Gender Matters in the Judiciary: Adjudicating Sexual Assault in Korea

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Dedication

In loving memory of my mother, Seonja Shin,

whose love and prayer shaped me into who I am today.

To my father, Yeonho Jo,

thank you for your endless sacrifices and love.

Your unyielding courage and endurance have always been my inspiration.

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Thank you for standing by my side through thick and thin,

for believing in me and pushing me to reach new heights.

Abstract

My dissertation, Gender Matters in the Judiciary: Adjudicating Sexual Assault in Korea, explores if and how the gender and hierarchy of judges influence their decision-making behavior in rape cases. When female victims turn to courts for relief and justice, judges and attorneys oftentimes use sexist language about a victim's sex life or appearance to trivialize violence and excuse the perpetrator. In the face of such problems, increasing the number of women judges on the bench has been considered a potentially important part of the solution. Yet, most of the existing research has focused on the gender difference in judging in the context of a few Western common law countries such as the U.S., the U.K., and Canada. As a result, to date, relatively little is known about if and how gender matters in civil law systems, leading to a one-sided conceptualization of the gender effect. Using an original dataset based on 756 rape cases and in-depth interviews with 42 legal elites, my dissertation remedies this gap by exploring if and how gender matters in the context of South Korea—a civil law country characterized by the absence of binding jury trials, hierarchical organization, and multi-judge panels in the first instance court.

My main finding and contribution to the scholarship is that if and how gender matters in the judiciary are not uniform across legal systems. After controlling for a host of variables, I find that the gender effect in judging in the context of Korea is conditional on two factors: the female judge's authorship and her experience on the bench vis-à-vis a male presiding judge, the most senior authority figure on the collegial panel. Unlike in common law systems where the presence of a female appellate court judge is found to influence her male colleagues on the panel in sex discrimination cases, the presence of a female judge alone does not have any effect on her colleagues in rape cases in a hierarchical collegial setting. The null gender effect, however, becomes positive when an experienced female judge authors a judicial decision. When the female

judge is an author and is at the rank of a junior judge as opposed to a freshman judge, the sentence length is extended by 2.2 months on average compared to an all-male panel.

Drawing from judicial politics, feminist jurisprudence, and social psychology, I argue that a panel consisting of all men tends to share similar views and reduces the possibility of discussing women's perspectives during deliberations, leading to more lenient sentencing toward male defendants. Also, in a vertical career judiciary, minority women judges, especially the youngest inexperienced judges, cannot, even if they wanted to, dissent or impose harsher sentences than male judges because they are concerned with social acceptance within the male-dominated organization. With experience, however, the pressure of tokenism—the pressure to live up to expectations and follow male-centered norms—is alleviated. Such pressure leads novice female judges to acquiesce in the lenient sentencing decision of the male presiding judge. Yet, experienced female judges have less reason to hold back their voices and behave how they might have otherwise, particularly when they are directly engaged in writing a judicial decision.

My dissertation suggests a vital policy implication: the mere presence of a female judge on the bench is insufficient in a vertical career judiciary, particularly in seniority-oriented societies. For a female judge to wield meaningful influence over her male colleagues during deliberations, she must accumulate sufficient bench experience and take on a role of an opinion writer. These findings are relevant to understanding gender interactions in other civil law countries such as Japan and Taiwan as well as in other hierarchical collegial settings like business firms and governments.

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CHAPTER ONE

Introduction: Does Gender Matter in Judging?

1.1 Motivation for the Research

On October 24, 2019, a high court panel led by Judge Oh overturned a verdict of a lower trial court in a hidden camera crime case so-called, “Mol-ka [몰카]” in Korean, in which the defendant was found guilty of secretly filming a young woman's legs and hips on a bus using his cellphone. Judge Jang at the lower trial court had concluded that the video recording of the victim's leggings constituted an object of sexual desire or shame even if no bare skin was exposed (2018 LC 1006). However, the high court judges disagreed, stating that the lower court misunderstood the legal principles and factual context regarding "the body that can induce sexual desire or shame" as specified in Article 14 (1) of the Special Act on Punishment of Sexual Violence Crimes. They reasoned that “the skin exposed was the upper part of the neck and hands, and the ankle between the end of the leggings and the sneakers” (2018 HC 3606). Consequently, they concluded that the young woman wearing leggings could not be considered an object of sexual desire.

Upon comparing the two judicial opinions from the first and second trials, it becomes clear that judges at different levels of court hold varying perceptions and understandings of Article 14 (1) of the Special Act on Punishment of Sexual Violence Crimes, particularly regarding "the body that can induce sexual desire or shame." The High Court, in line with Supreme Court precedents from 2008 and 2016, determined that the victim in leggings cannot be considered an object of sexual desire because (1) the defendant did not draw attention to her buttocks, (2) the video was not filmed in a provocative manner, and (3) leggings are similar to skinny jeans in their body-hugging nature (2018 HC 3606). The High Court's decision was based

on a more comprehensive consideration of various factors such as the victim's clothing and degree of exposure, the intention of the photographer, the shooting circumstances, and the angle, and distance of the video recording, as well as whether specific body parts were highlighted. On the other hand, the lower trial court considered the female victim's statements and perspectives.

The judicial opinion published by the exclusively male panel at the High Court appears to undermine their own judgment by citing a Supreme Court precedent (2015 SC 16851) concerning the interpretation of Article 14 (1). According to the precedent, "the body that induces sexual desire or shame" should be evaluated from the perspective of an average person of the same gender and age as the victim. However, one may raise the question about how an all-male panel can adequately represent female victims of the same age and can be fully “aware and actually sensitive to the state or condition of” the victim (Weinberg and Nielsen 2012: 325).

This idea aligns with the concept commonly referred to as “gender sensitivity,” a term introduced by Supreme Court Justice Kwon Soon-il during the intense #MeToo movement in 2018. Gender sensitivity encompasses the awareness of the influence of gender norms and power dynamics between male perpetrators and female victims in cases of sexual assault (2017 SC 4702). For example, judges who are gender-sensitive may challenge “the hidden masculine bias of purportedly neutral judicial decisions” and refrain from using sexist language when questioning the victim of sexual assault (Grey et al. 2021:255). Despite such precedents, judges had different interpretations of what gender-sensitive judging is.

This story illustrates an intriguing phenomenon—that even when the facts and laws of a case remain the same, judges may come to different conclusions. For example, a decision made by the trial court judges may not align with that of the appeals court judges. Furthermore, the Supreme Court may disagree with and overturn the appeals court's ruling and set a (binding) legal precedent for subordinate courts to follow. Such reversal of decisions underscores that "there are

moments when the law is not enough" (Weinberg and Nielsen 2012: 314). All else being equal, judges with differing perspectives may reach opposite decisions. As a result, the gender composition of a collegial bench may be a critical determinant of a particular sentencing outcome in gender-coded cases, particularly sexual assault.

Globally 1 in 3 women and girls experience domestic violence and sexual abuse in their lifetime (UN Women 2021). Given that sexual assault cases often involve a female victim, a male perpetrator, and male legal elites, the gender proportion in the courtroom is significantly skewed. In many instances, male legal elites are reported to use rape myths—blaming victims for their assaults and granting impunity to perpetrators (Boux 2016, Burt 1980). Although the #MeToo movement has had some success in transforming how people talk and think about gender-based crimes in many countries, courts have not changed much (Burstein 2021). In the face of such problems, increasing the number of women judges on the bench has been considered a potentially important part of the solution (IDLO 2018). *Might more women judges on the bench challenge the socially embedded gender bias against women and change outcomes in rape cases?*

Some scholars argue that women judges bring valuable information emanating from shared life experiences, primarily sex discrimination at the workplace, to the decision-making process, and render decisions that are (thus) more just and more legitimate (Boyd et al. 2010, Martin et al. 2002). In contrast, other scholars contest the gender effect in judges' sentencing behaviors, even in rape cases, holding that judges' demographics and private views are irrelevant to a decision-making process constrained by principles and rules (Boyd and Nelson 2017, Kulik et al. 2003). Moreover, most of the existing research has been predominantly focused on the context of a few Western common-law countries such as the U.S., the U.K., and Canada. As a result, to date, relatively little work has examined if and how different institutional settings might condition the gender effect in civil law systems.

Without considering the differences in legal systems, existing studies have overestimated the effect of individual characteristics of judges in a particular setting and undervalued the role of court structures and institutions in mediating the gender effect beyond a handful of Western common law countries. In common law countries (systems modeled after Britain) a significant share of serious criminal cases is tried by the jury, and a single trial judge has a more circumscribed "referee" role (Boigeol 2013). In contrast, most trials in civil law countries (those modeled on French and German systems) are bench trials, and courts at all levels are (frequently) set up as multi-judge panels. Simply put, three judges try rape cases in the court of first instance. This "collegial" structure facilitates consultations among the judges when they assess facts, apply laws, and determine the sentencing. Because of the greater roles played by civil law judges in the initial trial court, the gender composition and how a judge's gender influences other colleagues within the hierarchical panel are more pertinent in a civil law context than in its counterpart with a single trial judge and the jury.

My dissertation contributes another perspective to the existing literature by exploring if and how gender matters in the context of South Korea—a civil law country characterized by the absence of binding jury trials, hierarchical organization, and three-judge panels in the court of first instance. At first glance, Korea appears to be a "least likely case" (Levy 2008), where almost everything is working against the possibility that a judge's gender matters. The country's laws, rigorous and identical legal/judicial training, and culturally constructed social hierarchy all lead to the expectation that women judges will conform to the dominant patriarchal legal interpretations and practices. If gender matters in this "hard case" context, its theoretical relevance has significant implications for other countries that share similar legal systems and legal culture, such as Japan and Taiwan, and beyond.

Using an original dataset of 756 adult rape case decisions and 42 in-depth interviews with legal elites from my 15-month-long fieldwork in Seoul, I find that the presence of a female judge on the three-judge panel is associated with longer sentences for sex offenders. However, the positive gender effect is conditional on the female judge's authorship and her rank/experience on the bench. Ultimately, my research shows that if and how gender matters in judging varies across legal systems and institutional structures. My dissertation aims to show how some judges across gender, age, cohort, and gender attitude perceive rape and criminal trial procedure, and make decisions during deliberations on the collegial court. To my knowledge, this is the first scholarly research to use a mixed-methods approach to analyze judges' decision-making behavior in sexual assault crimes in the context of the Korean judiciary.

1.2 Gender and Hierarchy in the Korean District Courts

The Korean #MeToo movement began on January 29, 2018, when Mrs. Seo Jihyun, a female prosecutor unveiled her sexual assault experience on E-Pros, an intranet used among Korean prosecutors. The media got a hold of her post almost immediately, which led to Mrs. Seo's defending herself the following day on television. She described her experience of being sexually harassed by her senior prosecutor at a funeral in 2010. Mrs. Seo's exposure on television and her description of the assault in the past inspired numerous sexual assault victims from the public across the country to break the silence and speak out against their accusers. High-profile women and female celebrities in the fields of politics, medicine, sports, and entertainment also became empowered and inspired to speak up for truth and justice.

The #MeToo (#미투) movement went viral in Korea. According to UN Women, #미투 in Korean has ranked as the third most tweeted hashtag from January 2016 to May 2019 following #MeToo in English and #YoTambien in Spanish (Park 2019). Given the size of the world

populations that use each language, #미투 postings are proportionally the largest. Despite the magnitude of the public outcry, however, the behavior of legal elites in the courtroom has not changed much. For example, 90% of 200 judges in Korea responded that they have observed prosecutors and defense attorneys employing rape myths—victim-blaming rhetoric and sexist comments—during victim witness examinations (Gender and Law Symposium 2019). Judges also reportedly suspended sentences for rapists on grounds that: "he is young or old," "he was drunk, and it was an accident," or "he has a family to take care of" (Park 2019, WomenLink 2016). Infuriated by such dismissive responses, women's activist groups and politicians are calling for an increase in female judges in the judiciary.

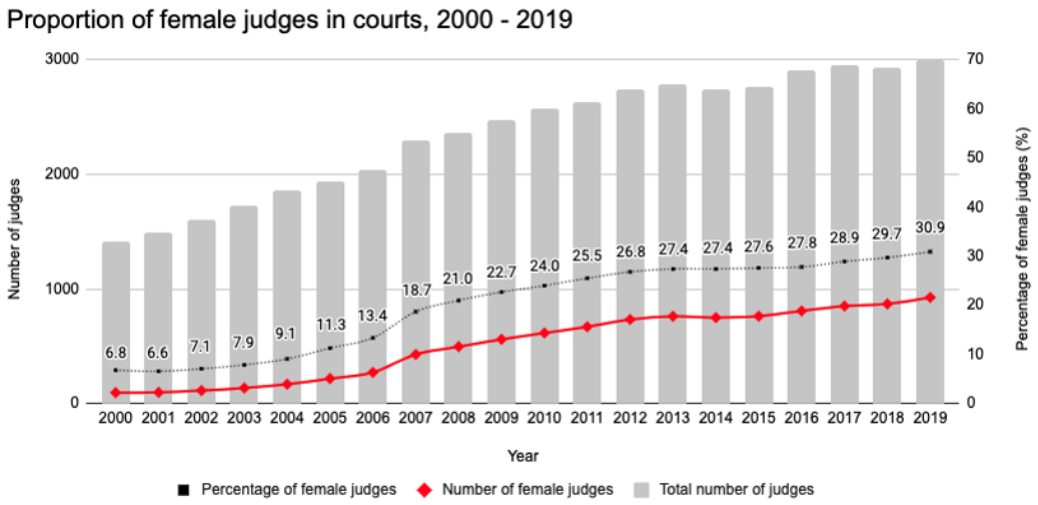

Figure 1: The Proportion of Female Judges in Courts, 2000-2019

Indeed, Korean courts today hardly reflect the general population. Across all court levels in Korea, only 30.5% (889 of 2,918) are female judges (Lee 2019). Although female associate judges at the court of first instance make up 40.4% (653 out of 1,615), the number of female presiding judges dramatically decreases from 19.7% (227 out of 1,150) at lower courts to only 4.3% (6 out of 139) at high courts. Given the current demographics in courts, sexual assault cases

are disproportionately assigned to and decided by men-majority panels and/or panels overseen by a male presiding judge. Public complaints and suspicions about men-majority panels adjudicating sexual violence cases have increased noticeably (Park 2019). Notwithstanding these reports, empirical evidence that adding more women to the bench would make a difference in the adjudication of sex crime cases in Korea is lacking. My project contributes to filling this empirical gap.

The absence of a jury system in a civil law context may enhance the interaction effect between a judge's individual characteristics (i.e., gender) and institutional position (i.e., seniority) on the collegial decision-making process and consequently, the outcome of rape cases. Unlike in jury trials where judges make decisions congruent with the jury (Spohn 1991), judges in the civil law system assess the facts, question the party, and decide the conviction and the sentencing. In short, judges have more discretion without a jury, and this raises the possibility that in rape cases, senior judges' unconscious gender bias combined with their authority may lead to decisions that reproduce rape myths and rape culture (Wistrich and Rachlinski 2017).

Civil law countries and common law countries handle criminal cases, such as rape, in distinct ways. In Korea, for example, the district courts consist of a collegial panel comprising judges of varying rank, age, and experience. In these panels, a presiding judge with at least 15 years of experience occupies the central position, while two associate judges sit alongside. Colloquially referred to as a 'right-sitting judge,' s/he typically has three years or more of additional experience compared to a 'left-sitting judge,' who is the youngest and least experienced. Examining data from five district courts in Seoul in 2018, out of 12 panels that presided over rape cases, 3 were composed entirely of male judges (MMM). Another 3 panels had a male majority with a female right-sitting judge (MM*F*), and the remaining 6 panels had a male majority with a female left-sitting judge (*F*MM). Notably, all rape cases were handled by

men-majority panels, devoid of a women-majority panel or a female presiding judge, indicating that women are still underrepresented in leadership positions within the court system. More recent data reveals that in 2020, among the 363 judges assigned to sexual assault divisions, there were only 60 female judges (16.5%) (Yoo 2020).

Apart from the lack of gender diversity in the judiciary, the hierarchical structure of institutions in Korea further contributes to a hostile collegial environment for judges. In theory, collegiality is "a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered" (Edwards 2003:1645). In practice, however, judges face a difficult collegial environment due to institutional factors. Unlike the common law system, where experienced lawyers are appointed/elected as judges to specific positions and enjoy a relative independence from high-ranking senior judges' (personal) control, most civil law countries follow a rigorous and technical judicial selection process based on examinations and training under the apprenticeship system.

In Korea, before 2013[1], only those who had passed the national bar exam, demonstrated a superb performance throughout the Judicial Research Training Institute (JRTI), and graduated within the top 150 out of 1,000 cohorts were qualified to become a judge. Not only that, their performance at the JRTI and graduation rank continued to have an impact on their judicial career including the first personnel appointment, evaluations for promotion, and reputation within the court. Fresh off the JRTI, freshmen judges with zero professional experience were first assigned to a civil or criminal collegial panel where they worked as "left-sitting judges," a colloquial term referring to associate judges, under the direct supervision of a presiding judge. The two associate judges were akin to apprentices; they were never equal to the presiding judge, who surpassed

[1] Starting in 2013, judges had to have at least three years of legal experience, such as law clerk or attorney, to enter the judiciary.

them both in rank and authority, thereby giving disproportionate weight to the presiding judge's voice in the deliberative process.

Moreover, as associate judges in civil law are required to perform multiple roles, judges in Korea move around regionally every two years and serve alone or on a panel in civil, criminal, or family courts. During the two years, associate judges are assigned to a different panel within the same court every year. While this system has been developed to prevent a cluster of judges in big cities like Seoul, it can be stressful for judges to get accustomed to the new jurisdiction, environment, and people in the courtroom when they have to constantly move from a court to another. Studies on group composition and decision-making show that group members who feel comfortable with each other are less likely to suppress alternative perspectives and conform to other's opinions while unfamiliar group members tend to do the opposite because they are anxious about being socially accepted and concerned with how they are evaluated by others (Baron et al. 1992, Nemeth 1986). In addition, the small court size may discourage dissents as judges "may be more sensitive to offending their colleagues than judges who sit on a large court" (Hettinger et al. 2019). Moreover, the nomadic life prevents judges from becoming a specialist in sexual assault crimes as their interests and sensitivity to gender issues may degrade when their tasks change every year.

1.3 The Argument and Contributions

Drawing from the fields of judicial politics, feminist jurisprudence, and social psychology, I argue that a female judge can make a significant impact on decision-making within a predominantly male panel when she possesses a gender perspective, extensive bench experience, and plays a role as an opinion writer in judicial decisions. The informational theory suggests that all-male panels tend to hold similar viewpoints, which reduces the likelihood of discussing women (victims)'s perspectives during deliberations and often leads to more lenient sentencing

for male defendants of rape (Boyd et al. 2015, Boyd et al. 2010). The presence of a female judge can introduce gendered perspectives to the discussion or curtail sexist behavior exhibited by male judges to a certain extent (Kenney 2013).

However, within a seniority-based vertical career judiciary, minority women judges, particularly those who are young and inexperienced, may face additional challenges in asserting their opinions compared to their male counterparts, especially when interacting with presiding judges. The hierarchical nature of the Korean judiciary limits the applicability of the informational theory developed in the common law context since not all panel members have an equal voice during deliberations. Nevertheless, as female judges accumulate more experience on the bench, they become more confident in their decision-making process and are less likely to defer to the opinions of their presiding judges. Conversely, it becomes more difficult for senior presiding judges to dismiss the perspectives of relatively experienced associate judges during deliberations compared to those who are new to the bench.

According to the deference theory, male judges are more likely to side with a female judge when they think the female judge has more expertise in gendered issues that they lack (Peresie 2005). When the female judge has personal experience in gender-coded cases such as, sex discrimination or sexual harassment, the deference worthiness is amplified. Since male judges are less likely to have undergone such gendered experiences in/out of the court, they will perceive the female judge's experience and gendered perspectives as credible.

Additionally, as the polarization theory suggests, if a female judge in a men-majority panel holds strong convictions regarding gender issues due to self-identification as a feminist or relatable personal experiences, she will be committed to persuading her male colleagues to side with her. If the two male judges do not have strong affinity for either outcome, Epstein et al. (2011) argue that the male judges will come to vote with the female judge to avoid having to

write a dissent opinion and that she would return the favor the next time. When the power imbalance due to rank difference is mitigated and the male judges perceive the female judge as credible, the feminist identifying female judge or female judge with gender perspective will be able to exert more influence on her male colleagues. Therefore, the rank of a female judge matters in judging in a hierarchical collegial setting.

Addressing the real-world issue faced by one in three women globally, my research offers several significant contributions. First, to my knowledge, my dissertation is the first scholarly work that employs mixed methods, incorporating original quantitative and qualitative dataset, within the context of Korea. The in-depth interviews conducted shed light on judges' subjective perceptions of sexism within their own ranks and provide valuable first-hand accounts of their professional experiences in behind-the-scenes deliberations. Second, this study contributes theoretical insights to the broader gender and judging discourse by highlighting the nuanced gender effects contingent upon court structures and institutions across legal systems. Lastly, my analysis suggests a vital policy implication: the mere presence of a female judge on the bench is insufficient in a vertical career judiciary, particularly in seniority-oriented societies. For a female judge to wield meaningful influence over her male colleagues during deliberations and in sentencing decisions, she must possess gender sensitivity, accumulate sufficient bench experience, and take on a role of an opinion writer. These findings are relevant to understanding gender interactions in other civil law countries such as Japan and Taiwan, which share similar cultural and institutional contexts, as well as in other hierarchical collegial settings like business firms and governments.

1.4 Outline of the Dissertation

The remainder of my dissertation is structured as follows. Chapter 2 delves into the key debates surrounding the impact of a judge's gender in judging, primarily focusing on the U.S. context. It

then shifts the focus to existing studies conducted in civil law countries. Drawing from various theories on the gender effect, I argue that not only the presence of a female judge but also her rank and authorship hold significance within a hierarchical collegial court setting.

Chapter 3 describes the mixed methods employed in my dissertation and provides justification for their appropriateness in addressing the research question. I elaborate a detailed explanation of the interview data collected and the original sentencing data used in my analysis.

Chapter 4 centers around the analysis of how gender influences judging from the perspectives of judges. Drawing from the in-depth interviews with 42 legal elites, I identify and analyze the formal institutions that constrain judicial discretion, the de facto deliberative process within the panel, the challenges encountered in adjudicating rape cases, and the impact of judges' gender and rank on their decision-making behavior.

Chapter 5 focuses on examining the interactions among the gender, rank, and hierarchical relationships of judges in the adjudication of rape cases. I investigate how the gender effect on sentence length is influenced by the different ranks of associate judges. To reinforce the findings obtained from the regression analysis, relevant interview data from Chapter 4 is incorporated.

Chapter 6, the concluding chapter, provides a comprehensive summary of the main findings from my dissertation and what they mean for the question: does gender matter in the judiciary? I discuss policy implications that extend beyond the confines of court settings and address limitations of my current research. Furthermore, I suggest directions for future research within this domain.

CHAPTER TWO

Gender and Hierarchy in the Collegial Court

"*As with any institution, key to understanding the behavior of judges and the outputs of courts is the institutional context in which they operate. Judiciaries are organized in a hierarchical structure, which provides judges with both potential problems and potential opportunities.*"

- John Kastellec (2017:2)

Scholars have long studied if and how demographic representation matters in political institutions, mainly the Congress and the House of Representatives. Research on minority representation in political institutions shows that the presence of women or racial minorities *does* make a difference in the decision-making arena. For example, increased visibility of female legislators on the floor not only signals "descriptive" representation (Pitkin 1967), but also enhances substantive representation of female constituents when members prioritize and vote for the bills that further women's interests more than men do (Swers 2002, 2013, Pearson and Dancey 2011, Bratton and Haynie 1999, Mansbridge 1999). When it comes to the judiciary, scholars generally concur that the presence of women judges on a bench enhances "the democratic legitimacy of the judiciary" (Hunter 2015:5, Malleson 2003) by reflecting the general population (George and Yoon 2016) and signals an equal opportunity for women in the legal profession (Kenney 2013, Hale 2001). However, they disagree on whether the gender composition on the bench translates into a substantive gender effect in judging.

Among many extralegal factors, I explore in particular the effects of judges' gender and relative rank on their judicial decision-making behavior in lower criminal courts. While the

effects of race and gender are frequently analyzed together as independent variables, the effect of rank on gender has received little attention in the gender and judging literature. This is because the literature on gender and judging is predominantly based on Western common law countries such as the U.S. where race is an essential demographic variable and the lateral entry to the judicial profession makes judges generally more experienced and thus more equal. Therefore, the effect of hierarchy among judges is less pronounced in such contexts. Judicial hierarchy scholars in the U.S. have focused on the effect of intercourt hierarchy—the dyadic relationship between a superior court and a lower court (i.e., trial courts and appellate courts, or appellate courts and the U.S. Supreme Court)—on judicial behavior (Kastellec 2017, Kastellec 2011). By applying the principal-agent theory, studies examine how a higher court sends a signal to lower courts and oversees their rulings to keep them compliant with the norm. While such a vertical judicial hierarchy is omnipresent in other countries regardless of their legal systems, what the U.S. or common law-focused literature overlooks is "*intra*court" hierarchy or unequal relationships among judges on the same jurisdictional level in institutional settings different from its own.

In this chapter, I review existing literature on gender and judging, initially focusing on common law countries and subsequently exploring that in the context of civil law countries. By highlighting the hierarchy embedded in collegial courts in the civil law system, I investigate how an unequal collegial atmosphere may impact judges' decision-making behaviors in the civil law context. Drawing from established theories like the information approach and the deference explanation, I introduce the categories of "rank" and "authorship" among collegial member judges. I postulate that the decision-making process of an associate female judge, who finds herself in a numerical minority within a hierarchical men-majority collegial environment may be constrained. However, such structural constraints imposed on her can be overcome as her rank rises (as she accumulates sufficient experience) and when she is an author of a judicial opinion.

2.1 Gender and Judging

The idea that female judges might decide differently from male judges stemmed from American psychologist Carol Gilligan's (1982) "different voice" argument. She theorized that male and female perspectives are inherently distinctive such that the male viewpoint is characterized by masculine values like autonomy and logic while the female viewpoint is devoted to feminine values like empathy and lenience (Schultz and Shaw 2013). Applied to judges, men and women judges would "think, communicate, and view the world differently from one another" (Boyd 2016: 789) and would always decide differently due to their biological sex. Yet scholars in the U.S. have found no systematic difference across judges' sex in case outcomes generally (Haire and Moyer 2015, Segal 2000, Ashenfelter et al. 1995), except for a relationship in civil cases involving sex-based employment discrimination and sexual harassment.

Critical of Gilligan's essentialist approach based on sex, some feminist legal scholars, most notably, Catharine MacKinnon, contended that gender differences in judging are not predetermined merely by one's sex but are shaped by *gendered socialization experiences* of sexism and discrimination, which "male authorities do not feel for or act for" (Cook 1981:217, Martin 1982, Martin et al. 2002). These scholars argue that women judges bring a gendered sensibility to the decision-making process, possess unique and valuable information, interpret facts through the lens of distinct life experiences of women and empathize with female plaintiffs of sex discrimination, and (thus) render decisions that are more just and more legitimate than those made by male judges who lack such gendered experiences (Etherton 2010, Boyd et al. 2010, Hale and Hunter 2008).

Empirical research focused on the U.S. generally affirms the effect of a judge's gender in civil cases involving sexual discrimination and harassment at workplace. Depending on the tiers of courts, judges' individual effect or panel effect may be manifested (Boyd et al. 2015). The

individual effect refers to whether judges across their gender behave differently while the panel effect refers to if and how the presence of a female judge influences her male colleagues. Within U.S. trial courts, where a single judge adjudicates a case often with a trial jury, research has found that female judges voted differently from male judges in sex discrimination cases (Boyd and Nelson 2017, Boyd et al. 2015, Haire and Moyer 2015). Moreover, in the U.S. appellate courts, where three judges deliberate, studies found that male judges were more likely to vote in favor of the female plaintiff when they sit with at least one female judge, compared to when they sit with all male judges (Boyd et al. 2015, Peresie 2005, Farhang and Wawro 2004). These empirical findings suggest that gender composition of the bench can sway the decision it makes.

When it comes to criminal court, however, findings vary within and across the types of crimes. For example, Steffensmeier and Herbert (1999) found that in Pennsylvania trial courts, female judges were 10 percent harsher in incarcerating property offenders and imposed longer sentences by five months compared to male judges. However, Boyd and Nelson (2017) found the opposite in Colorado trial courts, with female judges sentencing female defendants more leniently in marijuana-related drug cases. With regard to rape cases, early research indicated that male and female judges in the anonymous "Metro City" court[1] exhibited no difference in their overall sentencing behaviors (Kritzer and Uhlman 1977). Several years later, Gruhl et al. (1981) used the same dataset from the Kritzer and Uhlman's study and found that female judges were more likely to convict rape defendants but less harsh in sentencing the convicted defendants. The finding contradicted their hypothesis and led them to conclude that sentencing disparity varies by crime type, and there is no systemic pattern of the gender differences (Gruhl et al. 1981). In contrast,

[1] The study conducted by Kritzer and Uhlman does not disclose the specific name of the court, but it refers to the Metro City as one of the major urban areas in the country, known for its economic expansion and increasing crime rates with democratic tendency. During the specified period, the court had a total of seven female judges, which is quite significant considering that the majority of large jurisdictions at that time had only one or two female judges presiding over felony cases. For more explanation, see p.78 in Kritzer and Uhlman (1977).

Spohn's (1991) study revealed a noteworthy result: female judges in Detroit trial courts were found to impose sentences that were, on average, four years more severe for male defendants charged with rape compared to their male counterparts. It should be noted, however, that all these analyses before the 2000s are limited to single-judge trials and suffer from a minuscule sample of women judges in courts.

Outside the U.S. context, scholars also report mixed empirical results. According to Bogoch (1999), in the magistrates and district courts of Israel, women judging alone were found to impose lower sentences for sexual offences than men. However, when there was at least one female judge on the panel, the severity of the sentences increased compared to cases when no women were present. This finding provided empirical support for the defensive attribution theory, which highlights the Janus-faced traits of women judges. The defensive attribution explanation suggests that female judges perceive "situational similarity" with the female victims of sexual assault but distance themselves from them by emphasizing "personal dissimilarity" (LaDoux et al. 1989). While female judges recognize the potential vulnerability they share with the victims of assault, they often focus on contextual factors such as the clothing, background, and social characteristics of the victims in order to attribute blame to them for their assault, thereby creating a sense of separation between themselves and the victims. Moreover, due to the token status of women, female judges feel pressured to conform to the prevailing male decision-making model and are hesitant to fully exercise their judicial authority and sentence harshly when they are judging alone. However, when women serve on a collegial panel with men, they are more likely to adopt the harsher male standards of sentencing (69).

Moreover, in the context of Canada McCormick and Job (1993) found little statistical difference in judging across a judge's gender even on sexual assault cases at the Alberta Court of Appeals. On the other hand, Yahya and Stribopoulos (2007) found that while there is no

discernable difference in the performance of judges generally, gender composition of the bench seems to matter more than a judge's individual traits such as political ideology on specific issues. In their study, female appellate judges in mixed-sex panels at the Court of Appeals for Ontario tended to decide in favor of female victims in criminal cases involving sexual assault or domestic violence. When hearing sentence appeals by the accused, "mixed panels affirmed the sentence at a rate of 78%, while Male panels affirmed at a slightly lower rate of 73%. This difference suggests either a slight bias of female judges against men convicted of these offenses or, alternatively, a slight bias of male judges in favour of the convicted male" (351).

To explain the lack of gender effect in rape cases in these studies, scholars have come up with several explanations. Some argued that there is no gender difference in rape cases because both male and female judges view rape as a serious crime deserving of harsh punishment (Steffensmeier and Herbert 1999, Spohn, 1991: 98). Moreover, the difficulty in proving the elements of rape beyond a reasonable doubt, in accordance with the presumption of innocence in criminal cases, may result in negligible gender differences in rape cases, unlike in civil cases involving sexual harassment that require comparatively lower standards of proof (Spohn and Beichner 2000). Finally, rigorous legal training and career norms within the judiciary may limit the expression of a judge's demographics and private views emanating from distinct social experiences (Steffensmeier and Britt 2001, Sisk et al. 1998, Allen and Wall 1993, Kritzer 1978).

Although these explanations offer some insight, the legalist and institutionalist approach overemphasizes the dominant effects of legal principles and legal training while underestimating the role of judicial discretion and empathy in criminal cases. The seemingly objective method of upholding rationality through proof beyond a reasonable doubt is, in reality, relative and contingent upon a judge's subjective standards and values (Schuster 2019:129). In cases where there is no other corroborating evidence, the rigorous standard of proof beyond a reasonable

doubt is frequently employed to undermine the reliability of a rape victim's testimony. According to Posner (2013), no judge is independent of their own bias “formed by background, experience, and temperament, which every judge or decision-maker brings to a case” (21-22). Each judge has their own threshold of reasonableness and probability that they base their judgement of conviction, which may lead to disagreements among judges. Even if judges uniformly decide on conviction when the facts and evidence of a rape case strongly indicate a defendant’s guilt beyond a reasonable doubt (Posner 2013), judges may still disagree on the type of sentences and the sentence length (Spohn 1991, Petersilia 1983, Gruhl et al. 1981) because sentencing decisions are influenced by their personal values and discretions (George and Yoon 2017, Segal and Spaeth 2002, Epstein and Knight 1998, Baum 1997). In short, there is still room for judicial discretion.

Additionally, while common law-based studies on the gender effect in civil cases often involve collegiality at the appellate court level, research on judicial behavior in criminal cases is primarily focused on the court of first instance with a single trial judge and a jury. In common law countries with jury trials, lay people without legal training are selected through multiple screening processes to participate in finding the fact and deciding the verdict. In most states, single trial court judges then are responsible for determining the sentence length based on the jury’s decision. Hence, trial judges are neither directly involved in the process of finding facts during which one’s values, experiences, and biases could ultimately influence the outcome of a case. Moreover, they do not need to attend to the opinions of other colleagues (Haire and Moyer 2019). Even when hearing conviction appeals, the federal appellate judges’ main task is to review appealed cases to find any legal errors with the lower court’s proceedings and decisions, not to find facts or admit additional evidence. Hence, the appellate court judges are further removed from the hearings and the victim's voice than trial judges. Although it is crucial to examine the voting patterns of appellate judges, as the Court of Appeals usually serves as the last resort for

most cases (Kastellec 2011), such studies employing quantitative analysis approach do not delve into the substantial mechanisms of judicial decision-making in finding facts and evaluating the credibility of a victim's testimony (Haire and Moyer 2019).

In the absence of a consensus in the U.S.-based gender and judging literature, judicial scholars have shifted their focus from behavioral outcomes (i.e., voting results) to the overall litigation process to explore if and how male and female judges approach cases differently. The increase in the number of female judges in the court has enabled comparison between male and female judges across various legal dimensions such as dispositive motion, arraignment, and opinion writing. Scholars find that female judges are more likely to side with the prosecution's recommended sentence length or request than the defense in local criminal trial proceedings (Fox and Sickel 2000), encourage mediation in settling disputes than male judges (Boyd 2013), and 15 percent more likely to rule in favor of female plaintiffs in pretrial dispositive motions in sex discrimination cases (Boyd 2016). Female judges also show a great willingness to compromise in opinion crafting and oral argument questions; they are more likely to find the middle ground and write a concurring opinion compared to their male counterparts (Haire and Moyer 2015, Johnson et al. 2011).

Methodologically, feminist sociolegal scholars have also shifted their approach from quantitative methods to qualitative analysis using in-depth interviews and counterfactual experimentss to probe the gender effect in decision-making process. Since 2014, a group of feminist scholars has launched the Feminist Judgment Project, in several countries including Canada, Australia, and the U.S. (Hunter et al. 2010; Hunter 2018). Using a counterfactual analysis, they show how cases might have resulted in a different outcome had a feminist perspective been taken by judges. Lady Hale, the first woman justice in the U.K. Supreme Court, said the Feminist Judgment Project "demonstrat[es] with varying degrees of success that where

you start from can have an effect on where you end up" (Hunter 2015: 121). Hunter suggests that judges with a feminist attitude may differ in judicial reasoning and, therefore, outcome. Furthermore Hunter (2018) conducts 41 interviews with women judges in Australia and illuminates the struggles of women judges in their decision-making process, during which they feel pressured to decide like their male counterparts in order to appear professional and impartial (Schultz and Shaw 2013).[2] This is a dimension a dichotomous sex variable, a length of legal career, or party ID cannot appropriately capture in mere numbers (Kenney 2013). Since gender as a social process is not adequately reflected in a binary sex variable, triangulating both quantitative and qualitative approach is deemed necessary to examine how gender matters in judicial decision-making process (Haire and Moyer 2019).

These mixed findings suggest a possibility that the gender effect in judging may be contingent upon contextual factors, such as court structures, institutional settings, and time period. This idea has been echoed by other scholars. For example, Songer et al. (1994) noted that empirical findings at the level of trial court *may not* be generalizable to decision-making behaviors of judges at the level of federal appellate court due to institutional difference (427). Similarly, Spohn (2002) acknowledged that her results varied "depending on the time period, the jurisdiction, and the types of offenses included in the analysis" (116). Moreover, scholars found that female judges behave differently when there is a critical mass of women in the court (Allen and Wall 1993, Peresie 2005), especially in criminal justice cases (Collins et al. 2010). In other words, the court's institutional settings can modify the effects of the determinants on judging, including judges' individual characteristics and bench composition (Eren and Mocan 2020).

[2] Erika Rackley (2002) has termed this 'the Little mermaid syndrome' which likens Anderson's mermaid's selling her voice in order to walk on land with her prince to a woman judge's selling her voice to enter the courtroom. She argues that "her dangerous siren call is silenced, and in the silence, difference is lost" (603).

2.2 Gender and Judging in the Civil Law Context

The disproportionate focus on common law countries has left the gender and judging scholarship in civil law countries relatively less theorized. This is problematic considering that the percentage of the world population under the civil law system (60.06%) is almost twice as that of the global population under the common law system (35.17%) (JuriGlobe). Some scholars have recently begun extending their research on the collective decisions made by the three-judge panel beyond a handful of common law countries to encompass some civil law countries, including Poland, Brazil, France, Spain, China, and Korea. Examining the role of gender in these contexts, I assess whether the theories developed for the U.S. common law system are relevant in other countries (Grossman et al., 2015). Despite the similarity in civil law system, the findings vary depending on the procedural specificity and cultural norm embedded in the court within each country.

Despite the majority of female judges in the Polish judiciary two decades ago, Fuszara (2003) discovered that female judges tended to uphold traditional gender roles and norms within the family. They were more likely to empathize with accused men in child custody and alimony cases. For example, Fuszara's interviewees revealed that female judges expressed sympathy towards their alcoholic and unemployed husbands, often ruling that wives should continue childcare responsibilities while receiving unemployment benefits (377). Similarly, in Brazilian family courts, it was observed that female judges displayed bias against housewives in maintenance cases, "apply[ing] their own personal standards as professional women" (Shultz 2003:lv, Junquiera 2003). In Brazil, there appeared to be no gender difference in other areas of cases because female judges aimed to project themselves as asexual beings, relinquishing their feminine identity and conforming to the dominant decision-making processes that were inherently masculine and perceived to be "neutral" (Junquiera 2003:446).

The dominant presence of women judges in the judiciary in Western Europe has had different effects on judging. In the context of the French judiciary, where 65 percent of judges are women, the low representation of men raises concerns (Boigeol 2013). This is especially concerning for fathers in divorce litigation as empirical research finds that female judges in the Family Courts tend to favor mothers in alimony or child custody decisions. For example, the findings of Bourreau-Dubois et al. (2020) validate the critical mass theory by demonstrating that all-female panels in the French Courts of Appeals tend to award higher amounts of child support compared to mixed-sex panels, regardless of the gender of the recipient. This finding is also compatible with the polarization theory, as the presence of a male judge in a mixed-sex panel may introduce different perspectives and lead to lower amounts of child support. The authors argue that while individual differences exist based on the gender of judges, female judges tend to express their distinct viewpoints selectively only when they are surrounded by other female judges (Bourreau-Dubois et al. 2012).

Conversely, another qualitative study based on the surveys of 28 French judges in the Family Courts finds that while there is no gender effect in decisional outcomes, male and female judges demonstrate different attitudes regarding family court litigations. Bessière and Mille (2014) argue that because judges have different personal and professional paths into the judicial profession (e.g., arriving at the Family Courts at different points in their careers), they perceive their roles and cases differently, reflecting the social construction of gender. While female judges employ interventionist approach to the private life of individual litigants and track the cases over time despite overwhelming caseload, male judges are procedural and mechanical, and prefer criminal cases involving "confrontation, with the maintenance of public order" over family cases, which they regard as "boring, outside their competence and unrelated to their interest in the law" (Bessière and Mille 2014: e57). Hence, the authors argue that different career pathways cause

judges across sex to differ in how they respond to the institutional constraints of managing the caseload, and as a result, litigants perceive the judicial process, including the hearing and the written judgement, to be different across judges' genders.

In line with the aforementioned findings, Vallbé and Ramírez-Foch (2023) argue that in the context of Spain, judges' decision-making behavior is influenced not only by their personal characteristics but also by their experience and workload. By examining the lower pre-trial courts, which are predominantly female-dominated, the authors uncover gender differences in granting victim protections in cases of intimate-partner violence. Considering both institutional and personal constraints, they reveal that female judges are more inclined than their male counterparts to issue restraining orders against male offenders. Importantly, this gender effect is conditional on two contextual factors: the judges' experience on the bench and their workload. When judges face a high volume of cases and tight procedural deadlines, they are more likely to rely on personal cues or cognitive heuristics when making decisions. In gender-coded cases involving intimate-partner violence, these heuristics are influenced by the judges' own gender identity, resulting in in-group bias. Consequently, female judges exhibit greater empathy towards female victims of sexual violence and grant restraining orders more than male judges.

In the context of China, scholars generally find no gender effect among individual trial judges. They attribute the uniformity in sentencing decisions to institutional constraints, such as the 'Iron Triangle'[3] relationship, the Sentencing Guidelines, and the Adjudication Committee[4] (Lin et al. 2022, Wei and Xiong 2020). In line with the organizational theory, Wei and Xiong

[3] The Iron Triangle relationship refers to the collaboration of the court, the procuratorate, and the police in arresting and bailing suspects. The local police chief exerts influences on judicial decision-making (Fu 2014) and the judges tend to agree with the prosecutors' decision to arrest and bail suspects (Wei 2020).
[4] The role of the adjudication committee in China is to review and manage judges' decisions at each level of the court for consistency. In addition to the Sentencing Guidelines, it serves as a guide for judges, especially in difficult criminal cases, and it can even reject judges' decisions (He 2012).

(2020) argue that innate differences between male and female judges are "nullified and compensated by adaptive environment and judicial mechanisms" (243). Similarly, Lin et al. (2022) find that Chinese judges are subject to the legal factors such as the sentencing guidelines, offense types, and crime severity, but they acknowledge the effect of judicial discretion to an extent that extralegal factors, such as the offender's characteristics, influence judge's incarceration decisions. Defendants who are female, older, and/or of a higher social status are given a more lenient sentencing decision: probation. Wei (2020) also finds that different bench compositions weigh each sentencing factor differently.

In contrast to Spohn's finding that female judges tend to sentence sex offenders more harshly than male judges, Xia et al. (2019) assert that a female-dominated collegial bench imposes shorter sentencing than a male-dominated panel because women are more sensitive and thus show more sympathy towards defendants than do male judges (141). Yet, Xia and colleagues combined cases decided by a panel of three judges as well as a panel of a single judge and two lay assessors, an institutional mechanism observed in several civil law systems though combinations of lay and professional judges vary. In a mixed three-person panel, the role of lay assessors is minimal, and the panel is virtually no different from a single trial judge (Ivković 2007). As ordinary people lack legal knowledge and professional training in judicial decision-making, lay assessors tend to defer to the judge, the only legal expert on the panel (Ivković 2007, He 2016). Hence, the collegial decision-making in China is "a mere formality" (Wei 2020: 41), and in practice, it is the opinion of the presiding judge that matters. Despite the presence of hierarchy on the collegial panel, scholars have not taken into consideration the seniority aspect, such as judges' rank and age, due to the unavailability of Chinese judges' background information. Inconsistent findings in the context of China can be ascribed to the use of different control variables and availability/access to such data.

In Korea, there have been even fewer studies that specifically examine the impact of a judge's gender on sentencing. One study conducted by Park and Choi (2016) discovered that before the implementation of the sentencing guidelines in 2009, the presence of a female judge in a collegial panel led to an increase in sentence length of a rape defendant by 3.8 months, even when legal factors and case characteristics were taken into account. However, after the guidelines were implemented, the gender effect disappeared, indicating that judges strongly adhered to the guidelines. In another study by Park and Jeong (2020), no gender effect was found among single trial judges in sexual misconduct cases. Instead, they observed that when a female prosecutor and a female defendant's lawyer formed a dyad, the sentencing tended to be more severe. Existing research examining the influence of legal actors, including judges, has been relatively scarce in Korea as other Korean scholars mostly focus on evaluating judges' adherence to the sentencing factors specified in the guidelines and assessing their appropriateness (Cha 2021, Park and Choi 2016, Ki 2015). Each scholar relies on the dataset available to them at the time; hence the results differ depending on the nature of the data used. In addition, it is difficult for other scholars to replicate the data analysis to review for any error (Park and Choi 2016).

In sum, previous studies in the civil law context have predominantly applied theories developed within the U.S. common law framework, neglecting to consider the significant cultural and institutional differences. While some studies have taken into account institutional constraints such as workload (Vallbé and Ramírez-Foch 2023, Bessière and Mille 2014), the aspect of hierarchical collegiality, particularly in seniority-based civil law countries, has not received adequate analysis. The existing research has overlooked the theoretical insights related to the impact of rank and seniority on group dynamics within a collegial court, which could provide valuable understanding of how gender differences manifest in the sentencing of rape cases, specifically when taking into account the judges' relative rank difference.

2.3 Theoretical Framework

2.3.1 Hierarchical Collegiality

The existing literature on gender and judging in the common law context is institutionally blinded to recognizing the effect of hierarchical politics among judges on the same jurisdictional level of the court. Scholars consider the collegial members generally equal in terms of voice and authority, hence, their work often focuses only on the intercourt hierarchy between the superior court and the lower court (Kastellec 2011). Yet the opposite may be true in the civil law context where a vertical career judiciary operates like a corporate firm. Posner (2013) delineates the difference between judges across the two legal systems as the following:

> *A lawyer who becomes a judge after another career in the law is less disposed to play a passive role than a lawyer who started to climb the judicial ladder right out of law school and learned as in any bureaucracy to please his superiors by following rules, not by making or bending them (4).*

Unlike most judges in the U.S. who enter the judicial profession after having worked in a law firm or a prosecutor's office, judges in the civil law context obtain judgeships after completing and passing the qualification exams required at the judicial training institute. Thrust into a bureaucratic world, where order and control are highly valued, freshly minted civil law judges are more vulnerable to the influence of senior judges who surpass them in rank and experience.

Collegiality is the opposite of bureaucracy; therefore, it is highly ironic that the collegial court setting is commonly found in all levels of courts in the civil law countries while it is only found in higher courts such as the appellate courts and the Supreme Court in the common law world. In theory, collegiality is "a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered" (Edwards 2003:1645). The collegial structure promotes collective action among judges and reduces the chance of arbitrary

decision-making of a single judge. Unlike in a unipersonal court, judges in a collegial court decide case outcomes together through a deliberation process during which judges express their consent or dissent to arrive at a conclusion by a majoritarian vote. Yet in a hierarchical bureaucratic setting, "control is accomplished through absolute deference and following authority and adherence to the rules and regulations" (Freedman 2009: e379), which undermines the independence of individual judges (Hilbink 2012).

Studies on group composition and decision-making emphasize the importance of equality and relative status between group members (Correll and Ridgeway 2003). While group members who feel equal and comfortable with each other are less likely to suppress alternative perspectives and conform to other's opinions, unfamiliar group members tend to do the opposite because they are anxious about being socially accepted and concerned with how they are evaluated by others (Baron et al. 1992, Nemeth 1986). Moreover, in the context of the U.S., the majority of white males in positions of power dictate the norms within political and legal institutions, and thus, the voice of a racial minority and/or women is often silenced or suppressed (Haire and Moyer 2015, Haire et al. 2013, Kanter 1977). This perspective suggests that in the collegial court, the influence of a single female judge during deliberations would be significantly reduced or limited in a male-majority panel. Other studies on group deliberations in non-legal contexts also find that women's influence is undervalued (Johnson and Schulman 1989) and that women are disadvantaged in terms of having a voice and authority in the deliberative process when they are a numerical minority (Karpowitz et al. 2012).

2.3.2 Deference Explanation and Rank and Authorship Effect

Although the critical mass theory argues that women begin to exhibit different behaviors from men when they become a numerical majority (Eren and Mocan 2020, Collins et al. 2010, Kanter 1977), it will still take considerable time in many parts of the world for female judges to achieve

majority representation in their courts. Korea, where only 31% of judges are female, is no exception. Considering the hierarchical structure inherent in career judiciaries, I propose that the panel effect or the extent to which an individual judge's decision-making is influenced by his or her colleagues on a panel depends on the relative status or rank between them. In other words, factors such as judges' rank, institutional role, and career length, all of which are intricately intertwined, would play a significant role in shaping the group dynamics in the hierarchical collegial panel.

Even in the common law countries, career length of a judge matters. For example, appellate court judges tend to defer to more experienced and informed judges on a panel as a "shortcut to the desired end" (Peresie 2005:1784). This is driven by judges' leisure-seeking behavior in the midst of a heavy caseload and the lack of time to contemplate or articulate a dissenting opinion (Epstein et al. 2011, Howard 1981). Under such a circumstance, judges generally work towards efficient administration of justice; otherwise, "conflict among judges interferes with the orderly disposition of a court's caseload" (Hettinger et al. 2019:20). Applied to a vertical career judiciary, I suspect that this deference mechanism will be even more magnified when judges have extensive career length, are more senior in terms of age, and more advanced in their position with greater responsibility within the court. Some scholars find that older judges tend to impose severe sentencing length because they are more conservative than younger judges (Myers 1988, Kritzer 1978) while others find that experienced judges are more lenient in sentencing because of wider spectrum of life experiences or because their increased time on the bench has already fixed their sentencing behavior (Spohn 1991).

For a female judge, a minority in a collegial panel, to be able to exert influence on male judges' decision-making behavior, she must meet certain qualifications, one of which is deference worthiness. According to Peresie (2005), it is critical for male judges to perceive female judges as

credible in gender-related cases, and the more they respect female judges' opinions in gender-coded cases, the more likely they are to side with her. To be "deserving" of deference from male judges, particularly senior judges, a female judge must appear credible and knowledgeable in gender-related issues. Additionally, female judges' personal experience in sexual harassment or sex discrimination will enhance the credibility of their perspectives during deliberations.

On the other hand, when a female judge is inexperienced and lacks knowledge in adjudicating rape or sex-discrimination cases, her male colleagues are less likely to defer to her view despite her presence. Given her lower rank and relative inexperience, a novice female judge would face significant challenges when it comes to asserting her opinion. For instance, she may find it challenging to express her belief that the victim's testimony seems credible or disagree with the stringent standards of proof beyond a reasonable doubt set by her senior presiding judge, whose authority emanates from his rank and experience on the bench. Therefore, in order for a female judge to be able to exert influence on her colleagues so as to change their decision-making behavior, she would have to be (1) relatively experienced in judging and (2) in a position where she can exercise her judicial discretion by assuming an authorship of a judicial opinion.

Authorship of a written judicial decision grants judges with judicial discretion in terms of setting the tone, style, and length of the decision. For example, Boux (2020) finds that the gender of a judge alone does not explain the variation in the usage of rape myths in judicial opinions, but that those judicial opinion writers who had gendered career experiences in the past tend to challenge rape myths more than their colleagues (193). Haire, Moyer, and Treier (2013) find that diversity as well as identity of an opinion writer on the bench influences legal outputs, particularly the number of points of law used in the majority opinion. More specifically, they find support for a panel effect; an all-white male panel produces the least issue coverage in judicial decisions compared to mixed panels in terms of race and gender. When a white male opinion

writer deliberates with two nontraditional judges (say, an African American male judge and a Latina judge), judicial opinions written by the white male judge had greater issue coverage compared to those written by a white male author judge on a homogeneous bench. However, unless the nontraditional judge assumed the role of an opinion writer, the presence of a single nontraditional judge did not lead to an increase in the number of points of law included in the majority opinion (Haire et al. 2013:317). In other words, merely adding more gender and racial minority judges onto the bench does not automatically result in different decisional outcomes (321). Assuming the position of an opinion writer enables nontraditional judges to exercise influential policy leadership vis-à-vis traditional judges.

2.3.3 Polarization Theory and Gender Attitude

The gender composition of the bench is crucial, especially in the collegial setting. Sunstein (2003) argues that a panel consisting of like-minded judges will tend to share similar views and render decisions that are "ideologically consistent with the group's collective preferences" (Cross and Tiller 1998). For example, panels consisting of Democratic judges are 26% more likely to render a liberal decision than those seated by Republican judges, suggesting that "variations in panel compositions lead to dramatically different outcomes" (Sunstein et al. 2006:11). A group of homogeneous decision-makers facilitates "group polarization," which reduces the chance of discussing disagreements or diverse perspectives in the decision-making process (Cross and Tiller 1998, Hettinger et al. 2006:2). As a result, in the absence of a female judge, it is more likely that male judges' intuitions will coincide (Posner 2008) for they have less possibility for women's perspectives to be accounted for than a mixed-sex panel. If this gender composition (MMM) does not change, the reasoning and sentencing behaviors of three male judges will become fixed into a pattern the longer they remain seated together (Spohn 1991: 90).

Yet, in line with the informational theory, a judge with different political ideology, expertise, or life experiences may contribute a greater range of information and insights to the panel's deliberative process (Boyd 2016, Boyd 2015, Epstein 2011:208, Boyd 2010). According to Epstein et al. (2011), "the intensity of preference for a particular outcome" is one of the relevant factors determining a judge's dissent aversion:

> *If one judge feels strongly that the case should be decided one way rather than another, while the other two judges, though inclined to vote the other way, do not feel strongly, one of those two may decide to go along with the third to avoid creating ill will, perhaps hoping for reciprocal consideration in some future case in which he has a strong feeling and the other judges do not (108).*

Merging Epstein's argument with that of the feminist scholars, a feminist judge with a strong preference for a particular outcome in a gender-related case would attempt to persuade her peers on the panel with less or no feminist tendency. If one of the two remaining judges leans towards the view held by a feminist judge, the third judge is likely to align his or her view with the rest to avoid dissent. In civil law countries, a majoritarian vote would require the agreement of just two judges, in contrast to the unanimous vote required under the common law system. Hence, the difference in judging may be driven by the presence of a feminist judge, rather than just a female judge (McLoughlin 2022, Hunter 2008, Kenney 2008).

Having said that, in a male-dominated career judiciary, Korean judges are not professional equals. Rather, junior judges are akin to apprentices who allegedly need supervision from their presiding judge, justifying the presiding judge's interference with the junior judges' judicial independence. Furthermore, the numerical minority status of feminist judges compounded with the hierarchical collegial politics may weaken their influence on the bench. Hence it might be even more difficult for minority women judges, especially the youngest and

inexperienced judges, to dissent or impose harsher sentences than their male counterparts because they are concerned with social acceptance within the male-dominated organization. Although female judges are underrepresented within courts, as they become more experienced on the bench, the pressure of tokenism—the pressure to live up to expectations and/or follow male-centered norms—will be alleviated. When female judges are inexperienced and thus unsure of their decisions, that pressure leads them to sentence defendants leniently, acquiescing in the lenient sentencing decision of the presiding judge or the norms dictated by senior male judges on the bench. However, as female judges gain more experience, I argue that they become less hesitant to hold back their opinions and behave in accordance with their sincere understandings or preferences, particularly when they are responsible for writing a judicial opinion of a case.

Chapter Three

Data and Method

"These findings suggest the promise of shifting the analytical focus away from behavioral outcomes to consider whether, and how, women and men in the legal system shape litigation processes. Doing so will require additional data and triangulated approaches that employ both quantitative and qualitative methods."

- Susan B. Haire and Laura P. Moyer (2019: Summary)

Previous studies have been predominantly focused on the behavioral outcomes of judges, such as voting patterns and sentence lengths, to explore the effect of judges' ascriptive characteristics in judging. In so doing, scholars relied on a quantitative approach to show the statistical relationship between the judges' gender measured as a dichotomous variable and their decisional outcomes. Although numerous accounts of gender effect, including an informational account (Boyd et al., 2010) and a deference account (Peresie 2005), exist to explain why male judges vote in favor of female plaintiffs in certain gender-coded cases when seated with a female judge on the panel, they remain speculative about the mechanism because:

> *collegiality is a qualitative variable in appellate decision making because it involves mostly private personal interactions that are not readily susceptible to empirical study. Regression analysis does not do well in capturing the nuances of human personalities and relationships, so empirical studies on judicial decision making that rely solely on this tool are inherently flawed (Edwards 2003:1656).*

As pointed out by Appellate Court Judge Edwards, the decision-making process at the collegial court is a highly complex process of exchanges of agreements and disagreements among judges who may have different political ideologies, personal values, experiences, and career paths.

Other scholars who criticize the binary concept of gender have argued that gender should be understood as a social process rather than an immutable and binary biological trait (Kenney 2008, 2013). They have also shifted their focus from the behavioral outcomes to the litigation process to further examine how the gender of legal actors is manifested throughout the adjudication process. Using qualitative methods including surveys and in-depth interviews, scholars have shed light on not only the diverse perceptions of judges and lawyers on gender-related cases but also what shapes such different perspectives and how they translate into different decision-making behaviors (Martin et al. 2002). Yet their findings are also challenged on the grounds that interviews of legal actors are subject to researchers' personal interpretation and the responses of the interviewees do not always reflect their true behaviors.

In recognition of these methodological limitations, I use a mixed-methods approach to complement the weaknesses of each approach as well as to overcome data constraints. While quantitative researchers in the context of common law countries enjoy the luxury of the data available to them, including judges' voting data at the appellate courts and their personal information, such data are not easily accessible in most civil law countries, as judges are not required to publish dissenting opinions and are considered "anonymous" (Koch 2004:143). Furthermore, the lack of access to court trial transcripts or the absence of deliberation transcripts makes it difficult to examine the process by which judges deliberate and arrive at a verdict. To overcome these obstacles and synthesize two distinct methods, as Haire and Moyer (2019) suggested, I triangulate approaches and data from quantitative and qualitative methods.

During my 15-month fieldwork in Seoul, Korea, I conducted extensive research, which included creating an original case-level dataset based on 768rape cases. Additionally, I gathered data on the demographic characteristics of judges, observed criminal court proceedings, and conducted interviews with 42 judges, prosecutors, and attorneys using a snowball sampling approach. Given the absence of published dissent opinions and deliberation transcripts, I relied on semi-structured in-depth interviews with legal elites. These interviews provided valuable insights, uninterrupted access to elite participants, and insider information on their deliberative process, factors influencing sentence length determinations, and challenges in persuading the presiding judge (Gallagher 2013). In conjunction with the interviews, I employed the Heckman Selection model as a second method to analyze the impact of judges' gender and hierarchy on sentence length. This analysis controlled for variables such as the degree of assault, legal sentencing guidelines, and the social and demographic backgrounds of judges. The judicial decisions used in the study were collected from eight district courts across four cities in Korea from 2014 to 2020. This time frame ensured an adequate sample size with varied gender compositions, while holding constant relevant criminal law following a reform in 2013.

3.1 Qualitative Method

I conducted a total of 42 interviews with the legal elites, with 10 in the summer of 2019, followed by 21 in the spring and 11 in the summer of 2020 despite the challenges posed by the Covid-19 pandemic. As a Ph.D. candidate, I faced the obstacle of interviewing judges who typically do not respond to cold calls. To overcome this, I used snowball sampling to build my interviewee sample. However, one potential drawback of snowball sampling is that "respondents often suggest others who share similar characteristics, or the same outlook (Seldon and Pappworth 1983), so the researcher needs to ensure that the initial set of respondents is sufficiently diverse so

that the sample is not skewed excessively in any one particular direction" (Tansey 2007: 770). To avoid this, I arranged that my set of interviewees was diverse, including both genders across six different age groups ranging from 30 to 59.

All 42 interviews were conducted in person, lasting between 90 to 190 minutes, either at a cafe or the judges' office. As a token of gratitude, each interviewee received a Starbucks gift card valued at approximately $15 for their generous contribution of time. All of these interviews were conducted in Korean, audio-recorded on the basis of anonymity in the reporting of interview data, and later transcribed into 20-30 single-spaced page Word documents. I developed my interview instruments by referencing some interview questions previously used in the Australian Feminist Judgments Project in 2013 and in Hunter (2018) and Temkin and Krahé (2008). Questions about collegial court experiences and hierarchy were tailored specifically to the Korean context. The instrument was organized around three main themes including collegial court experience, adjudicating rape cases, and feminist decision-making. A complete list of interview questions is provided in Appendix A.

I hired an undergraduate research assistant to help transcribe the audio-recorded interviews, train him in NVivo, and code the interview transcripts. The research assistant had been involved in the earlier data collection phase including transcribing some of the interviews as well as coding judicial decisions. Given that the research assistant had an overall understanding of my research and was a native speaker of Korean, he was deemed the most appropriate coder besides myself. As the principal investigator, I developed the thematic coding scheme based on twenty interview transcripts and went over them with the assistant, explaining what each code refers to, how to identify/exclude them, and concrete examples from an interview transcript. The coding scheme consisted of three umbrella themes, each with 10 to 16 sub-themes, including topics such as collegial court experience, trying rape cases, and feminist decision-making. After

the discussion, we each coded independently a copy of a randomly selected interview transcript and compared the result using a Coding Comparison query feature in NVivo. It provides the Kappa coefficient to measure intercoder reliability and the calculation of the percentage agreement in addition to the visual identification of colored shading indicating agreements and disagreements between two coders.

Of 42 interviewees, 22 are female and 20 are male. At the time of the interview, there were 34 acting judges, two retired judges, and six attorneys. Of the six attorneys, four had been former judges, and one had been a former prosecutor. To put it briefly, 40 interviewees had experience as a judge. Two attorneys, a former prosecutor turned attorney (FA31) and another victim attorney (FA11), provided external viewpoints of the court and judges. Although my sample of interviewees, with an oversampling of women judges, is not representative of 3,000 Korean judges, this was intentional to capture the experiences of women judges and how their experiences within the court have evolved over time with the increasing number of women in the court. The average age of all interviewees is 45.7, 46.8 for men, and 44.6 for women (as of 2020). Table 3.1 below presents the compiled demographic information of the 42 participants. For a visual representation of the demographic information, please refer to Appendix A.

The length of experience on the bench varied among the participants, ranging from as short as 4 years to as long as 30 years, with an average of 16.5 years. In Korea, judges with over 15 years of experience are called “presiding judges” and are responsible for leading a collegial court trial along with two associate judges. At the time of the interview, 22 interviewees have been or were previously presiding judges, while 18 participants were associate judges. To capture the evolving norms, attitudes, and perspectives on sexual assault within and outside the court, judges from older cohorts were deliberately oversampled. Among the 42 interviewees, a total of

35 were married, while the remaining 7 were single. Out of the 35 married judges, 11 had daughters, 11 had sons, and 13 had both sons and daughters.

In reporting the interview data, neither geographical indicators nor court level (i.e., Supreme Court, High Court, or District Court) is used in the interviewee ID in order to protect the anonymity of the interviewees. Instead, each interviewee is identified as either MJ (male judge) or FJ (female judge), followed by a random number (i.e., FJ1, MJ12). In addition, I make no claim that my interview data are representative of the general view of the Korean judiciary.

Table 1: Demographics of Interviewees (N=42)

Characteristics	Number	Ratio
Gender		
Male	20	48
Female	22	52
Age		
30-39	11	26
40-49	16	38
50-59	15	36
JRTI Admission		
Yes	41	98
No (Law School)	1	2
Years in Office		
10 Years or Less	10	24
11-20 Years	18	43
21-30 Years	14	33
Presiding Judge		
Yes	22	55
No	18	45
Children		
Son(s)	11	26
Daughter(s)	11	26
Both	13	31
None	7	17
Gender and Law Community		
Member	22	54.8
Non-member	18	42.9

All this information is provided by judges, prosecutors, and lawyers during the interview.

3.2 Quantitative Method

3.2.1 Case-level Data

In Korea, there are basically three types of rape crimes—Rape, Like-Rape (Imitative Rape), and Quasi-Rape—and each type is punishable by varying sentencing periods by the specific article of the Criminal Act. First, rape (강간, Gang-gan) is defined as penetration of one's genital by the other person's genital through violence or intimidation and is punishable for at least three years in jail by Article 297 of the Criminal Act. Second, like-rape (유사강간, Yu-sa-gang-gan) is inserting his or her genitals into the inner part of another person's body or inserting a finger or other objects into one's genitals or anus and is punishable for at least two years by Article 297-2 of the Criminal Act. Lastly, quasi-rape (준강간, Jun-gang-gan) refers to sexual intercourse with another person by taking advantage of his or her state of unconsciousness or inability to resist (asleep or drunk or both) and is punishable for at least three years by Article 299 of the Criminal Act. All these articles are applied to rape cases when the victim is nineteen years old or older.

The first official sentencing guideline for sexual assault crimes was promulgated on April 24, 2009, and since then has been amended four times. As shown in the table below, the latest standard sentencing range for committing rape against an adult victim is from two years and six months to five years. Compared to this "standard rape," other types of rape such as "rape by relative" or "rape after robbery" are subject to heavier sentencing ranges because the crime is perpetrated against a family member or rape involves other criminal acts. On the other hand, "attempted-rape" and "like-rape" cases are subject to lower sentencing ranges than "standard rape" cases. Quasi-rape (not shown in the table) is subject to the same sentencing range as standard-rape. Based on these reasons, I further narrow my cases to "standard rape" and "quasi-

rape" to control for the effect of the law.

Table 2: Types of Rape and Sentencing Periods

Type	Classification	Mitigated Sentencing Range	Standard Sentencing Range	Aggravated Sentencing Range
1	Standard Rape	1 yr 6 mos ~ 3yrs	2 yrs 6 mos ~ 5 yrs	4 yrs ~ 7 yrs
2	① Rape by Relative ② Rape after Intrusion upon Habitation ③ Special rape (involving a weapon or two accomplices)	3 yrs ~ 5 yrs 6 mos	5 yrs ~ 8 yrs	6yrs ~ 9 yrs
3	Rape after Robbery	5 yrs ~ 9 yrs	8 yrs ~ 12 yrs	10 yrs ~ 15 yrs

Source: The Sentencing Commission

The sentencing data for this study covered a period of six and a half years, from January 1, 2014, to June 30, 2020. The data was gathered from eight District Courts in four cities, namely Seoul, Euijeongbu, Suwon, and Incheon. The collection process took into account the amended sentencing guidelines, which came into effect on June 19, 2013, and on July 1, 2020, respectively.[1] Initially, a keyword search using "standard rape" and "quasi-rape" yielded a total of 993 potentially relevant cases within the specified timeframe. However, upon closer examination, only 12 judicial opinions were available for the year 2020. Among these opinions, only one defendant received a 30-month prison sentence, while the remaining 11 defendants were granted probation. Due to the limited and biased nature of the 2020 dataset, which showed tendency towards lenient sentencing, I have chosen to exclude these twelve cases from further analysis. Additionally, I refined the sample size by excluding cases involving stays of indictment,

[1] The sentencing guideline was amended again in May 2022 and voted on July 4, 2022. The amended sentencing guideline will take effect on cases indicted on October 1, 2022, and onward.

multiple defendants, juvenile victims aged 18 and under, and cases with restricted public access due to a litigation party's request. As a result of these exclusions, a total of 756 cases from 2014 to 2019 were used for analysis in this study.

Since the gender composition dataset for each sexual assault panel does not exist in Korea, I created my own dataset by looking up who worked where and when using the Judicial Yearbook (사법연감, Sa-beop-yun-gam). It is made up of five chapters and contains information on the court organization, judicial administrative policies and management, and case statistics of the year. It is annually published by the National Court Administration in September of the following year. After obtaining the list of judges' names, I searched their demographic information on lawtimes.co.kr/lawman. This website is free of charge and offers basic demographic information such as a judge's photo, gender, birth year and date, and the JRTI cohort number, allowing me to measure their career length and seniority. In some cases where that information was occasionally unavailable or judges' names and even their birth year and date were exactly the same, I paid a one-time monthly membership fee around $80 USD (100,000 Korean Won) to use Thomson Reuter LAWnB, a privately run website that offers more detailed information including judges' high school names and their entire career history (i.e., Judge A worked in court B from 2015~2017 and in court C from 2017~2019) to help resolve the namesake issue.

3.2.2 Methodology

I employ the Heckman's selection model to sequentially analyze incarceration (INOUT) and sentence length decisions (INCARCERATION). First-step estimation of the incarceration decision is governed by a probit model, and the second-step estimation of prison sentence length is performed using an OLS for cases where defendants are incarcerated. Extant studies published in Korean journals have often simply used the nominal sentence length as the dependent variable

without distinguishing the sentence length executed from a stay of execution[2], which is largely misleading. For example, even if a judge sentences a defendant to 36 months in prison, the final sentence served in prison will be 0 months if the sentence is suspended.[3] Unless stays of execution are controlled for, offenders sentenced to 36 months in prison are not any more different from those sentenced to 36 months in prison but given probation. Relying on the nominal sentence length as a dependent variable thus fails to account for the different degrees of punitiveness between sentence types and moreover exaggerates the socially perceived level of sentencing for rape defendants when more than a half of rape criminals in fact go home "free" (Wilson et al. 2018). Other scholars treated probation cases as 0 months, yet this results in incorrect coefficient estimates in OLS due to the clustering of observations at zero (Bushway et al. 2007, Kurlycheek and Johnson 2004, Osgood et al. 2002, Bushway and Piehl 2001).

While the Tobit model may be a superior alternative to an OLS, mitigating the abovementioned biases, it is not without limits. The Tobit model faces some hurdles such as meeting the normality assumption, the proportionality assumption, and the homoskedasticity assumption. When these assumptions—rarely tenable in the context of sentencing data—are violated, the Tobit model is no better than the OLS. The Heckman's selection model, on the other hand, predicts the effect of the focal independent variables on incarceration length after accounting for the likelihood of incarceration. Results from the incarceration regression would therefore represent the influence of judges' gender and rank on top of the legal factors and case characteristics on sentence length, conditional on being selected into the incarceration population. The Heckman model accounts for the fact that only some convicted offenders are incarcerated.

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[2] A stay of execution refers to a situation when "the defendant receives a nominal prison sentence but only serves it if he violates the conditions of probation" (King and Johnson 2016, pp. 98).
[3] In Korea, a sentence length less than or equal to 36 months can be suspended by the judge.

3.2.3 Key Variables

3.2.3.1 Dependent Variables

I operationalized two outcome variables: the incarceration decision (INOUT) (0 = probation, 1 = incarceration) for the selection equation and the length of incarceration (INCARCERATION) measured in months for the outcome equation. Sentence length has a specific range from 0 years (0 months) if acquitted to 7 years (84 months) if aggravated according to the sentencing guideline. INCARCERATION is observed only for non-suspended sentences. The suspended sentences are treated as missing data.

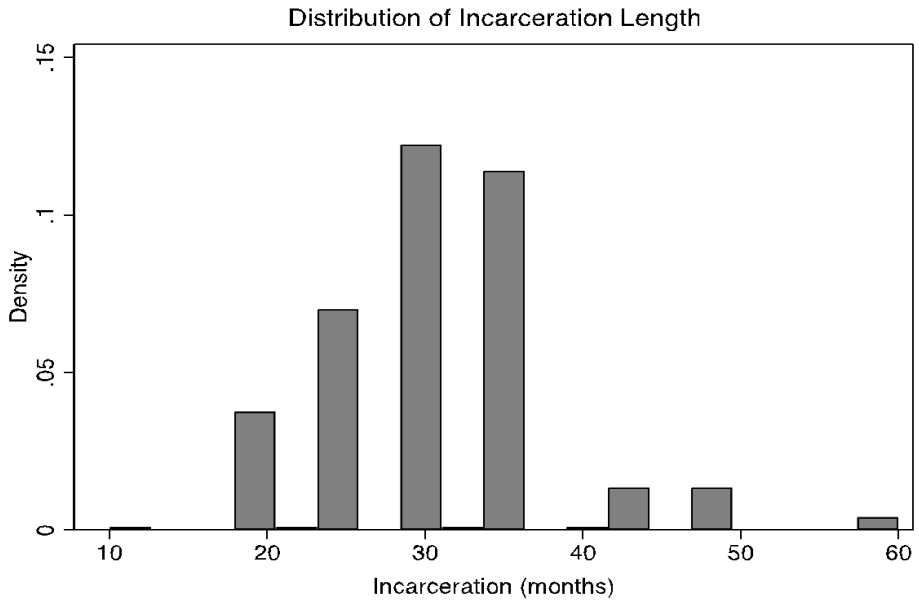

Figure 2: The Distribution of Incarceration Length (N=363)

3.2.3.2 Independent Variables

Past studies have simply relied on a binary variable where 1 indicates the presence of a female judge on the panel to measure the panel effect of gender. In line with the past literature, I use *Female Presence* to test my first hypothesis. The mere presence of a female judge on the bench

might influence her male colleagues to become more cautious of their language or examine their perspectives during informal discussions. When using a simple binary variable for the presence of a female judge, however, it is not clear whether the female judge on the bench is an author or not. If she is an author judge, we can expect her to play a more direct role in examining the case evidence and deliberating with her presiding judge to determine the appropriate sentence length whereas if she is a non-author judge, she would be more likely to refrain from directly influencing her male colleagues. I, therefore, use another binary variable, *Author Sex*, where 0 refers to a male author judge and 1 refers to a female author judge.

Author Rank is an ordinal categorical variable where 0 refers to a freshman author judge (i.e., left-sitting judge), indicating the lowest rank on the panel and 1 refers to a junior author judge (i.e., right-sitting judge), corresponding to the second most experienced judge on the panel. As explained previously, due to the overwhelming workload, judges have informally adopted the division of labor—associate judges are each responsible for writing judicial opinions on different cases (i.e., freshman judges may take odd case numbers while junior judges take even case numbers or vice versa). Because multiple trials are going on simultaneously throughout the week, each author judge pays more attention to their own case during the trials, reviews their case records more thoroughly, and plays a more pivotal role in determining the sentence length with their presiding judge during the deliberation. Korean presiding judges do not write judicial opinions (unless in the event of an emergency); rather they play a supervisory role by reviewing the drafts and providing feedback. Hence, *Author Rank* mainly explores the effect of the rank of associate author judges who are more directly engaged in influencing sentence length of certain cases by writing judicial opinions. Lastly, I explore the interaction effect between *Author Sex* and *Author Rank* to probe if the effect of author judges' gender on the incarceration length is conditional on their rank.

3.2.3.3 Control Variables

To control for the effect of criminal codes, my sample of rape cases is limited to the type 1 standard rape, involving non-disabled female victims over the age of 19. This restriction allows for a more consistent comparison as other contextual complexities, such as cases involving victims with disabilities, victims below the age 13, rape committed by relatives, or rape occurring after intrusion upon habitation, are subject to different Articles in the criminal law with wider sentencing ranges, potentially biasing the results towards longer sentences. Additionally, I account for various case characteristics in my analysis. These include the court where the case is heard, the year of the case, the type of defense attorney involved, the age of the victim, and the type of relationship between the victim and the defendant. Notably, the age of the defendant is not listed in publicly accessible judicial opinions, while the age of the victim is recorded even after the de-identification process.[4] Moreover, I control for power dynamics between presiding judges and associate author judges by incorporating factors such as career difference and age difference between them. While Korea is gradually becoming a multicultural society, it remains predominantly homogeneous in terms of race and ethnicity, thus eliminating the need to control for judges' race and/or ethnicity, unlike in the context of the United States. Regrettably, the political ideology of judges is not publicly available within the context of Korea, and therefore cannot be controlled for in the analysis.

Regarding the control factors within the legal framework, the sentencing guidelines primarily consider the elements of the crime that impact the level of responsibility, including aggravating and mitigating factors. These factors are then assessed to determine their influence on

[4] Other empirical studies published in Korean journals that used the dataset provided by the Prosecution Service contain the defendant's age information. However, the data is only up to 2014 whereas my original dataset ranges from 2014 to 2019.

the length of the sentence, categorized as special sentencing factors and general sentencing factors. Special sentencing factors hold greater weight as they contribute to establishing the recommended sentence length, whereas general sentencing factors do not possess the same level of impact. However, general sentencing factors are still considered when determining the specific sentence length within the recommended range.

The special sentencing factors encompass conduct-based factors that focus on the defendant's actions during the commission of the crime, such as the use of cruel methods or premeditation. Additionally, there are actor/other factors that pertain to the defendant's personal characteristics and actions after the crime, including surrendering, making a significant deposit to the court, expressing sincere regrets, or having no prior criminal record. While both types of special factors play a role, the conduct factors carry more weight in the sentencing decision. For instance, in a scenario where there is one special aggravating factor and four general mitigating factors, the special aggravating factor would be given priority in setting the recommended range for an aggravated sentence. Subsequently, the general mitigating factors would be taken into consideration to determine the final length of the sentence and potential probation. In summary, the sentencing guidelines consider both special and general factors, with the conduct-based factors holding greater influence in the determination of the sentence, while actor/other factors are also considered.

In the context of rape cases, the *special* sentencing aggravating factors include (1) if the defendant exhibits a sadistic or perverse criminal behavior causing an extreme level of sexual humiliation [Humiliation], and (2) if the victim is impregnated because of the crime [Pregnant]. The *special* sentencing mitigating factor includes if the defendant is feeble-minded [Feebleminded]. The *general* sentencing aggravating factors include (1) if the crime was planned [계획된 Planned], (2) if interpersonal trust is abused to commit the crime [Trust], (3) if the crime

is repeated [누범 Repeated], and (4) if the defendant harms the victim in the course of reaching a settlement [Revictimization]. All of these sentencing factors are coded as dummy variables, with 1 indicating the presence of the factor of interest and 0 otherwise. The *general* sentencing mitigating factors include (1) if he shows signs of sincere regrets [Sincere Regret], and (2) if he has no previous criminal record [Criminal Record].

As for factors that influence the decision to suspend sentences (probation), the primary negative factor is Unwillingness to Punish (1 = the victim does not want the defendant punished, 0 = not mentioned). This is the instrument variable in the selection equation that is not included in the outcome equation. General factors are No Prior Record (1 = No criminal record, 0 = previous criminal record more severe than or equal to probation), Sincere Regret (1 = sincere regret, 0 = no signs of remorse), and Court Deposit (1 = if the defendant deposited a sum of money to court after failing to reach a settlement with the victim, 0 = no deposit).[5] I also use court and year fixed effects to account for any variation that has not been controlled for.

3.2.4 Descriptive Data

Appendix B reports information for the overall sample which includes 756 convicted individuals who were sentenced to either prison or probation from January 2014 to December 2019 across eight trial courts of first instance. Of the convicted, 362 defendants (47.9%) were sentenced to prison for an average sentence length of 30.9 months. The minimum and maximum incarceration lengths are 10 months and 60 months, respectively. Of the convicted, 394 defendants were granted probation (52.1%). The defendants are all male and their age information is classified in the published judicial opinion. Victims are all female whose age

[5] For the selection equation, REPEATED and PREGNANT are omitted because there is very little variation within the variables.

ranges from 19 to 66 years old. The mean age of the victims is 26. Most of the offenders had no prior criminal record (90.6%), and for those who were incarcerated, 12.2% (44/362) had a criminal history of probation and beyond. The Seoul Central District Court had the largest number of rape cases (139, 18.4%), followed by the Suwon District Court (116, 15.3%) and Incheon District Court (101, 13.4%). The Euijeongbu District Court (63, 8.3%) had the lowest number of rape cases.[6]

[6] For more information, see Table 3 in Appendix A.

CHAPTER FOUR

Behind the Bench: Inside the Minds of Judges

"Many judges would say that nothing outside 'the law' influences their judicial votes at all. Some of them are speaking for public consumption, and know better. Those who are speaking sincerely are fooling themselves." - Richard A. Posner (2013:22)

Cho Doo-soon, who was convicted of kidnapping and sexually assaulting an elementary school child and sentenced to 12 years in prison, was released on December 12th, 2020. Despite his release, there was an ongoing nationwide petition against it, with many people expressing their agreement. In light of this event, Korea Research conducted a public opinion poll which revealed that just 29% of 1,000 participants had trust in the court's decisions. Moreover, 48% of the respondents indicated that they would prefer an AI judge over a human one (39%). This figure reflects the public perception that human judges are likely more partial and biased than AI judges. Over 90% of the respondents demanded harsher punishments for sex offenders and 86% of them perceived that the punishment severity for sex offenders varied depending on the judge of a case.

My in-depth interviews with legal elites show that such public perception of lenient sentencing and sentencing disparity across judges is not entirely unfounded. The varying sentiments and opinions held by each judge interviewee were noteworthy, given the striking differences observed among them. Some interviewees stated that judges do not have 'much wiggle room' because 'there are sentencing guidelines in place that put some boundaries' (FJ10) while other judges indicated the exact opposite:

I think there is a lot of variation in sentencing between panels. Obviously, I haven't compared all the judges, but just by looking at some cases reported by the media, I can tell 'this was a little too much,' or 'it was a little too weak.' I think I have to admit that there are some deviations from the norm across each panel. That's because it's connected to gender sensitivity at the end (FJ37).

Judges were also divided regarding the punishment severity for sexual assault criminals. Some judges sided with public opinion that the sentence length for sexual assault criminals is too lenient (FJ33, FJ40, MJ24, MJ25). On the other hand, other judges were concerned that it has become harsher imprudently in response to public rage against the Cho Doo-soon case in 2008 and the Gwangju Inhwa School case in 2012[1] (MJ21, FJ1, FJ33, FJ35):

If we're increasing the sentencing for sexual violence crimes, should we be making them more severe than murder cases? It's really up to judges to make that call. Personally, I feel like murder is a more serious crime. However, with the rise in sentencing for sexual violence crimes, it's also pushing up the sentencing for other types of criminal offenses. Now, that's not necessarily a bad thing if it's what our society wants. But, I'm a bit skeptical about whether being more punitive is really the best solution (FJ35).

None of my interviewees was satisfied with the status quo and some even argued that the overall sentencing guidelines need to be restructured (MJ26).

Judges' dissatisfaction with the existing severity of sentencing for sex offenders and their tendency to use the sentencing range for murder cases as a reference point suggests that sentencing is a matter of subjective evaluation and relative judgments. In contrast to the widely

[1] The Gwangju Inhwa School was a school for students with hearing impairment. According to a 2005 investigation, five teachers and a principal sexually molested and/or raped at least nine deaf-mute students.

held belief that judicial discretion is limited in civil law countries where "a code is self-sufficient, self-contained body of law" (MacLean 1982:47), my interview data has revealed that the process of adjudicating rape cases and determining sentence lengths of rape defendants is unclear, illogical, and based on one's gut feelings (MJ8, MJ25). As fact finders and appliers of the law, judges often find themselves torn between their ethical obligation to ensure justice for the victim, the public's outcry against the court's lenient sentencing of sexual assault offenders, and the slow pace of legal reform by lawmakers on sexual assault issues, all while being constrained by heavy caseload, limited time, and insufficient resources to acquire essential expertise in the courtroom. Their predicament is further intensified when a defendant denies the allegation and the objective evidence is weak, leaving judges with a victim's testimony only to establish the facts of a case.

In this chapter, I argue that judges' personal values and biases influenced by their gendered experiences and feminist attitudes influence judges' interpretation of the case facts and assessment of the evidence, leading to sentencing disparity among judges. Although formal institutional structures and collegial norms on the bench constrain the exercise of judicial discretion to an extent, in certain circumstances where legal principles and criminal codes are not enough, judges are unconsciously guided by their personal cues, values, and subjective standards to arrive at a verdict. Such situations include establishing the facts of rape cases, evaluating the credibility of a victim's testimony, and determining a sentence length of a defendant. The deliberation turns into a process of balancing between objectivity and subjectivity among three judges of varying ranks. Consequently, sentencing decisions depend on the author judges' feminist attitude, experience on the bench, and the power dynamics among the judges on the panel. In the following section, I show how formal institutions, such as the judicial research and training institute, the apprenticeship system, and the sentencing guidelines, serve as mechanism to

limit judicial discretion. Even within these institutional constraints, however, judges still retain a degree of discretion in their decision-making process.

4.1 Formal Institutions Against Judicial Discretion

When asked about the extralegal factors that influence their rulings in criminal cases, most interviewees initially denied their impact, emphasizing the effect of law:

> *Korea's legal system, which is based on the French and German continental law, doesn't leave much room for discretion. It's all about evaluating the facts and making sure the constituent elements of a crime are valid. Based on this assessment, the judgment is made following the law's provisions, leaving minimal room for interpretation. As a result, the outcome of a case is usually pretty straightforward (MJ8).*

Judges were defensive and reluctant to admit the influence of extralegal factors on their judging such as ideology, political view, and gender. Based on my interviews, institutional factors such as the rigorous and identical legal training at the Judicial Research and Training Institute (JRTI), the apprenticeship system within the court, and strong adherence to the sentencing guidelines are frequently mentioned factors that constrain judicial discretion in the decision-making process.

4.1.1 The Judicial Research and Training Institute

The first legal institution that constrains judicial discretion is the Judicial Research and Training Institute (JRTI). Although the judgeship qualification has changed due to the introduction of the law school system in 2009 and the abolishment of the National Judicial Examination in 2017, all of my interviewees, except for one judge, took the National Judicial Exam and entered the JRTI (Table 3.1).[2] My interviewees described themselves (judges) as a

[2] Since January 1, 2013, only lawyers with three years of legal experience were qualified to be appointed as judges. The length of legal experience required has increased from 3 years in 2013 to 5 years in 2018 to 7 years in 2022. It will

homogeneous group of socially inept (MJ7), conformist (MJ25), conservative (MJ2), submissive (FJ33), and rule-abiding students (MJ24) who graduated from one of the top three universities in Seoul, with years of identical and formulaic legal/judicial training from the JRTI:

> *Judges often try to avoid standing out or being different. It's almost like people see being unique as a sign of incompetence. Most people expect judges to come to the same conclusion for the same case, but if they keep giving different verdicts, it can be seen as a problem with their abilities (MJ25).*

Given the highly competitive nature of the training process where only the top 150 out of 1,000 judicial trainees from the JRTI were qualified to become judges, it is highly probable that the JRTI training curriculum and the atmosphere reinforced the judges' conformist behavior.

The training at the JRTI consisted primarily of memorizing and being tested on legal codes, precedents, and the format of writing judicial decisions rather than educating on how to evaluate the credibility of a victim's testimony or how to find facts of a case:

> *At the Judicial Research and Training Institute (JRTI), the way we were taught was by cramming education. We learned how to quickly get done with practical tasks, but we weren't really taught how to review errors in establishing the facts or how to make effective arguments. Not at all (FJ3).*

Nor were they properly equipped to openly discuss their opinions with peers as well as senior judges who surpassed them in expertise, experience, and rank. Instead, they were trained and evaluated on how to apply legal codes and reasonings to specific types of cases, civil or criminal, and write judicial opinions using a template to achieve standardized outcomes:

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increase to 10 years of legal experience starting on January 1, 2026. Due to the number of years required to become a judge, only a handful number of judges are currently the law school graduates in Korea. For my study, however, most judges took the National Judicial Exam and entered the JRTI (Supreme Court of Korea).

> *There are templates for writing judicial decisions in criminal trials and I use them by tweaking a bit here and there. When I click 'Create Verdict' on the judgment writing system, a neat summary of the crime's facts, evidence, and how the law applies to the case pops up. The Central District Court in Seoul has entered all this information into the online system so that it's automatically generated (FJ3).*

The implementation of a digitalized software system for writing judicial decisions assists judges in effectively managing their workload. However, judges are frequently criticized for "churning out similar judicial decisions" (MJ8), lacking diversity and individualized approaches to cases.

4.1.2 The Apprenticeship System

Against this backdrop, the court's apprenticeship system in Korea further restricted associate judges' discretion in decision-making. In contrast to the common law system that mandates prior legal experience as a lawyer or prosecutor to become a judge, the civil law system educates inexperienced judges by placing them alongside an experienced senior judge in a collegial panel (Koch 2004). Having been appointed as judges at a relatively young age immediately after completing the training at the JRTI, freshman judges without any practical experience on the bench received supervision from their presiding judges on the panel. Presiding judges are typically middle-aged men with at least 15 years of experience on the bench, and they have the authority to review the judicial decision written by associate judges on the panel, make corrections, and approve the final sentencing decision. According to one male judge:

> *I became a judge when I was pretty young, around 28 or 29 years old. When I started working at the X District Court, I noticed a big age gap between me and the presiding judge. He was in his mid-40s, so we're talking about a difference of at least 15 years. Our judicial system is still very much based on the apprenticeship system, where the presiding judge teaches the associate judges. But what happens when we disagree? (He laughs)*

Well, usually the associate judges lose out. Unless you can find the perfect precedent or the presiding judge happens to miss something, it's tough for an inexperienced judge like me to win against someone with years of experience under their belt (MJ21).

In addition to their level of seniority and experience, presiding judges also have the exclusive authority to fashion trial court rules and command during trials. According to a male judge (MJ30), presiding judges oversee the trials and decide which evidence is admissible in court. If a presiding judge rejects evidence that could have been important because he deems it irrelevant or unimportant, it could impact the ruling.

Moreover, presiding judges have the power to evaluate the performance of their subordinate associate judges. The Korean judiciary, like other civil law countries, controls promotions and assignments of judges as a self-governing judicial body (Koch 2004). The annual evaluation reports could impact the chances of getting assigned to a preferred department within the court or being selected for overseas training opportunities (FJ34). Such an evaluation system may "provide positive incentives and mentoring, as well as discipline," but it is not without potential hazards if accountability and transparency measures are not implemented (Koch 2004: 146). Consistent with Koch's concern, one female judge recounted an instance of her presiding judge mistreating the evaluation system when she was a freshman judge:

There were some rumors at the time that the presiding judge gave me an "E" even though I worked the hardest. Apparently, the chief of the court thought it was odd that only I got an "E" while everyone else got an "A", so he changed it to a "C" during a meeting. It's not easy being a novice judge in the court during the first couple of years (FJ39).

In her first year, the female judge (FJ39) received a below-average evaluation grade, an "E", as a result of her opposition to a lenient sentencing by her presiding judge. She suspected that his decision was influenced by his personal relationship with the defense attorney of the case, who

had previously been his presiding judge. As an inexperienced freshman judge, her dissent was met with negative reception, and resulted in a poor evaluation of her performance. This negative evaluation can be seen as a subtle form of retaliation against her for challenging the opinion of a presiding judge. Anxiety about backlash can silence junior judges and make them comply.

Additionally, interview participants exhibited mixed attitudes towards the apprenticeship system and the role of a presiding judge on the panel. I noticed a significant generation/cohort gap in judges' perception of the apprentice system within the court. While judges from an earlier cohort viewed the apprentice system as adequate and necessary, younger judges often expressed antagonism and discomfort towards such a system:

> *Our system is akin to the intern-resident apprenticeship that doctors undergo. This allows individuals without prior legal experience to participate in trials. Otherwise, if a person doesn't have any legal experience, how can I entrust that person to trial? I think there's something wrong with the way some young judges nowadays believe that they can conduct a trial on their own right away. It is a little too reckless to think like this. Only those with extensive legal careers can take control of the courtroom (FJ1).*

In contrast to the view of a distinguished female judge, relatively younger judges perceived it as authoritarian, patriarchal, and even harming judicial independence:

> *The panel belongs to the presiding judge, who is like a patriarchal figure in charge of the panel regardless of the outcome of the case. Associate judges are merely opinion writers, and presiding judges view them as tools. It is not my personal domain but his, and the presiding judge makes the final call, which becomes the ruling, not mine (FJ13).*

Under the apprenticeship system, subordinate judges may find it difficult to express their opinions to their superiors due to the uneven distribution of experience and rank among collegial members. The one-way evaluation system may exert tacit pressure on associate judges to comply with their

presiding judges or conform to the collegial norm in order to avoid negative impacts on their promotion, opportunities to study abroad, and most importantly, their reputation within the court. As a result, the judicial discretion of associate judges may be significantly constrained.

4.1.3 The Sentencing Guidelines

Lastly, gender disparity in sentencing is deemed unlikely because of the sentencing guidelines in place. On January 26, 2007, the Supreme Court Sentencing Committee was established, and the sentencing guidelines set by the Sentencing Committee came into effect on July 1, 2009. Article 81-7 of the Court Organization Act manifests that sentencing guidelines do not carry legal obligations, but judges are expected to follow them when deciding on the type and duration of a sentence. If a judge decides to deviate from these guidelines, they must provide a written explanation in the judgment, except in cases of summary judgment procedures (Cha 2021). According to my interviewees, however, judges at the time did not welcome the idea of having sentencing guidelines for the following reason:

> *When I was a freshly minted judge, there weren't any fixed guidelines for sentencing. Later, the prosecution proposed the idea of standardizing sentences, but the court was initially against it. The prosecution felt that every court was handling things in a different and unpredictable manner, but the court's fear was that standardization would make things too uniform. There was a concern, for example, that an agreement between a victim and a defendant with monetary compensation attached would always lead to an automatic reduction in sentence length, and that's not how things should be. I was worried that judges, given their rule-abiding tendency, would start blindly following these standards (FJ33).*

Judges attributed lenient sentencing of sex offenders to the implementation of sentencing guidelines. Prior to the adoption of these guidelines, only victims of sexual assault were permitted to file a complaint themselves. If the victim did not want the perpetrator to be punished, the case would be dismissed immediately. In order to walk out free, defendants sought an agreement with victims not to press charges in exchange for monetary compensation. Since the current sentencing guidelines were formulated on the basis of accumulated sentencing data from prior judgments, implementation of the guidelines has resulted in lenient sentencing practices that place significant emphasis on the agreements/compensations between victims and defendants:

> *In my opinion, the problem is that they are based on the existing sentencing statistics at the time. So, it's not surprising that the sentencing level has stayed low. That's just how it goes when you organize things with the same stats you already have (FJ34).*

As a result of such an institution, immediate effects, both good and bad, followed. Given their submissive and rule-abiding attitudes, judges voluntarily and actively complied with the guidelines in practice, validating the female judge's (FJ33) concern. Judges' compliance rate reached 89.7% in the second half of 2009 and 90.6% in 2010 across all types of criminal cases (Lee 2012). In the case of sexual offenses alone, the sentencing guidelines compliance rate was 81.9% (Kim and Ki 2014). It has also increased judges' work efficiency. Below example illustrates how a judge determines sentencing when she is unsure:

> *When I have some tricky sentencing situations, I use 'the Judgement Search System.' Lots of sentencing data are stored there, and I can just click to open a judicial decision of cases similar to mine by using filters to select the type of crime, the court the case is in, etc. Plus, sentencing factors like whether or not the defendant confessed or reached an agreement with the victim, the sincerity of the defendant's apology, and the amount of monetary compensation can really affect sentences. There are so many decisions in the*

system but since I can't read them all because I have a lot of work to do, I usually read through a few cases to get a sense of appropriate sentencing for my case (FJ5).

Despite such resources, however, some judges criticized that the sentencing guidelines interfered with judges' judicial independence (MJ20). The high compliance rate demonstrates that determining sentencing has become a mechanical process in which a defendant's sentencing outcome is highly predictable based on the presence/absence of some sentencing factors. The agreement between a victim and a defendant remains the most influential sentencing mitigating factor, followed by a defendant's sincere regret and no criminal record (Kim and Ki 2017, Park and Choi 2016, Ki 2015). Consequently, blogs with over 90,000 members are thriving online, advertising tips for sex offenders facing trials on how to get lenient sentencing, notably, a sentence suspension (probation), including writing apology letters to victims and donating to sponsor women's organizations. These prevalent online websites for sex offenders testify a concerning trend of judges' reliance on sentencing guidelines to avoid responsibility, which undermines their judicial independence and consequently erodes public trust in the judiciary. Furthermore, such a trend has become a dictating norm within each panel as presiding judges from older generations believed that the sentencing guidelines must be adhered to (MJ20).

4.2. Gaps in the Legal Principles and Judicial Discretion

Notwithstanding the presence of institutional mechanisms such as the JRTI, the apprenticeship system, and sentencing guidelines, my interviewees disclosed that judicial discretion still plays a role in the adjudication of rape cases as they became more at ease during the interviews. Given the nature of sex crimes, finding facts of a case often solely depends on a victim's testimony, and assessing its credibility is the most challenging and complicated aspect of adjudicating rape cases. Sexual assault crimes are usually unreported, unseen, and lack material evidence, such as

documents or video recordings (Cook et al., 2011). It is also common for the victim to immediately take shower or discard underwear on which the defendant's DNA is buried, for reasons involving sexual shame and cleanliness (Hlavka and Mulla 2021, Park and Lee 2020). Even if it remains, such evidence cannot prove guilt beyond a reasonable doubt that it was rape, which is defined as adultery committed through violence or threat. My interviewees indicated that they often rely on a victim's testimony to find facts:

> *Especially in cases that involve sex crimes, it's really tough to figure out who's telling the truth—the accused or the victim. If the accused denies the allegations, then we have to take the victim's statement very seriously. Basically, it all comes down to what the victim is saying. There are times when the accused might confess if there's a surveillance camera recording or something. But if it's just a matter of testimonies, things can get pretty confusing, and conflicts can arise. This is when we usually turn to the more experienced judge to judge who's telling the truth (MJ21).*

Turning to the presiding judges for a final decision is consistent with the effect of the apprenticeship system and reflects the lack of a universal and scientific criterion for evaluating the credibility of a victim's testimony. It is also uncertain how reliable the presiding judges' subjective judgments are in this regard as their experience on the bench is built on the past social norms in proportion to their career length, which arguably reinstates and reproduces patriarchal power relations between male defendants and female victims (Barn and Kumari 2015).

To establish the facts and assess the credibility of a victim's testimony, judges typically resort to one or more of the following practices: (1) comparing a victim's testimony to objective evidence such as a footage from a surveillance camera, (2) consulting people around them including their colleagues, friends, and family members, and (3) adhering to the fundamental principles of the criminal justice system—proof beyond a reasonable doubt. However, in the

absence of a scientific measure of a victim's credibility or an objective standard of proof beyond a reasonable doubt, judges recount that their subjective values, including gender sensitivity and intuitions, can intervene in each of the practices. I argue that the extent to which judges determine the proof beyond a reasonable doubt in a difficult case is contingent upon their personal values and experiences on and off the bench. This can lead to different interpretations of similar rape cases despite the victims' comparable testimonials and behaviors, and consequently result in sentencing disparity (Park and Lee 2020, Schuster 2019).

The most common approach to evaluating the credibility of witness statements is by matching victims' and defendants' statements to objective facts. Objective facts include not only video recordings but also other types of circumstantial evidence, including "Kakao Talk messages (equivalent to WhatsApp in the U.S.) exchanged before and after the sexual encounter and call history" (FJ36). A female judge provided a detailed account of how she evaluates the credibility of each party's statement vis-à-vis indirect evidence:

> *One of the cases I worked on involved a situation where the defendant and the victim were in a relationship and staying at a motel. Unfortunately, things turned violent, and the defendant ended up raping the victim. While the defendant claimed that everything was consensual, the victim claimed that she was raped. The tricky thing was that there weren't any cameras in the motel room where the rape occurred, but there was footage of the victim running down the hallway in a T-shirt and the defendant chasing and dragging her back into the room while he was naked. Because the defendant said that he was wearing pants, but the video showed him entering the room without any bottoms on, his story didn't quite add up. That's when I started leaning towards believing that the victim's testimony was more credible (FJ32).*

In this example, the female judge (FJ32) concluded that the sexual encounter was not consensual, based on the inconsistency between the direct and indirect evidence presented. Moreover, the victim's attempt to flee the scene while naked and subsequently being dragged back into the motel room was deemed sufficient proof beyond a reasonable doubt by the female judge.

In contrast, the presence of such indirect evidence is sometimes used to weaken the credibility of the direct evidence when the victim in a video fails to achieve "the identity of the so-called genuine victim" (Schuster 2019). Even if a victim's testimony is detailed and consistent throughout, the judge's subjective interpretation of the video content can undermine the credibility of the victim, the direct evidence. Below example shows how a male judge interprets a victim's behavior captured in a surveillance camera:

> *The victim's testimony was very detailed, and that made the presiding judge think that the defendant was guilty. But as I closely watched the footage for the whole afternoon, I started to wonder if the woman had gone to the hotel voluntarily, or if the defendant had taken an unconscious woman there. It was really unclear from the footage. I thought the defendant was not guilty because the woman didn't appear that drunk. She staggered a bit, but she paid the hotel with her credit card then she texted on her phone. I don't drink much, so I don't know how much I need to drink to blackout, but in my view, it would be difficult to consider her unable to resist. They even entered the hotel crossing arms and the woman paid after the man said he would pay (MJ28).*

In contrast to the presiding judge who found the victim's detailed testimony credible, the male judge (MJ28) discredited the victim's statement by pointing out that certain behaviors of the victim shown in the footage before sexual intercourse do not align with what is typically expected from (drunk) rape victims. During the interview, the male judge (MJ28) repeatedly mentioned that the victim did not appear to be too drunk to resist the accused if indeed the sexual intercourse

was not consensual and mentioned twice that the victim paid for the hotel using her credit card. Although the male judge is not a drinker himself, his rule of experience was at work to judge that a woman paying for the hotel cannot be considered a true victim of sexual violence.

This is not to say that female judges are independent of rape myths and the stereotypes of an ideal rape victim. Rape myths are problematic beliefs or misconceptions about sexual assault manifested as but not limited to the following: finding faults with female victims' behavior or appearance, accusing them as liars, regarding the crime as a trivial incident, and exonerating the defendant on the basis of his good behavior. In the example below, a female judge outlines a list of specific actions that victims should absolutely avoid in order to improve the chances of their testimony being accepted by judges:

> *If the victim appears calm and collected in the video after leaving the motel room, it may not work in her favor. If the victim doesn't take legal action right away, it could be really disadvantageous for her if she decides to file a complaint much later. If there were witnesses or video recordings of previous interactions between the victim and defendant, and the victim got along well with the accused, that can really work against her and make the situation even more disadvantageous for her (FJ36).*

The ideal victim stereotype encompasses "visibly demonstrat[ing] profound and spectacular trauma" in the courtroom as well as in the footage after the incident (Hlavka and Mulla, 2019:83). Despite the efforts of the Supreme Court of Korea to promote gender sensitivity and challenge the notion of an "ideal victim" by recognizing the diverse behaviors exhibited by sexual assault victims, judges' mindset is yet to change. Since the prosecution bears the burden of proof in criminal trials due to the defendant's presumption of innocence, judges end up scrutinizing the victim's testimony to decide whether or not the defendant is guilty. Moreover, some female

judges also exhibited their prejudice and bias against female victims of rape, especially when the victim is drunk or works at a hostess bar:

> *People with lower social status are more vulnerable to sexual crimes. For example, if someone has their own car and lives in a safe environment, they are less likely to be sexually assaulted on the street. So, it might be hard for female elites to understand why a victim would follow a stranger to a motel after drinking instead of going straight home. Instead of empathizing with the victim, female judges may question their actions (FJ32).*

This aligns with the defensive attribution theory, which suggests that female judges attribute the blame on the female victims by emphasizing their appearance, backgrounds, and social characteristics (Bogoch 1999). Even though female judges may understand the vulnerability faced by the female victims, they tend to distance themselves and believe that they would not have made the same choices or decisions in those circumstances.

Similar to the findings in Poland (Fuszara 2003) and Brazil (Junquiera 2003), another female judge demonstrated empathy towards the male offender while displaying bias against the female victim. During the interview, one female judge (FJ35) shared her sympathy towards a young male defendant who seemingly had a promising future ahead of him while subtly blaming the victim for the lack of resistance:

> *He had been leading a pretty low-key, responsible life up until he entered the medical school. But then, he made a mistake that landed him in some serious trouble. Honestly, I think this whole situation could have been resolved without any charges or at least with a settlement. As a judge, maybe I shouldn't say this, but looking at it from an outsider's perspective, it's just really sad. The victim didn't resist hard and just laid there. I can still picture him in my mind—he was a student at a really good medical school (FJ35).*

It can be deduced from her response that the female judge (FJ35) dismisses the notion that "the cumulative effect of a number of less drastic forms of pressure may be acquiescence to unwanted sex" while readily accepting the concept of "consent given at knifepoint" (Jackson 1992:201). In contrast to Gilligan's 'different voice' argument that men and women are inherently different, therefore, approach judging differently, these two remarks exemplify how rape myths are deeply ingrained in the minds of the judges regardless of their sex. Judges tend to blame the victim for her 'irrational' behavior before/after sexual assault and exonerate the defendant on the basis of inadequate reasoning that it was 'accidental' due to the effects of 'alcohol' and the victim did not express an 'explicit' consent or 'resist furiously.' It is empirically observed in my interviews that judges regardless of their sex are vulnerable to rape myths and the stereotypes of an ideal victim.

4.3 How Gender Matters on the Bench

4.3.1 Female Presence on the Bench

Given these limitations, might the presence of a female judge on the bench result in a different sentencing outcome despite the influence of rape myths? The interviews suggest a range of responses, from no effect to minor influence to a substantial impact on the judging process. According to a few judges (MJ30, M25, MJ19), the presence of a female judge on the panel does not have a significant impact on the judgment itself. Rather, in their opinion, it served as a mere deterrent for male judges to refrain from using inappropriate language when in the presence of a female colleague:

> *During our conversations among ourselves, we tend to ponder over why a defendant committed a certain act and may comment, "this isn't fair for the guy," or "let's be cautious too," or "hey, be careful when you go out for drinks." However, we know that it's not appropriate to make such remarks when speaking to a female judge (MJ25).*

As such, judges regardless of their sex who lacked experiences of witnessing gender effect in judging simply described the daily inconveniences they faced while working in close proximity with colleagues of the opposite sex. Due to the shared office space between associate judges, judges commented on how it is more comfortable to engage in routine activities such as talking on the phone (FJ5), wearing a sleeveless top in the summer (FJ10), or even physiological functions such as burping (MJ26) when working alongside a colleague of the same sex. The gender of a judge was inconsequential when it came to adjudicating sex crime cases.

4.3.2 Gender Sensitivity

On the contrary, several female judges argued that the discomfort experienced when working with a judge of the opposite gender cannot be solely attributed to sex differences, but rather arises from varying degrees of gender sensitivity. The term, ‘gender sensitivity’ first appeared in the Supreme Court decision (2017 SC 4702) of a sexual harassment case involving a university professor and his students, during the intense #MeToo movement in April 2018. In the written opinion, Supreme Court Justice Kwon Soon-il (a woman) expressed the following viewpoint:

> *In the context of reviewing a lawsuit related to sexual harassment, it is crucial to maintain "gender sensitivity" in order to comprehend the issue of gender discrimination within the specific circumstances of the incident and to promote gender equality. Due to the prevailing culture, perception, and societal structures that prioritize the interests of the perpetrators, victims often face negative reactions, public scrutiny, unfavorable treatment, and subsequent psychological harm when reporting sexual harassment and raising concerns. This phenomenon, commonly known as "secondary victimization," highlights the potential for further harm to be inflicted upon the victims. It is important to acknowledge that victims may suffer damage as a result.*

She further discussed that victims may continue their relationship with the perpetrator even after experiencing victimization due to anxiety or fear of facing secondary victimization. Although the term has faced criticism from legal experts and the general public for being bad (FJ3), ambiguous (MJ27, MJ28, MJ30), difficult to understand (FJ9, MJ30), non-legal (MJ25, MJ26), emotionally charged (MJ8), and therefore, inadequate (FJ1), what the Supreme Court aimed to achieve by using the term was to reaffirm and emphasize the following practices to lower courts: (1) critically examining the context of each sexual assault case and (2) not dismissing the victim's statement based on rape myths.

The varying levels of gender sensitivity among judges can influence their value judgments when evaluating whose testimony aligns closer to the objective truth. Interviewees generally understood the gender sensitivity as "looking at the assault situation from the perspective of the female victim" (MJ26, MJ29, MJ30), accepting that "every victim can behave differently after the rape" (MJ8, MJ25, MJ27, MJ30), or "excluding prejudice and bias about sexual assault" (FJ3). Judges who have received education/training on gender sensitivity, have a particular interest in gender-related issues, or identify themselves as feminists tend to empathize with the victim's perspective and recognize that victims do not always conform to the "ideal victim" stereotype. These judges actively engage in the victim-centered approach to better understand the victim's situation in light of the patriarchal social norm, the (hierarchical) relationship between the perpetrator and the victim, and the different gendered experiences between men and women. For example, some female judges appreciated the presence of another female judge on the panel, not because they could wear sleeveless top or talk on the phone easily but because they shared similar understanding of gender sensitivity:

> *When working with two male judges in a sex crime division, there were times I felt uncomfortable talking about the case facts during the deliberation process because of the*

differences in the basic sentiment or values they had. I felt uneasy talking about the details of the case. But now, I work with a female presiding judge and it's much more comfortable. It's easier because she and I both share the understanding of gender sensitivity, and we agree on when and where it needs to be applied (FJ41).

Although most of my interviewees firmly believed that their sex does not and should not lead to a particular outcome or sentencing, they, at times, experienced how male and female judges could differ in their approach to interpreting the constituent elements of a crime, understanding the case facts, empathizing with the victim, and determining the appropriate sentence length. In short, having a female judge on the bench has a more direct and substantive effect in judging when the female judge is involved in a decision-making process. During an interview, a female judge (FJ41) revealed a deliberation process in which judges' interpretations of what qualifies as a sexual crime differed based on their gender. The judges disagreed on whether a middle-aged man indicted for holding a little girl's hand is guilty. The female judge (FJ41) reasoned that the man was guilty because (1) he had made inappropriate statements to the girl, such as expressing love for her and wanting to keep in touch, (2) he held the girl's hand for an extended period of time, despite her attempts to withdraw, and (3) a woman approached the girl and asked if she knew the man, to which the girl replied in the negative:

Despite all of these, the author judge saw hand-holding as an innocent gesture, normal thing people do all the time, like grandfather holding his granddaughter's hand. But there has to be a line somewhere, right? Which part of the body can be recognized as sexual misconduct? At which point do we start considering it? I mean, I get where he's coming from, but I can't help feeling like there's a difference in how men and women view things like this. As a woman, I tend to empathize more with sexual assault victims and

female witnesses. I understand how they feel and why they might behave the way they do in these situations. But sometimes I feel like my male colleagues don't quite get it (FJ41).

In the end, both the female presiding judge and the female associate judge (FJ41) had the same opinion, leading to a 2:1 decision in favor of conviction. This example raises the possibility that the outcome of the case could have been different had there been a judge who held a view similar to that of the male author judge.

Another female judge (FJ35) shared her experience in which she realized that gender differences exist between male and female judges that are difficult to overcome. The case she struggled with involved a male professor who was accused of sexually assaulting his student social worker in a bathroom during a staff dinner. According to the victim's testimony, the defendant was heavily drunk, so she assisted him as he stumbled to stand up and walk to the restroom, which was located far outside the building. Once they arrived at the restroom, the defendant forcibly dragged the victim into the toilet and raped her. Despite this, the victim did not flee but instead aided the defendant in returning to the restaurant. She promptly informed her boss at the social welfare center of the incident, and the defendant apologized and issued her a check for $300,000 which the victim declined to accept. While the female judge (FJ35) could relate to every detail of the victim's testimony because it resonated with her, two male colleagues believed the defendant was innocent based on the victim's irrational behavior, such as aiding the defendant back to the restaurant after being raped. According to the female judge (FJ35):

We even went to the crime scene, a toilet, and I played the victim to create the events based on the witness testimonies. The defendant argued that the toilet was too small to close the door with two adults inside, while the victim maintained that the door did in fact close. To test this, I went in with another male judge, and even though I am not small, the door closed with us inside. The male judges eventually came around and we found the

defendant guilty. However, they told me that they found it hard to accept the victim's account prior to the on-site inspection. Later on, when I presented this case to a group of all female judges, without hesitation, they all agreed that the defendant was guilty. It was then that I realized that certain barriers cannot be overcome, no matter how rationally we try to bridge the gap in consciousness caused by our biological sex (FJ35).

The male judges' lack of empathy for the victims and differing opinions on the conviction decision left the female judges (FJ41 and FJ35) feeling frustrated and shocked in both cases. These examples suggest the possibility that the absence of a female judge on the bench could have led to a totally different case outcome—defendant not guilty.

Lastly, the presence of a female judge on the panel sometimes resulted in harsher sentence lengths for sex offenders. For some male judges, working with a female colleague on the panel caused them to reevaluate and increase their sentence length during deliberations:

Say I had in mind a 5-year sentence, but having a female judge in the room can sometimes sway my decision towards a 7-year sentence. I've noticed that most female judges these days tend to be more empathetic towards the victim, which can complicate things. Right now, I'm working with a female judge, and let me tell you, I get a lot of information from her. For instance, I may have a particular viewpoint on a case and suggest a sentence length based on factors A, B, and C. Then she'll come in and say, "What about D? Shouldn't we consider that too?" And honestly, I'm totally open to her point of view. But there are just some things that I might not see as clearly, and that's where female judges come in. They have a knack for picking up on things that us men might miss. So, while I may not completely change my original sentence, it's not uncommon for it to vary by a couple of years (MJ26).

This male judge's response can be complemented by another account provided by a female judge, who highlights the value of having a female judge on the panel during deliberations:

> *When I look at the case from the victim's point of view, it may alter the weight of mitigating or aggravating factors. For instance, as I said before, if an agreement between the two parties was reached, I can raise a point about the true meaning of the agreement in place, that it's important to consider the context and motivations which led to it. I could offer a female perspective on cases where a woman was unable to seek assistance and whether the agreement was coerced (FJ34).*

Both of these examples demonstrate that working in a criminal collegial court with a female judge generates a learning opportunity for male judges and facilitates their understanding of victims' perspectives, thereby enhancing gender sensitivity. This confirms an informational account in the U.S. gender and judging literature in which scholars find that gender and racial minority judges bring valuable information to the deliberations process that "pale and male" judges lack (Rackley 2013, Boyd et al. 2010, Boyd 2016).

4.3.3 Gendered Experiences and Feminist Attitude

Those who disagreed with the idea that the gender of a judge has a substantive effect in judging claimed that a judge's gendered experience, rather than one's biological gender, matters in judging (Kenney 2013). Based on the interview responses, it appears that encountering gender-based discrimination or harassment and/or having a daughter tend to shape the judges' perspectives in a way that is more understanding of a female victim's situation. Regarding gendered experiences, judges recognize that cultural and social norms can influence how men and women act and perceive certain situations differently:

> *I don't believe that gender has a binary impact on judging. Rather, in my opinion, experience plays a significant role in judging. For instance, in Korea, growing up as a*

man or woman would results in unique experiences such as men serving in the military, while women may feel unsafe about using public toilets or walking alone at night. These anxieties and fears are independent of one's intentions and may influence the perspective of female and male judges (MJ19).

Despite this acknowledgement, some judges were still skeptical about the idea that such different perspectives stemming from gendered experiences would extend to sentencing disparity, arguing that judges lack direct experience of being sexually assaulted. As discussed in the beginning of the chapter, judges perceive themselves as a group of elites who share homogeneous life experiences. Several male judges assumed that female judges who allegedly grew up in affluent backgrounds would lack understanding of the sexual assault crimes or empathy for the victims in such cases:

For instance, female judges may have never been sexually harassed on the subway or in school because they are the top students. Top students are usually not targeted. So, there is a difference in experience between these elite women and those who are not. For those who have not gone through such experiences, they may not have much empathy for either the defendant or the victim (MJ19).

While it is true that extensive social experiences can broaden one's perspective about life events, society, and people, assuming that only those with direct experience of sexual assault can comprehend or empathize with the victim can lead to a fallacy in the pursuit of justice.

Nonetheless, judges' direct involvement in sexual assault or sex discrimination experiences is unquestionably powerful and is related to women's feminist self-identification (Ayres et al. 2009, Nelson et al. 2008). Several female judges' gendered experiences propelled them to cultivate a different perspective regarding sexual assault criminal cases:

> *When it comes to cases involving sexual misconduct by teachers, it's shocking how young and innocent the teachers can appear. Male judges often find it hard to believe, questioning whether the accused teacher could have really done such a thing. But I tell my male colleagues, "I'm sorry, but there is no girls' school that hasn't had a teacher like that—I've experienced it myself." It's disheartening to think that even top students can be targeted. Looking back, I now recognize that what I went through was sexual harassment, and it still weighs heavily on me. I once gave judges a lecture on gender awareness where I shared my story, thinking it was important for them to know. However, I was met with blank stares from the audience (FJ36).*

The account of the female judge (FJ36) challenges the misconception that high-achieving students cannot be subjected to sexual harassment, thereby shifting the responsibility for blame from the students to the perpetrators. Research indicates that women often develop a feminist identity through two distinct pathways: (1) a coping mechanism in response to experiences of sexism and (2) exposure to feminism (e.g., taking women's studies classes or having a feminist mother) (Nelson et al. 2008). Additionally, women who identify as feminists are more inclined to actively engage in collective action when encountering sexism in the future (Downing and Roush 1985; Liss et al. 2004; Nelson et al. 2008). Having experienced being in the victim's position, the female judge will approach similar cases of sex crimes in a significantly different manner compared to those who lack such gendered experiences.

In contrast, male judges have vastly different experiences compared to their female counterparts. One notable example is the presence of a drinking culture in Asia that is deeply rooted in masculinity and misogyny. This culture, which is incongruous with the principles of #MeToo movement, creates significant disparities between the experiences of male and female

judges. Male judges, especially those from the earlier cohort were not an exception from the influence of the prevailing corporate drinking culture:

> *In certain bars, it is not uncommon for men to touch women's buttocks while pouring drinks. Although this behavior is not desirable, it is generally accepted in those settings. Is this a sexual misconduct? It depends…The cost of a drink includes a female server sitting with the customer and pouring their drinks, sometimes at a significant price. As a result, some level of physical contact is deemed acceptable in many bars. When such a case is presented to us in a trial, we, men, may not perceive it as sexual harassment, whereas a female judge may view it differently (MJ19).*

While men have diverse reasons for participating in drinking, such as managing stress (Davies et al., 2000) and expressing their masculinity (Dempster, 2011), Korean scholars have noted a unique aspect of Korean men's perspective on drinking. They perceive drinking as an avenue to freely express their deepest emotions and foster closer connections that might be difficult to establish without the presence of alcohol (Kim et al., 2018). As a result, these male-bonding outings centered around alcohol, with female hostesses accompanying them, epitomize notions of masculinity at a collective level (Yang and Sohn 2022). Enveloped by this cultural context, the male judge (MJ19) viewed physical contact with a female hostess as a generally acceptable and inconsequential action. It is plausible that such gender-specific experiences could have desensitized him when dealing with comparable cases, even in situations outside bars or clubs. Conversely, it is highly improbable that the female judge (FJ36), who had experienced molestation by her schoolteacher, would perceive such actions in a similar light because individual judge's gendered experiences can inform their legal reasoning differently.

Furthermore, female judges perceive the drinking culture as a manifestation of structural gender discrimination within the judiciary. While it occurs less frequently now than in the past,

the timing, location, and nature of these gatherings often result in the exclusion of women. Consequently, women are often denied crucial networking opportunities that can influence their career advancement and promotions:

> *Isn't everything designed to favor men? Given the male-dominated nature of society, there are various contributing factors. In order to climb the ladder of success, one must conform to certain expectations. In Korea, this often involves participating in unique cultural practices such as drinking, or engaging in activities in certain places I won't delve into in detail. In order to be acknowledged for my competence, I would need to fully commit myself to my professional duties while disregarding household responsibilities. Personally, I cannot and do not wish to conform to such expectations (FJ13).*

As the female judge described, distinct gender roles contribute to distinct gendered experiences for male and female judges. All judges bring their lived experiences to the bench, and they shape judges' values and perspectives through which they process information and adjudicate sexual assault cases. While some gendered experiences make judges more empathetic towards victims, other gendered experiences reinforce one's gender bias and prejudice against female victims.

On a different note, judges' experiences in raising children may vary depending on their children's gender, which could affect their handling of cases involving gender issues (Glynn and Sen 2015). For example, a male judge (MJ28) remembered that his presiding judge, who had three daughters, tended to impose harsher sentences on defendants than he did, by an additional two years. Judges with daughters showed more empathy towards the victim's perspective and were more aware of potential gender-based threats in daily life:

> *It must have been more uncomfortable for women to live until now. From a woman's perspective, I think there are many things that need improvement in the future. For example, it takes longer for women to use the restroom at the rest area on the highway.*

> *Keeping the restroom the same size for both genders is not reasonable equality. To be reasonable, it's right to make it bigger for women. And there is a higher chance for younger girls to be exposed to the crime-prone environment. I haven't seen many cases of prostitution for underage men, but I have seen a lot of the opposite case. Then of course I think that there should be systematic improvement (MJ14).*

Similarly, some female judges with sons were observed to display empathy towards relatively young male defendants of an age similar to their sons because the sentencing standards with which they convict defendants can be used against their own sons if they were to be in similar situations:

> *Sometimes when I handle rape cases, I can't help but think about how I would feel if my son were in the same situation. Maybe it's because I only have a son. Although I try not to let it affect my judgment, the thought does come up unconsciously. For instance, in cases of quasi-rape that occur at college events where the victim is drunk and the defendant takes advantage of the situation by offering to take her home, it's hard not to think about how I would feel if it were my son involved (FJ32).*

According to the female judge (FJ32), sentencing disparity does not depend on the gender of the judge, but rather on the gender of their children. She recalled a sentencing debate at the JRTI where a range of sentences was discussed for a particular crime, from probation to capital punishment, and it was mostly male judges with daughters that voted for capital punishment because they shared similar experiences as fathers who have daughters (MJ14).

These interview responses highlight the substantive impact of judges' gender-related experiences and feminist attitude on their decision-making behaviors. In the following section of this chapter, I elaborate on the practical workings of deliberation within the Korean collegial

court and examine how a judge's rank and authorship work to moderate the gender effect during the deliberation process.

4.4 Hierarchical Collegial Court

4.4.1 Collegiality and the De Facto Deliberative Process

Collegiality in the context of the U.S. refers to a process in which each member of the group, with equal rank and say, examines, shares, and contributes their ideas to achieve an agreement. The criminal cases collegial panels adjudicate are much more serious and difficult than those decided by single trial judges. Hence three heads are considered better than one in handling complex criminal cases as well as holding one another accountable. In the Anatomy of Judicial Collegiality (1985), Judge Frank M. Coffin at the U.S. Court of Appeals for the First Circuit, discussed the pros and cons of collegiality and their impacts. In the end, he concluded that "the opinions of a truly collegial court are bound to be better in substance, style, and tone than opinions of, basically, one judge whose colleagues have merely joined in the result" (9).

However, my interviewees have revealed that the reality of deliberation process in Korean trial courts is far different from the ideal. Due to the overwhelming workload and time constraints, it is rare for a three-person deliberation to occur. Instead, a two-person deliberation between an author judge and a presiding judge is the preferred method, which excludes a non-author associate judge. To provide some context, in 2019, there were 2,966 judges in Korea, and 1.37 million civil and criminal cases were filed in the same year according to the Court Administration Office of the Supreme Court (Park 2021). This means that on average, each judge handled 464.07 cases per year. In comparison, Germany had 89.63 cases per judge, which is one-fifth of Korea's workload. France had 196.52 cases per judge, and Japan had 151.79 cases per judge. Despite this heavy workload, Korea outranked all three countries for having a timely and

effective criminal adjudication system by the World Justice Project. In 2019, Korea was ranked 4th out of 126 countries and 2nd in East Asia and Pacific, following Singapore, while Germany was ranked 6th globally and 4th regionally, France was ranked 21st globally and 13th regionally, and Japan was ranked 22nd globally and 6th regionally. Triangulating this information, it is evident that the Korean collegial courts prioritize efficiency over fostering intellectual discourse and a sense of cooperation among collegial member judges.

Moreover, the two-person deliberation method was often superficial and lacked the in-depth discourse between an author judge and a presiding judge. One judge explained the general adjudication process as follows:

> *In order for the collegial panel to operate efficiently, the associate judges cannot see the case records, in both civil and criminal cases, until the hearing is concluded, and the presiding judge takes care of everything. When the hearing is concluded and the stacks of records are delivered to our office, we examine the records after the presiding judge has first read them and then we "deliberate" with the presiding judge. We write the decision once the conclusion is reached. That's why associate judges are often called 'judgment-writing machines' (MJ8).*

As opposed to an adversarial system where the defense and the prosecution compete to establish the facts of a case, under the inquisitorial system, the authority to command trials is concentrated on a presiding judge (Dammer and Albanese 2014). Consequently, the role of an associate judge in a given case is minimized as a mere "judgment-writing machine" (MJ8). During my fieldwork, on multiple occasions, I observed associate judges dozing off sitting next to the presiding judge during trials lasting less than ten minutes. My conversation with a male judge revealed the reason behind why associate judges were nodding off on the bench:

> *In our panel, we do things a bit differently in both civil and criminal cases. First, the presiding judge reads through all the records, and then associate judges also examine them. We go through each page and organize everything, looking for any missing information or evidence. Before we finalize the judgment, the presiding judge and the author judge have a quick discussion to make sure everything is in order. One of the things I am proud of my panel is that our associate judges are very attentive to the cases they know about, so they never fall asleep during hearings. I mean, if I'm not too familiar with the specifics of the case, honestly, why stress about it? (MJ8).*

In most cases, junior judges arrive in the courtroom without having thoroughly reviewed the case records, for the presiding judge holds the authority to shape the proceedings.

Although some judges stated that deliberation takes place among the three-member judges, with each judge offering insights gained from observing the courtroom proceedings (FJ37), they are still unable to review the records before or during the hearings. A male judge stated that this form of deliberation is shallow and diminishes the impact of a non-author judge's perspective:

> *Even with three judges deliberating at the table, a non-author judge may not have a comprehensive understanding of all the evidence and records presented. The non-author judge may only have a general overview of the main issue at hand and rely on the other two judges' analysis to arrive at a conclusion (MJ22).*

According to a female judge, "Practically, it's between two judges, not three. But if two of us out of three agree, it's still a majority agreement, right?" (FJ6). The female judge (FJ6)'s brazen response indicates that the two-person deliberation has become the norm on the collegial court. Technically, it is not a violation of Article 66 of the Court Organization Act which states that collegial adjudication shall be decided by a majority unless otherwise provided by the

Constitution and Acts. However, the act of excluding non-author judges from their rightful place at the deliberation table and taking away their voices contradicts the principle of collegiality, which aims to incorporate everyone's perspective "both in conference and during the drafting of opinions, in which judges, individually and collectively, often come to see things they did not at first see and to be convinced of views they did not at first espouse" (Edwards 2003: 2002).

Most of my interviewees were genuinely concerned with the current method of deliberation, but they found themselves in a helpless position (MJ22, MJ26). Unless there is to be a top-down structural adjustment, whether it be a significant increase in the number of judges appointed to the bench or a reduction in the number of cases filed annually, there was virtually nothing judges could do at an individual level to implement a three-person deliberation:

> *I am not satisfied with the current deliberation method, especially in the court of the first instance. But we can't have three judges deliberating. It's just physically impossible. If you do that, judges have to come out on Saturdays and Sundays, and they have to stay up all night. That's just not practical, and it's really tough on them (MJ26).*

In sum, it appears that the collegiality within the Korean court is superficial. In contrast to Edwards' view that "differences in professional and personal background, areas of expertise, and ideological perspectives make the deliberative process more lively, rich, and thorough," existing legal institutions and hierarchical collegial structures centered around order, uniformity and efficiency have shaped judges to behave in an unstimulating, plain, and superficial manner (2003: 1668). The formal institutions, including the JRTI and the apprenticeship system, have increased the dependence of associate judges on their senior presiding judges while the mechanical application of the sentencing guidelines has constrained judicial discretion in determining the sentencing. Despite the institutionalization and socialization of judges on the bench, my

interviews indicate that there still exist differences in judges' personal values and perspectives, which inevitably influence their interpretation of the evidence in rape cases.

4.4.2 The Effect of a Judge's Rank and Authorship

Against this backdrop, younger and inferior judges felt uneasy about openly discussing differing views with their presiding judges who surpass them in experience and rank. Almost all interviewees acknowledged the discomfort they had experienced in their interactions with presiding judges. Even the current presiding judges did so as they recollected their old days as associate judges:

> *During my first and second year as a judge, I found it quite challenging to convince high-ranking senior judges, especially given my limited experience. But I believe this is a common experience for all new judges. As I entered my 5th or 6th year, I noticed that the dynamics started to shift. The reality is that as an associate judge, it can be difficult to have an equal voice with senior judges. However, once you accumulate 4-5 years of experience, the presiding judge tends to take your opinion more seriously. Certainly, some presiding judges may allow associate judges to speak more freely, but it is generally not easy to assert your opinions during the first couple of years. The lower your rank and seniority, the less authority you have in decision-making (MJ30).*

The combination of gender hierarchy and the social hierarchy determined by rank (seniority) on the panel within the career judiciary can often create an unfavorable collegial environment for associate judges, particularly inexperienced female judges. Under the existing apprenticeship system, younger and less experienced associate judges can feel intimidated by the authority of their senior presiding judges and think that their judgment and sentencing decisions are inferior to those of their superiors. Judges unequivocally stated that older judges who are

more experienced on the bench tend to impose lenient sentences to rape defendants (FA31, FJ32, FJ33, FJ34, FJ35, FJ36, MJ25, MJ8):

> *As judges get older, they tend to be more lenient in their sentencing because they've dealt with really heinous cases in the past. It's concerning to see how desensitized we might be becoming to these types of offenses (MJ25).*

In a career judiciary, a judge's experience on the bench is highly correlated with his or her age. According to the male judge (MJ25), having extensive experience in adjudicating criminal cases of varying cruelty and severity may lead to a perception that sexual assault crimes, especially quasi-rape cases, are less serious, and thus, less deserving of harsh sentences. Many other judges also observed that the older and more experienced judges, such as presiding judges, tend to impose shorter sentencing to sex offenders than relatively inexperienced judges:

> *More experienced judges have more "data" to draw on, so they know how far they can push the sentencing. But if you have less experience, you think within a narrower range. When you're dealing with criminals who commit these kinds of crimes, they're usually pretty awful. So experienced judges go easy on defendants for less serious cases (FJ34).*

Another male judge whose presiding judge tended to sentence leniently recounted that the presiding judge once told him the following: "If we were to decide per your opinion, the prison would be overcrowded" (MJ8).

Different sentencing sentiments can potentially result in disagreements during deliberations. In times of disagreement, associate judges, especially the freshman judges, were significantly influenced by the opinion of the presiding judge due to seniority and organizational hierarchy:

> *For example, the presiding judge belongs to cohort 9, and the two associate judges belong to somewhere between 25 and 30, with little to no practical experience. They have*

only read case files during their training at the JRTI. This is their first assignment, and they have only received basic training. It's evident that there is a difference in skill level based on experience. I can't refute against the presiding judge. He's always right (FJ35).

However, as associate judges gain more confidence and become more vocal about their opinion, presiding judges also become more respectful and receptive of the author judges' opinion:

During my first five years as a judge, I worked on both civil and criminal cases in a collegial court. Then I worked as a single trial judge for the next five years. Now, since 2018, I am back to being a collegial court judge. Maybe because of the changing times, or maybe because the presiding judge respects my years of experience and my experience as a single-judge trial judge, I now have more autonomy in my decision-making. But initially, I used to think that the presiding judge was always right and rarely felt the need to argue about legal aspects. I just followed what the presiding judge said. Especially in the X District Court, where there was a 20-year age gap between me and the presiding judge, I couldn't dare to disagree with the presiding judge. But this year, the age gap is only ten years (FJ10).

Moreover, some judges indicated that judges with previous experience, particularly, in handling sex crime cases adjudicate differently from those who do not have any prior experience. Below a female presiding judge shares her experience working with two unmarried male associate judges in the sex crime division. She recounts how difficult and embarrassing it was to discuss rape cases and look at evidence photos:

I don't think it would have been any more comfortable if I had worked with young female judges. I believe there would have been a difference in perception due to the age and

experience gap. For judges who have not handled such cases before, as soon as they see the first case, they think the perpetrator should be severely punished. Of course, there are awful criminals in every case, but for judges who have dealt with many cases like this, it may not be as surprising. So I need to calm them down (FJ33).

According to the female judge (FJ33), the gender of the associate judges is irrelevant, as those who lack experience in adjudicating sex crimes tend to react with alarm to the crime and impose lengthier sentences. This viewpoint is also supported by another female judge:

You can really see a difference between judges who have worked in the sex crime division for a couple of years versus those who have no experience at all. They have a completely different approach and attitude towards the cases. They become more empathetic, and their perspectives change. Even something like the legging's incident[3] is viewed differently. It's really critical to have experience in sex crimes when it comes to discussing these cases. Judges who have experience are easier to talk to and less hostile. It would be great if all judges could take turns trying sex crimes, if possible (FJ36).

Furthermore, a former prosecutor turned attorney points out that presiding judges who are inexperienced in sex crime cases often struggle to lead the trials and end up giving lenient sentences due to their lack of confidence (FA31). Also judges who have been presiding over civil cases for a while have a hard time transitioning to handling sex crime cases. They may fail to properly question witnesses, request necessary evidence, or forget to separate the victim from the defendant during witness testimony. These examples illustrate that while experience on the bench is important, having experience specifically in handling sex crime cases is even more crucial in approaching rape cases and running the trials smoothly.

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[3] The leggings incident refers to the hidden camera case mentioned at the beginning of Chapter One.

In sum, freshman judges' sentencing decision, regardless of their gender, seems to have depended a lot on the personality of presiding judges and their gender norms. Yet as junior judges accumulate more experience (4 – 5 years) on the bench and grow more confident about their judging, they are less likely to just follow presiding judges' sentencing decisions. As judges from the baby boomer generation gradually retire from the judiciary and are succeeded by a relatively progressive and younger generation, current presiding judges have shown increased respect towards their junior colleagues. Having at least one experienced female judge in the panel provides windows of opportunity for women's perspectives to be accounted for compared to an all-male panel. While women judges are a minority group within courts, as they become more experienced in judging, the pressure of tokenism, that is pressure to behave like men and/or follow the male-centered norms, is alleviated. When female judges are inexperienced, that pressure leads them to sentence defendants leniently. However, as they become more experienced and confident about their decision, they have less reason to hold back their opinions.

4.5 Conclusion

The findings from Chapter 4, which involved 42 in-depth interviews with legal elites, indicate that judging rape cases is a complex process for judges, particularly when it comes to assessing the credibility of a victim's testimony in the absence of objective evidence. Since there are no scientific standards for evaluating a victim's credibility devoid of judges' subjective interpretations, judges usually rely on their personal values and gut feelings, which are influenced by their gendered experiences and experience on the bench. The interviews also revealed that having a female judge on the bench can have various effects on male judges. For instance, it can prevent male judges from using biased language against victims, educate male judges about victim's perspectives, or result in harsher sentence lengths for defendants.

However, the impact of a female judge on the decision-making process depends on her rank, authorship, and power dynamics on the panel. The hierarchy inherent in the apprenticeship system can make it challenging to have egalitarian discussions among three judges, potentially undermining the judicial independence of associate judges. Inexperienced female associate judges, who are almost always a numerical minority on the bench and within the court, may initially conform to the presiding judge's opinion as a coping mechanism, but as they gain more experience, they become more vocal and challenge dominant masculine perspectives about rape defendants and victims by providing counter-perspectives that male judges might have overlooked.

In the next chapter, I use a quantitative approach to examine whether the presence of a female judge on a three-member collegial panel leads to more severe sentence lengths for male defendants in adult rape cases while controlling for other factors, such as the law, case characteristics, and sentencing guidelines.

CHAPTER FIVE

Gender, Rank, Hierarchy, and Sentence Length

"There's this unspoken rule that the presiding judge always leads the way, and the associate judges like me are supposed to follow behind. It's like a well-rehearsed formation wherever we go, even if it's just grabbing lunch. One time, I was walking ahead of my presiding judge, and he actually scolded me for it. He made it clear that I should never be in front of him. It's mind-blowing how deeply ingrained this mindset is among judges. Is it because of age difference? Or maybe it's about the length of our careers? Whatever it is, 99.9% of judges in court still walk in that hierarchical formation."

– Female Judge 12

From the insights gathered in Chapter 4 through interviews, it becomes evident that judges' gender attitudes, rank, and the hierarchical structure of the collegial bench all play a significant role in shaping their interactions. The judges interviewed discussed the several avenues of the gender effect and how the judge's gendered experiences, or lack thereof, impacted their deliberation process, particularly in establishing the facts of a case. Among the female judges, many discussed their experiences of having to persuade their male colleagues when faced with challenges in accepting the victim's testimony. They also recounted how they used to follow the presiding judge's opinion when they were inexperienced. Male judges who had more exposure to working with female judges in rape cases demonstrated a greater awareness of the impact of gender bias and rape myths. They described these experiences as valuable learning opportunities that contributed to their increased understanding of the victim's perspectives and other

complexities involved. In contrast, some male judges tended to believe that gender had no influence on their decision-making in rape cases. Their lack of exposure to different perspectives in a homogeneous panel may have contributed to this viewpoint.

In addition to the qualitative evidence presented, it is important to explore whether there is a systematic difference in judging based on the gender of judges. Increasing the number of female judges has been considered a crucial step in addressing issues like rape myths, gender bias, and achieving fairer outcomes in gender-related cases. The prevailing theory, known as the informational account, suggests that women judges bring a unique perspective to the decision-making process, view and interpret facts through the lens of distinct life experiences of women. Several studies found that a woman judge influences her male colleagues on the same panel, and that they are more likely to decide for the female plaintiff than are all-male panels (Boyd et al. 2010, Farhang and Wawro 2004, Peresie 2005).

However, early research found no gender difference in judges' sentencing behavior. These studies argued that once judges enter the judicial system, they become acclimated to the customs and norms of the institution (Wasby 1989). Hence, judges' demographics and private views become irrelevant under the autonomous system of logically consistent principles, concepts, and rules (Kritzer and Uhlman 1977, Solimine and Wheatley 1995, Sisk et al. 1998). This organizational argument has been contested by other studies as the number of women judges in the court continued to increase. Studies conducted after 2000s have found that there is a substantive gender effect in judging, particularly in sexual harassment and employment discrimination cases. However, existing empirical studies, focused exclusively on Western countries, have produced no consensus on whether gender makes a substantive difference in adjudication. Moreover, they have not considered the impact of rank or seniority on the gender of judges among the collegial members on the panel.

Previous quantitative studies have been criticized for using a binary sex variable to measure gender, which fails to capture the gender as a social process (Kenney 2013). Since gender consciousness and feminist attitude are not something one is naturally born with but needs to acquire through experience, the individual experiences of judges matter greatly in interpreting facts in cases. Kenney argues that judges with experience of gender-based exclusions will interpret facts differently from judges without those experiences. Given that Korea ranks 126th of 149 countries on gender equality (WEP 2018), it is not surprising that fewer women judges are found in the higher courts and women judges often endure gender-discriminating practices from male judges. Following Kenney's logic, I suspect that Korean women are much more prone than men to experience not only discriminatory exclusion but also sexual harassment in their lifetime given the cultural context deeply rooted in social hierarchy and patriarchal norms.

While quantifying judges' gender or feminist attitudes in the context of the Korean judiciary presents challenges, the polarized gender composition of the Gender and Law Community membership within the court and among the interviewees suggests that judges' gender could serve as an indirect indicator of their gender sensitivity or gender attitude. In other words, the gender composition of the bench can be seen as an indirect proxy of whether the three judges on the panel take gender sensitivity into account (Jeong and Park 2020).

In this chapter, using an original dataset, I employ a quantitative approach to explore how the gender effect on sentence length is modified by judges' rank across the power differentials between judges. While other demographic variables such as age and experience have been considered in previous studies, rank, albeit related to age and experience, has not been considered as a modifying variable on judges' gender in common law countries, because the hierarchical relationship in the same jurisdictional level is less prominent there compared to a vertical career judiciary in civil law countries.

5.1 Measuring Judges' Feminist Attitudes

Assessing judges' attitudes toward gender involves examining their participation in feminist activities or gender-focused initiatives while serving on the bench. For example, Boux (2016) explores if judges' gender-emphasized career is related to their use of rape myths in judicial opinions. In order to gather data, she looked up the Appellate Courts websites for respective judges' biographies and measured "1" if the judge's biography mentions one or more of the followings: (1) interests in gender-related issues, (2) work experience in gender-related areas such as sexual violence, or VAW (violence against women)[1], or (3) service in a professional committee that deals with gender, sexual violence, or VAW issues[2] (93). In states where appellate court judges are subjected to (partisan) elections, the emphasis placed by judges on gender-related could matter, and the information on their public websites serves as a signal to their constituents, demonstrating their dedication and sense of responsibility to gender and justice. Thus, it is reasonable to hypothesize that such judges are more likely than those without any affiliation with gender matters to refrain from using rape myths and challenge their colleagues who use them. Indeed, Boux finds that the gender of a judge alone does not matter, but those with gender-focused careers tend to use rape myths less than their colleagues.

However, unlike in the United States, judges in Korea are considered civil servants, do not face elections, and are largely discouraged from explicitly stating any affiliation with political or ideological associations or movements, in order to maintain a perception of impartiality as neutral arbiters. Since no public data on judges' gender-focused careers are readily available,

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[1] "Judge Friedlander is former co-chairman of the Indiana Supreme Court's Commission on Race and Gender Fairness," "Judge Barnes also created a domestic and family violence unit in the Prosecutor's office and launched a pretrial diversion program for nonviolent misdemeanor offenders that served as a model for successful state legislation. The domestic and family violence unit focused solely on crimes against women and children, including abuse and neglect." (Indiana Judicial Branch 2012).

[2] "Judge Robb was Founding Chair of Governor Bowen's Commission on the Status of Women" (Boux 2016:93)

especially at the level of district courts, I asked my judge interviewees during the interviews about their membership status in the Gender and Law Community. The Gender and Law Community was established in 2007 as an intracourt group with the aim of studying and promoting gender equity and gender-related issues, including the abolition of the head of the family system. In 2008, out of the 274 members, only 10 (3.6%) were male judges (Kim 2008). Over the course of ten years, the membership increased to 710 judges, comprised of 660 female judges and 50 male judges (7%) (Lee 2018). In 2018, there were a total of 2,935 judges in the Korean judiciary, with 875 of them being female judges. This means that 75.4% of female judges (660 out of 875) were registered members of the Gender and Law Community. In contrast, only 2.4% of male judges (50 out of 2,060) were members of the said group. Based on my sample of interviewees in 2020, there were 22 judges who were members of the Gender and Law Community, excluding two acting attorneys. Among the 22 members, 20 were women, representing 90.9% of the group, while 2 (1%) were men.

Furthermore, I asked my interviewees whether they identify themselves as feminists. Out of 21 female interviewees, 15 (71.4%) responded that they consider themselves feminists. The remaining six interviewees offered three different types of responses: (1) a clear "No" (FJ32, FJ35, FJ42), (2) a statement that they lack the qualities of a feminist (FJ10, FJ39), and (3) a preference not to be labeled in any particular way (FJ33):

> *As judges, we have a responsibility to stay neutral and unbiased, as mandated by the law. Even if we have personal beliefs, we should not express them publicly. For example, if word goes out that some female judges identified themselves as feminists, people might assume that all female judges are like that. It's frustrating, but until people's attitudes change, some of us may prefer to keep our beliefs private. Female judges especially have to be careful with what they say, as they could face backlash from their colleagues. That's*

why statements like "I prefer not to be defined by any labels" can be a way to protect oneself from attacks (FJ37).

Although I cannot claim that all members of the Gender and Law Community would identify themselves as feminists, the observable gender imbalance within the Community and the self-identification of some female members as feminists indicate that, in Korea, female judges are more likely than male judges to hold feminist perspectives or have a gendered outlook, even if they do not explicitly identify as feminists. Hence, for my quantitative analysis, I use judges' sex as a proxy for gender sensitivity.

5.2 The Hypotheses

Given these observations, the gender composition of the judiciary becomes critical, particularly when adjudicating cases that are gender-coded, such as rape cases. The presence of different genders on the bench can potentially influence the decision-making process and outcomes in such cases. It is presumed that the gender composition of the bench indirectly reflects the level of gender sensitivity among panel judges (Jeong and Park 2020). It is therefore reasonable to assume that an all-male panel lack opportunities for female perspectives to be considered when adjudicating rape cases.

Hypothesis 1: An all-male panel (MMM) will sentence more leniently compared to any other gender compositions (MMF & FMM).

According to an informational account, a female judge will bring experiential knowledge and information to a gender-coded case that her male colleagues lack and perceive as credible (Peresie 2005). As a result, male judges change their behavior and align with the female judge's perspective in favor of female plaintiffs in gender discrimination or sexual harassment cases (Farhang and Wawro 2004). However, I argue that this informational account holds true only in

certain institutional settings where judges have equal voice and authority. In the context of the Korean court system, characterized by social hierarchy and hierarchical bureaucratic nature, judges have unequal voice and authority depending on their age, experience, and rank, making it less likely for senior judges to consider differing views from their subordinates, particularly female judges. However, as female associate judges gain confidence over the years, they are more likely to voice and raise awareness about gender perspectives and share their own gendered experiences. Once male presiding judges recognize their worth and defer to their opinions, their viewpoints are more likely to be respected by their male colleagues. Additionally, when a female judge assumes the role of an opinion writer, she can exercise greater judicial discretion and commitment to the case, compared to when she is a non-author judge on the panel.

Hypothesis 2: The presence of a female judge will have a greater effect on sentencing when she is a more experienced author judge.

5.3 Results

The results in Model 1 in Table 6 (Appendix B) report the effect of Female Presence while controlling for other factors. The Female Presence indicates whether the panel has a female associate judge. The effect of having at least one female judge on the bench, although its coefficient is positive, is statistically insignificant, failing to support my first hypothesis that *an all-male panel (MMM) will impose shorter sentences than mixed-sex gender compositions (MMF & FMM).* Having a female judge on the bench alone does not have a statistically discernable effect on sentence length. Considering the reality of the two-person deliberative process and the insignificant role of a non-author judge recounted by my judge interviewees in the previous chapter, the mere presence of a female judge on the bench is not sufficient to exert substantial influence on the sentencing length of a defendant. Hence the other models use Author Sex rather

than Female Presence. The results in Heckman's selection models also show that the selection lambda is statistically significant and negative, indicating that the error terms in the selection and primary outcome equations are negatively correlated.

In Models 2 through 4, I regress Author Sex and Author Rank to examine whether being a female author judge and having more experience on the bench in a hierarchical collegial setting have an independent impact on determining the sentence length of a defendant. The results in Models 2, 3, and 4 show that the individual effects of Author Sex and Author Rank are negative and statistically insignificant while controlling for other factors. Their interaction effect in Model 5 is also statistically insignificant albeit positive. Initially, the gender and rank of a judge seem to have no significant impact on their decision-making behavior.

However, it is worth noting that the influence of rank may have diminished in importance due to the change in judgeship qualification standards implemented in 2018. This change raised the requirement for legal experience from three years to five years for newly appointed judges, narrowing the experience gap, including age, between some associate judges and between associate judges and their presiding judges.[3] As a result, for example, in 2022, in one branch court of the Daejeon District Court, a presiding judge happened to be younger than both of his associate judges, who have accumulated considerable experience in prestigious law firms (Kim et al. 2023).

Considering the substantial institutional changes in 2018, I conduct an estimation of the interaction effect between Author Sex and Author Rank based on the data from 2014 to 2017 only. While the Author Rank variable remains negative and statistically insignificant, the Author Sex variable shows a negative and statistically significant effect at $p < 0.05$. Interestingly, the

[3] Between 2013 and 2017, the percentage of judge appointments with a minimum of three years of experience ranged from 52.4% in 2013 to 79.6% in 2016. However, starting in 2018, when a new standard requiring a minimum of five years of experience was implemented, the percentage of appointments with only five years of experience ranged from at least 52.4% in 2019 (Choi 2021, Han-gyeo-re)

interaction term between these two independent variables is positive and statistically significant at $p < 0.05$. This suggests that when comparing male and female opinion writers, female judges tend to impose sentences that are three months shorter on average. However, when considering experienced or higher-ranking female opinion writers, they tend to impose sentences that are approximately 5.3 months longer than inexperienced male judges. These findings lend support to my second hypothesis, indicating that experienced female author judges tend to impose longer sentence lengths compared to their male counterparts, with an average difference of 2.2 months.

To further unpack the influence of the interaction term, I examine the marginal effects of Author Rank on Incarceration Length across Author Sex. Although the coefficient of the interaction term between Author Sex and Author Rank is 5.3 months, it cannot be interpreted as an unconditional marginal effect (Brambor 2006). The average marginal effect calculates the varying effect of Author Rank on Incarceration Length at different values of Author Sex (Busenbark et al. 2022). When there is an interaction between variables, the marginal effect at specific values is more important than the coefficient on the interaction term (an average effect).

Figure 2(a)(b) below illustrates the marginal effect of Author Sex on Incarceration Length while Author Rank varies between 0 (Freshman or "left-sitting" judge) and 1 (Junior or "right-sitting" judge), using the data prior to 2018. In Figure 2(a), the marginal effect of Author Sex on Incarceration Length is negative and statistically significant when Author Rank is a freshman judge (i.e., left-sitting judge). However, the marginal effect of Author Sex on Incarceration Length is positive but statistically insignificant when Author Rank is a junior judge (i.e., right-sitting judge), as the confidence interval crosses zero. This implies that there is no discernable effect of Author Sex on Incarceration Length for experienced judges, but for the inexperienced judges (i.e., the left-sitting judges). In other words, an inexperienced or lowest ranked female author judge tends to sentence leniently.

However, following the change in judgeship requirements in 2018, as depicted in Figure 2(b), the marginal effect of Author Sex is no longer statistically significant across different levels of Author Rank. This can be attributed to the reduction in the experience gap between associate judges, resulting from the implementation of a five-year legal experience requirement. Since 2018, newly appointed judges have been required to have a minimum legal career length of five years, which is two years longer than the previous requirement for freshman judges before 2018. Consequently, the marginal effect of the sex of judges is no longer moderated by their rank (or the difference in experience).

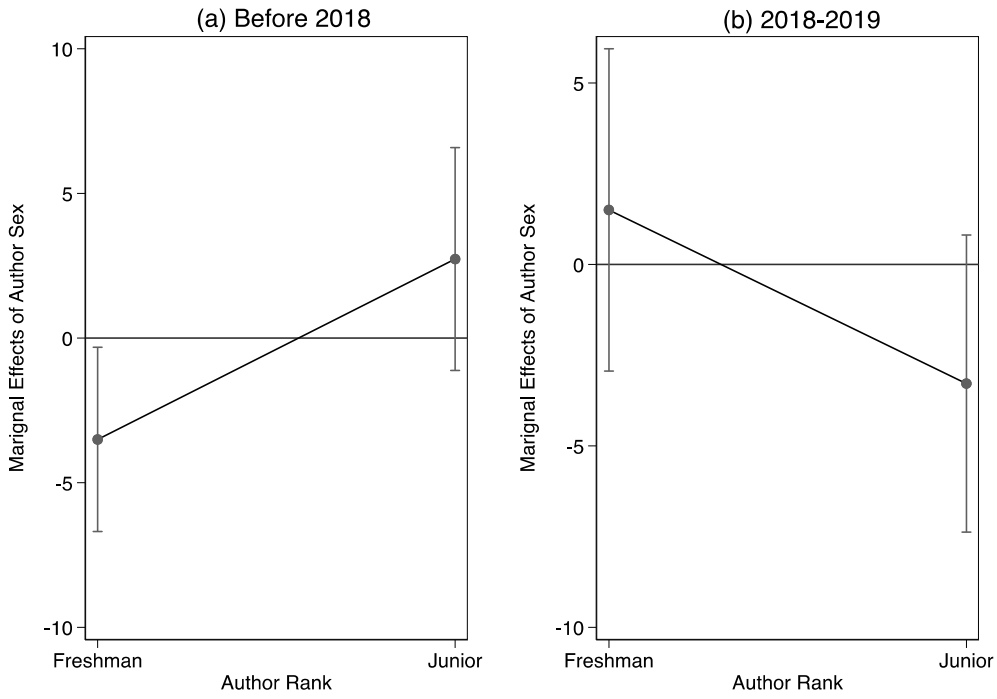

Figure 3(a)(b): Marginal Effects of Author Sex on Incarceration Length

This figure is consistent with some of the qualitative evidence from Chapter 4. Thinking back to their freshmen years, female judges have expressed a sense of uneasiness about being in disagreements with their presiding judges due to the hierarchical relationship. Female judges

(FJ12, FJ41, FJ13, FJ32, FJ33) have recounted that they were affected a lot by the opinions of their presiding judges and followed their opinions many times for "the panel belongs to the presiding judge, a patriarchal figure" (FJ13). As one female judge puts it:

> *The power dynamics really seep into every nook of our lives that it's not just in our everyday encounters, but even in legal proceedings. The presiding judge is not only higher up than me, but also older. In Korea, respecting your superiors is a big deal, so I'm expected to hold back and not spill all my thoughts and opinions. They think they can say whatever they want while shutting me down. This is how collegiality works (FJ12).*

Against the backdrop, less experienced judges tend to experience more insecurity about their decisions, which leads them to engage in additional research in search of similar precedents (FJ32). They often align their decisions and sentencing with those precedents and the opinions of their presiding judges. This inclination towards leniency is particularly observed among older male judges, who tend to impose shorter sentences compared to their younger counterparts. According to my interviewees, this leniency can be attributed to various factors, such as senior judges becoming desensitized to the severity of heinous cases, as mentioned by MJ25. They also have a larger pool of experiential data at their disposal, allowing them to draw on more extensive knowledge when making their decisions, as noted by FJ34.

Conversely, Figure 3(a)(b) below illustrates the marginal effect of Author Rank on Incarceration Length across Author Sex (0 = male, 1 = female). Using the sentencing dataset from 2014 to 2019, the marginal effect of Author Rank is statistically insignificant, and there is no statistically significant difference in marginal effect between male and female author judges. On the other hand, in Figure 3(b), of which the sentencing dataset runs from 2014 to 2017, I find that the effect of Author Rank on the Incarceration Length is significant for a male judge. These results suggest that the effects of Author Rank are stronger in the dataset prior to 2018 than that

of the entire period when assessing how male and female judges differ in sentencing rape defendants. In other words, when male judges become relatively more experienced, they impose lenient sentence lengths to rape defendants. However, there may not be a statistically significant difference in the marginal effect of Author Rank between male and female opinion writers. While rank has a negative effect on sentencing when the author judge is male, it does not have a significant effect when the judge is female despite its positive effect.

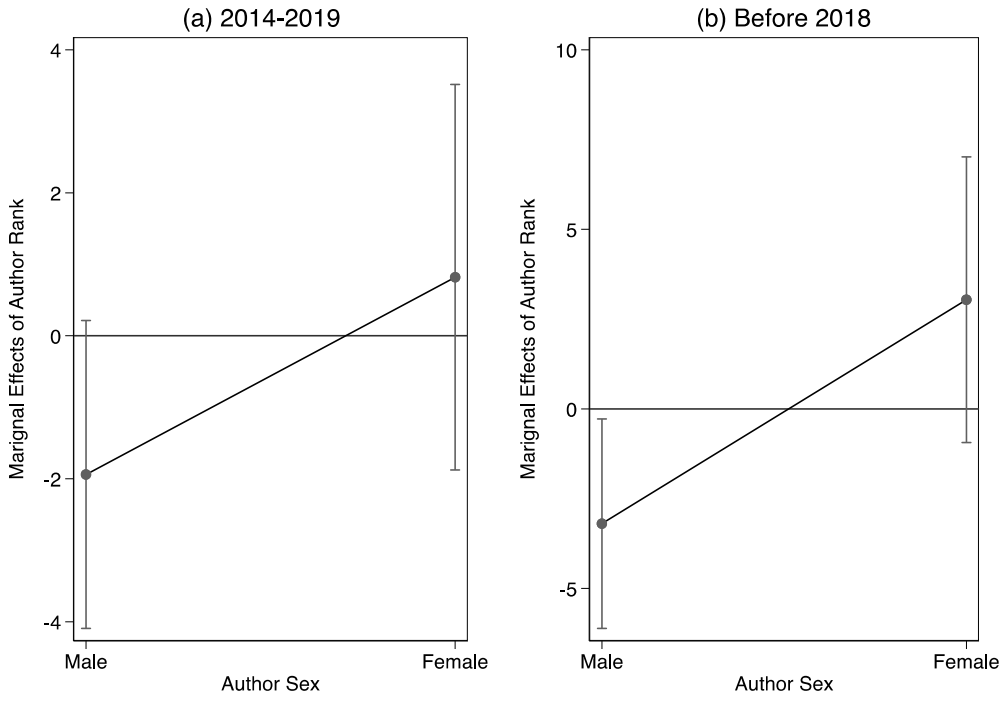

Figure 4(a)(b): Marginal Effects of Author Rank on Incarceration Length

The difference between female freshman judges and female junior judges is more pronounced in Figure 4. I further examine conditional relationships among the variables by calculating the marginal effect of Author Sex on Incarceration Length and how this is modified by Author Rank across the career difference between the author judge and the presiding judge.

The average career length difference among the judges between 2014 and 2017 was 14.9 years. The smallest difference in career length is 5 years and the largest difference in career length is 22 years. Since using each individual career difference would significantly reduce the statistical power of my analysis, I decided to use just two career difference splits divided by that median (Shen 2020). Those who had a career length difference larger than 14.9 years at the time of the sentence were coded as 1, indicating a larger career difference, and those with less than 14.9 years of career difference were coded as 0, indicating a relatively smaller career difference.

Model 7 in Table 8 in Appendix B shows the results of the three-way interactions. Neither the coefficients of individual independent variables nor those of the two-way interaction terms are statistically significant, except for Author Sex X Author Rank X Career Difference. The three-way interaction term is positive (13.54) and statistically significant at $p < 0.01$. I calculate the marginal effect of Author Sex on Incarceration Length for different levels of Author Rank across Career Difference between judges.

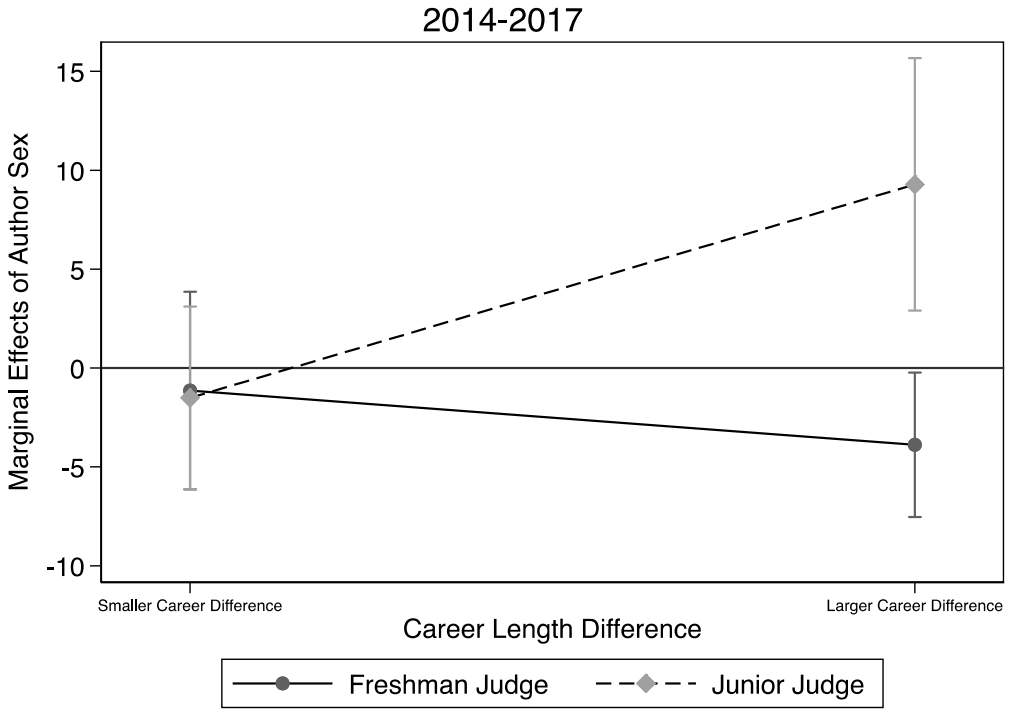

Figure 5: Marginal Effects of Author Sex on Incarceration Length

The difference in the marginal effect of Author Sex on Incarceration Length for associate judges of varying ranks becomes statistically significant when the power differential measured in career length difference between an author judge and a presiding judge is taken into account. The marginal effect of Author Sex on Incarceration Length has an increasing effect when an author judge is junior (i.e., right-sitting), and the career difference is relatively large (CLD ≥ 14.9 years). However, when an author judge is a freshman judge (i.e., left-sitting) with relatively little experience on the bench, the marginal effect of Author Sex has a decreasing effect on incarceration length when the career difference is large. When there is a significant disparity in career experience between a female judge and the presiding judge, an experienced female judge with a relatively higher rank tends to deliver harsher sentence lengths compared to an inexperienced female judge at the lowest rank.

When the career length difference is smaller, it indicates that the presiding judge and the associate author judge shares similarities in terms of age, cohort, and generation. In contrast, when there is a larger career difference of 14.9 years or more, the judges involved are likely from different generations and thus are less inclined to have shared values and norms. To illustrate, for a female judge to have a career length difference of only five years with her male presiding judge, she must have served on the bench for at least ten years since the early 2000s. During that time, female judges constituted less than 10 percent of the entire court in Korea (see Graph 1 in Chapter 1). According to the critical mass theory and organizational socialization theory, female judges, as a numerical minority, would have undergone a process of adaptation within a male-dominant court culture and practices (Kanter 1977, Wasby 1989, Kritzer 1978).

Recently, the generational gap among judges is leading to divergent perspectives in determining guilt. As stated by a male presiding judge below:

> *Back when I was in the criminal trial court, there was this case where an elderly person who gently stroked a kindergartener's face and complimented her on her looks was accused of sexual harassment. Now, as someone who grew up in the 1960s, I remember village elders doing the same to me without any fuss. So, naturally, I asked, "Isn't this a bit too much these days?" But then this young female judge told me that times have changed, and such actions aren't acceptable anymore. When judges can't agree on the guilt in cases like these, it just shows that they have their own personal standards for judging sexual impropriety. Personally, I don't think it's all that strange for someone to touch my child in a harmless way. But the associate judge strongly advised me against any physical contact with children. It's just the way things are now, I suppose (MJ16).*

As the length of their careers diverges, so does the generational gap between the presiding judge and the author judge. It is interesting to observe that a relatively experienced

female junior judge is gaining credibility in the eyes of her presiding judge. She brings forth valuable information and perspectives that the presiding judge may not have considered. Moreover, the current cohort of presiding judges is noticeably younger by nearly five years compared to their superiors. This generational shift brings about a less authoritarian and more progressive approach among them.[4]

5.4 Robustness Check

Since the Author Sex variable alone cannot distinguish between an all-male panel and a mixed-sex panel, as a robustness check, I use an alternative measure, Panel Gender Composition, to examine the effect of Author Sex by considering the gender composition of the collegial bench. When Author Sex is 0, two possible gender compositions exist: an all-male panel where the author judge is male and a mixed-sex panel where the author judge is male. However, Panel Gender Composition is a categorical variable where 0 refers to an all-male panel with a male author judge (MMM), 1 refers to a mixed-gender panel with a male author judge (MMF or FMM), and 2 refers to a mixed-gender panel with a female author judge (MMF or FMM).[5] As shown in Model 8 of Table 9 in Appendix B, the coefficient on the mixed-sex panel with a male author is very small and positive but statistically insignificant. The coefficient on the mixed-sex panel with a female author is negative and statistically insignificant as well. Author Rank is negative and statistically significant at $p < 0.01$. When the two variables interact, Mixed Panel &

[4] Indeed, in my sample of 756 judicial decisions, the mean age of the presiding judges increases by one year from 54.2 years old in 2014 to 55.2 in 2015, but gradually decreases to 55 in 2016, 53.4 in 2017, 52.6 in 2018, and 51.2 in 2019. Although the 2020 sentencing data is not included in the analysis due to the shortage of accessible data at the time of field research, the mean age of the presiding judges in 2020 is 50.75. Since 2014, the presiding judges have gotten younger by roughly five years.

[5] The analysis presented below utilizes sentencing data from the entire period of 2014 to 2019. The analysis conducted on the 2014-2017 dataset yielded similar results. However, the analysis for the 2018-2019 period could not be carried out due to a lack of observations for certain combinations of Panel Gender Composition and Author Rank.

Male Author X Author Rank is positive and statistically significant at $p < 0.05$. Mixed Panel & Female Author X Author Rank is also positive and statistically significant at $p < 0.01$.

According to Figure 6, the effect of Author Rank on Incarceration Length is only significant when the author judge is male in an all-male panel, while it does not have a significant effect in other mixed panels. This finding aligns with the previous finding that the influence of Author Rank differs based on the gender of the author judge, showing a negative and statistically significant effect when the author judge is male. Furthermore, Figure 5 illustrates that the effect of Author Rank on Incarceration Length varies depending on the gender composition of the panel. Thus, the significant negative effect of Author Rank when the author judge is male primarily arises from cases where there is a male author judge in an all-male panel, rather than a male author judge in a mixed-sex panel. This result emphasizes the significance of the gender composition of the bench, not just the gender of an individual author judge. In situations where an experienced male judge in an all-male panel (MMM) authors a judicial opinion, lenient sentences tend to be imposed on defendants in rape cases. The absence of a female judge in an all-male panel obstructs the inclusion of a female perspective, limiting opportunities for diverse viewpoints. As a male judge gains more experience but lacks exposure to working with a female judge in a collegial court, he becomes less likely to consider gender perspectives and, consequently, more inclined towards lenient sentencing for rape defendants as he becomes desensitized to more severe offenses.

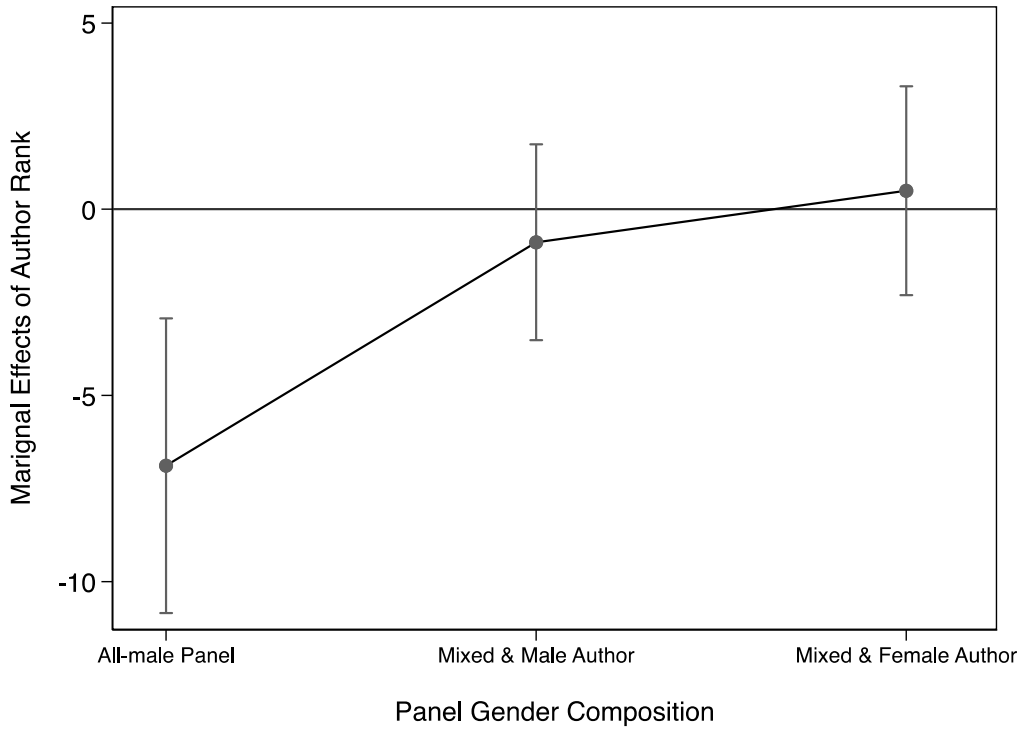

Figure 6: Marginal Effects of Author Rank on Incarceration Length

On the other hand, the rank of an author does not have any marginal effect on incarceration length in mixed-sex panels, regardless of whether the author judge is male or female, as indicated by the confidence intervals that encompass zero. The difference in the marginal effect between an all-male panel and a mixed-sex panel with a male author judge is not significantly different, as their confidence intervals overlap. However, the difference in the marginal effect between an all-male panel and a mixed-sex panel with a female author may be significantly different, given that their confidence intervals do not overlap. In conclusion, the colleagues with whom judges share their office, seek consultation when uncertain, and deliberate on cases can significantly influence their decision-making processes.

Finally, Figure 7 shows the marginal effect of author rank on incarceration length for varying panel gender compositions across career length difference. In contrast to Figure 6, when

career length difference is large (CLD ≥ 14.9 years), the positive rank effect becomes statistically significant for a mixed-sex panel with a female author judge. The rank effect on incarceration length remains negative and statistically significant for an all-male panel and the marginal effect of rank for a mixed-sex panel with a male author judge remains statistically insignificant. The difference in the marginal effect of author rank between an all-male panel and a mixed-panel with a female author judge is statistically significant as their confidence intervals neither cross zero nor overlap. This suggests that an all-male panel imposes more lenient sentence length compared to a mixed-sex panel with a female author judge when career difference is large.

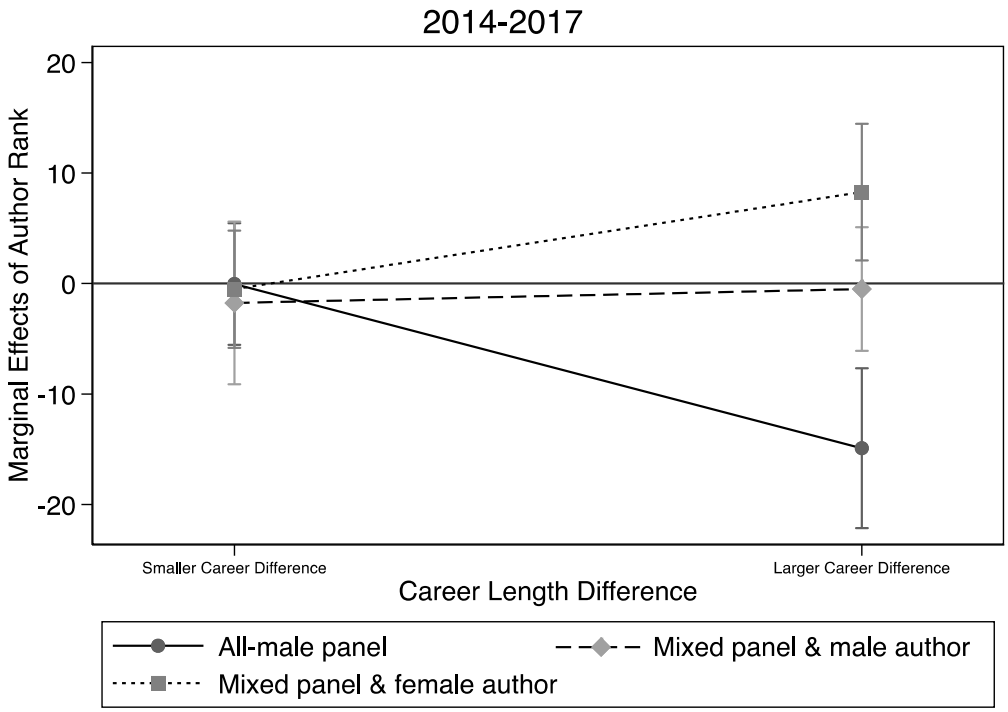

Figure 7: Marginal Effects of Author Rank on Incarceration Length

As expected and consistent with prior work, legal control variables in the outcome equation such as Pregnant Victim and Repeated Crime are salient determinants of aggravated sentencing. Other extralegal factors, such as the age difference between the author judge and the

presiding judge, and the victim's age are not statistically significant, except for a certain type of victim-defendant relationship. When the defendant is a stranger, the defendant is sentenced to prison for roughly 4 months longer than when the defendant and the victim are acquainted. Judges tend to perceive sexual assault between acquainted people—married couples, divorced couples, dating couples, and friends—as less serious and damaging than strangers, validating the influence of rape myths. Interestingly, having a public defense attorney rather than a private defense attorney is associated with shorter sentence length by less than 3 months for defendants. This finding is contrary to what most research finds in the context of the U.S., and it would be intriguing to further explore the influence of public/private defense attorney and their gender effect on judges' decision-making process in future research.

5.5 Discussion and Concluding Remarks

Unlike in common law systems where the presence of a female appellate court judge is found to influence her male colleagues on the panel in sex discrimination or sexual harassment cases, the situation seems to be quite different in the hierarchical collegial setting of the Korean court, specifically when it comes to rape cases. Interestingly, the mere presence of a female judge does not have any impact on her male colleagues' view. However, when that female judge is an experienced author of a judicial decision, the null gender effect turns positive and becomes statistically significant. On average, when there is an experienced female judge as the author in a mixed-sex panel, the sentence length gets extended by around 2.2 months compared to an inexperienced male judge in an all-male panel.

I also find that the marginal effects of Author Sex and Author Rank on Incarceration Length vary across different moderating factors. The effect of a judge's sex on sentencing is negative when the judge is a left-sitting opinion writer. However, the effect of a judge's rank on

sentencing is negative when the judge is a male opinion writer. In other worlds, female judges tend to give more lenient sentences when they are inexperienced opinion writers, whereas male judges tend to give more lenient sentences when they are experienced opinion writers, especially in all-male panels. This result supports both the informational theory and the polarization theory. It suggests that the presence of a female judge brings in diverse viewpoints influenced by their unique social experiences, which male judges may not have previously considered or neglected during deliberations. In the absence of a female judge, all-male panels tend to lean towards lenient sentencing for rape defendants, aligning with the prevailing sentencing norm at that time.

However, when we take into account the power dynamics between the presiding judge and the author judge, the three-way interaction model reveals an interesting finding. If a female author judge holds a senior rank (i.e., right-sitting) and there exists a significant power differential between her and the presiding judge, the incarceration length increases significantly.

Conversely, if a female author judge holds a junior rank (i.e., left-sitting) and faces a significant power differential between the presiding judge, the incarceration length decreases significantly. Given that the average career length difference between an associate judge and a presiding judge between 2014 and 2017 is 14.9 years, it makes sense that a female author judge with a higher rank would impose harsher sentences on rape defendants compared to a female author judge with a lower rank. This can be explained by the deference theory, where female right-sitting judges, who are generally more experienced and are more confident, are more likely to be considered credible by the presiding judges.

In contrast to Wei (2020)'s finding which finds that in the context of China monetary compensation reduces sentence lengths only by small amount, my analysis reveals that monetary compensation, that is reaching a settlement with the victim, almost always results in probation, the most lenient sentencing outcome for the convicted. Unwillingness to Punish, which refers to

the victim opposing the punishment of the defendant, is a special sentencing mitigating factor which automatically shortens the recommended range of the sentence length. In theory, Unwillingness to Punish indicates cases in which "the offender expresses sincere remorse with genuine efforts to reach an agreement with the victim [and] the offender pays proper compensation for the damage caused in which the victim acknowledges this and expresses objection to punishing the offender with a clear understanding of the legal and social implications of such objections."[6] Given that it is legally possible for a judge to suspend a sentence if the nominal sentence length is less than or equal to 36 months, of 768 convicted cases, 96% of cases are sentenced to between 10 months and 36 months. Of 737 cases, victims opposed punishment in 393 cases (53.3%). Defendants in 381 out of 393 cases (96.9%) received probation; they served zero months in jail and went home free. What this means is that there is virtually nothing judges can do to incarcerate the defendant if the victim ends up opposing punishment because of a monetary settlement between the two parties.

The significant impact of the Unwillingness to Punish factor in sentencing guidelines supports the organizational theory, considering the notable characteristics of the Korean judiciary, such as its codified legal system and rigorous training. Judges are trained to adhere to the law and sentencing guidelines, being cautious not to deviate too far from the established sentencing norms. However, the prominent influence of this particular mitigating factor, among several others, also validates public criticism regarding lenient sentencing for rape defendants by the court. Exploiting this institutional loophole in the Korean criminal justice system, defendants and defense attorneys often try to negotiate a monetary agreement with the victim, in exchange for the victim expressing Unwillingness to Punish, which increases the likelihood of probation

[6] Sentencing Guideline p.69

(correlation coefficient of 0.91). While predictability in judicial decision-making is an important characteristic of the legal system, the Korean court and legislators should reevaluate the impact and reconsider the appropriateness of the existing sentencing guidelines.

This is problematic in several ways. As we discussed in Chapter 4, judges ascribed the lenient sentencing to the implementation of sentencing guidelines, which were largely built on the accumulation of prior sentencing data. A high conformity rate to the sentencing guidelines shows that judges adhere to the rules of the game and are unlikely to deviate from the established norm for fear of social acceptance and judicial reputation. Unless there is an exogenous shock, whether it be an elimination of the mitigating factor or a stricter interpretation of the agreement between the victim and defendant, judges' incarceration pattern is likely to remain a status quo.

CHAPTER SIX

Conclusion

My research suggests that the presence of a female author judge on the bench overseen by a male presiding judge is associated with longer sentences by 2.2 months for sex offenders in rape cases, controlling for a host of other demographic and legal factors. Given that rape defendants in Korea are incarcerated for 30 months on average, the observed effect is both statistically and substantively significant. The positive gender effect, however, is conditional on the female junior judge's authorship and her relative seniority and experience on the bench vis-à-vis the presiding judge. As the experience gap widens, it becomes more difficult for a female associate judge with little to no experience in the criminal court to assert her opinion against a male presiding judge with a minimum of 15 years of experience. I also find that being an author of a judicial decision is critical in influencing sentence length as the gender effect is null when a woman is not the author regardless of her rank on the bench.

My in-depth interviews with 42 legal elites not only buttress the statistical findings but also help reveal how judges across gender, rank, and cohort/generation vary in their perception of sex crimes and victims, interpretation of case facts and laws, and decision-making of sentence length during the deliberation process. Based on my interviews, having at least one woman experienced in judging in the panel provides windows of opportunity for women's perspectives to be accounted for compared to an all-male panel. Male judges gave accounts of experiences in which they benefited from having a woman on the panel because they bring valuable information like female victims' perspectives. Likewise, female judges also recalled their frustrations at male presiding judges' lack of gender sensibility. In addition, more than half of my interviewees (58%) answered that they have followed the presiding judge's opinion when in disagreement and 50% of

respondents acknowledged that they have "unequal power" in the collegial panel. Yet as associate judges accumulate roughly 4 to 5 years of experience on the bench and grow more confident about their sentencing sentiment, they are less likely to acquiesce to presiding judges' opinions. More recently, presiding judges have also become more respectful of their associates.

Gender interacted with these institutional features and further restricted women judges' judicial discretion in judging. Being a minority in the court, older female judges shared their experience that in retrospect they had followed the opinion of their male presiding judges and the opinion of the majority on the panel, validating the organizational theory. This is somewhat similar to the findings in the quantitative analysis where female author judges whose career length difference with their presiding judges was between five and seven years tended to sentence more leniently as they became more experienced. Younger female judges showed opposite behaviors. Female judges who had a difference in career length of 15 years or more tended to sentence defendants more harshly as they became more experienced. This demonstrates that there is a generational difference among judges and the collegial atmosphere has changed within the court. In the past, going against one's presiding judges was unthinkable, but now current presiding judges are of a different generation and junior judges have become more progressive.

One limitation of my research is primarily related to the nature of the available data. My original dataset spans from 2014 through 2020, which is a relatively short period. This is due to the amendment of sentencing guidelines that occurred in 2013 and 2020, which restricted the timeframe. Moreover, my data includes a transitional period due to the implementation of the changed judgeship requirement that began early 2018. If the sentencing data from the early 2000s had been publicly available, the marginal effects of Author Sex on Incarceration Length across Author Rank would likely have been even more significant. However, only the judicial decisions of criminal cases adjudicated after January 1st, 2013, are accessible for purchase by the public.

Access to datasets prior to that date is usually limited to the Prosecutor's Office or the JRTI, and they typically do not share their data with researchers outside their institutions.

Due to the limited availability of data and the underrepresentation of women within the court, there is currently a lack of diverse gender compositions in the Korean court system. For the purposes of this study, my focus was primarily on three specific gender compositions: all-male panels (MMM) and two mixed-sex panels (MMF and FMM). However, there were originally two other gender compositions, namely MFM and MFF. These two compositions were excluded from the study due to their significantly smaller sample sizes compared to the rest. The MFM panel had only adjudicated three rape cases, while the MFF panel had handled 54 cases. Consequently, I faced limitations in investigating the influence of different gender compositions, specifically the effects of a female-majority panel in line with the critical mass theory, as well as the effects of a panel led by a female presiding judge to examine the impact of gender when a single woman is the most senior and authoritative figure in a hierarchical setting.

Despite these limitations, my findings contribute valuable theoretical insights to the broader debates on gender and judging and gender and politics where demographic representation, group interactions, and/or organizational hierarchy are considered important for political decision-making. Given that more than half of the global population currently lives in civil law countries (JuriGlobe), my research not only enriches scholarly discourse but also offers empirical evidence to encourage policy dialogues among lawmakers and activists who aim to achieve gender balance in courtrooms. Such efforts are crucial for including women's perspectives and ensuring decisions that better respect and protect women's dignity.

Previous theories on gender and judging, primarily focused on common law countries, have focused on judges' demographic characteristics, inadvertently undervaluing the influence of court structures and institutions on judges' gender-related behaviors. However, my empirical

results challenge this limited perspective by demonstrating that, within the context of a seniority-oriented vertical career judiciary, the mere presence of a woman on the bench does not automatically guarantee a substantive gender effect in judicial decision-making. Instead, adding more women on the bench, at a sufficiently higher rank, can challenge socially embedded gender bias against women in sexual assault criminal cases. Female associate judges need to have substantial experience in order to effectively influence their male presiding judges within the hierarchical collegial panel. Taking on the role of an opinion writer further empowers female associate judges, allowing them to transition from a passive position to an active author judge. This institutional role grants them leadership in closely examining witness statements, evaluating circumstantial evidence, and ultimately crafting judicial opinions based on their decisions.

6.1 Future Research

Moving forward, it is anticipated that the inclusion of more women on collegial panels in the future could validate some of the influences already identified in my quantitative analysis. Although the number of female judges entering the judiciary is increasing annually, they still constitute a numerical minority within the organization. Critical mass theory argues that once women form a majority within a group, their behavior will significantly differ from that of men (Kanter 1977). However, gender compositions where women dominate the panel or women judges preside over the panel (FFF, MFF, FFM, or MFM) are not as prevalent as the male-majority panels (MMM, MMF, and FMM). Notably, in 2021, the number of newly appointed female judges surpassed that of male judges for the first time since the implementation of the judge qualification system in 2013. Out of a total of 157 newly appointed judges, 82 were female judges (52.2%) while 75 were male judges (47.8%). With this encouraging upward trajectory,

there is hope that in the future, it will be possible to generate a larger sample of female-majority panels to test the critical mass theory.

Moreover, the policy implication about women in the leadership position calls for future research to explore the existence of persistent institutional biases and structural barriers that hinder women's progress and promotion within the judicial system. Even if the number of women judges entering the court is on the rise at the level of the court of first instance, still only a small percentage of women is found in the High Court of Korea.[7] Several female judges shared personal accounts of experiencing gender discrimination within the court. These instances ranged from feeling compelled to apologize for taking maternal leave, which can impact their chances of promotion to the rank of presiding judges, to encountering sexist remarks made by presiding judges during meetings or staff dinners. It is therefore essential to identify and overcome these obstacles to advance gender equality within the Korean courts.

Furthermore, future studies have the potential to compare the impact of gender and rank on sentence length prior to specific policy changes. For instance, one study could examine and compare the current dataset with a previous dataset before modifying the judge qualification requirement in 2013. Prior to 2013, newly graduated candidates from the Judicial Research and Training Institute (JRTI) were immediately appointed as judges and assigned to criminal or civil collegial courts without prior experience as lawyers or prosecutors. Therefore, it is plausible that the influence of rank and hierarchy on sentence length was more pronounced than what is shown in the current dataset in which judges have at least three or more years of a legal career before entering the judiciary. Another potential study could explore the effect of gender and rank on sentencing before implementing the Sentencing Guidelines in 2009. Since according to my

[7] As of March 2019, there were only 6 female presiding judges (4.3%) in the High Court of Korea, compared to 133 male presiding judges (Lee 2019).

interviewees judges had more discretionary power in the absence of the sentencing guidelines, the interaction effect between the gender and rank of a judge may be more significant. However, the small number of female judges in the court may constrain the number of possible observations.

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Appendix A

Chapter 3

Below I provide interview instruments used for conducting in-depth interviews with 42 judges, prosecutors, and lawyers. Although the interviews were conducted in Korean, I have provided the English wording of these questions.

Interview Instruments

1. Opening questions

1) What motivated you to become a judge? When did you become a judge? Where were you first assigned to? What year is your JRTI cohort?
2) What was the atmosphere of the collegial court like at first? First feeling?
3) How many sexual assault cases have you tried? For how long?

2. Trying Rape Cases

1) Is the sexual crime case (rape) treated differently from other criminal cases? Do you judge rape cases similar to other criminal cases? (Krahé & Temkin 2008)
2) Do you have any difficulties in judging sex crimes? What is the most important evidence?
3) Do you have any concerns/recommendations about how the criminal justice system is currently dealing with rape cases?
4) As you know, the Korean public is largely dissatisfied with low sentencing in sexual crime cases. Do you share these concerns?
5) In judicial decisions, under the sentencing reasoning, what are the aggravating and reducing factors? Do you think they are appropriate reasons? Especially, when defendants were drunk and committed the crime "accidentally"?
6) Comparing the jury trial with a three-judge panel, which of the two do you think is more suitable for trying a sex crime? What do you think of the public participation trial in sexual crime cases?
    a) Have you experienced any difficulties in the deliberation process in the collegial court?
7) What do you think affects the outcomes of sexual crimes other than the criminal law? (Judge's personal disposition, experience, background, beliefs, etc)

8) Do you think that defense attorneys, prosecutors, or judges sometimes ask victims inappropriate questions about their sexual history, outfit, attitudes before and after the rape?

3. Collegial Court Experience

1) What is the influence of the chief judge in the three-judge panel? What were the chief judges you have worked with like?
2) If your opinion/decision differs from that of the chief judge, how much is your opinion affected? Have you been able to persuade the chief judge?
3) Have you worked with a left/right sitting judge of a different sex? Is there a difference between working with a judge of the same sex or different sex? Do you prefer working with a judge of the same sex or different sex? Are there pros and cons working with the same sex and/or different sex judge in the panel?
    a) Which of the male or female chief judges do you prefer working with?
        i) If there is a particular gender, why so?
        ii) If not, what kind of styles of a chief judge do you prefer to work with?
        iii) If chief judge, what do you think your style is?
4) Who do you consult with when you are stuck in an ambiguous case?
5) Are you satisfied with the deliberation process in the collegial court? If not, what are your concerns/dissatisfactions?

4. Feminism and Feminist Decision-making

1) How do you define feminism?
2) Do you consider yourself a feminist judge?
    a) If yes, have you ever been engaged as a feminist activist within/outside the courts?
    b) Are you a member of the Gender and Law Community within the court?
    c) How do you think the feminist tendency is revealed in the ruling on sexual crime? What do you think about the term, gender sensitivity? How are judges supposed to deal with the Supreme Court's decision and use of gender sensitivity in the decision? How do you apply/use the term 'gender sensitivity'?
3) What do you think about the term, gender sensitivity? How are judges supposed to deal with the Supreme Court's decision and use of gender sensitivity in the decision? How do you apply/use the term 'gender sensitivity'?

4) What is your opinion of the impact of Mr. Ahn's case, the N-room case, the leggings case, and K-pop star Koo's case?
5) Have you ever experienced sexual discrimination or discrimination of any sort in court? From other judges, officers, and defendants?
6) Do you think the recent #MeToo movement has had an impact on sexual crime cases? If so, how? Positive? Negative? Victims? Defendants?
    a) Have you ever had a conflict between applying the criminal law and feminist perspective in sexual crime cases?
    b) Do you have a role model judge? Can you say that he or she is a feminist?

Miscellaneous

1) Have you received training in judicial fact-finding, victim's testimony credibility, and gender equity before/after becoming a judge?
2) Are you married?
    a) If yes, do you have a child?
    b) If yes, girl or boy?
    c) Are you a member of the Gender and Law Community within the court?
    d) Do you think there is a difference between regional courts and Seoul district courts? (In terms of Different sentencing sentiment)
    e) The public trust in the judiciary is very low in Korea among the OECD countries. In light of your experience, what can explain people's low trust?

Table 3: The List of Interviewees

Interviewee	Date	Length (Minute)	Sex	Occupation	Referral
FJ1	20190731	105	1	Retired judge	1
MA2	20190801	83	0	Attorney (Former judge)	0
FJ3	20190801	158	1	Judge	1
FJ4	20190806	88	1	Judge	1
FJ5	20190807	191	1	Judge	1
FJ6	20190807	105	1	Judge	0
MA7	20190819	103	0	Attorney (Former judge)	0
MJ8	20190820	172	0	Judge (Former attorney)	0
FJ9	20190821	98	1	Judge	0
FJ10	20190822	105	1	Judge	0
FA11	20200213	71	1	Attorney	0
FJ12	20200218	115	1	Judge	1
FJ13	20200227	87	1	Judge	1
MJ14	20200311	93	0	Judge	1
MJ15	20200316	115	0	Judge	1
MJ16	20200317	56	0	Judge	0
MA17	20200320	96	0	Attorney (Former judge)	0
MA18	20200323	146	0	Attorney (Former judge)	1
MJ19	20200323	118	0	Judge	0
MJ20	20200324	124	0	Judge	1
MJ21	20200330	187	0	Judge	1
MJ22	20200331	92	0	Judge	0
MJ23	20200401	112	0	Judge	0
MJ24	20200410	75	0	Judge	0
MJ25	20200410	89	0	Judge	1
MJ26	20200414	99	0	Judge	1
MJ27	20200420	102	0	Judge	1
MJ28	20200420	92	0	Judge (Former attorney)	0

MJ29	20200424	92	0	Judge	0
MJ30	20200427	74	0	Judge	0
FA31	20200429	119	1	Attorney (Former prosecutor)	0
FJ32	20200722	111	1	Judge	0
FJ33	20200727	80	1	Judge	1
FJ34	20200729	73	1	Judge	1
FJ35	20200804	128	1	Judge	1
FJ36	20200810	93	1	Judge	0
FJ37	20200814	84	1	Judge	1
FJ38	20200816	64	1	Judge	1
FJ39	20200819	47	1	Judge	N/A
FJ40	20200819	42	1	Judge	N/A
FJ41	20200822	79	1	Judge	N/A
FJ42	20200824	60	1	Judge	N/A

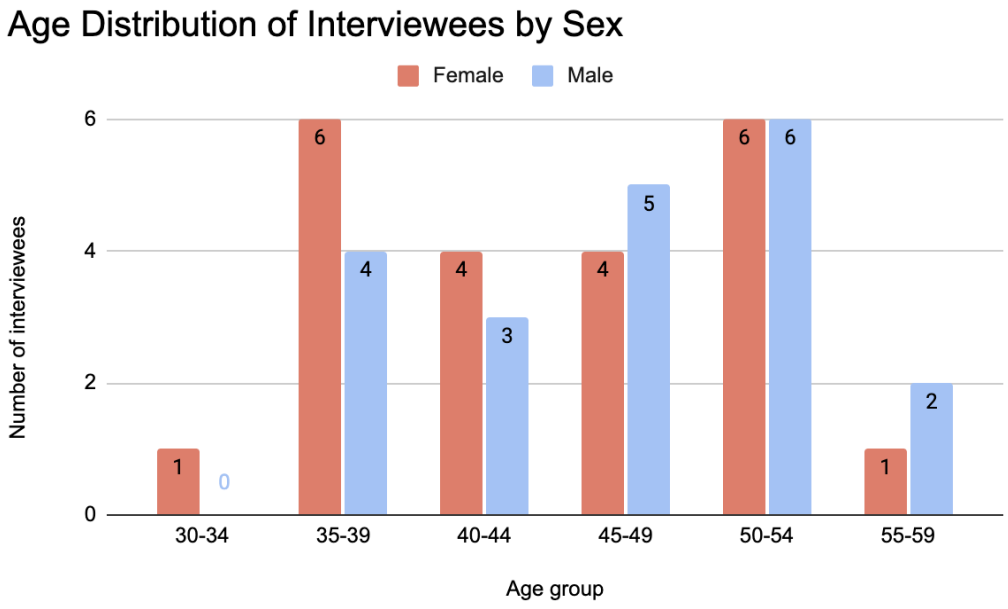

Figure 8: Age Distribution of Interviewees by Sex

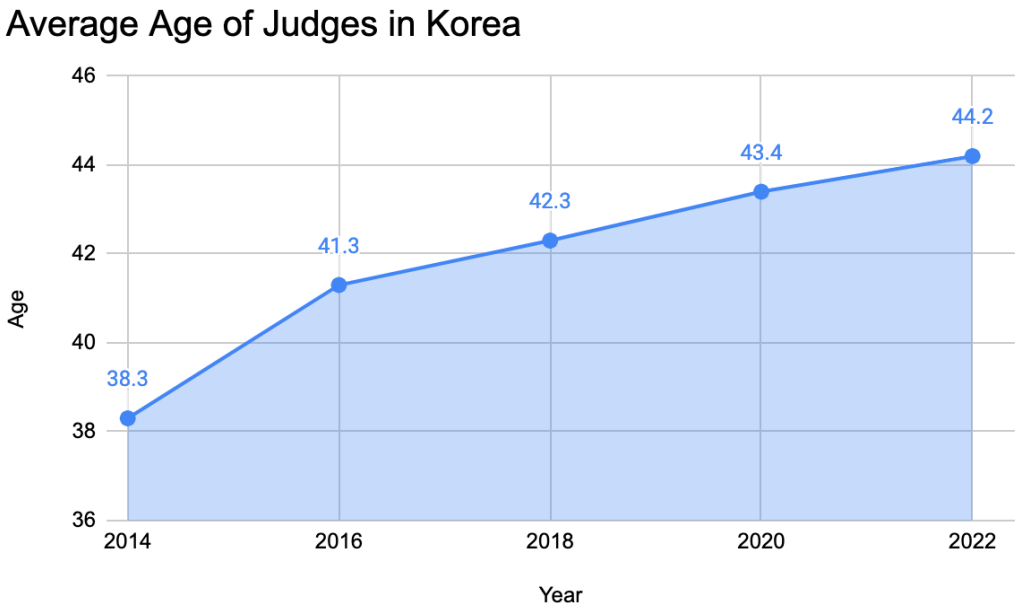

Figure 9: Average Age of Judges in Korea

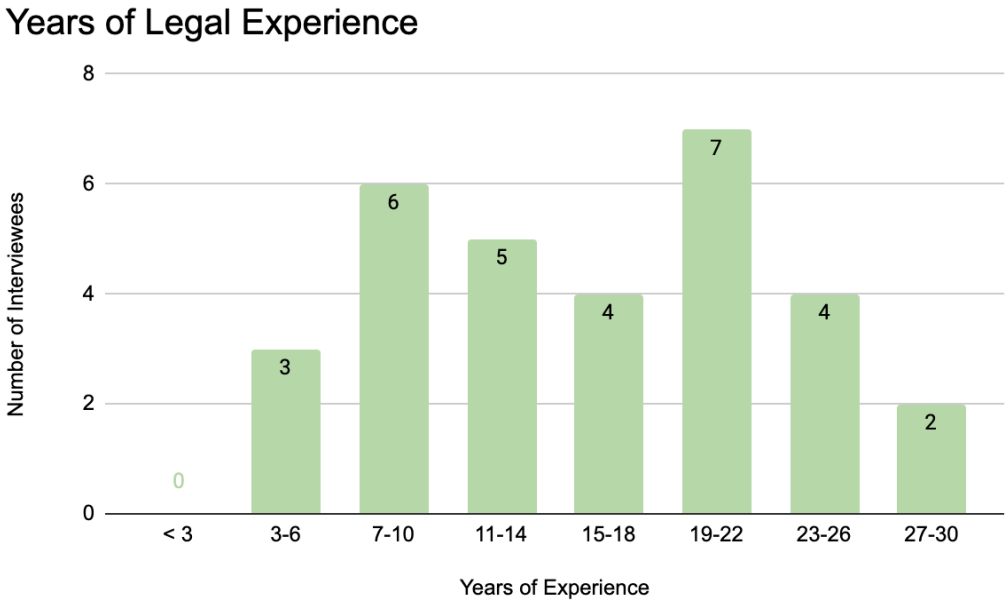

Figure 10: Years of Legal Experience

Appendix B

Table 4: Descriptive Statistics

Variable	Obs	Mean	Std. Dev.	Min	Max
Year	754	2016.7	1.756	2014	2019
Crime	754	1.609	.488	1	2
Author Age	744	1983.011	3.953	1969	1989
Presiding Judge Age	754	1968.584	3.319	1962	1976
Author Cohort	753	40.163	2.262	34	43
Presiding Judge Cohort	754	26.046	2.739	19	31
Career Difference	753	14.118	3.061	5	22
Sentencing	754	26.357	7.64	10	60
Incarceration	754	14.792	16.343	0	60
Defense Attorney	754	.334	.472	0	1
Probation	754	17.761	17.818	0	60
Victim Age	736	25.951	7.388	19	66
Stranger	754	.123	.329	0	1
Few hours before	754	.3	.458	0	1
Acquaintance	754	.528	.5	0	1
Unknown	754	.049	.216	0	1
Humiliation	754	.005	.073	0	1
Pregnant	754	.008	.089	0	1
Repeated	754	.016	.125	0	1
Planned	754	.015	.12	0	1
Feebleminded	754	.008	.089	0	1
Unwillingness to punish	752	.509	.5	0	1
Settlement	750	.527	.5	0	1
Sincere regret	754	.139	.346	0	1
No criminal record	745	.917	.276	0	1
Court deposit	754	.016	.125	0	1
Trust	754	.021	.144	0	1
Revictimization	754	.017	.13	0	1
Court	754	3.398	2.434	0	7

Table 5: List of District Courts

District Court	Freq.	Percent	Cum.
Seoul Central	139	18.44	18.44
Seoul Eastern	75	9.95	28.38
Seoul Western	85	11.27	39.66
Seoul Southern	89	11.80	51.46
Seoul Northern	75	9.95	61.41
Incheon	112	14.85	76.26
Euijeongbu	63	8.36	84.62
Suwon	116	15.38	100.00
Total	754	100.00	

Table 6: Models of Incarceration Length in Adult Rape Criminal Cases

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
Female Presence	1.430					
	(1.128)					
Author Sex		-0.221		-0.364	-1.352	-3.048*
		(0.811)		(0.816)	(1.164)	(1.540)
Author Rank			-1.059	-1.110	-1.849	-2.293
			(0.868)	(0.875)	(1.068)	(1.415)
Author Sex X Author Rank					2.087	5.265*
					(1.757)	(2.554)
Career Difference	0.0212	-0.0241	-0.0930	-0.110	-0.0803	-0.0383
	(0.202)	(0.206)	(0.215)	(0.218)	(0.219)	(0.328)
Age Difference	0.0222	0.0437	0.0271	0.0317	0.0257	0.144
	(0.104)	(0.104)	(0.103)	(0.104)	(0.104)	(0.150)
Public Defense Attorney	-2.483**	-2.391**	-2.422**	-2.396**	-2.398**	-2.681*
	(0.849)	(0.854)	(0.852)	(0.853)	(0.851)	(1.154)
Victim Age						
Between 30 and 39	0.821	0.795	0.834	0.811	0.828	-0.403
	(1.053)	(1.059)	(1.057)	(1.058)	(1.055)	(1.430)
Between 40 and 49	-0.341	-0.281	-0.197	-0.230	0.112	-0.582
	(2.232)	(2.244)	(2.240)	(2.240)	(2.248)	(3.682)
Between 50 and 59	4.191	3.490	3.313	3.324	3.367	4.483
	(2.520)	(2.549)	(2.547)	(2.546)	(2.540)	(2.917)
60 and over	-4.363	-4.448	-4.230	-4.239	-4.141	-6.073
	(2.599)	(2.609)	(2.615)	(2.613)	(2.607)	(4.461)
Relationship Type						

Met Few Hours Before the Crime	-1.334	-1.301	-1.268	-1.269	-1.329	-2.794*
	(0.885)	(0.892)	(0.891)	(0.890)	(0.890)	(1.252)
Stranger	3.669**	3.618**	3.709**	3.680**	3.652**	2.515
	(1.249)	(1.257)	(1.258)	(1.259)	(1.256)	(1.593)
Sentencing Factors						
Humiliation	4.495	5.005	4.668	4.958	5.643	7.187
	(5.083)	(5.091)	(5.026)	(5.059)	(5.041)	(5.495)
Pregnant	11.10***	10.71***	10.59***	10.61***	10.67***	5.883
	(3.032)	(3.036)	(3.046)	(3.049)	(3.041)	(4.336)
Planned	2.525	2.518	2.548	2.445	2.002	0.714
	(2.800)	(2.799)	(2.812)	(2.820)	(2.831)	(3.781)
Feebleminded	4.820	4.426	4.124	4.128	4.257	-6.109
	(3.681)	(3.652)	(3.672)	(3.676)	(3.668)	(6.893)
Trust	1.342	1.123	1.145	1.092	1.276	2.173
	(2.211)	(2.227)	(2.229)	(2.231)	(2.225)	(3.043)
Repeated	5.154*	4.997*	5.354*	5.425*	5.399*	3.968
	(2.148)	(2.168)	(2.181)	(2.185)	(2.179)	(2.704)
Sincere Regret	0.0987	0.398	0.421	0.478	0.493	1.163
	(1.682)	(1.683)	(1.681)	(1.686)	(1.681)	(1.869)
Revictimization	-0.472	-0.572	-0.601	-0.610	-0.964	0.989
	(2.334)	(2.344)	(2.338)	(2.338)	(2.351)	(3.378)
District Court						
Seoul Eastern	1.713	1.650	1.468	1.476	0.981	-2.156
	(1.543)	(1.539)	(1.539)	(1.539)	(1.584)	(2.279)
Seoul Western	1.822	1.814	1.947	1.993	1.618	0.648
	(1.473)	(1.484)	(1.484)	(1.487)	(1.517)	(2.385)
Seoul Southern	4.492**	4.098**	4.168**	4.125**	3.916**	3.454
	(1.515)	(1.499)	(1.494)	(1.496)	(1.503)	(2.107)
Seoul Northern	1.342	0.792	0.805	0.729	0.550	-2.527
	(1.583)	(1.539)	(1.529)	(1.537)	(1.539)	(2.229)
Incheon	-0.0524	-0.304	-0.414	-0.446	-0.702	-2.579
	(1.490)	(1.482)	(1.485)	(1.485)	(1.496)	(2.173)
Euijeongbu	0.0684	-0.363	-0.308	-0.333	-0.856	-5.656*
	(1.834)	(1.795)	(1.792)	(1.791)	(1.835)	(2.430)
Suwon	0.0819	-0.0864	-0.293	-0.351	-0.458	-0.935
	(1.448)	(1.449)	(1.453)	(1.458)	(1.457)	(1.999)
Year						
2015	-2.296	-2.122	-2.130	-2.097	-2.284	-3.250*
	(1.457)	(1.461)	(1.458)	(1.459)	(1.463)	(1.570)

2016	-1.491	-1.212	-1.267	-1.213	-1.424	-2.355
	(1.504)	(1.505)	(1.498)	(1.503)	(1.510)	(1.596)
2017	-0.357	-0.259	-0.250	-0.271	-0.630	-1.670
	(1.461)	(1.472)	(1.472)	(1.472)	(1.496)	(1.623)
2018	0.863	1.208	1.119	1.143	0.796	
	(1.305)	(1.294)	(1.293)	(1.293)	(1.318)	
2019	2.893	3.172*	2.775	2.774	2.291	
	(1.485)	(1.493)	(1.526)	(1.525)	(1.566)	
_cons	29.21***	30.83***	32.58***	32.92***	33.50***	34.38***
	(3.261)	(3.086)	(3.452)	(3.526)	(3.548)	(5.145)
INOUT						
Female Presence	0.338					
	(0.262)					
Author Sex		-0.0172		-0.0036	-0.133	0.264
		(0.199)		(0.200)	(0.286)	(0.424)
Author Rank			0.317	0.317	0.222	0.330
			(0.228)	(0.228)	(0.272)	(0.374)
Author Sex X Author Rank					0.266	-1.300
					(0.419)	(0.694)
Career Difference	0.161**	0.142**	0.167**	0.167**	0.171**	0.196
	(0.0517)	(0.0531)	(0.0560)	(0.0561)	(0.0568)	(0.100)
Age Difference	-0.0368	-0.0332	-0.0281	-0.0281	-0.0290	-0.0144
	(0.0276)	(0.0274)	(0.0278)	(0.0278)	(0.0280)	(0.0422)
Public Defense Attorney	-0.198	-0.190	-0.194	-0.193	-0.192	-0.273
	(0.220)	(0.218)	(0.220)	(0.220)	(0.220)	(0.317)
Victim Age						
Between 30 and 39	-0.0653	-0.0548	-0.0701	-0.0701	-0.0631	0.0818
	(0.250)	(0.247)	(0.249)	(0.249)	(0.249)	(0.348)
Between 40 and 49	0.109	0.169	0.164	0.164	0.167	0.261
	(0.627)	(0.638)	(0.635)	(0.635)	(0.631)	(0.965)
Between 50 and 59	-0.273	0.302	0.320	0.321	0.320	0.765
	(0.665)	(0.833)	(0.840)	(0.840)	(0.848)	(1.236)
60 and over	0.165	0.167	0.102	0.102	0.0801	-0.578
	(0.648)	(0.649)	(0.655)	(0.656)	(0.656)	(1.403)
Relationship Type						
Met Few Hours Before the Crime	0.111	0.105	0.0775	0.0778	0.0643	0.0158
	(0.220)	(0.220)	(0.221)	(0.222)	(0.223)	(0.329)
Stranger	0.0134	0.0204	0.0180	0.0177	0.0132	0.215
	(0.310)	(0.306)	(0.312)	(0.312)	(0.312)	(0.405)
Sentencing Factors						

No Criminal Record	-1.019*	-1.000*	-0.974*	-0.975*	-0.947*	-1.281
	(0.408)	(0.411)	(0.415)	(0.416)	(0.418)	(0.704)
Unwillingness to Punish	-3.999***	-4.000***	-4.025***	-4.023***	-4.035***	-4.561***
	(0.260)	(0.261)	(0.267)	(0.267)	(0.269)	(0.483)
Sincere Regret	-0.904**	-0.862*	-0.906**	-0.906**	-0.912**	-1.199**
	(0.343)	(0.339)	(0.347)	(0.347)	(0.348)	(0.434)
Court Deposit	-0.941	-0.881	-0.858	-0.858	-0.860	-1.376
	(0.610)	(0.586)	(0.586)	(0.586)	(0.585)	(0.722)
District Court						
Seoul Eastern	-0.460	-0.561	-0.507	-0.507	-0.557	0.204
	(0.346)	(0.339)	(0.344)	(0.344)	(0.354)	(0.560)
Seoul Western	0.107	0.0756	0.000019	0.00058	-0.0383	0.344
	(0.386)	(0.388)	(0.392)	(0.393)	(0.398)	(0.686)
Seoul Southern	0.552	0.428	0.439	0.440	0.415	1.275*
	(0.391)	(0.388)	(0.387)	(0.388)	(0.389)	(0.640)
Seoul Northern	0.240	0.0758	0.0935	0.0931	0.0878	0.447
	(0.405)	(0.388)	(0.393)	(0.394)	(0.394)	(0.605)
Incheon	0.964*	0.902*	0.971*	0.971*	0.951*	1.863*
	(0.409)	(0.408)	(0.417)	(0.417)	(0.419)	(0.724)
Euijeongbu	0.371	0.173	0.161	0.161	0.114	1.247
	(0.465)	(0.460)	(0.455)	(0.456)	(0.464)	(0.737)
Suwon	0.810*	0.730*	0.809*	0.810*	0.793*	1.609*
	(0.358)	(0.358)	(0.365)	(0.365)	(0.365)	(0.660)
Year						
2015	-0.197	-0.204	-0.229	-0.229	-0.230	-0.352
	(0.376)	(0.370)	(0.374)	(0.374)	(0.373)	(0.425)
2016	-0.938*	-0.902*	-0.915*	-0.915*	-0.943*	-0.976*
	(0.409)	(0.407)	(0.409)	(0.412)	(0.414)	(0.487)
2017	-0.526	-0.465	-0.438	-0.438	-0.476	-0.472
	(0.380)	(0.378)	(0.382)	(0.382)	(0.386)	(0.446)
2018	-0.642	-0.586	-0.558	-0.558	-0.585	
	(0.362)	(0.356)	(0.360)	(0.361)	(0.363)	
2019	-0.510	-0.465	-0.376	-0.375	-0.411	
	(0.399)	(0.398)	(0.401)	(0.403)	(0.408)	
_cons	1.062	1.557	0.930	0.931	0.963	0.411
	(0.843)	(0.820)	(0.928)	(0.932)	(0.937)	(1.492)
/mills						
lambda	-5.966***	-6.148***	-6.045***	-6.020***	-6.050***	-4.500**
	(0.917)	(0.904)	(0.917)	(0.920)	(0.915)	(1.439)
Observations	698	696	696	696	696	401

Table 7: Rape Case Outcomes by Panel Gender Composition

Panel gender composition	**Number of cases**	**Number of probation cases**	**Percent of probation cases**
All males (MMM)	151	88	58.28%
One female	559	281	50.27%
Left-sitting judge (MM**F**)	331	167	50.45%
Right-sitting judge (**F**MM)	228	114	50%
Total cases	710	369	51.97%

Table 8: Models of Incarceration Lengths in Adult Rape Criminal Cases

	Model 7 Incarceration	INOUT	/mills
Author Sex	-1.142 (-0.45)	0.714 (0.84)	
Author Rank	0.0162 (0.01)	0.671 (1.30)	
Author Sex X Author Rank	-0.369 (-0.10)	-1.850 (-1.80)	
Career Difference	2.515 (0.97)	1.012 (1.50)	
Author Sex X Career Difference	-2.740 (-0.87)	-0.648 (-0.65)	
Author Rank X Career Difference	-3.980 (-1.36)	-0.746 (-0.97)	
Author Sex X Author Rank X Career Difference	13.54** (2.60)	0.635 (0.45)	
Age Difference	0.193 (1.36)	0.0146 (0.38)	

Public Defense Attorney	-2.960**	-0.296
	(-2.60)	(-0.94)
Between 30 and 39	-0.187	0.150
	(-0.13)	(0.43)
Between 40 and 49	-0.168	0.239
	(-0.05)	(0.26)
Between 50 and 59	4.857	0.573
	(1.71)	(0.47)
60 and over	-5.772	-0.607
	(-1.31)	(-0.50)
Few hours before	-2.487*	0.0123
	(-2.00)	(0.04)
Stranger	2.592	0.199
	(1.67)	(0.50)
Humiliation	6.516	
	(1.21)	
Pregnant	5.578	
	(1.32)	
Planned	1.926	
	(0.52)	
Feebleminded	-4.617	
	(-0.67)	
Repeated crime	4.108	
	(1.55)	
Trust	2.967	
	(1.01)	
Revictimization	2.441	
	(0.73)	
Court Deposit		-1.477*
		(-2.10)
No Criminal Record		-1.123
		(-1.65)

Unwillingness to Punish		-4.421***	
		(-9.94)	
Sincere regret	1.363	-1.141**	
	(0.74)	(-2.64)	
Seoul Eastern	-2.270	0.154	
	(-0.99)	(0.26)	
Seoul Western	-1.081	0.725	
	(-0.46)	(1.02)	
Seoul Southern	3.245	0.987	
	(1.49)	(1.55)	
Seoul Northern	-2.889	0.274	
	(-1.28)	(0.43)	
Incheon	-1.583	1.605*	
	(-0.66)	(2.22)	
Euijeongbu	-4.386	1.209	
	(-1.66)	(1.48)	
Suwon	-0.731	1.500*	
	(-0.32)	(2.14)	
2015	-4.040*	-0.541	
	(-2.54)	(-1.25)	
2016	-2.504	-1.109*	
	(-1.58)	(-2.28)	
2017	-1.613	-0.599	
	(-1.01)	(-1.32)	
Lambda			-4.404**
			(-3.18)
Constant	31.38***	2.329*	
	(9.40)	(2.18)	
N	401		

Table 9: Models of Incarceration Length in Adult Rape Criminal Cases

	Model 8 Incarceration	INOUT	/mills
Mixed panel & male author	0.0366 (0.02)	0.477 (1.23)	
Mixed panel & female author	-1.414 (-0.95)	0.133 (0.38)	
Author Rank	-6.873*** (-3.40)	0.167 (0.38)	
Mixed panel & male author X Author Rank	5.954* (2.57)	0.00853 (0.02)	
Mixed panel & female author X Author Rank	7.402** (3.03)	0.384 (0.70)	
Career Difference	-0.00510 (-0.02)	0.185** (3.18)	
Age Difference	-0.0112 (-0.11)	-0.0420 (-1.45)	
Public Defense Attorney	-2.664** (-3.15)		
Between 30 and 39	0.374 (0.36)		
Between 40 and 49	0.474 (0.21)		
Between 50 and 59	3.874 (1.59)		
60 and over	-3.560 (-1.43)		
Met few hours ago	-0.927 (-1.05)		
Stranger	3.864** (3.11)		
Humiliation	6.315 (1.26)		

Pregnant	11.55***	
	(3.83)	
Planned	0.946	
	(0.33)	
Feebleminded	6.514	
	(1.71)	
Trust	1.591	
	(0.72)	
Repeated	6.386**	
	(2.96)	
Sincere regret	-0.597	-0.891*
	(-0.33)	(-2.41)
Revictimization	-3.209	0.740
	(-1.25)	(0.68)
No criminal record		-0.913*
		(-2.32)
Unwillingness to punish		-3.956***
		(-14.73)
Court deposit		-0.454
		(-0.56)
Seoul Eastern	0.588	-0.506
	(0.35)	(-1.32)
Seoul Western	1.681	-0.00849
	(1.05)	(-0.02)
Seoul Southern	4.046*	0.456
	(2.53)	(1.11)
Seoul Northern	1.480	0.200
	(0.88)	(0.45)
Incheon	-0.610	0.928*
	(-0.38)	(2.15)
Euijeongbu	-0.371	0.175
	(-0.19)	(0.36)

Suwon	-0.551	0.783*	
	(-0.35)	(2.00)	
2015	-3.098*	-0.163	
	(-2.10)	(-0.44)	
2016	-2.061	-1.016*	
	(-1.34)	(-2.44)	
2017	-0.881	-0.517	
	(-0.56)	(-1.25)	
2018	-0.357	-0.658	
	(-0.26)	(-1.77)	
2019	1.194	-0.552	
	(0.73)	(-1.32)	
Lambda			-5.318***
			(-5.49)
Constant	33.50***	0.586	
	(8.82)	(0.61)	
Observations	664		