioners were strongly influenced by their exclusive organisational culture, as discussed in Chapter 3. As a result, they were disinclined to openly share their opinions, despite acknowledging the need to resolve some issues to obtain more useful information for their decision-making process. The way in which judges used pre-sentence reports only as a source of general information about the defendant, regardless of their original purpose, could be an example of the conservative attitudes of practitioners.

Second, practitioners appeared to resolve any challenges they encounter within their own organisation, without communicating with each other. The use of court personnel by judges as sentencing investigation officers demonstrates their unwillingness to openly discuss what is needed for sentencing decision-making.

Third, each agency attempted to resolve the issue independently, without engaging in open communication with others. This problem-solving approach exacerbated conflicts. Following the example set by the courts, who employed their own investigation officers to rationalise sentencing, the Prosecution Service also mentioned its plans to appoint investigation officers for the same purpose. Second, practitioners seemed to solve any issue they

face within their own organisation, instead of communicating with each other. The reason behind judges using their own court personnel as sentencing investigation officers clearly showed their reluctant attitudes to speak openly about what they required for sentencing decision-making. Considering the primary responsibility of the sentencing investigation officers to contact victims, implementing a similar system in a different agency would only result in the victims enduring an unnecessary process twice.

Fourth, the working methods of practitioners were inherently incoherent, causing disruptions to decision-making processes based on a more comprehensive way of thinking. According to judges, the effectiveness of punishments, particularly preventative measures, is uncertain given the current practices of the Ministry of Justice and the courts.

Finally, the tension among practitioners ironically provided justification for them to rely on their own precedents, particularly when making decisions about sentencing. Practitioners' assessments of information sources are based on general attitudes of doubt and undermining of their values due to the tensions between each criminal justice agency. This further creates an environment in which the practitioners can justify their dependence on precedents. In that sense, the notion of the courtroom workgroup can be characterised by conflict and tension, rather than cohesive collaboration in Korea. Furthermore, the segmented approach resulting from this conflict appears to impede a holistic view of the criminal justice process.

8.5. Concluding comments

The aim of this chapter was to understand sentencing practices by focusing on the relationship between different groups of practitioners. The influence of organisational pressure was seen to affect the way they worked, leading to an interplay among practitioners based on rivalry-like relationships. The usage of prosecutors' recommendations, sentencing inquiry reports, and pre-sentence reports in practice indicated the tension between each other. Although practitioners considered these sources useful in their decision-

making, they often undermined their credibility because they were provided by different criminal justice agencies. As a result, the conflicts further contributed to the practitioners to be based on their old customs and practices. This was discussed in Chapter 6 as one of the factors reflecting the unchanging nature of sentencing practices.

Chapter 9. Conclusion

9.1. Introduction

This thesis examined the gap between legislative efforts to increase sentences for sexual offences and the reality of sentences imposed. Following an unprecedented public outcry over a series of sexual offences against children and disabled victims, there have been major changes to the overall sexual offences legislation based on a more punitive approach. The implementation of stricter statutory punishments and the introduction of preventative measures aimed to increase the severity of sentences for sexual offences. However, concerns persist regarding the leniency of sentences, and greater scrutiny has been placed on the justification for current sentencing practices in sexual offences.

In this context, this study aimed to understand the rationale behind sentencing decisions in sexual offence cases by triangulating findings from interviews with practitioners and analysis of court decisions. As this is the first Ph. D. study on the sentencing of sexual offences in Korea which is based on empirical evidence, it intended to shed light on the issue of sentencing practices by exploring the perspectives of judicial practitioners.

To provide a background for the study, the thesis examined Korean society by understanding Confucian influences. After establishing a general understanding of Korean society, the study delved into the culture of judicial practitioners. Finally, recent legislative responses to sexual crimes were illustrated to discuss the changes in legal and political discourses over time.

After exploring the practitioners' work and environment, the thesis presented the judicial practitioners' perspectives on the sentencing framework, specifically regarding the legislation on sexual offences and sentencing guidelines, through findings from qualitative interviews. The study examined how relationships between practitioners across various criminal justice agencies impact their views on information sources for sentencing decisions. To understand the dynamics between courtroom actors, the concept of the

'courtroom workgroup' was explored.

Additionally, the study extensively addressed practitioners' ingrained stereotypes of sexual offence victims and how these influenced their sentencing decisions. The examination of court decisions also provided useful insights to fill the research gap by providing some evidence to support the interview findings.

The first section of this chapter reflects on the research findings. It aims to understand the rationale behind sentencing practices for sexual offences based on the summary of the empirical findings. The second section examines the methodological aspects of the study. The following section provides insights for future research in this area. Finally, the thesis concludes with some final thoughts on the research.

9.2. Reflections on the research findings

This section illustrates sentencing practices for sexual offences in Korea based on the research findings. To gain a deeper understanding of sentencing practices, the study has set out the following research objectives: to examine changes in the legal and policy framework for sentencing sexual offences over time; to identify court decisions in sexual offence cases; to analyse practitioners' perspectives on sentencing sexual offences; and to explore the factors and influences that shape practitioners' decision-making in practice. Based on the research questions, the study argued that a notable disparity exists between what practitioners are required to do by law (i.e. the law 'on the books') and what actually happens in sentencing sexual offences (i.e. the law 'in action'). The thesis demonstrated that the legislative changes' punitive rhetoric was not adequately reflected in sentencing practices, which resulted in consistent criticisms of leniency in sexual offence sentencing outcomes. By examining how practitioners use the sentencing framework in their daily work and the rationale behind their approach, the study aimed to unravel the reasoning behind sentencing practices.

To build background knowledge, the thesis first attempted to identify what contributed to the legislative changes in sexual offences. Understanding the sentencing framework was crucial in sentencing studies as it provides the basic standard for practitioners in their decision-making process (Kim, 2011b). Furthermore, the framework supplies essential knowledge regarding the fundamental aspects of the sentencing system, including the main purpose, social standpoint, and corresponding penal theories and principles (Frase, 2001).

Over the last 20 years, a range of legislative measures has been implemented due to the increasing severity of sexual offences and the public and media's heightened awareness of the issue (Shim, 2002). Chapter 4 offers a detailed analysis of modifications to the legal structure for sentencing sexual offences. In recent times, rapid alterations have been made to the Korean criminal justice system, particularly in the past decade, due to various notorious cases of sexual violence targeting minors and individuals with disabilities (Kim, 2012). There was a clear indication of a more punitive approach in legislative responses to unprecedented public outcry (Han and Lee, 2011). As a result, legislation and sentencing guidelines have been frequently revised, leading to a sharp increase in the range of statutory punishment for sexual offences through aggravated sentences (Byun, 2011; Seon, 2014). The incorporation of numerous preventative strategies, such as electronic monitoring and a notification system for sexual offenders, was another notable aspect of the changes (Kim, 2013a).

As this legislative change occurred within a relatively short timeframe, some researchers have criticized the current sexual offense legislation as being a result of populism and 'legislation politics', rather than the outcome of rigorous policies regarding sexual offenses (Kim, 2012; Park, 2013). The interview findings reveal that practitioners criticised the frequent enactment and revision process of the Special Acts for overlaying similar contents in different legislation and thereby complicating the overall system.

Additionally, the interviewees expressed concerns that the current sexual offence legislation is significantly influenced by 'irrational and emotionally charged demands' from the public. Previous research has

primarily concentrated on the involvement of the media and public in the punitive discourse within the legal system (Hough and Roberts, 2002; Roberts, 2003). In a similar vein, judges attributed misinformed criticisms to the distorted media coverage of certain high-profile sexual offence cases. As the public's message was mainly focused on a retributive and crime control approach, judges kept a distance from this stance since they perceived the law to be excessively punitive. Consequently, they expressed their reluctance to comply with the transition in sexual offences legislation.

The analysis of court rulings corroborated the interviews conducted. To briefly summarise the analysis of court decisions, the frequent use of suspended sentences (in over half of the cases) and minimum sentences (in over 60% of the cases) was clearly observed, as discussed in detail in Chapter 6. Since sentencing practices were primarily focused on reducing outcomes via the application of several mitigating factors, the lenient appraisal of sentencing outcomes in sexual offence cases may have been affected. Although the sentencing outcomes adhered to the boundaries of the law and sentencing guidelines, this was largely due to the wide range of statutory punishments that allowed judges to conform to recommended ranges. Some prosecutors and lawyers expressed similar views, although they were more concerned with the consistency and proportionality of the legislation. When comparing sexual offences legislation with other legislation, they argued that a skewed approach to punishment focused only on certain types of sexual offences, particularly those involving child victims, would threaten the coherence of the entire legal system. For instance, they specifically criticised the fact that some child sexual offences are punished more severely than murder under the current legislation.

Before discussing the factors that shape the way practitioners work, it was also important to find out about the legal tradition in Korea. A thorough understanding of this legal tradition is imperative for comprehending how the criminal justice system works in actual practice (McConville and Baldwin, 1981). Although the Korean criminal justice system was significantly influenced by the continental system, recent developments have focused on implementing more adversarial elements to properly secure the procedural

rights of victims and defendants (Kuk, 2006). In particular, adversarial procedural rights have been extensively introduced to replace heavy reliance on dossiers during trials, in order to properly reflect the voices of victims and defendants, as discussed in Chapter 3. While the emphasis on the principle of the crime control model has been demanded by the punitive rhetoric of public outcry, the Korean criminal justice system has experienced a dynamic struggle between the ideal principles of the due-process model, such as equality and fairness, and a more informal yet practical emphasis of the crime control model (Rutherford, 1994).

To some extent, the approach of Korean judges to not strictly apply the law the way it was oriented could be interpreted as due process oriented. Judges have voiced worries about the implementation of punitive changes to the law without careful consideration of the overall legislation, as well as the potential for defendants to be treated unfairly during criminal proceedings. In this sense, their practice can be considered as correcting erroneous legislation influenced by ill-informed public opinion. Although judges were hesitant to claim that they had any specific intentions to apply or modify the law in a certain way in order to convey any messages, the analysis of court decisions clearly showed their attitude towards the current legislation as mentioned earlier. At face value, it appears that the judges have adhered to the established framework as the sentencing outcomes were within the prescribed range set out in the sentencing guidelines. Nevertheless, it is feasible that the judges have taken an 'activist' stance by imposing the lowest possible sentence or frequently using suspended sentences, rather than being a 'passive arbiter' (Fielding, 2011:98). If this were true, their approach may be viewed as a conservative form of judicial activism, since their stances oppose external legislative and policy alterations (Galanter et al., 1979; Fielding, 2011).

According to interview findings, however, practitioners appeared to be 'applying' the law rather than having a specific intention behind their practice. Despite frequently expressing concerns about the increasing complexity and punitive nature of sexual offence-related legislation, they showed reluctance to advocate against any possible legislative changes. While some

practitioners have stated their desire not to interfere with the role of legislators and to respect their boundaries, others have admitted that they do not want to overcomplicate or burden their workload with additional tasks.

While practitioners experienced pressure from the punitive legislation, the conservative and exclusive organisational culture seemed to justify the tendency of judges to rely on precedent (i.e. case law). Practitioners' work may be influenced by institutionally defined priorities rather than socially derived formal objectives or principles (Garland, 2012). Therefore, the crucial question remains - to what extent do organisations control the behaviour of their members (Gelsthorpe and Padfield, 2002). Prior studies have highlighted the internal organisational context as a significant factor that shapes practitioners' interpretation of the law (Skolnick, 1966; Young, 2013). As outlined in Chapter 3, the judicial culture of Korea relied on a rigid hierarchical system, which had profound Confucian influences (Chang and Janeksela, 1996; Kim, 2009). The emphasis on maintaining social stability meant conformity to authority took priority over individuality, an idea that could be readily justified within this traditional mindset (Choi, 2002). It appears that junior members are frequently compelled to defer to their seniors as a gesture of respect. As a result, individual voices could easily be silenced in the name of maintaining consistency within their organisations. Therefore, the way in which practitioners interpreted and applied the law appeared to be profoundly entrenched over time.

Another key aspect mentioned in terms of organisational culture was the overall male-dominated judicial culture in the Korean criminal justice system (KOSIS, 2018). Despite the limitations pertaining to the sample size used in this study, which may not be sufficient to draw concrete conclusions, all female interview participants acknowledged that there seemed to be some differences in their views on appropriate gender roles and behaviours. Based on a patriarchal perspective and the influence of Confucianism, male practitioners tend to conform more to traditional and conservative gender roles. Additionally, female practitioners may experience added pressure in a largely male-dominated judicial culture to be accepted as equals (Trice, 1993). Consequently, they may feel the need to demonstrate their belonging through

engaging in 'masculine' behaviours (Zimmer 1986). Based on this premise, some female interviewees have expressed concerns regarding the questionable reflection of voices from sexual offence victims (over 90% of whom are women, SPORK, 2021) during the process.

While the exclusive and conservative nature of the organisation justified practitioners' tendency to rely on their old customs and practices (Church, 1982), conflict between different criminal justice agencies was clearly observed during the interviews. Previous studies in both the UK and the US have indicated that practitioners typically work in a cohesive and cooperative manner rather than adopting an adversarial approach (McConville and Baldwin, 1981; Rumgay, 1985). By introducing the notion of the 'courtroom workgroup', the studies analysed the collaboration amongst practitioners for achieving efficiency in their daily proceedings (Eisenstein and Jacob, 1977). The workgroups develop several shared practices to aid their work through the interplay of diverse stakeholders present in a courtroom environment (Lipetz, 1980).

In the case of Korean practitioners in courtroom settings, however, the dynamic appeared to be quite complex, as discussed in Chapter 6. Rather than working in a collaborative and friendly manner, there was a more apparent long-standing conflict or tension between the different criminal justice agencies, which had been created by the historical and political context. Judges' wide discretionary powers were seen as the main source of rivalry between the courts and other criminal justice agencies, particularly the prosecution service. In contrast to the UK, Korean prosecutors have the authority to suggest sentences based on their investigation results, as is the case in the US (McConville and Baldwin, 1981). To ensure a conviction and reflect their recommended sentence in the sentencing outcomes, prosecutors often argue against judges who are inclined towards leniency. During the interviews, prosecutors frequently criticised the appraisal of lenient sentencing outcomes in sexual offences as being mainly due to judges' failure to reflect the driving force for legislative changes in their sentencing practices. Conversely, judges considered prosecutors to be 'conviction-oriented' and even unrealistically punitive.

This ongoing tension between different criminal justice agencies was also clearly reflected in the way practitioners viewed the sources of information from different agencies. Instead of collaborating, practitioners often discredited such sources to maintain their work scope and discretionary power. Rather than a consistent approach across the system, the conflict between different actors in the criminal justice process can lead to fragmented approaches by different agencies. As a consequence, vital information for sentencing may be ignored due to agency conflicts. Furthermore, this would have a considerable impact on the public's perception of the criminal justice system and their confidence in it.

However, it is crucial to recognise that this conflict and tension among courtroom actors appeared to ironically reinforce practitioners' tendency to adhere to precedent. As practitioners were well-informed of each other's actions in trial settings, they seemed to be indirectly impacted by the informal and shared way of working (Eisentein and Jacob 1977; Rumgay 1995; Hucklesby, 1997). In essence, despite their apparent hostility towards each other, courtroom actors work together routinely, anticipating each other's actions (McConville et al., 2003). The imposition of preventive measures for a specific period in court decisions also suggests the existence of informal rules and norms that govern their behaviour.

In sexual offence cases, the status of the victim is a critical factor in sentencing. The high statutory punishment and organisational culture of sexual offences put pressure on practitioners, so the whole process of sentencing inevitably focused more on identifying the real victim to ensure that the defendant was guilty. As the Korean criminal justice system is primarily grounded in continental jurisdiction, the credibility of victims played a crucial role during the sentencing phase. This is because the process of sentencing entails making determinations with respect to the culpability or innocence of defendants, while also determining the appropriate level of punishment.

Under these circumstances, the presence of a credible victim, in other words a 'real victim', has certainly helped to reduce the burden on judges in sentencing and to reduce doubts about the possibility of a false accusation. As a result, vulnerable victims such as children and disabled individuals are

more commonly believed to be genuine victims since a 'real' or 'ideal' victim is often defined as one who has had no part to play in their victimisation (Spalek, 2006). This division inevitably created a victim hierarchy, where some victims were seen as deserving of their treatment, while those who did not conform to the stereotypical expectations of practitioners' discretionary processes could be further marginalised (Mawby, 1988; Carrabine et al. 2004).

Based on the interview findings, it appears that practitioners' perception of sexual offense victims and their use of informal criminal agreements play a crucial role in practice. Shared beliefs and ideas have a significant impact on the way practitioners work in their field (Church, 1982; McConville et al., 2003), therefore comprehending their perception of sexual offence victims was crucial. Furthermore, the practitioners' viewpoints towards victims had a close association with the use of the informal criminal agreement, which was found to be the most significant mitigating factor in the sentencing of sexual offences, as discussed in Chapter 7.

The primary objective of this informal criminal agreement was to consider victims' perspectives in sentencing, as sexual offences cause more harm to victims than other types of crimes (Han and Lee, 2011). However, the research findings contradict the original victim-oriented approach, stating that the defendant benefits significantly from this informal agreement in many cases. As the main objective of the agreement is to lower the sentencing outcomes, it unavoidably had a more defendant-focused approach (Chang, 2012). While the agreement aimed to demonstrate the defendant's genuine remorse and efforts towards restoration, it predominantly focused on the defendant's perspective and failed to fully capture the actual assessment of the defendant's efforts based on the victim's perspective (An and Yoon, 2014). As a result, the practical use of the agreement was primarily concerned with defendants' rights to defend themselves and potentially reduce sentencing outcomes, rather than asking victims what they wanted.

Furthermore, the agreement process was criticised as one of the main causes of secondary victimisation during the process, as the agreement was usually reached in a private area where judges and prosecutors did not formally intervene (Chang, 2012). Although judges and prosecutors appeared

to place more emphasis on the agreement process, largely as a result of extensive criticism of its misuse in the past, this emphasis has centred mainly on children and disabled victims, given their incapacity for rational decision-making. As a result, adult females, who constitute the primary victim group in sexual offences and are capable of independent decision-making, have been relatively neglected in terms of this additional caution throughout the process.

Moreover, the financial element of the informal criminal agreement seemed to reinforce practitioners' ingrained stereotypes of the 'real victim' frame by dividing victims into two groups: real victims and so-called 'gold diggers' (undeserving victims). As the credibility of a victim was predominantly based on the practitioner's expectation of how an actual victim would respond, the majority of practitioners anticipated encountering emotionally distressed and traumatised victims of typical sex crimes. Therefore, they chose the case where the victim initiated the informal criminal agreement process as the factor that undermined the victim's credibility. In such circumstances, victims were frequently coerced to refuse compensation to establish their innocence (An and Yoon, 2014).

Practitioners' stereotypical views and overly cautious approach have been questioned regarding victim involvement throughout the process. Previous studies in the context of gender and sentencing (Pollack, 1950; Rock, 2004) have explored practitioners' protective attitudes towards victims, revealing that women tend to receive more lenient sentences due to practitioners' chivalrous or paternalistic attitudes (Moulds, 1980; Rodriguez et al., 2006). However, this study suggests that the paternalistic and chivalrous discourses were applied differently in Korea. With a close link to the real victim stereotypes mentioned above, the paternalistic approach of practitioners ironically marginalised the status of the victim during the process. Once genuine victims were identified, they were categorised as trustworthy and protected. Ironically, this overprotective approach appeared to render victims invisible from the process by offering additional layers of support, such as lawyers representing the victim.

In light of the severe impacts of sexual offences on victims, the courts have implemented several measures to enable victim participation throughout

the process. One of the most noteworthy changes recently introduced is the provision of lawyers for victims in sexual offence cases (Ahn and Choi, 2015). Victim support representatives were considered an effective means of mitigating the risk of secondary victimisation, as practitioners do not necessarily need to have direct contact with the victim (Lee, 2014). Nevertheless, empirical evidence identified that support services were infrequently utilised in some small towns and the degree of involvement varied considerably due to their uncertain role within the legal process. Moreover, the victim's legal representatives were dissatisfied with their restricted involvement and general treatment throughout the proceedings.

The use of a victim's lawyer has also raised concerns over the status of victims in the legal process. Although the changes in sexual offence legislation aimed to increase victim involvement by providing effective legal aid and opportunities to express their views, the application of victim's lawyers deviated from the intended victim-oriented approach (Ahn and Choi, 2015). Judges and prosecutors regarded victim's lawyers favourably because they preferred communicating with those who speak 'the same language'. Some studies have highlighted that the criminal justice system often disregards statements that are emotionally charged or include unexpected outbursts from victims (Walklate et al., 2012). Refining the language of the victim into more legally suitable statements solely for the convenience of practitioners raises questions about the role of the victim's lawyer as a representative. This approach adds unnecessary layers to the process and significantly reduces opportunities for victims to express their voices and be directly involved. Given the limited application of this protection to victims who fit the description of a 'real victim', there existed potential for the marginalisation of unworthy victims throughout the process. Moreover, the possibility of injustice may be raised as an issue as some victims appeared to lack equitable access to legal representation, due to limited resources based on the location of the courts.

In summary, the study examined the factors that affect the way practitioners approach sentencing in sexual offence cases. By understanding the pressures of punitive law, the influence of organisational culture and the interplay between practitioners, the study aimed to discuss how practitioners

apply the law in reality and why they work in a particular way. Furthermore, the study extensively analysed practitioners' ingrained prejudices towards sexual offence victims to assess their impact on the interpretation of cases. Additionally, it highlighted the irony in the supposedly victim-oriented approach leading to the silencing of victims throughout the process. The study also investigated the role of the informal criminal agreement in further reinforcing practitioners' stereotypes. Based on the findings, the study noted that current sentencing practices could be summarised as a compromise by practitioners between their reluctance to use the harsh law and their lack of suspicion of victims of sexual offences. Additionally, the analysis of court decisions provided evidence for this argument, revealing that judges tend to impose the lowest possible sentence and frequently resort to suspended sentences.

9.3. Reflections on methodological aspect of the study

This section reflects the methodological aspect of the study. The main objective was to analyse practitioners' perspectives on sentencing sexual offences. Thus, capturing their voices on the subject was a crucial part of the study. However, the research's methodology posed several challenges due to the conservative and exclusive nature of the Korean judicial culture (Choi, 2015). Additionally, due to the sensitive nature of the research topics, namely sentencing and sexual offences, a more careful preparation process was required in terms of having various alternative options for access and recruitment. The recruitment of interviewees relied primarily on snowball sampling, with the exception of prosecutors who were granted official permission for interviews by one of the Prosecutor's Offices. A comprehensive overview of access, sampling, and research scope is provided in Chapter 5.

The key advantage of this study is its ability to gather varied opinions from practitioners with different backgrounds in terms of gender, age and length of experience. Overall, the study involved 42 participants consisting of 17 judges, 11 prosecutors and 14 lawyers, all selected from a wide variety of locations and sizes. Overall, the diverse backgrounds of the interviewees

enhanced the data analysis by offering varied perspectives based on their cultural and geographical disparities.

For this research, the number of interview participants may not be representative enough to generalise the data. To address this issue, this study aimed to provide a better picture of sentencing practices by triangulating the data collected from the interviews and the quantitative analysis of court decisions. Moreover, interviewing seven senior position participants further strengthened the research's reliability. During the recruitment stage, specific selection criteria were employed to ensure the inclusion of individuals with the most insightful firsthand experience on the topic. The preparation process included court observation and pilot interviews, which also served to increase credibility. Pilot interviews with former practitioners were carefully conducted to test the reliability of the interview questions and to build background knowledge for conducting the interviews. Conducting a pilot study was particularly beneficial in refining the interview questions and selecting more appropriate terminology.

The status of the researcher, not being a member of the criminal justice agencies, acted as a double-edged sword. In terms of potential disadvantages, the in-depth knowledge of the insider may have helped to establish rapport more quickly and easily, which is essential in interviews. Most importantly, the imbalance in power dynamics was a concern during the interview process due to the nature of elite interviewees. As elites are often specialists in certain fields (Brinkmann and Kvale, 2015), obtaining information on their expertise can be challenging at times. Empirical studies examining judicial practitioners have frequently noted a defensive atmosphere in the criminal justice system (McConville and Baldwin, 1981). Given their exclusive nature, judicial practitioners may demonstrate minimal interest or reluctance to participate in external investigations. As outlined in Chapter 5, certain practitioners voiced their unease concerning questions about their work. Additionally, particular senior members critiqued the quality of the interview questions and verified the interviewer's understanding of sentencing practices.

In addition, as practitioners are experts in the field of sentencing, it would be particularly problematic if interviewees were to withhold or even

mislead the interviewer by providing only one side of the story. To address such concerns, conducting pilot interviews beforehand has assisted the researcher in familiarising themselves with the interview setup and better prepared in dealing with any potential challenges. Investigating different viewpoints by interviewing three groups of participants (judges, prosecutors, and lawyers) aided in filling the research gap by contrasting diverse opinions.

Although the exclusive attitudes of practitioners were often observed during the interviews for this study, there were more advantages to being an outsider during the interview process. This research is the initial Ph. D. empirical study on sentencing, unaffected by any particular organisational pressures or political conflicts between different criminal justice agencies. Practitioners appeared at ease as this study was conducted in a foreign institution that diminished their concerns about possible negative consequences of participating in the research.

For the participants, their lack of experience of empirical research, especially qualitative interviews with an outsider, seemed to make them more cooperative and open because they seemed to genuinely enjoy the participation process. Some were satisfied to be interviewed because the interviews gave them the opportunity to explain their work in their own words. Since the interviewees appeared to be at ease due to their similarity in legal background with the researcher, they anticipated that this research would aid in dispelling any misconceptions related to their work.

Being unfamiliar with the interview process, sometimes they were curious about what others think. In particular, some senior judges were keen to hear the views of junior members. Prosecutors were particularly interested in judges' opinions on specific matters, such as the implementation of sentencing investigation officers. Interviews were held separately for each practitioner in offices, ensuring a disturbance-free setting.

In summary, the lack of official channels for conducting empirical research initially made the research particularly challenging. Some interviewees did not like the idea of being questioned about their sentencing practices, as this could lead to further criticism of their work. Nevertheless, the majority recognised the importance of empirical data to assess the nature of

their work. Some practitioners strongly insisted that sentencing decisions should not be made in a vacuum. Therefore, having the opportunity to discuss sentencing practice with others would also benefit their work.

9.4. Implications for future research

This section offers insights for future research on sentencing sexual offences by reflecting on the findings. As mentioned earlier, sentencing research has long been a 'wasteland in the law' in Korea (Frankel, 1972:242). Until recently, judges had considerable discretionary power, and questioning their decisions was not encouraged (Hong, 2013). The Korean judicial culture's exclusive and defensive nature has hindered empirical studies because practitioners are unwilling to disclose their work and practices in the sentencing area (Kim and Ki, 2016).

Understanding sentencing practices is crucial because it reflects the way practitioners apply the law. Practitioners' methodologies are substantially influenced by various factors, such as personal beliefs, organisational culture, and the dynamics of legal actors. Despite providing fundamental principles and formal rules, legislation and sentencing guidelines unavoidably create a gap, as demonstrated by this research. Through an analysis of the factors that contribute to the divergence between legal requirements and actual practice, this study aimed to contribute to a better understanding of sentencing practices and to address existing problems, such as sentencing disparities.

To gain a better understanding in sentencing studies, one of the fundamental starting points would be to examine the underlying theories of law and practice. However, as the daily work of practitioners tends to focus on getting through the day's business rather than reflecting on specific moral values or principles, identifying a clear ideology or rationale has often been seen as a challenging task (Rutherford, 1994). A study on policing in England and Wales demonstrated that police culture adopts an approach that is mainly pragmatic and reflects an 'anti-theoretical perspective of conceptual conservatism' (Reiner, 2010:131). The study highlights that practitioners often

display indifference towards theory-related questions during interviews, arguing that these are more suited for academics. They therefore found it particularly difficult to answer questions about theories of punishment, describing them as abstract and too academic.

Regardless of practitioners' general disinterest in the theoretical underpinnings of sentencing practices, their personal and organisational values and beliefs would undoubtedly be influenced by theories of punishment. As the objectives of punishment are reflected in the overall discourses of sentencing policy and legislation, a deeper understanding of the theoretical aspect of sentencing would help to identify the focus of the criminal justice system and assess the effectiveness of related policies (Valier, 2002; Von Hirsch et al, 2009). This would also offer valuable insights for subsequent sentencing reform.

One of the difficulties encountered during this research was the lack of information available to study the daily work of criminal justice practitioners in Korea. Earlier studies concerning sentencing mainly concentrated on legislative revisions (Kim, 2012; Park, 2014), resulting in an incomplete overview, as empirical studies examining the work of practitioners were lacking. Although the concept of the courtroom workgroup or court culture has been established in other jurisdictions as an important factor to capture the world of practitioners for decades, they have hardly been mentioned in sentencing studies in Korea. Without a comprehensive knowledge of the dynamics of practitioners and their influence on sentencing outcomes, it would be impossible to fully understand the factors that impact practitioners' sentencing decision-making processes. Therefore, these concepts offer an alternative approach to studying sentencing practices and improving understanding. Although some previous studies have also suggested that an overemphasis on criminal justice as a whole system could threaten the independence of different agencies (Rutherford, 1994), some practitioners interviewed for this study agreed that an understanding of the dynamics between the different players in the courtroom working group would certainly benefit their work, as they might be able to adopt a more coherent approach.

Most importantly, practitioners' perceptions of sexual offence victims

and their impact on their practice would also provide a wealth of information to understand how they approach sexual offences. Moreover, a thorough study of the prevalent stereotypes on victims of sexual offences can aid practitioners in identifying the possibility of potential miscarriages of justice. During the interviews, it became apparent that many practitioners were influenced by the conservative and traditional notions of genuine victims. Although they paid significant attention to violence and intimidation as key components of sexual offences, they remained tied to the belief that real victims would have resisted. Some practitioners have expressed concerns that the judicial system has not adapted to the changing societal norms of gender sensitivity. The perpetuation of rape myth-based stereotypes can lead to secondary victimisation during the trial process.

Consequently, a greater awareness of the gap between the public's expectations and the approach of practitioners in sexual offence cases would be crucial for future sentencing studies. Merely highlighting judges' 'sentencing sense' or distinguishing between the boundaries for practitioners and academics, rather than undermining the value of public opinion, more efforts to uncover sentencing practices would be crucial to achieving transparency and public trust in sentencing (Hong, 2013).

One way to encourage research on sentencing is to make court decisions publicly available. This has been requested by various academics and experts for the purposes of sentencing research (Park, 2014; Kim and Ki, 2016). Despite this, the courts have chosen not to release this data to the public, arguing the need to guarantee privacy for those involved. Obtaining access to court judgments, as described in Chapter 5, proved challenging, even for research purposes. Other criminal justice agencies, such as the Prosecution Service, also did not have access to court decisions as different agencies do not share the database system. Without comprehensive and robust data, sentencing policy may not accurately reflect reality (Roberts and Hough, 2015). Court decisions offer comprehensive details on sentencing practices, making it beneficial to practitioners to have more opportunities to scrutinise them. This allows for a better evaluation of the criminal justice process. Furthermore, court decisions are intertwined with the lives of the

general public. As such, having multiple feedback sources would enhance public confidence in the overall criminal justice process.

Finally, the following implications of the research findings can be considered useful for future sentencing studies. For example, the impact of practitioners' age on sentencing may be a crucial issue. According to interviews with practitioners, older judges tend to be more lenient in their sentencing compared to younger judges. Due to the size of the sample, in both qualitative and quantitative sources, this research could not identify the correlation between practitioners' age and sentencing outcomes. Nevertheless, it provides a valuable insight for judges who wish to identify potential factors contributing to sentencing disparity.

Regarding the influence of gender dynamics on sentencing for sexual offences, defence lawyers have noted that defendants perceive a female prosecutor and judge combination to be the most disadvantageous scenario for sentencing. Although other practitioners disagreed with this assumption, the sample size did not allow this research to provide a concrete explanation that could be generalised. However, it was argued by certain lawyers that defendants receive more lenient sentences when represented by female practitioners. If female practitioners do tend to be more lenient in their sentencing, as argued in the interviews, it would be worthwhile to investigate the rationale behind this tendency to provide additional avenues for study. Understanding this aspect could provide valuable insights into the impact of a male-dominated judiciary culture, as suggested by the research findings.

According to the findings, all participants were aware of the disparity in sentencing between different courts. Judges particularly emphasised the need to maintain consistency in sentencing outcomes, not only across the country but, more importantly, within their courts. While this survey did not provide data on geography-based sentencing disparity, there was a discernible reputation of the courts. Practitioners have argued that varying thresholds of acceptance should be applied based on the size of cities. For instance, in rural areas, particularly small towns, the gravity of the offence could be significantly higher as most households have closer connections with each other. Accordingly, some lawyers contend that courts in rural areas tend

to impose harsher sentences than those in urban areas. Examining this aspect closely would yield valuable insights into the problem of sentencing disparity.

9.5. Concluding reflections

This study endeavoured to unravel sentencing practices by discussing empirical research findings. The study showed that while on the surface the Korean criminal justice system may be paternalistic towards victims of sexual offences, the way it operates in sentencing sexual offences may tell a different story for a number of reasons. The study examined the evolution of sexual offense legislation and policy, highlighting the criminal justice system's attempts to represent the victims' voice. However, the study found that despite efforts to change legislation, the way practitioners worked in reality seemed to render these changes powerless. By examining legal perspectives and influences from organisational factors, the study explored the role of practitioners in contributing to critiques of lenient sentencing outcomes for sexual offences, highlighting how following precedents may have played a part. The study also emphasised the negative impact of practitioners' biases on victims of sexual offences, in particular the disempowerment of women in the process. The study aimed to highlight the significance of comprehending practitioners' practical approaches by exemplifying how increasing choices and supports for victims has an ironic effect of diminishing their power.

Furthermore, it is noteworthy that the way the criminal justice system operates is influenced by the social mood or public demands based on the specific circumstances of each society. Throughout the interviews, some practitioners argued that they were satisfied with the current system and sentencing practices because the courts had done all they could to protect victims. It was surprising that this satisfactory assessment, or even uncritical acceptance of the way they work, came mainly from relatively junior practitioners. Additionally, most practitioners contended that academics are responsible for identifying issues and developing solutions. Nevertheless, given the exclusive composition of the entire judicial system, it is doubtful

whether external individuals can offer significant inputs on sentencing practices. Moreover, the competitive nature of each criminal justice agency's operations, which resulted from prolonged tension and conflict, presents a fragmented approach that impedes the provision of a clear evaluation. Maintaining an objective stance is crucial for the judiciary, given the struggle to attain judicial independence in Korean history. However, it may be essential to understand the gravity of their work, as 'the life of the law has not been logic; it has been experience' (Holmes, 2004:1).

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Appendix A. Information sheet

School of Law

UNIVERSITY OF LEEDS

Sentencing Decision Making in Cases of Serious Sexual Offences in South Korea

Information Sheet

My name is Hye-in, Chung. I am a Ph.D. student of the School of Law, University of Leeds, UK, under the supervision of Professor Anthea Hucklesby and Mr. Nick Taylor. The purpose of my doctoral research is to examine sentencing decision-making in cases involving sexual offences to understand the differences between the rhetoric and the actual approach of sentencing law. To address this central aim, this research includes examining changes in the legal and policy frameworks for the sentencing of serious sexual offences over time; identifying sentencing decisions in cases involving serious sexual offences; exploring the factors and influences that are considered in sentencing serious sexual offences; and analysing judicial practitioners' perspectives on sentencing decisions in cases of serious sexual offences.

As learning from experiences and expertise from judicial practitioners is fundamental to this study, I would like to ask you some questions regarding your experience and involvement in the area. You are not expected to discuss individual cases. Instead the interview will focus on your general approach to the sentencing of offenders convicted of serious sexual offences. For your information, I am interviewing 35 judicial practitioners including judges from District Courts, prosecutors and lawyers.

Your participation in the interview is entirely voluntary and you can stop the interview at any time, for any reasons, without any negative consequences. You can also withdraw your consent for your interview to be used in the research within one month after the interview by contacting me at lwhic@leeds.ac.uk. If you withdraw your consent during or after the interview, any information collected will be destroyed and will not be used for the purpose of this research.

The interview should last around an hour. I also seek your permission to record the interview so that I can make sure I correctly record your views and experiences. If you prefer otherwise, please tell me and I shall take notes instead. You may refuse to answer particular questions. You can also bring up subjects that you think that may be useful which I have not asked directly about. You can ask to take a break at any time during the interview.

The interview will be confidential so that anything you say will only be known by the research team (myself and supervisors). The important exception to this is if you say anything, which, in the opinion of my supervisors or myself, may amount to evidence of a serious offence or malpractice. If this is the case, the information may be reported to the relevant authorities.

I will include in my thesis and publications general findings from the interviews as well as some illustrative quotations. Research participants will only be referred using their professional roles (e.g. Judge, lawyer, prosecutor) and will not be named in the thesis or in any publications arising from the research. However, given your role you may be indirectly identifiable and I cannot promise that your views will be anonymous.

Although there are no immediate benefits to you as an interviewee, the research will result in recommendations being made to the Government of Korea to improve sentencing legislation and practice.

If you require any further information please contact either myself or my supervisors at the School of Law, University of Leeds, LS2 9JT, United Kingdom: Professor Anthea Hucklesby (a.l.hucklesby@leeds.ac.uk) and/or Mr. Nick Taylor (n.w.taylor@leeds.ac.uk).

Thank you for agreeing to be interviewed and taking part in this research project.

Appendix B. Consent form

School of Law
Faculty of Education, Social Science and Law
UNIVERSITY OF LEEDS

Consent to take part in the research entitled:
Sentencing Decision Making in Cases of Serious Sexual Offences in South Korea

In order to comply with the ethics code of the university, I would be grateful if you would sign this consent form stating that I have explained the interview process to you fully and that you understand the interview process, and all procedures related to data storage and data analysis.

	Add your initials next to the statements you agree with
I confirm that I have read and understand the information sheet explaining the above research project and I have had the opportunity to ask questions about the project.	
I agree for the data collected from me to be used in relevant future research in an anonymised form.	
I agree to participate in the research on sentencing decision making in cases of serious sexual offence cases in Korea, which is being undertaken by the researcher Hye-in, Chung.	
I understand that my participation is voluntary and that I am free to withdraw at any time during the interview without giving any reason.	
I agree that Hye-in, Chung can record the interview.	

Name of participant	
Participant's signature	
Date	
Name of lead researcher	Hye-in, Chung
Researcher's signature	
Date	

If you do not wish to give your signature but are willing to participate, you can read the following statement out loud, which will be recorded. Please state the following: I am (name). I confirm that I have read and understood the information sheet in relation to the research being carried out by Hye-in, Chung. I hereby consent to be interviewed.

Project title	*Document type*	*Version #*	*Date*
Sentencing Decision Making in Cases of Serious Sexual Offences in South Korea			

Appendix C. Interview schedule

<Interview with Judges>

Note: The italicised notes will be mentioned to the interviewees as an introduction to each section and to help guide the conversation.

Thank you again for agreeing to take part in an interview in this project.

First of all, I would like to start by asking some questions about your background and position.

Professional profile (Demographics and background)

1. **How long have you been working in this court?**
    a. How long have you been working as a judge?
    b. Are there any special requirements to work at the specialised sexual offence court?
2. **Why did you become a judge?**
    a. What do you see as a main role of the judge?
3. **How often do you deal with serious sexual offence cases? (Monthly basis)**
    a. What is your view on 'serious sexual offence' cases?

+Do you have anything else that you would like to add about your professional profile?

Penological Objectives

Now, I would like to ask your views on the objectives of sentencing.

4. **What do you think is the main purpose of sentencing?**

(Retribution/Rehabilitation/Deterrence/Incapacitation)

    a. To what extent does having this particular purpose of sentencing affect your sentencing decision-making in general?

-How do you operationalise this objective in practice?

5. **What objectives do you prioritise in serious sexual offence cases?**
    a. Are there any other important secondary objectives?

b. Does this differ to the way you deal with other cases?

-other sexual offence cases

-other types of criminal offence cases

c. Are there any particular aspects of serious sexual offence cases that you pay more attention to?

Eg. Punishing the offender, a just compensation for victim, fair trial, proportionate sentencing, protection of the society and the public, etc.

(-What would you like to achieve/contribute through sentencing decisions in serious sexual offence cases?)

+Do you have anything else that you would like to add on this point?

Sentencing framework

The following questions aim to discuss legal and extra-legal influences in your sentencing decision-making.

6. **In terms of the sentencing framework, which of them are the most important/ less important in your sentencing decision-making in serious sexual offence cases?**

(sentencing framework: eg. Legislation, Sentencing guidelines, any other influences)

Legal Influences

7. **To what extent do you find sexual offence legislation useful in sentencing decision-making in serious sexual offence cases?**

(In this interview, sexual offence legislation refers to criminal acts and any other sexual offence related special acts)

a. What aspects of sexual offence legislation are useful in sentencing decision-making? / not useful

(eg. Provides useful guidance/ too complex to apply/ too many special acts, etc.)

8. **When you consider the available punishment and preventive measures, do you think that there are sufficient options for your sentencing decision-making in these cases?**

(In this interview, available preventive measures include electronic monitoring, registration and chemical castration, etc)

a. If they are sufficient, are there any specific punishment and preventive measures that are particularly useful?

- If they are sufficient/ useful, which aspects are most useful/ least useful?

-If they are not sufficient/adequate, in which particular aspect do you find that they are not useful?

Eg. Too much constraint, too harsh, complex to apply, lack of clear guidance or standard for judging certain criteria

b. What is your view on a preventive measure (give example) in particular?

- Are they more sufficient than they were before?

- How often do you use them (roughly in percent)/ why?

- Especially in what kind of cases do you use this measure?

- In terms of the information you need to decide whether to impose certain measure, are there sufficient information available?

+Are there anything else you want to have but not yet provided? If yes, what is it and why?

Now, I will move on to the questions regarding sentencing guidelines.

9. To what extent do sentencing guidelines influence your sentencing decision-making in serious sexual offence cases?

a. Is there any particular aspect of sentencing guidelines that you would consider the most important?

b. In what way, do you find them useful? /not useful?

-If yes, what do you particularly find them useful?/ why?

-In your opinion, do you find them easy to apply?

-What is your view on sentencing guidelines as a role of guidance in your sentencing decision-making in serious sexual offence cases?

eg. Decision-making on the range of punishment/ any influences on imposing preventive measures

-If not, why not?

c. What is your view on sentencing guidelines having an advisory function?

-To what extent do you tend to stick to them? /why?

(What makes you stick to the guidelines in spite of their advisory function?)

- Are there any particular circumstance that you find hard to stick to the guidelines?

Now, I would like to ask you about more specific factors provided by sentencing guidelines.

10. **Based on the sentencing factors mentioned in sentencing guidelines, to what extent do they influence your sentencing decision-making in these cases?**

(eg. The nature of offence, information on victim or offender etc)

a. Are these available sentencing factors helpful? /sufficient?

-If yes, in what sense? /In what aspects are they particularly useful?

-If not, why not?

b. In your opinion, what are the three most important factors considered in sentencing decision-making of serious sexual offence cases? /and why? -What about the least important factors? /and why?

11. **What are the most important aggravating factors in serious sexual offence cases? / Why?**

(eg. Age/occupation/virginity/previous criminal records (sexual offence related or other types) etc)

a. Are these available aggravating factors useful? /sufficient?

12. **What are the most important mitigating factors in these cases? /and why?**

a. (In case the interviewee has chosen different criteria for the victims and offender), what made the difference?

b. Are these available mitigating factors useful? /sufficient?

13. **In your view, do you get sufficient information in judging these sentencing factors?**

a. In particular, how do you judge the factors such as sign of remorse, sufficient level of resistance?

14. In terms of the source of the information, how does it influence your sentencing decision-making in these cases?

a. Is there any difference between other types of cases and sexual offence cases in terms of your standard of judging the origin of information?

b. Are there any differences in your approach to these sources depending on where they are from?

-from people (victim, offender) / criminal justice agencies

-If yes, how are they different? Why?

-Are there any particular sources you rely on more? / less?

c. Based on your own perspectives, what makes this information more credible than others?

-What do you consider to be the most credible source? / Why?

least credible source? / Why?

Now, I will ask questions regarding the source of information based on 3 different categories: criminal justice agencies, offenders and victims.

15. Criminal justice agencies:

a. Are there any particular sources within the boundary of criminal justice agencies that you would generally trust more than others? /less? Why?

b. To what extent do you consider prosecutor's recommendation in your sentencing decision-making of these cases?

c. Are there any differences in prosecutor's recommendation or general approach after the implementation of sentencing guidelines?

-If yes, how does it influence your sentencing decision-making in these cases?

d. Regarding the pre-sentence investigation, what is your general view on this?

-How do you decide whether you would request further information from probation officers or court personnel?

-Which source do you rely on more? Why?

e. When you need to request further information regarding sentencing decision-making in these cases, where do you prefer to get the information from? And why?

(Eg.Prosecutors/ police/ probation officers/ court personnel/lawyers)

16. The victim:

a. To what extent do you trust the victims?

- What makes a more credible victim? / less credible?

b. Between the information you get directly from the victim's testimony and the information delivered by prosecutors, which one do you find more reliable? /why?

-When supported by medical reports or other reports from the criminal justice agencies, how do they make difference? / To what extent? /

-virginity of the victim

-physical/ mental damage

c. What is your view on the importance on the victim in your sentencing decision-making of these cases?

-whether victim's voice should be more reflected or no?

-If yes, how?

d. What is your view on the victim impact statement?

17. The defendant:

a. How do they influence your sentencing decision-making process in these cases?

b. Between the information you get directly from the offender's statement and the information delivered by lawyers, which one do you find more reliable? /why

c. c. How do you judge the sign of remorse

d. If you want to get more information from the offender, how would you like to get information? Directly or by other criminal justice agencies?

e. To what extent do you consider the previous criminal history of the defendant? (in the same type of offences/ different types of offences)

We have talked about legal influences on your sentencing decision-making of serious sexual offence cases.

18. How does the legal framework structure your discretionary power in these cases?

(= How much discretion does the law allow you on sentencing these cases?)

-especially in relation to achieving the sentencing objective in these cases

a. Do you find your discretionary power in these cases differ from other types of cases?

-If yes, to what extent? / why?

-If you think your discretionary power in these cases are under more constraints than other types of cases, why?

b. Other than legal influences, are there other influences on your sentencing discretionary power in these cases?

+Anything else you would like to add to this point?

Now we will move on to the questions regarding extra-legal influences in your sentencing decision-making of serious sexual offence cases.

<u>Extra-legal influences</u>

19. Are there anything that is not provided by legal framework but which you rely on?

a. What are they?

b. Why do you rely on them?

c. How important are they in your sentencing decision-making in these cases?

Eg. Media, Public etc

Now, I would like to ask you about the influence of the public and media on your sentencing decision-making.

20. Media:

a. To what extent, does it influence your sentencing decision-making in these cases?

- Does it make any difference if the case is a high-profile media case?

21. Public:

a. To what extent, does it influence your sentencing decision-making in these cases?

22. If the media and public influence your sentencing decision-making in these cases, what is your view on this?

a. Is there any difference in terms of the level of the influences of the media and public on sentencing in sexual offence cases and other types of cases?

b. Are there any other important influences?

-court culture

-sentencing decision database system

+Colleagues/senior judges/legislator/Previous cases you dealt with?

+Anything else you would like to add to this point?

<u>Concluding questions (further reforms)</u>

Finally

23. Is there anything you would like to change in relations to sentencing of serious sexual offences?

a. Regarding sexual offence legislation

(eg. Too many Special Acts, frequent revisions, punitive approach etc)

b. Regarding sentencing guidelines

(In terms of application/format/contents/role etc)

-In terms of guidance, do you think you need more/ specific guidance in your sentencing decision-making?

-Do you think the current provided sentencing factors are useful? / if not, what would suggest?

c. Regarding the procedural rules regarding sentencing

d. Regarding the pre-sentence investigation

+Is there anything else you would like to add to this point?

Thank you.

[Information]

Date:

Place:

Identification number:

Gender of the interviewee:

Court:

Age band:

Interview schedule-Judges

<Interview with Judges>

Note: The italicised notes will be mentioned to the interviewees as an introduction to each section and to help guide the conversation.

Thank you again for agreeing to take part in an interview in this project.

First of all, I would like to start by asking some questions about your background and position.

Professional profile (Demographics and background)

1. **How long have you been working in this court?**
    a. How long have you been working as a judge?
    b. Are there any special requirements to work at the specialised sexual offence court?
2. **Why did you become a judge?**
    a. What do you see as a main role of the judge?
3. **How often do you deal with serious sexual offence cases? (Monthly basis)**
    a. What is your view on 'serious sexual offence' cases?

+Do you have anything else that you would like to add about your professional profile?

Penological Objectives

Now, I would like to ask your views on the objectives of sentencing.

4. **What do you think is the main purpose of sentencing?**

(Retribution/Rehabilitation/Deterrence/Incapacitation)

a. To what extent does having this particular purpose of sentencing affect your sentencing decision-making in general?

-How do you operationalise this objective in practice?

5. **What objectives do you prioritise in serious sexual offence cases?**

    a. Are there any other important secondary objectives?

    b. Does this differ to the way you deal with other cases?

        -other sexual offence cases

        -other types of criminal offence cases

    c. Are there any particular aspects of serious sexual offence cases that you pay more attention to?

        Eg. Punishing the offender, a just compensation for victim, fair trial, proportionate sentencing, protection of the society and the public, etc.

        (-What would you like to achieve/contribute through sentencing decisions in serious sexual offence cases?)

+Do you have anything else that you would like to add on this point?

Sentencing framework

The following questions aim to discuss legal and extra-legal influences in your sentencing decision-making.

6. **In terms of the sentencing framework, which of them are the most important/ less important in your sentencing decision-making in serious sexual offence cases?**

    (sentencing framework: eg. Legislation, Sentencing guidelines, any other influences)

Legal Influences

7. **To what extent do you find sexual offence legislation useful in sentencing decision-making in serious sexual offence cases?**

    (In this interview, sexual offence legislation refers to criminal acts and any other sexual offence related special acts)

    a. What aspects of sexual offence legislation are useful in sentencing decision-making? / not useful

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    a. Do you find your discretionary power in these cases differ from other types of cases?

       -If yes, to what extent? / why?

       -If you think your discretionary power in these cases are under more constraints than other types of cases, why?

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-sentencing decision database system

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+Anything else you would like to add to this point?

Concluding questions (further reforms)

Finally

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(In terms of application/format/contents/role etc)

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c. Regarding the procedural rules regarding sentencing

d. Regarding the pre-sentence investigation

+Is there anything else you would like to add to this point?

Thank you.

[Information]

Date:

Place:

Identification number:

Gender of the interviewee:

Court:

Age band:

Appendix D. Ethics approval

Performance, Governance and Operations
Research & Innovation Service
Charles Thackrah Building
101 Clarendon Road
Leeds LS2 9LJ Tel: 0113 343 4873
Email: ResearchEthics@leeds.ac.uk

UNIVERSITY OF LEEDS

Hye-in Chung
School of Law
University of Leeds
Leeds, LS2 9JT

ESSL, Environment and LUBS (AREA) Faculty Research Ethics Committee
University of Leeds

9 June 2016

Dear Hye-in

Title of study: **Sentencing decision making in cases of serious sexual offences in South Korea**
Ethics reference: **AREA 15-114**

I am pleased to inform you that the above research application has been reviewed by the ESSL, Environment and LUBS (AREA) Faculty Research Ethics Committee and following receipt of your response to the Committee's initial comments, I can confirm a favourable ethical opinion as of the date of this letter. The following documentation was considered:

Document	Version	Date
AREA 15-114 Committee Provisional responses.doc	1	20/05/16
AREA 15-114 Information Sheet May 2016. docx.docx	1	20/05/16
AREA 15-114 Ethical Review Form.doc	2	20/05/16
AREA 15-114 Information Sheet.docx	1	19/04/16
AREA 15-114 Consent Form.doc	2	20/05/16
AREA 15-114 Fieldwork Assessment Form.docx	1	19/04/16

Committee members made the following comments about your application:

- Whilst the issues have been addressed to a certain extent, there are a couple of niggles. A9 is still quite unclear. It might have been clearer to replace the references to sentencing decision-making with 'sentencing practices' as it implies that the research is looking at particular decisions rather than practices more broadly. C3 is also still a bit vague in parts, participants will be "asked mostly about general knowledge of..." doesn't give a sense of purpose.

Please notify the committee if you intend to make any amendments to the original research as submitted at date of this approval, including changes to recruitment methodology. All changes must receive ethical approval prior to implementation. The amendment form is available at http://ris.leeds.ac.uk/EthicsAmendment.

Please note: You are expected to keep a record of all your approved documentation. You will be given a two week notice period if your project is to be audited. There is a

Appendix E. Covid-19 impact statement

Doctoral College & Operations
(Progression & Examination)
Enquiries: rp_examinations@adm.leeds.ac.uk

UNIVERSITY OF LEEDS

Covid-19 Impact Statement

The University recognises that there will be some situations where progress will have been affected by the Covid-19 pandemic. In some cases there may have been an impact on the research project to such an extent that adjustments needed to be made to a PGR's individual research plans. This might include changes to the methodology, experimental design, plans for data collection, or refining the scope or the emphasis of the original research project.

PGRs are invited to upload to GRAD alongside their thesis an impact statement which describes any impact of Covid-19 on their research plans and thesis submission. This document will be shared with the Examiners.

PGRs are reminded that the statement will be shared with the internal and external examiner(s) and are strongly encouraged not to include personal or sensitive information in their statement. The statement should instead focus on the impact of the pandemic on their research project and any changes required in response to this.

Name of PGR	Hye-in, Chung
Please use the sections below to describe any impact of Covid-19 on your research project. Your statement should focus on how your research project was impacted and any changes you had to make as a consequence E.g. changes to the methodology, experimental design, plans for data collection, or refining the scope or the emphasis of the original research project.	
How the Covid-19 pandemic impacted the original research project plans.	
I received the examiner's report and notes on the 20th of February in 2020, which was shortly before the Covid-19 outbreak. During the pandemic period, I was unable to go to the university or library and it was difficult for me to concentrate on my study. As the situation got worse, my parents suggested me to come back to Korea even for a short period of time before the lockdown officially started. This whole process of uncertainty made me hard to focus on the thesis and heavily affected my mental health. I have experienced depression and anxiety disorder. Unstable mental health status also affected my physical health and I have suffered from frequent joint problems, gastroenteritis, cystitis and migraine. These health issues have significantly impacted the progress of my study ever since the pandemic started.	
What steps were taken to mitigate against the disruption.	
I had to see various doctors for my physical health problems. For mental health issues, I have been taking some medication to ease anxiety disorder, sleep disorder and depression.	

Any decisions taken to change direction or focus, or re-design the research plans in response to Covid-19	
With the support from the supervisor and the school, I had to take some time off from work and requested extension of submission several times to recover from health issues.	
PGR Signature/Authorisation:	Hye-in
Supervisor Signature/Authorisation:	
Please save this document as "Impact Statement" and upload this to GRAD alongside your thesis submission for examination. **This document will be shared with the Examiners.** Statements can be accepted after thesis submission (by email to rp_examinations@adm.leeds.ac.uk) but examiners may not be able to take the statement into consideration if they receive it too close to the date of the viva.	