Volume 4 Issue 2 December 2022

# International Journal of Criminal Justice



KICJ Korean Institute of Criminology and Justice

## INTERNAITONAL JOURNAL OF CRIMINAL JUSTICE

EDITOR IN CHIEF: Yoon, Jeongsook, Ph.D, Director, Crime Analysis and Survey Research Division, KICJ
ASSOCIATE EDITOR IN CHIEF: Yu, Jin, Ph.D, Deputy Director, International Cooperation Center, KICJ
MANAGING EDITOR: Kwon, Hyewon, M.A, Programme Officer, International Cooperation Center, KICJ




## JOURNAL DESCRIPTION

The primary research areas of the journal are change of human behaviors, community response, and social system in the field of criminal law, criminology, criminal justice and psychology. We welcome research contributions that achieve: (a) improving knowledge and understanding of the etiology and trends of crime (b) utilizing theoretical frameworks and research methodologies in evaluation of criminal legislations and policies in different jurisdictions and (c) undertaking analysis and research on enacting and amending the criminal codes and legislations in response to changing or evolving crime trends with an eye towards improving the effectiveness of the judicial system and criminal policies.

# International Journal of Criminal Justice

Contents

# Religious Alignment and Criminal Justice Legitimacy in Morocco

*Nabil Ouassini*[*]
*Assistant Professor*
*College of Juvenile Justice,*
*Prairie View A&M University*

## Abstract

This study examines perceptions of criminal justice legitimacy in the Kingdom of Morocco. Through qualitative interviews from thirty-six participants, data were collected over six months in Tangier, Morocco. The results reveal the underlying frameworks that participants utilized to conceptualize criminal justice legitimacy through religiously oriented critiques. The broad spectrum of experiences and perceptions on whether the criminal justice system aligned with participants' own moral/religious interpretations produced four categories: (1) the Moroccan criminal justice system as congruent with their religious interpretation and legitimate; (2) the system as deviant from its essence and can be legitimate only if it reforms to its pre-colonial Islamic origin; (3) the system as an illegitimate, alien, anti-Islamic institution that is irreconcilable with their religious interpretation; and (4) and finally, those that identify the criminal justice system to be a secular institution centering legitimacy in the realm of universal human and civil rights rather than religious beliefs. The overall results provide alternative insights into criminal justice legitimacy, address literature limitations with policy implications on southern criminology.

## Keywords

Arab criminology, criminal justice legitimacy, Morocco, religion, North Africa

* Direct correspondence Nabil Ouassini Ph.D., College of Juvenile Justice; nmouassini@pvamu.edu
* http://dx.doi.org/10.36889/IJCJ.2022.004
* Received 25 August 2022; First Revised 16 October 2022; Second Revised 10 November 2022; Accepted 16 November 2022
INTERNATIONAL JOURNAL OF CRIMINAL JUSTICE, Vol. 4 Issue 2, December 2022, 3-29

# INTRODUCTION

The research on criminal justice legitimacy has undergone several paradigm shifts in the last forty years. Before Tyler's *Why People Obey the Law* (1990), distributive justice dominated the discipline as Sarat contended back in 1977, "the perception of unequal treatment is the single most important source of popular dissatisfaction with the American legal system" (p. 434). Tyler's research rendered procedural justice the prominent theoretical approach to criminal justice legitimacy (Bottoms & Tankebe, 2012). The word legitimacy derives from the Medieval Latin word *legitimus* or lawful, which connotes legality, fairness, and justice. Legitimacy is defined as the "psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just" (Tyler, 2006, p. 375). Tyler (2003) argues that the public will comply and cooperate with criminal justice actors when they perceive the system as legitimate; conversely, an illegitimate system would lead citizens to cynicism and criminal activity (as cited in Gau, 2015). Numerous studies substantiate Tyler's claim that fairness in the processes is of greater significance to legitimacy than outcomes (Tyler, 2000; Reisig & Chandek, 2001; Belvedere et al., 2005; Gau & Brunson, 2009; Walters & Bolger, 2019; Nagin & Telep, 2020). Increasingly, scholars have called for a disparate approach to legitimacy that moves beyond procedural justice (Smith, 2007; Tyler, 2007; Bottoms & Tankebe, 2012; Tyler & Jackson, 2013; Tankebe, 2013; Tankebe & Liebling, 2013; Sun et al., 2018; Nivette & Akoensi, 2019).

In the legitimacy research, the perception of whether the justice system represents the beliefs, values, and morals of its citizens is a concept of substantial interest to researchers (Beetham, 1991; Tamanaha, 2001; Coicaud, 2002; Bottoms & Tankebe, 2012; Tankebe, 2013; Cheng, 2018). Beetham (1991) argued that rules and laws are generally justified by the norms and values of the given society, indicating, "without a common framework of belief…the powerful can enjoy no moral authority for the exercise of their power, whatever its legal validity; and their requirements cannot be normatively binding, though they may be successfully enforced" (p. 69). Coicaud (2002) suggests, "the authority of the law . . . rests on the belief that legality is the expression of the values of the society" (p. 24-25). In liberal democratic governments, a system's values are morally aligned with the public as the legislature and criminal justice actors presumably serve on their behalf and reflect society's values. However, in many nations of the Global South whose criminal justice systems were transplanted by colonial

powers or ruled by an authoritarian government, the system tends not to reflect nor represent the governed. These governments produce alternative strategies toward trust, legitimacy, and collaboration that require further examination (Karstedt, 2013).

In the legitimacy literature, the comparative context remains abysmal, with imperative research needed to test the generalizability of Western approaches that have not been applied clearly to the Global South (Tyler, 2007; Smith, 2007; Tankebe, 2008; Bottoms & Tankebe, 2012; Tankebe & Liebling, 2013; Bradford et al., 2014; Jackson et al., 2014; Trinkner et al., 2020). Part of the effort in this study is to move beyond the frameworks set within Northern approaches that have dominated the discipline and expand research in the Global South through the analysis of dynamics that shape legitimacy (Carrington et al., 2016). Morocco is a country in a region with no previous studies regarding the legitimacy of the justice system. This paper will reveal the prominent role of religion in the perceptions of criminal justice legitimacy. Sunshine and Taylor (2003) contend that citizens will internalize the system if society's moral values align with criminal justice institutions.

The religious-based responses are unsurprising in a semi-authoritarian monarchy. In societies across the Global South, religion, spirituality, and the supernatural are critical factors that shape perceptions of crime (Cross, 2018; Seto & Said, 2022). For over a millennium, Moroccan sultans and monarchs legitimized their reigns and security apparatus through religion. The use of long-established religious approaches and a distinctive Moroccan/Islamic narrative has effectively justified the monarchy's domination of Morocco. The monarchy has formulated its legitimacy through the use of present-day Islamic rituals of power that include the *bay'a* (public oaths of allegiance practiced since the time of Prophet Mohammed), the King's *sharif* lineage (claim of being a direct descendant of Prophet Mohammed), the position of *Amir al Mu'mineen* (leader of the religious faithful), and mystical *baraka* (divine blessing) to reinforce the monarchy*'s* hegemony and legitimacy (Daadaoui, 2010). Additionally, the current King has promoted an image abroad as the regional frontrunner of moderate Islam through its training of male and female imams (a leader of worship services) from several African and European countries. The monarchy*'s* absolute oversight of every state institution and total control over the dissemination of information has conveniently yielded a monopoly over the narrative on religious/political legitimacy and the suppression of alternative versions.

Despite these authoritative strategies passed down from reign to reign, the contemporary expansion of civil society, new media, and the regional events of the last

two decades have exposed Moroccans to an array of ideas, political systems, and religious interpretations that were not readily accessible in the past. The events of the Arab Spring challenged the state's traditional narratives and are continuously reshaping Moroccan perceptions of state institutions, including that of the criminal justice system. The reforms presented by the Moroccan government after the Arab Spring were unsatisfactory in the perception of many citizens, and the state has used heavy-handed tactics against public dissent brought by the unequivocally critical Herak Rif movement, a protest movement that took place late 2016 through 2017 in the ethnically Berber-speaking Rif region of northern Morocco. Bottoms and Tankebe (2012) claimed that legitimacy is dialogic, where an authority has a dialogue with different audiences of claims about the authority's legitimacy. In Morocco, the dialogic claims of legitimacy by the powerholders are explicit. The monarchy continues to hold the ultimate authority over a hierarchical and centralized criminal justice system that has devised copious religious, political, and traditional legitimacy claims. The paper will present audience legitimacy; Moroccan perceptions, experiences, and responses to the state's claims of criminal justice legitimacy.

Several research questions guide this study on the perceptions, experiences, exercise, and formulation of criminal justice legitimacy in Morocco. Although procedural justice has dominated legitimacy research, many academics dispute the claim "that procedural fairness is the sole or central foundation of legitimacy in all societies at all stages of development" (Smith, 2007, p. 31-32). Legitimacy varies contextually, requiring an analysis of the unique relationship between a society and its authorities. This research presents evidence to support the challenges made by various scholars to the procedural justice literature by revealing how legitimacy is perceived in an unconventional non-Western/non-democratic context. This is the first study to examine and explore criminal justice legitimacy in Morocco utilizing the following research questions:

- How do Moroccans conceptualize criminal justice legitimacy and what are the factors that shape their perceptions?
- How is criminal justice legitimacy exercised in a semi-authoritarian monarchy? What factors explain the preservation of criminal justice legitimacy in Morocco despite the comparable development indicators to other nations in the region that were overthrown in the Arab Spring?
- What claims does the Moroccan state make towards criminal justice legitimacy and how does the monarchy maintain it amongst its citizens?

- Does the economic, political, cultural, and sociological context shape legitimacy; and does the state's legitimacy extend to the criminal justice system?
- What strategies does the criminal justice system employ to formulate legitimacy and what is the process in which legitimacy is produced and negotiated? Is the process effective or deleterious; and what steps can the criminal justice system take to enhance legitimacy?

# CULTURAL CONTEXT: RELIGIOUS ALIGNMENT TO FRAGMENTATION

Monarchs, sultans, and emperors have held a monopoly over Morocco's religious discourse for over a millennium. The *Maliki* school of thought, an orthodox Sunni Islamic ideology, and adherence to Sufi brotherhoods have been the essence of Moroccan cultural, national, political, and social identity. Historically, the monarchy had to share its religious authority. The monarchy and military enforced the law, while religious interpretation was shared between the *'ulama* (Islamic scholars) and *zawaya* (religious schools and monasteries). The Islamic criminal justice system of the past was based on *shari'a*, a word that means "a path to be followed." The sources of criminal law include the 1) Quran (the primary religious text in Islam), 2) the Sunnah (the traditions and practices of the Prophet Mohammed), 3) *ijma'* (consensus from scholars), and 4) *qiyas al fuqaha* (analogical deduction by jurists) (Kamali, 2008). Punishable offenses were categorized into *huddud* (fixed punishments for offenses against God) *qisas* (violations against the rights of humans; *lex talionis* ), and *ta'zir* (violations that are unspecified in the Quran and Sunnah that require judicial discretion). The *qadi* (judge) was at the helm of the court, and the *mufti* was the legal scholar advising the courts to ascertain the truth, determine responsibility, and interpret laws (Bassiouni, 1982).

After Morocco gained independence, the monarchy sought to dominate and marginalize all religious institutions. In ratifying Morocco's first constitution in 1962 and suspending it in 1965, King Hassan II (1961-1999) consolidated his power. The monarchy became a "sacred and inviolable" institution with the right to "deliver addresses to the nation and to the parliament and shall not be subject to any debate" (Geertz, 1968, p.88). This move allowed the King to seize complete control of the religious authority and align citizens under one narrative under his 38-year reign.

In the current reign of Mohammed VI (1999 to present), the internet, new/social media, and the rise of pan-Arabic satellite stations have provided alternatives to state-controlled information. Unlike the reign of Hassan II, Moroccans today openly discuss discordant Islamic paradigms, including those that challenge the state's monopoly on religious interpretation. The conditions have created a competitive market for interpretive pluralism that has enhanced the religious economy. As a result of the growth of civil society and new/social media, there has been a broader spectrum of promulgated Islamic movements that either support or challenge the official religious discourse. These movements have critical implications for the state as they not only influence the religious worldviews of its followers; they also shape perceptions of the government, its politics, and the criminal justice system for this study. As Finke and Stark (1988) conclude in their empirical article on religious participation, "a natural consequence of an open religious economy is a religious pluralism that forces each religious body to appeal successfully to some segment of the religious market, or to slide into oblivion" (p.47). The last two decades fragmented the state's domination of the religious sphere and provided Moroccans the opportunity to be consumers of transnational Islamic religious ideologies.

## METHODS

In assessing the Moroccan criminal justice system, this study examines the factors that generate legitimacy and cynicism. For this project, data was collected from in-depth semi-structured interviews with a purposive sample of 36 participants for six months in Tangier, Morocco. Tangier is one of the largest and fastest-growing cities in Morocco. Marshall and Rossman's (2014, p. 55) criteria informed the selection of Tangier as the research site that incorporates: the possible entry into the site; the high probability that a rich mix of the processes and people that are part of the research questions will be present; the researcher's ability to maintain continuity of presence for as long as necessary; and finally making sure that the data quality and credibility are reasonably assured. More than any other city in Morocco, Tangier was most accessible due to the researcher's long-established relationships and rapport with various gatekeepers. The gatekeepers offered a variety of credible participants that provided quality data and fulfilled the criteria set for data collection. Participants met the researcher in one of four

neighborhoods in Tangier that include Beni Makada, Mershan, Boulevard Pasteur, and Grand/Petit Socco. Participants lived close to the areas or were required to be in the vicinity for other personal reasons. The city of Tangier was the most feasible location due to the familiarity with the numerous sites, the continued development of rapport, and the accessibility of prospective participants.

In selecting participants, the study sought a diverse sample of participants over the age of 18 that were Moroccan nationals and had extensive knowledge (post-graduate degree) and experiences working in or with the Moroccan criminal justice system. All participants were selected through non-random purposive sampling due to the techniques' high regard for and focus on an individual's subjective and unique perceptions. Purposive sampling is used in research to identify and select individuals that are knowledgeable or experienced for an effective use of limited resources (Patton, 2014; Creswell & Clark, 2017). The sampling size of 36 participants is modest. The participants for this study belonged to a broad range of demographic backgrounds. Out of the 36 participants, 28 males and only eight females were interviewed. Although male/female dynamics have progressed in Morocco, specific gender roles remain firmly fixed, and access to female participants proved challenging. Two of the eight females interviewed, for example, agreed to participate only if their spouses could sit in the interviews. For this study, the ethnicities included 23 self-identified Arab and 13 self-identified Amazigh. Many participants also identified themselves with a specific value system. Participants identified themselves as members of a particular political party, socialist, Islamist, leftists/former leftist, conservative, while the majority claimed no specific ideological, religious, or political affiliation. The participants' professional occupations varied, and each interview took place in a public setting.

The face-to-face interviews lasted between 60 to 90 minutes per meeting; however, four interviews continued for two hours. Twenty-seven participants participated in a second interview to discuss further, clarify, expand, and member check the material from the initial responses. The questions focused on the conceptualization of criminal justice legitimacy; the strategies, claims, manner, and processes the state produces and negotiates legitimacy; the factors that preserve criminal justice legitimacy; the factors that shape participants' perceptions; and the steps participants believed would enhance the criminal justice system's legitimacy. All interviews were audio-recorded except nine participants who felt more comfortable if the interview was documented by shorthand. The researcher received approval from the University's Institutional Review Board and followed all ethical guidelines including informed voluntary consent, the assignment of

aliases to protect the participants' confidentiality, a discussion on the risks and benefits, as well as the encryption of all data collected. The interviews were transcribed verbatim in Moroccan Arabic (*Darija)*, translated into English, and coded for emergent and recurring themes. Thematic analysis with components of grounded theory (Glaser & Strauss, 2017) identified relevant themes embedded in the data. The study utilized a constant comparative method (Corbin & Strauss, 2014) to analyze the responses line by line and classify the codes from the data. The codes were reduced to categories of themes and subthemes, with all unused data reserved in separate categories. The themes identified in the interviews focused on how participants' conceptualized legitimacy through their perceptions of justice and morality in religious interpretive frames.

# RESULTS

## The Moroccan criminal justice system is legitimate and in alignment with their interpretation of Islam.

The first category of participants believes that the criminal justice system in Morocco is legitimate because of its alignment with their religious interpretations. These participants argue that criminal justice legitimacy is built on recognizing the monarchy's authority as *Amir al Mu'mineen* (leader of the religious faithful), the support by the nation's *ulema* (religious scholars), and the enforcement of the traditional values that they claim the majority of Moroccan society ascribes. Raheema (all names henceforth are pseudonyms) explained that:

> The justice system symbolizes us and aligns with our religious principles. The King and the scholars we have in Morocco would not abandon them. We recognize that the system has flaws and we might not agree with everything within it but this is the system we have and I would disagree with those that claim it is illegitimate or un-Islamic. We can all work within it for its improvement that's what the parliament is for.

The participants in this category are loyal to the monarchy and unreservedly accept its narrative. Like Raheema, participants believe that the monarchy's legitimacy stems from his position as *Amir al Mu'mineen*, the protector of Islam and its values in society. The position held by the King ensures that the criminal justice system is following

Islamic/Moroccan values. Participants have also cited the role of the *ulema* as further substantiation in their function as the guardians of Morocco's religious and legal traditions. Some participants recognize their lack of independence from the state but still argue that their voice can be critical in censuring the criminal justice system if it chooses to do so. Other participants have also bolstered the criminal justice system's claims of legitimacy through the role of parliament. Although Morocco is not a Western style liberal democracy, there is a recognition that elected representatives have the power necessary to enable processes to deal with citizen grievances against the criminal justice system.

While accepting the authority of the Moroccan state, participants had expressed their perceptions of which moral values made the criminal justice system more legitimate while criticizing others that might argue for a more punitive religious interpretation. Mohammed commented,

> Criminal justice legitimacy is enforcing rules and laws of the country that represent the people. For those that believe it is not representative of our values and morals run for office and try to change them. We all know that we are a moderate Muslim country that does not want the laws of Afghanistan or Saudi Arabia or criminal punishments of the past. We apply Islamic law as our modern scholars understand it for our time, for the benefit (*maslaha*) of our country and its citizens.

Participants in this category continuously felt the obligation to authenticate their interpretations that align with the state. They defended their position by presenting their views as moderate, progressive, and aligned with traditional Moroccan values. One of the keywords that participants used in their description of criminal justice legitimacy dealt with the concept of *maslaha*. The concept is of great significance and invokes setting rules based on whether it will serve the public interest or the common good, a utilitarian law perspective. This concept is in line with the famous scholar of Islamic jurisprudence, al-Shatibi, who argued that religion relates to the relationship between God and man while *maslaha* should focus on laws on the relationships between people and others like Mohammed 'Abduh, *maslaha* reconciles modern Western values with Islamic law (Ahmed et al., 2018). This approach was perceived to be progressive according to participants aware of this concept since it harmonizes religious principles with international standards. This balance by the criminal justice system between these various ideals was perceived to present the perceptions and values of most Moroccans and therefore increased its legitimacy.

Participants were also quite judgmental of others that questioned their perceptions of criminal justice legitimacy. The participants in this category kept asking rhetorically, "What does an Islamic criminal justice system mean?" Amine, one of the respondents from the participant majority that had no affiliation with any religious organization, remarked:

> Is there such thing as an Islamic policing system? Or Islamic prisons? Do we really want religious police like those in Saudi Arabia that enforce their own interpretations of what society should be like? Our religious tradition as followed by our forefathers in Morocco is about choice. You can't force people to practice religion it goes against logic. People would just follow out of fear and not because of the spiritual obligations we have to God. It takes out sincerity from acts which is the most important concept behind deeds.

Cognizant of the criticism against their perceptions, participants repeatedly referred to fundamentalist Muslim majority countries like Iran, Saudi Arabia, and Afghanistan as examples that Morocco should never follow. Participants in this category criticized criminal justice in those countries and contended that there is no benefit in applying *huddud* (fixed punishments for offenses against God) punishments in Moroccan society. The system they believed should focus on the spirit and not the letter of Islamic principles. Amine, for example, had emphasized that the criminal justice system should be about the spirit of Islamic justice through the maintenance of security and the protection of society rather than the old-style punishments prescribed for certain crimes and practiced by some other Muslim majority countries.

Although participants perceived the system to be legitimate and in alignment with their religious interpretations, they also recognized the problems in the Moroccan criminal justice system. Chief among those identified were corruption, misconduct, and ineffectiveness. However, these issues were attributed to criminal justice actors rather than the legitimacy of the system as a whole. Abdelilah explained:

> Look the problem with our system's legitimacy is not with the type of laws that are there. They represent us and what we believe. The problem is not with the system but with the people working in it. Every country has corruption at some level and Morocco is no exception. The problem we have is with those in the criminal justice system that are corrupt. We just need to implement the laws we have and those caught should be punished to deter others.

Corruption, misconduct, and ineffectiveness are a couple of the factors mentioned by participants that continue to pervade and contribute to the system's negative

perceptions. However, like Abdelilah, some participants in this category separated these negative factors from the system's legitimacy. The system was believed to have procedural laws to confront these problems and therefore blamed these deficiencies on individuals working in the system for not implementing the established rules. Participants understood that problems in criminal justice are universal but affirmed that officials in the system are to blame rather than the legitimacy of the system as a whole.

### The Moroccan criminal justice system had deviated from its essence and can be legitimate only if it reforms to its Islamic origin.

The second category of participants believed that criminal justice has diverged from its Islamic core but could become legitimate if it reformed and re-aligned with their religious interpretation. The consensus amongst these participants was that the criminal justice system must enforce and implement Islamic values to be legitimate. These values vary, but most participants included the Quran, the Sunnah, *fiqh* (Islamic jurisprudence), and the concept of *maqasid* (later explained) as sources for the values enforced in the criminal justice system. Participants were also outspoken about characteristics of the criminal justice system they perceived to conflict with their religious values. The main characteristic raised was the discrepancies in the treatment of citizens based on social status in society that clashed with participants' religious values and sense of a legitimate system. Regardless of the list of inadequacies that delegitimized criminal justice, participants were confident that society could optimistically transform the system. Overall, the participants in the category perceive contemporary criminal justice as misguided and in dire need of reform.

When asked about what he meant by a legitimate system based on Islamic values, Anas explained:

> Legitimacy of the criminal justice system should be based on the laws of God. The West might complain about the harsh punishments in the *Khaleej* (Arab Gulf states) but the people there support it. I am sure without a doubt that in the whole world the *Khaleej* Arab Gulf states) has the lowest amount of crime. Where in this world can you find a country where if you forgot something you can find it if you return there hours later? Our criminal justice system is ineffective and based on a system that was designed by someone somewhere in Europe that doesn't know or care for our people here. The system has failed us that is why crime is uncontrollable.

The discussion on a legitimate criminal justice system grounded on Islamic values had a wide range of ideas and notions. Some participants considered the criminal justice systems in other Muslim countries as examples, while others gave their opinions on the role of the King, the state, and other political figures in an Islamic system. Fatima evoked an aversion to a hereditary monarchy and preference for "an Islamic republic that combines society's spiritual and material needs" as a means to building a legitimate criminal justice system. All participants agreed that a legitimate system would use the Quran and Sunnah as the primary sources for the criminal justice system but even amongst scholars, the interpretations of these sources are often complicated and can vary depending on the context. The idea of Islamic justice, a similarly vague term, was also repeated quite often by these respondents. When asked to conceptualize the term, some participants pondered on their insights on Islamic jurisprudence and divine justice. When inquired on what makes a criminal justice system legitimate and Islamically just, Rachid answered:

> When you asked me the question on criminal justice legitimacy and Islamic justice, I am reminded of what Si-Abdesalam said. He always said that if you want justice in society, in the criminal justice system, in the government then we are obligated to listen to the guidance of God in these matters. Si-Abdesalam said that we must ask what does God tell us about these topics and follow the concept of justice described to us in the Quran. What does God say regarding the rights of men and women, how we should deal with criminals and their victims, and what kind of person should be a judge, police officer, and work in the system. Because in order for us to have a stable system of government and healthy society the government is obligated to implement what God has revealed to us as the right way to govern. But I have to say that the general people also need to follow the Quran and Sunnah because that is how we purify and use a religious approach to criminal justice. The state and the people both need purification since together they make it illegitimate.

Other participants were able to clarify the concept of Islamic criminal justice through various perspectives of *maqasid*. The *maqasid* relates to the objectives of Islamic law of preserving five fundamental rights; life, religion, reproduction, property, and reason. The protection of life, property, and the practice of religion is universal, but the protection of reproduction and reason differs from other legal traditions. The latter two are forms of moral regulation as the right to reproduction protects the family, its lineage, and progeny against extramarital sexual relations. While protection of reason aims to save the intellect from substances (intoxicants) that might weaken its ability to

function. Participants were adamant that a legitimate criminal justice system would protect these five fundamental rights even if they undermine individual civil liberties. Ramadan, an older participant that has lived between Morocco and Norway, provided some insight into what he would like to see in Morocco when comparing criminal justice in the countries of his dual citizenship:

> Yes, Europe is a more just society than Morocco but should we have their system here? No, because the laws they have do not represent the people here. We don't want to legalize prostitution, pornography, or have complete freedom of speech to insult anyone or thing you want. We want European organization and order. But we also want to establish justice based on Islam through education, and the prevention of hardship for people and by getting rid of oppression. We also want to uphold morality in public and private according to our religious teachings.

In the interview, Ramadan's personal experience in Europe was positive as he depicted the criminal justice system in Norway as just and legitimate for the Norwegian people. Despite his positive perception, Ramadan did not believe that Norwegian criminal justice was appropriate for Moroccans mainly because of the distinctions between the divergent moral values. As quoted, Ramadan aspired for the organization, order, and professionalism displayed by Norway's officials but would also prefer enforcing Islamic values. In his interview, Ramadan spoke disparagingly towards the Moroccan criminal justice system and its numerous inadequacies. Like Ramadan, other participants repeatedly questioned the system's legitimacy in the particular deficiencies that directly opposed their understanding of Islamic principles. Of those mentioned, the most significant contradiction with Islamic values was the differential treatment between the underprivileged and the country's powerful. Unlike the former category that identified the system as legitimate, these participants not only attributed these deficiencies to criminal justice actors but placed the responsibility of failure on the system itself. Equal treatment by the law is recognized as a universal value, but for participants, the emphasis in Islamic morals and law on protecting the rights of those in the lower stratum of society is one of the fundamental teachings of the religion. The restoration of a criminal justice system grounded on Islamic values was perceived to prevent the exploitation of society's poor and weak and increase the general population's confidence in the system.

Notwithstanding the perceived departures in criminal justice from their religious values, participants were prudently hopeful in improving the system's legitimacy. As Walid, one of the participants, commented:

> These past few years have brought some hope to the Arab countries. The Arab Spring with all its successes and failures still shook up the governments. In Morocco, we are doing better than other countries. We have an Islamic party in the government that has done well unlike other Arab countries that don't allow any other viewpoints that might challenge the government. It is an admirable sign of our government that we can let the party that won an election be in power. It gives us more rights to speak out about the concerns we have about the criminal justice system since we can now use politics and our parliament to make the necessary reforms.

Though participants deplore the deficiencies in legitimacy, they still postulate that criminal justice can reform in contemporary Morocco. The regional events in the Arab Spring that include a referendum for constitutional reforms as a response to protests in Morocco are still fresh in participants' memories. The 2011 Constitution handed several powers that previously belonged to the King over to the Prime Minister and Parliament. These outcomes and the election of an Islamic party for the first time bolstered the state's claims of building a genuine democracy. For these reasons, participants believed that criminal justice reform is possible in Morocco.

### The criminal justice system in Morocco is an illegitimate, foreign, anti-Islamic institution that is irreconcilable with their religious interpretation.

Individuals in this category have contemptuous views of the criminal justice system. Participants perceive the criminal justice system as illegitimate, and they also deem the system as an extrinsic anti-Islamic institution that stifles religious influences. Participants in this category argued that the criminal justice system is a combination of a less Islamic and a more foreign European foundation alien and averse to Moroccans. Similar to the previous category, participants also claim that the system is not based on the morals of Moroccan society but rather on the whims of the country's elites. The state, they argue, appeases the general public through the veneer of Islamic values while sustaining power within the hands of societies' privileged. Participants allege that the

system is beyond reform and in need of a complete transformation. When Latif was asked about criminal justice legitimacy, he answered:

> No one can say that this country's criminal justice system is legitimate or just or is Islamic without a sneer. Every criminal justice system in Arab or Muslim countries are designed to benefit the few powerful instead of applying what God has revealed to us. Here the state pretends to follow the Sharia' (law) of God and is good at keepingappearances but they are not fooling anyone we all know this is how our governments keep control of the people that are ignorant. I respect politicians that want a secular system and that declare it publically because they are honest. But the politicians who pretend that we have an Islamic system really think we are fools.

Participants ceaselessly questioned criminal justice in Morocco, with many indicating that the system's goals and aims are illegitimate and clash with their religious values. These participants profess that the system has the outward Islamic guise and that a legitimate criminal justice system applies Islamic law in all aspects of cultural, political, and social life. In advocating for Islamic law, participants suggest that the state picks and chooses the features that suit its rule while ignoring others that they felt were of the utmost importance. The failure to apply specific punishments decreed by Islamic law for criminals was perceived as the prevailing impediment to legitimacy. Although there were mixed opinions on what constituted *huddud* (fixed punishments for offenses against God), a couple of participants went as far as to question the faith of those Moroccans that disagree with their interpretive understanding of these punishments. Tariq argues that the current approach to criminal justice is alien to orthodox Islam's accepted mores and customs, particularly in its elimination of *huddud* punishments. In an example, Tariq relates:

> The other day I heard that someone from the neighborhood murdered someone because of an unpaid debt. This person if the system was legitimate and implemented the *huddud* of God should have been executed so that people can see the consequence of this act. But instead he will most likely go to prison and find a way out after serving only five years. If we were a legitimate system that really followed the Quran and Sunnah we would not have this situation. We wouldn't have the crime that exists everywhere and criminals would think hard before they commit a crime.

One of the other underlying themes in questioning the criminal justice system's legitimacy is the direct defiance of the regime's religious authority. As Latif clarified, "The King is not *Amir al Mu'mineen.* He is the Amir of Morocco… we believe he has

political leadership but don't look to him for religious matters." These participants believed that there was nothing Islamic in any of the government institutions of Morocco except in the values that serve the state's interests and reinforce its legitimacy and authority. It was argued that the regime's role in religious affairs is not about addressing the religious needs of the public or representing their values, but rather the promotion of its version of values that can placate society and help maintain social control. In this category, the participants did not consider the criminal justice system to represent their morals and were unfavorable to the King's narrative and religious authority. Miriam disclosed that an authentically Islamic system would not render judgments in the name of the King and would "hold everyone accountable under the law no matter who they are," and that "even the King and his family should be equally subjugated to the law." In questioning the system's legitimacy, Miriam had also mentioned;

> The criminal justice system is not a system for justice but rather a system that maintains the status quo under the appearance of Islamic values…this French system is foreign to us and our people and was only supported by the French and the *makhzen* (Morocco's elites) to maintain dominance over the people. They are the only ones that benefit from this legal system.

The statement by Miriam, was also common amongst participants in this category. The legal transplantation of the French system has always been contentious and perceived by participants as a severance between the law and Islamic moral traditions. Participants in this category provided a broad spectrum of thought on the blend of a criminal justice system founded on the French legal system and a Moroccan system with a perceived façade of Islamic principles. These participants depicted the criminal justice system as imposed by a foreign country that has debased its Islamic identity. Tariq, for example, believed that the imposition of the French legal system on Morocco was a *Francafrique* policy to promote the French language and culture in a more modern form of imperialism. Others perceived that the French legal system was adopted by and for the state to promote its interests and dominance over the rest of society. Participants often depicted the elites in society as agents of French cultural imperialism that assumed superiority over the general public in the same fashion as the French over their former colonial subjects. With these perceptions, participants alleged that the criminal justice system opposes their religious interpretive values and identifies them as a threat to hegemony. This skeptical perception of the system's legitimacy was less ominous than

the claim by some that criminal justice in Morocco was an anti-Islamic institution. Adil expressed;

> Along with Thailand, we have become the most popular destination for prostitution. Whatever a tourist wants they offer here: men, women, even children. The government permits and ignores these issues because of the money they make from tourism. Tell me if you can, does this sound like legitimacy to you? The system is the opposite of what an Islamic system is supposed to be and is against the values of our religion.

Self-identified Salafists held unwavering perceptions that were antagonistic to the criminal justice system. Abdelqadir expressed an example of these views. Abdelqadir is an advocate involved with many former convicts who have turned to Salafism (a theological reform movement focused on reforming Islam by going back to the practices of the early generation of Muslims) for personal improvement. Abdelqadir articulated:

> How can I trust a criminal justice system that allows its youth to drink (alcohol) at bars, dance in nightclubs, and openly tolerate promiscuity while imprisoning and humiliating those youth that want to practice their religion? You know what makes me laugh, so many of these groups are talking about human rights and bringing the criminal justice system to the standards of Europe but what happens when they see a person with a beard, or a person that prays *Fajr* (early morning prayer) at the mosque? The police then want to know who they are listening to, how do they view the government, and the King, and so forth. When they arrest us and beat us in jail no one ever complains or raise our issues to the newspapers or television... It's clear, the government itself does not want to implement an Islamic system because they couldn't get away with their thieving and they don't want people to be religious minded because they would turn against the corrupt system.

While a critical examination of the criminal justice system and distrust of those in power was a common reaction by Moroccans that have reservations regarding legitimacy, the notion that the system vigorously sanctions an anti-Islamic agenda was the most cynical accusation that emerged in the lawfulness discussions. Participants provided several explanations on how they formulated these perceptions. The most common sentiment was that the criminal justice system's values and actions deliberately contradict their religious interpretations. The first mentioned by participants was the state's perceived promotion of immorality. The daily interaction with violent crime, the proliferation of alcohol and drug abuse, the hostile encounters with pimps and prostitutes in specific neighborhoods, along with the light punishments handed to

tourists for crimes that include the sexual abuse of children were mentioned as concrete examples of the system's inherent anti-religious agenda. Every participant in this category insists that Morocco's newly acquired reputation as a destination for vice is not fortuitous. Similar to the quote by Adil, participants alleged that an Islamic system that aligned with their religious interpretations was not beneficial for Morocco's upper classes. Participants believed that spreading these vices increases the elites' profits from the tourism industry and diverts the people's attention away from injustices and corruption within the system. An example repeated was the perceived tendency for the system to monitor and imprison devout Muslims while ignoring criminals involved with the previously mentioned vices. Participants claimed that the system had abandoned Islamic values and fostered immoral, corrupt, materialistic, and enacted for the interests of the economic aristocracy.

> In Morocco, there is no justice, we have names related to a functioning system but it doesn't serve or represent us. Its goal, like in any other country in the world is to control the people into conforming to the will of those in power. Anyone that steps out of line is herded into the system like an animal…the justice system is not legitimate because the people in the *makhzen* (Morocco's elite) are the biggest criminals in Morocco that are never punished for the worse crimes. If you are a part of the *makhzen* or have money, you can get away with the impossible, that's justice in Morocco. I am not optimistic about our system and I am sure that any Moroccan that is honest in their interviews will say the same.

Shakir reflected the dominant perception that the reform of criminal justice was improbable. Unlike the previously mentioned categories, participants in this category did not believe that the system could have the appropriate reforms that would legitimize the system. Participants like Shakir perceived criminal justice as a system that vindicates those in power while subjugating the powerless rather than fulfilling its duties in administrating justice. Participants were adamant that those in power would not risk their already advantageous social and economic positions for a system that could hold them accountable for their actions.

**The Moroccan criminal justice system is a secular institution that should be free from religion whose legitimacy is determined by universal human and civil rights.**

Amongst the last category of participants were those that embraced a secular outlook in their perceptions of criminal justice legitimacy. These individuals were not involved with any religious organizations, identified themselves as Muslim, and believed Islam and secularism were compatible and necessary for Morocco. The respondents believed that the criminal justice system should be a secular institution and that a legitimate criminal justice system should represent universal standards of human and civil rights rather than the religious morals of Moroccan citizens. As Jamal, articulated:

> To me, religion should not be used to assess criminal justice legitimacy. Through the experiences and conflicts of the past we have international standards for human rights. As humanity we learned our lessons and understand the importance of a secular criminal justice system…a legitimate system is one that successfully protects human rights and applies the right procedures for due process.

Participants are convinced that criminal justice-related issues should not be determined by religion; Jamal reiterated that even in Morocco, the Ministry of Justice and the Ministry of Endowments and Islamic Affairs were separate departments with distinct functions. According to this category, religion is a personal issue that is inconsequential to legitimacy since criminal justice should rely on universal standards of morality. These participants expressed that morals and norms shifted with every generation and argued for the criminal justice system to reflect those fluctuations. A legitimate system is inclusive and mediates between the assorted values within Moroccan society. This secular approach to criminal justice was regarded as agreeable with their religious views. Abdelhaq clarifies:

> Islam teaches about our relationship with God and not how to organize a criminal justice system. I think that criminal justice should be separate from our religion because it needs effective management from people like you that study the system and how it works and not people who only study religion. Justice and people's rights are the values we have to apply in our country and both the criminal justice system and religion have to be fair and recognize those rights… Secular belief and Islam go together, this was the case throughout history… A secular criminal justice system

> allows everyone to practice their interpretation of religion according to their understanding without anyone using the system against them for doing so.

One perspective within this category approved of Islam's roles in public segments of Moroccan society and only wanted to limit religion within criminal justice. These participants recognized Islam's impact in forming Moroccan identity and culture. They were fully supportive of religious values that are harmonious with Moroccan culture and international human rights standards but distrustful of the literal and stringent interpretations. Criminal justice was described as an institution that required versatility and the capability to acclimate with the peculiarities of every generation. The current system and the collaboration between the monarchy, parliament, the country's *ulema*, and criminal justice officials were recognized as one practical approach that embraces and balances competing interests in the system.

Other participants view traditional religious values as outdated for contemporary societies and categorically declare that protecting human rights and individual freedom should be the foundation of criminal justice legitimacy. Through a value-free approach to legitimacy that is reminiscent of the legal realist viewpoint, participants held that the system's interest should be in the larger society and not the application of any particular religious interpretation. Religion could be an inspiration, but none of these participants accepted it as the source for legitimacy. Ethics free of religion, logic, and reason were deemed sources for an effective and legitimate criminal justice system that accommodates citizens of different ideals, values, and persuasions. Riyyad rationalized:

> The use of religion for a nation of this century demonstrates how distorted we are as a society. The reason why we and other Muslim countries fall behind the world in modernizing and being part of the first world is our obsession with religion. Religious values are narrow, what we need is a system that encompasses all values under the standards that the whole world accepts. In Morocco we need to promote the secularization of society and increase individual freedoms.

Although participants differed on the role of religion in society, they agreed that it should be restricted in matters pertaining to criminal justice. The perception amongst participants is that the reliance on religious values is an archaic approach to criminal justice. A modern criminal justice system was characterized as one that emphasizes the concepts of justice, stability, development, equality, and tolerance, values that are perceived as independent of religion. Participants repeated that the criminal justice

system should represent universal secular values that benefit society and citizens even if those values contradict religious or cultural norms. Abdelaziz provided an example for this point;

> The tourism industry requires us to attract people from the world by selling alcohol and opening casinos for gambling in different cities. These actions contradict religious values and would be punished under an Islamic system. But we know that these businesses keep people working and increase money in our economy. Working in these businesses is a personal decision and it is for no one else to keep someone from making a living, it is the way it works now and the way it should be.

An additional position that participants in this category dispute is the claim that the contemporary legal system is extrinsic and foreign to Moroccans. Although they recognized the French's imposition of the legal system and its adoption by the monarchy after independence, participants strongly believe that in the sixty years that passed, Moroccan society has incorporated the French system and molded it into the customary norms and values of Morocco. When Abdelaziz made this point in our interview, he concluded, "The system is one with French and Islamic characteristics that makes it Moroccan."

In the discussion on legitimacy, participants were concerned about the issues surrounding the enforcement of their values in the Moroccan criminal justice system. Participants were optimistic about the current progress in human rights and the active inclusion of civil society in criminal justice since the Arab Spring. The general perception is that the Moroccan system will gradually shift towards their values and away from religious interpretations. The biggest threats to this advancement of the system and its legitimacy that all participants repeated are the increase in religious extremism, corruption amongst officials, poverty, and the class disparities in the system. As a response, participants were resolute that knowledge answers the actual and potential threats to legitimacy. Education was perceived as the means of turning the public away from the reliance on religion and into a more secular approach to criminal justice where legitimacy like liberal democracies would be measured by procedural justice rather than on the type of values applied. Jamal remarked:

> You might be surprised at the amount of people who are illiterate in Moroccan cities, and I don't need to mention the estimated amounts in the countryside…The key to legitimacy in the system is education. From the young to the old, every citizen should be able to read, listen, and discuss knowledge that promotes ideas. Education will make everyone a better

> citizen by teaching them empathy and the understanding of other viewpoints. That is how we should be fighting our social problems… Religion in society has its use, but I would rather use reliable research for social policies.

# DISCUSSION

The study explored how participants conceptualize criminal justice legitimacy, the factors that shape perceptions and would enhance legitimacy, and the state's strategies in producing and negotiating legitimacy. This paper presented how the discord surrounding participants' religious interpretations shapes perceptions of criminal justice legitimacy. The competing religious paradigms identified vary from the traditional ones that defer to the monarchy's moral authority to those that openly challenge and conflict with the state's claims of legitimacy. The study reveals the dominant role of religion as an agent of socialization in criminal justice institutions.

This study contributes to the ever-growing literature on criminal justice legitimacy. The theme that emerged in the qualitative interviews orientated towards the recent re-examination and expansion of legitimacy research into moral alignment or the shared morals, values, and norms between the criminal justice system/actors and citizens (Beetham, 1991; Bottoms & Tankebe, 2012; Jackson et al., 2012; Van Damme, 2017; Sun et al., 2019; Cao et al., 2022). Even more imperative is the use of religious interpretations to conceptualize criminal justice legitimacy. The identified groups deliberating on whether the system aligned with their religious interpretations depicted a cultural battle within criminal justice institutions. The type of laws and morals the system will enforce will determine the state's future nature, character, and identity. The results also highlight the role of civil society in challenging and negotiating criminal justice legitimacy, especially in undemocratic regimes. The third sector, through social networking, the media, and literature; from the local, national, and international levels, are informing the public about issues in criminal justice.

As the first study on criminal justice legitimacy in the Arab world, the results fill gaps in the literature by providing a non-Western perspective. The interviews revealed that as religious interpretations and practices form moral judgments and conduct, they also shape criminal justice institution perceptions and legitimacy. A criminal justice system can be in accordance with international human rights standards and receive

international praise for its efforts and still be perceived as illegitimate if it is not inclusive of society's values. Religion endures as a significant source of inspiration and meaning for many societies, yet the literature regarding the role of religion in criminal justice remains oddly scarce (Cross, 2018). Participant responses reflect perceptions from a case in the Global South of the criminal justice system that inform competing perspectives around legitimacy.

The results are only tentative yet offer numerous prospects for future research on criminal justice legitimacy. Further research is necessary to explore the process associated with legal socialization and moral alignment to identify the factors that shape perceptions of legitimacy in diverse legal and political systems. Studies on the criminal justice systems in the region remain deficient and scholars familiar with Western and Arab cultural backgrounds need to expand the region's criminal justice research (Ouassini & Ouassini, 2020, 2023). Although there are access issues in many regimes, researchers need to broaden the effort to collaborate with local academics, criminal justice actors, and other individuals interested in criminal justice. Foremost in moral alignment, researchers must examine the critical link between religious and criminal justice institutions. The results warrant a quantitative analysis to test the arguments presented and future research should replicate this study in sundry cultures and criminal justice systems. Similar to procedural justice, the themes identified are essential to legitimacy, and future studies should examine how the public sphere and civil society shape perceptions of legitimacy.

The main limitations are the inherent generalizability issues regarding the perceptions of Moroccans due to the study's use of purposive sampling in Tangier. Collecting and analyzing the data was an overwhelming task. There were challenges in translating aspects of the language/culture to English to represent the participants' statements accurately. The researcher is responsible for making sense of the cultural messages collected and then communicating those messages to readers unfamiliar with the culture. In the translations, the researcher sought to present the participants as precisely as possible based on his understanding of the culture, language, and context in which the conversations took place. The results focus on the meaning that each participant conveyed in the conversations, and like any translation, there might be particular meanings lost in the process.

The policy implications provide researchers, policymakers, NGOs, and criminal justice actors insight into criminal justice legitimacy. The first relates to the relationship between moral alignment and legitimacy. The Moroccan criminal justice system must

balance religious values and international human rights standards. While most participants supported the balance, significant amounts of Moroccans perceive the two in contradictory terms. The state must confront religious interpretations that contradict international human rights standards and promulgate the consensus amongst the world's scholars that international human rights and the Islamic religion are compatible. The results also demonstrate the power citizens and civil society have over criminal justice reform.

The differences in perceptions, experiences, and values are vital to the democratic ambitions of the Moroccan people. Moroccan society should openly discuss criminal justice legitimacy and other politically sensitive topics to move citizens away from dull compulsion and feelings of powerlessness. More broadly, the results illustrate the role of religion in the formation of legitimacy with implications for reform, institution building, and stability in the Arab world. The uprisings in the region reflect the fragmentation of values between the region's citizens and the state. As religious and ideological interpretations shape identities and become internalized, excluding certain groups in Arab societies creates a dissonance between individuals and the state. The study demonstrates that there is a broad spectrum of values pertaining to criminal justice. Despite the various perceptions presented in this study that might seem highly critical, official state narratives must tolerate dissenting opinions that challenge the status quo.

## References

Ahmed R., Nassery I., & Tatari M. (2018). *The Objectives of Islamic Law: The Promises and Challenges of the Maqasid al-Shari'a*. Lanham, MD: Lexington Books.

Bassiouni, M. C. (1982). Sources of Islamic law, and the Protection of Human Rights in the Islamic Criminal Justice System. In M.C. Bassiouni (Ed.). *The Islamic Criminal Justice System*. (pp. 3-53). New York, NY: Oceana Publications.

Beetham, D. (1991). *The Legitimation of Power*. Atlantic Highlands, NJ: Humanities Press International, Inc.

Belvedere, K., Worrall, J. L., & Tibbetts, S. G. (2005). Explaining Suspect Resistance in Police Citizen Encounters. *Criminal Justice Review*, *30*(1), 30-44.

Bottoms, A. & Tankebe, J. (2012). Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice. *The Journal of Criminal Law & Criminology, 102*(1), 119-170.

Bradford, B., Huq, A., Jackson, J., & Roberts, B. (2014). What Price Fairness When Security is at Stake? Police Legitimacy in South Africa. *Regulation & Governance*, *8*(2), 246-268.

Cao, L., Chen, F. L., Wu, Y., & Sun, I. Y. (2022). Police Integrity in Taiwan and Its Correlates. *Asian Journal of Criminology, 17*(3), 1-17.

Carrington, K., Hogg, R., & Sozzo, M. (2016). Southern Criminology. *The British Journal of Criminology*, *56*(1), 1-20.

Cheng, K. K. Y. (2018). Legitimacy in a Postcolonial Legal System: Public Perception of Procedural Justice and Moral Alignment Toward the Courts in Hong Kong. *Law & Social Inquiry*, *43*(1), 212-228.

Coicaud, J. M. (2002), *Legitimacy and Politics*. Cambridge: Cambridge University Press.

Corbin, J., & Strauss, A. (2014). *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*. Sage Publications.

Creswell, J. W., & Clark, V. L. P. (2017). *Designing and Conducting Mixed Methods Research*. Sage Publications.

Cross, C. (2018). Marginalized Voices: The Absence of Nigerian Scholars in Global Examinations of Online Fraud. In K. Carrington, R. Hogg, J. Scott and M. Sozzo, (Eds.), *The Palgrave Handbook of Criminology and the Global South*. Palgrave Macmillan.

Daadaoui, M. (2010). Rituals of Power and Political Parties in Morocco: Limited Elections as Positional Strategies. *Middle Eastern Studies*, *46*(2), 195-219.

Finke, R., & Stark, R. (1988). Religious Economies and Sacred Canopies: Religious Mobilization in American cities, 1906. *American Sociological Review*, *53*(1), 41-49.

Gau, J. M., & Brunson, R. K. (2009). Procedural Justice and Order Maintenance Policing: A Study of Inner-city Young Men's Perceptions of Police Legitimacy. *Justice Quarterly*, *27*(2), 255-279.

Gau, J. M. (2015). Procedural justice, Police Legitimacy, and Legal Cynicism: A Test for Mediation Effects. *Police Practice and Research*, *16*(5), 402-415.

Geertz, C. (1968). *Islam Observed Religious Development in Morocco and Indonesia*. Chicago, IL: University of Chicago Press.

Glaser, B. G., & Strauss, A. L. (2017). *The Discovery of Grounded Theory: Strategies for Qualitative Research*. Routledge.

Jackson, J., Bradford, B., Hough, M., Myhill, A., Quinton, P., & Tyler, T. R. (2012). Why do people comply with the law? Legitimacy and the influence of legal institutions. *British Journal of Criminology*, *52*(6), 1051-1071.

Jackson, J., Asif, M., Bradford, B., & Zakria Zakar, M. (2014). Corruption and Police Legitimacy in Lahore, Pakistan. *British Journal of Criminology*, *54*(6), 1067-1088.

Kamali, M. H. (2008). *Shari'ah Law: An Introduction*. Oxford: Oneworld Publications.

Karstedt, S. (2013). Trusting Authorities: Legitimacy, Trust, and Collaboration in non-Democratic Regimes. In J. Tankebe & A. Liebling (Eds.) *Legitimacy and Criminal Justice-An International Exploration*. Oxford University Press.

Marshall, C., & Rossman, G.B. (2014). *Designing Qualitative Research*. Newbury Park, CA: Sage Publications, Inc.

Nagin, D. S., & Telep, C. W. (2020). Procedural Justice and Legal Compliance: A Revisionist Perspective. *Criminology & Public Policy*, *19*(3), 761-786.

Nivette, A. E., & Akoensi, T. D. (2019). Determinants of Satisfaction with Police in a Developing Country: A Randomised Vignette Study. *Policing and Society*, *29*(4), 471-487.

Ouassini, N., & Ouassini, A. (2020). Criminology in the Arab World: Misconceptions, Nuances and Future Prospects. *The British Journal of Criminology, 60*(3), 519-536.

Ouassini, N., & Ouassini, A. (2023). *Arab Criminology*. New York: Routledge.

Patton, M.Q. (2014). *Qualitative Evaluation and Research Methods: Integrating Theory and Practice*. London: Sage Publications.

Reisig, M. D., & Chandek, M.S. (2001). The Effects of Expectancy Disconfirmation on Outcome Satisfaction in Police-citizen Encounters. *Policing: An International Journal of Police Strategies & Management*, *24*(1), 88-99.

Sarat, A. (1977). Studying American Legal Culture: An Assessment of Survey Evidence. *Law & Society Review, 11*(3), 427-488.

Seto, C. H., & Said, I. (2022). Religious Perceptions of Crime and Implications for Punitiveness. *Punishment & Society*, *24*(1), 46-68.

Smith, D.J. (2007). The Foundations of Legitimacy. In T.R. Tyler (Ed.), *Legitimacy and Criminal Justice: International Perspectives* (pp. 30-58). New York, NY: Russell Sage Foundation.

Sun, I. Y., Li, L., Wu, Y., & Hu, R. (2018). Police Legitimacy and Citizen Cooperation in China: Testing an Alternative Model. *Asian Journal of Criminology*, *13*(4), 275-291.

Sun, I. Y., Wu, Y., Liu, J., & Van Craen, M. (2019). Institutional Procedural Justice and Street Procedural Justice in Chinese Policing: The Mediating Role of Moral Alignment. *Australian & New Zealand Journal of Criminology*, *52*(2), 272-290.

Sunshine, J., & Tyler, T. R. (2003). The Role of Procedural Justice and Legitimacy in Public Support for Policing. *Law & Society Review*, *37*(3): 513-548.

Tamanaha, B. Z. (2001). *A General Jurisprudence of Law and Society*. Oxford, UK: Oxford University Press.

Tankebe, J. (2008). Colonialism, Legitimation, and Policing in Ghana. *International Journal of Law, Crime and Justice*, *36*(1), 67-84.

Tankebe, J. (2013). Viewing Things Differently: The Dimensions of Public Perceptions of Police Legitimacy. *Criminology*, *51*(1), 103-135.

Tankebe, J., & Liebling, A. (2013). *Legitimacy and Criminal Justice: An International Exploration*. Oxford, UK: Oxford University Press.

Trinkner, R., Rodrigues, H., Piccirillo, D., Gifford, F. E., & Gomes, A. M. M. (2020). Legal Socialisation in Brazil: Examining the Generalisability of the Procedural Justice Model. *International Journal of Comparative and Applied Criminal Justice*, *44*(1-2), 7-27.

Tyler, T. R. (1990). *Why People Obey the Law.* New Haven, CT: Yale University Press.

Tyler, T. R. (2000). Social Justice: Outcome and Procedure. *International Journal of Psychology*, *35*(2), 117-125.

Tyler, T. R. (2003). Procedural justice, Legitimacy, and the Effective Rule of Law. *Crime and Justice*, *30*, 283-357.

Tyler, T. R. (2006). Psychological Perspectives on Legitimacy and Legitimation. *Annual Review of Psychology*, *57*, 375-400.

Tyler, T. R. (Ed.). (2007). *Legitimacy and Criminal Justice: International Perspectives*. Russell Sage Foundation.

Tyler, T. R., & Jackson, J. (2013). Future Challenges in the Study of Legitimacy and Criminal Justice. In J. Tankebe & A. Liebling (Eds.), *Legitimacy and Criminal Justice: An International Exploration*. Oxford, UK: Oxford University Press.

Van Damme, A. (2017). The Impact of Police Contact on Trust and Police Legitimacy in Belgium. *Policing and Society*, *27*(2), 205-228.

Walters, G. D., & Bolger, P. C. (2019). Procedural Justice Perceptions, Legitimacy Beliefs, and Compliance with the Law: A Meta-analysis. *Journal of Experimental Criminology*, *15*(3), 341-372.

# Criminal Justice in a Time of Ecological Crisis: Can the Serious Accidents Punishment Act in Korea Be Enforced to Punish 'Ecocide'?

*Juneseo Hwang*[*]
*School of History, Anthropology, Philosophy and Politics,*
*Queen's University Belfast*

## Abstract

At the global level, voices are growing to criminalise severe environmental destruction as ecocide so that the International Criminal Court can punish. This social phenomenon suggests that international criminal law has been ineffective in protecting the environment and humanity at the time of planetary crisis. In parallel, however, only a small body of literature exists looking at how criminal justice is effective in preventing environmental damage at the domestic level. To address this research gap, this study first builds a green criminological perspective, which emphasises crimes of the powerful, and explains different types of ecocide. Then, it examines Korean environmental criminal law and demonstrates that high-level personnel in corporations have not been adequately held accountable for serious environmental destruction. As a viable option to strengthen criminal justice in the environment sector in Korea, it is argued that the Serious Accidents Punishment Act (SAPA) can be amended to hold business owners and other responsible persons accountable and liable for serious environmental crime caused by corporate activities.

Keywords:

ecocide, environmental criminal law, ecological sustainability, Serious Accidents Punishment Act, South Korea

* Direct correspondence Juneseo Hwang; jhwang02@qub.ac.uk
* http://dx.doi.org/10.36889/IJCJ.2022.005
* Received 11 October 2022; Revised 16 November 2022; Accepted 2 December 2022
INTERNATIONAL JOURNAL OF CRIMINAL JUSTICE, Vol. 4 Issue 2, December 2022, 30-57

# INTRODUCTION

In 1972, the then Swedish Prime Minister Olof Palme condemned the American military's use of chemicals, known as the 'Agent Orange', in Vietnamese forests. This act was called 'ecocide', which meant indiscriminative and destructive warfare against the environment (Anderson, 2022). Although several decades have passed since the Vietnam War, the legacies of chemical contamination, such as deforestation, unexploded munitions, and health impacts are still agonising local people and causing hazardous effects to local ecosystems (Le and Nguyen, 2020). The Vietnam War and the rise of environmental movements during the 1970s nurtured global discussion on the introduction of a law of ecocide. For instance, 'freedom from ecocide' was proposed as a constitutional right in the US (Pettigrew, 1971). During this time, ecocide mainly meant environmental warfare or military-induced environmental destruction. However, the term ecocide that requires stronger environmental regulations was quickly forgotten in the global policy agenda, followed by the neoliberal economic paradigm that emphasises environmental deregulation (Ruggiero, 2013).

The political landscape has dramatically changed, as the global society is facing severe environmental costs of neoliberal development. Climate change has been declared an international emergency for its role as a driver of biodiversity loss, food insecurity, natural disasters, poverty and conflicts, and so on (Gills and Morgan, 2020). Accordingly, the term 'ecocide' has been revived in the global policy arena, conceiving a wider meaning than the past. Polly Higgins, a British attorney, called for the international community to legislate a law of ecocide in the Rome Statue of the International Criminal Court (ICC). Defining ecocide as 'extensive loss, damage or destruction of ecosystems', she proposed ecocide as the fifth crime against peace, for which governments and large corporations should be held accountable and liable (Higgins, 2010). This green approach to criminal justice has evolved from the awakening that international environmental regimes have failed to address the acceleration and worsening of environmental challenges.

Growing voices for a law of ecocide are making a wave of new environmental campaigns. Small island countries, such as Vanuatu, have already urged the ICC to prosecute multinational corporations which should be held responsible for environmental destruction and degradation. Belgium and the European Parliament also endorsed the addition of ecocide to the Rome Statue. In parallel, some countries have passed

legislation to punish ecocide within their jurisdiction. Some former Soviet countries like Russia, Georgia, and Ukraine codified ecocide as a crime a long time ago. Recently, Ecuador acknowledged the rights of nature and criminalised the violation of the rights of nature in 2014 and France introduced a law of ecocide in 2021. There are ongoing discussions to include ecocide as a crime that the European Union should address in its Environmental Crime Directive.

That the International Criminal Court can only address limited cases of severe environmental destruction at the global level raises a question on how domestic environmental law can contribute to protecting citizens' environmental rights and ecosystems from ecocide.[1] This article is written to facilitate debates and discussions on the effectiveness of Korean environmental law in preventing and punishing severe environmental destruction that can be framed as ecocide. To do so, through a lens of green criminology, it conceptualises four types of ecocide committed by powerful actors in the society—namely, states and corporations. Then, it analyses the effectiveness of Korean environmental criminal law in fulfilling its purpose. Finally, *the Serious Accidents Punishment Act* is given attention as a viable option to strengthen the role of criminal justice in protecting the environment in the jurisdiction of Korea.

# CRIMES OF THE POWERFUL AND A TYPOLOGY OF ECOCIDE

## Crimes of the Powerful

Green criminologists conceptualise environmental crime as acts that cause ecological disorganisation, if defined as scientifically identifiable harms that cause the disorganisation of ecosystems by the production of environmental pollution and the consumption of natural resources beyond the planet's resilience capacity. Lynch, Long, Barrett and Stretesky (2013) distinguish two major mechanisms of environmental crime. First, ecological additions are the acts that generate pollution and contamination to the

[1] Moreover, the jurisdiction of the ICC may be limited only in member states that ratified the Rome Statue of the ICC. This means that the ICC cannot investigate or prosecute countries that are not signatories of the Rome Statue, including the U.S., even if 'ecocide' is codified in the Rome Statue and those countries shall be held liable for it.

environment. The production of waste, excessive carbon emissions, the use of pesticides are examples of this. Second, ecological withdrawals include the extraction of natural resources, such as minerals, woods, oil, and gas. Consequences of ecological disorganisation are often widespread, long-term, accumulative, and severe to not only nature but also human health.

In many countries, criminal law has evolved to strengthen mechanisms to protect the environment by directly criminalising acts of ecological disorganisation. For instance, European countries like Germany changed its law to recognise environmentally destructive activities as autonomous criminal offences 'in order to express the importance of environmental crime' (Faure, 2017, p. 17). However, it appears that certain actors, especially the powerful of the society, are not held accountable by environmental criminal law. 'Crimes of the powerful' are to explain certain acts that are committed by state and/or corporations but not criminalised or less punished for their contribution to ecological disorganisation. <Table I> shows the major characteristics of crimes of the powerful.

Table I. Crimes of the Powerful (Hwang, 2022, p. 80)

| Type of Crime | Perpetrators | Motives | Mechanisms |
|---|---|---|---|
| State Crime | States/Governments | To fulfil its self-interest or maintain the status quo | Direct or Indirect Failures in environmental protection |
| Corporate Crime | (Transnational) Corporations | Maximisation of Profits | Continuous expansion of corporate activities that exploit human and nature |
| State-Corporate Crime | State and Corporations | To collectively pursue a common goal between states and corporations | States to adopt policies to support corporate activities or accelerate deregulation |

According to Rothe and Medley (2016, p. 102), state crime refers to not only the violations of the existing law by the state but also failures to act 'that results in violations of domestic and international law… done in the name of the state regardless of the state's self-motivation or interests at play'. From this insight, governmental development policies that may cause severe environmental damages or the military's deployment of weapons that destroy the environment may be accepted as legal but should be

criminalised, in proportionate to their impacts on the environment and human health. Governmental subsidies for environmentally destructive industries, such as coal mining, and state failures to protect land defenders from extrajudicial killing are also examples of state crime against the environment. The major problem of state crime is that these acts are rarely enforced by domestic environmental criminal law, because the state itself is less likely to pursue justice for its own failures (Wolf, 2011). At the international level, the ICC is capable of prosecuting individuals for their war crimes that involve severe environmental destruction, but even so, international criminal law cannot be enforced against states or groups (International Criminal Court, 2020, p. 14).

In the capitalist system, ecological additions and withdrawals by corporations are normally accepted as legitimate for economic growth. A dilemma of environmental criminal law in the capitalist system emerges when environmental values are compromised with ecological disorganisation caused by legitimate profitmaking activities by businesses. Businesses may be held culpable for significant environmental accidents, such as oil spills and deforestation, but the accumulation of environmental burdens by legal corporate activities is less likely to be recognised as criminal. In capitalist societies, criminal justice is pursued to prevent only limited forms of environmental crime by corporations, such as failures of compliance or illegal commercial activities. Green criminologists argue that the accumulation of environmental pollution generated by routinized corporate activities is equally detrimental to the planet and should be put to a social inquiry. In particular, corporations may seek the maximisation of profits by colluding with illegal businesses like organised criminal groups. For example, Italian mafia groups have generated their income from cooperation with legal waste processors who seek a downscaling of their landfill tax (Walters, 2013). However, corporate criminal liability is often reduced or inadequately enforced because environmental criminal law appears to be weak and impotent (Ruggiero and South, 2010).

In the real world, state crime and corporate crime against the environment may converge. Lynch, Long, Stretesky and Barrett (2017, p. 248) note that ‘profit-seeking firms require expanded production, and expanded production requires an increase in the consumption of raw materials and an increase in pollution, which promotes the consumption and destruction of nature in unsustainable ways’. When the government and its institutions fail to enforce environmental law or protect the environment and humanity from the consequences of ecological disorganisation, the convergence may occur. Kramer, Michalowski and Kauzlarich (2002, p. 263), define state-corporate crime as ‘criminal acts that occur when one or more institutions of political governance

pursue a goal in direct cooperation with one or more institutions of economic production and distribution'. Numerous scientific studies have suggested that corporations are most responsible for anthropogenic environmental problems, such as climate change and biodiversity loss (White, 2010). Yet, businesses have legally avoided liability or culpability, and their exploitative activities are assisted or encouraged by governmental policies that turn a blind eye to corporate malfeasance. As Ruggiero argues, ecological disorganisation is mainly caused by both legal and illegal environmental activities.

> The notion that there is continuity between legality and illegality is crucial for an understanding of corporate, state, white-collar crime and crimes of the powerful in general… Harms to the environment is caused by a serious of interlaced conducts that are bad in themselves (mala in se) and conducts that are bad because they are prohibited by law (mala prohibita) (Ruggiero, 2013, p. 421).

Thus, states create a socio-political environment where corporations can pursue 'legal' profiteering activities at the costs of ecological sustainability, although such actions shall not be accepted as socially legitimate. For instance, climate change is known to be the most serious threat to human civilisations but criminalising corporate activities most responsible for it has not taken place at both international and domestic levels. Rather, market-oriented mechanisms such as carbon taxation and compliance measures were introduced through international climate agreements. This is in stark contrast to the fact that climate change functions as a multiplier of environmental degradation (Agnew, 2012). To this end, from the viewpoint of academia and environmental activism, voices calling to make a law of 'ecocide' are growing (White and Kramer, 2015).

## A Law of Ecocide

Campaigns to make a law of ecocide are centred around the revision of the Rome Statue of the International Criminal Court (ICC). The group Stop Ecocide International appear to be a forerunner of such actions. In 2021, it convened an independent panel to agree a definition for ecocide, which was proposed as below:

> 'unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts' (Stop Ecocide Foundation, 2021, p. 5)

There are legal issues that make legislating a law of ecocide difficult. Thresholds to determine a particular action as an act of ecocide that warrant international interventions may be contested. Also, proving one's intent of actions that may bring about ecocidal consequences may be complex and difficult. In spite of some drawbacks, a law of ecocide is an innovative response to ecological disorganisation, breaking path-dependency in the international criminal justice system. The reinforcement of criminal law is a message to society, raising public awareness of particular acts that should be prohibited. Thus, a law of ecocide can improve morality and social responsibility for environmental protection. Robinson (2022, p. 318) notes that:

> The crime of ecocide would provide stronger penal sanctions, stigmatization, jurisdictional reach, and commitments to prosecute in relation to the worst environmental crimes. But perhaps an even greater value of the crime is… reframing massive environmental wrongdoing not as a mere regulatory infraction, but rather as one of the gravest crimes warranting international concern.

For this reason, advocates of a law of ecocide have expanded the use of the term ecocide to condemn military-induced environmental destruction, corporate crime, and state-corporate crime against the environment (Chandy, 2021). Based on the literature and policy papers in the field, four categories of ecocide can be conceptualised by types of perpetrators and intent. The typology of ecocide presented in <Table 2> below is not exhaustive, because ecological disorganisation may be caused by destructive activities such as organised environmental crime and terrorism (Edwards and Gill, 2002; Rose, 2022). Still, for analytical purpose, it is useful to capture the sophisticated nature of ecocidal activities by the powerful actors in environmental criminal law and enforcement.

Table 2. Typology of Ecocide

| | | **Perpetrator** | |
|---|---|---|---|
| | | **State/Government** | **Corporations** |
| **Purpose** | Deliberate/Intentional (Absolute Liability) | Environmental warfare (Group I) | Pollution Crime/Organised Environmental Crime (Group III) |
| | Unintentional/Negligent (Strict Liability) | Peacetime Military Operations/Development Projects (Group II) | Environmental Accidents (Group IV) |

Among state-induced ecocide, deliberate actions to cause severe environmental contamination and destruction can be categorised in Group I. Environmental warfare is an example. Environmental warfare causes serious and long-term environmental destruction, which cause ecocidal impacts. The wide use of Agent Orange during the Vietnam War was committed by American jetfighters to destroy the local forests where Vietnamese guerrillas might subsist within and ambush from. Almost six per cent of Vietnamese territory was destroyed and the legacies of chemical contamination, such as rare diseases and biodiversity loss, are well known to the public (Westing, 1985; Zierler, 2011). In the Gulf War, the Iraqi military troops initiated a so-called 'scorched earth' strategy by burning more than 700 oil wells in Kuwait. Such acts were deliberately committed in order to stop the march of the US-led coalition troops. While two to six million barrels of oil per day were being burnt, these oil fires caused serious damage to the ecosystems and also soldiers and local residents (Roberts, 1996). To prevent such deliberate environmental destruction for military interest, international environmental agreements were signed. For instance, the Environmental Modification Convention (ENMOD)[2], adopted in 1977, bans particular acts that use the environment as a means of warfare, which may involve artificial change or manipulation of the environment. More lately, the UN International Law Commission (ILC) adopted 27 draft principles to protect the environment throughout 'the entire conflict cycle' (Weir and Pantazopoulos, 2020, p. 9). However, they appear to be ineffective in fulfilling their purpose. At the international level, it is under the jurisdiction of the ICC. However, it has never pursued justice against criminals liable for environmental destruction (Cusato, 2017). At the domestic level, military operations that are deemed to cause ecocide are hardly prohibited, as they are accepted as legitimate security activities.

Ecocide may occur because of governmental actions without an intention to destroy the environment. This is mainly due to negligence or ignorance, using the environment for other purposes such as economic development. For now, this type of ecocide is named Group II. There are many examples of this group, but peacetime military operations and large-scale development projects are discussed here. The military causes long-term and widespread environmental contamination even if it is not deployed in battlefields. For instance, the American military is known to be the single largest organisation polluter in terms of its consumption of energy and production of

[2] The full name of the Convention is the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

carbon emissions. A study suggested that if the US military were a country, it would be the 47th largest polluter in the world (Belcher, Bigger, Neimark and Kennelly, 2020). Along with other countries' military forces, however, its responsibility for carbon neutralisation is widely exempted from international climate agreements. Given that anthropogenic climate change is the most significant driver of mass extinction, it is problematic that the military is not held accountable for its ecocidal activities. However, like Group I of ecocide, even if there is a likelihood of serious environmental destruction, military actions that may cause ecocide are recognised as legitimate for national security and economic health. Governments' energy and development policies that involve large-scale construction or land reclamation can be condemned for their environmental destruction. In the following section, some cases for this type of ecocide will be discussed in the Korean context.

Business activities that generate serious ecological disorganisation fall into Group III of ecocide, recognised as criminal offences against environmental law. The use of chemicals, especially pesticides, for industrialised farming may cause serious deforestation and biodiversity loss. Global citizens organised the International Monsanto Tribunal, where citizens examined environmental impacts of Monsanto's use of agrochemicals and found the multinational company guilty of ecocide. The jury of the tribunal concluded that Monsanto's involvement in the US-led war on drugs, production of genetically modified crops, and contamination of land and water shall constitute a crime of ecocide (International Monsanto Tribunal, 2017, p. 47). Organised environmental crime is another example of Group III ecocide, which exposes a 'dirty' connection between legal businesses and criminal groups. Corporations may find illicit businesses more attractive when they can maximise profits while minimising environmental costs. According to Europol (2022), many perpetrators of environmental crime started legal businesses and found opportunities for profitmaking by violating the environmental law. Given that environmental protection mechanisms are weak or fragmented, criminal groups can easily infiltrate the legal realm. For example, criminal networks intentionally destroy forests and manipulate local ecosystems to plant more profitable trees or crops such as drugs. While environmental criminal law can punish these environmental crimes, it is too weak and ineffective in preventing and deterring serious environmental destruction—especially that committed by white-collar groups (Lynch, 2020). It is why the number of advocates who demand a law of ecocide is growing.

Finally, Group IV of ecocide includes environmental destruction caused as unintended consequences or negligence by business activities. The Deepwater Horizon incident might be a case to this type of ecocide. In the Gulf of Mexico in 2010, British Petroleum's oil drilling rig exploded. Known as the largest oil spill disaster in world history, the explosion of Deepwater Horizon led to massive scale oil flows for 87 days. The accident caused not only human casualties—11 deaths and 18 injuries—but also public health issues, such as rare diseases and trauma, and the destruction of marine ecosystems including the mass killing of aquatic flora and fauna and birds (National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, 2011). Investigations suggested that one of the most disastrous industrial accidents could have been avoided if safety rules were obeyed and the company was not in haste to develop the oil rig. While environmental clean-up and restoration were necessary for years afterwards, criminal justice was also sought against BP and its partner companies for causing serious ecological disorganisation. In January 2013, a criminal case was settled between BP and the US government, with the former agreeing to pay a $4.5 billion fine. Even so, criminal charges were limited as 'misconduct' by employees and applied to only a few people, which raised doubts over the effectiveness of criminal justice in deterring serious environmental crime (Jarrell and Ozymy, 2021).

Criminal law regulates social behaviours by showing the line on morality that a society must follow. In the social system where environmental destruction is often accepted as a trade-off for economic activity, it is difficult for criminal justice to be pursued to protect the environment. Environmental crime may range from minor pollution to large-scale environmental destruction. To date, criminal law has been challenged by voices which call for much stronger and proactive responses to environmental crime that threatens the survival of the planet. Cases of environmental crime mentioned above could be framed as ecocide for their contribution to serious ecological disorganisation including the mass killing of flora and fauna, the long-term destruction of ecosystems, and risks to public health. However, these voices have revolved around reforms in international criminal justice. In the following section, the focus of discussion is laid on South Korea, interrogating how environmental criminal law can be enforced to punish ecocide at the domestic level.

# ENVIRONMENTAL CRIMINAL LAW IN KOREA

## Major Developments and Reforms

To examine the capability of Korean criminal law in deterring serious environmental crime, the development of the existing criminal justice system should be analysed first. In the aftermath of colonisation and the Korean War, the Korean Peninsula was divided into two systems. While both Koreas claim state sovereignty over each other, economic development and military competition were top policy priorities for both. Rapid industrialisation caused severe air pollution as well as land and groundwater contamination, but without adequate environmental regulations to protect public health and ecosystems. However, amid the hostile competition with North Korea, environmental values were largely ignored or side-lined in policymaking in South Korea. Although the then President Chung-hee Park introduced the Environmental Conservation Act during the 1970s, environmental problems were widely accepted as inevitable costs for economic development (Chung and Kirkby, 2001). Thus, criminal justice mechanisms and penalties against environmentally destructive activities were distinctly lacking.

The political atmosphere changed from the 1980s. This period was marked by the tide of democratisation in South Korea, which led to the mushrooming of social movements including environmental campaigns. Citizens concerned with serious environmental degradation established numerous environmental non-governmental organisations (ENGOs) to organise social campaigns to strengthen governmental environmental policies and law. In 1985, it was reported that local residents and workers in the Onsan National Industrial Complex in Ulsan, one of the industrialised cities in Korea, had suffered from symptoms similar to *Itai-itai disease*, including skin diseases and neurosis. Environmental campaigners blamed the industrial complex for causing so-called *Onsan illness*. Later, the government admitted that the Onsan illness is a pollution-related disease, which was likely caused by the accumulation of air, land and groundwater contamination by toxic chemicals from the industrial complex.

In response to strengthened public awareness of environmental degradation, the Korean government had to take a proactive response to environmental issues. For the first time in its history, in the 8$^{th}$ amendment of the Korean constitution, environmental rights were recognised as constitutional rights. Also, the government revised its environmental policies to regulate air pollution and water contamination. For instance,

it commanded governmental institutions and state-owned corporations to conduct environmental impact assessments in 1981 and private businesses in 1986. In 1980, the Environment Agency was created to enforce environmental law and monitor non-compliance cases. However, in spite of institutional and legislative developments, enforcement remained ineffective and weak. Many companies could easily avoid criminal charges for environmental pollution because there was a lack of political willingness to tackle environmental crime and an absence of inter-agency cooperation for environmental enforcement (Ku, 1996). Therefore, governmental policies to strengthen environmental regulations were seen as merely political gestures to appease the public outcry for governmental failures in environmental protection.

The Nakdong River Phenol Contamination incident in 1991 created more momentum for an ecological awakening. After 30 tonnes of purely concentrated phenol were spilt into the river, which provided drinking water to more than two million citizens, another 1.3 tonnes of phenol were again leaked by the same company. This huge industrial accident followed just after the *Onsan illness* case, but criminal justice was not thoroughly pursued because environmental law was weak. Two significant pieces of legislation were introduced, signalling a major shift from mere political gesture to comprehensive prevention and punishment mechanisms to protect the environment. First was *the Framework Act on Environmental Policy* in 1990, specifying goals and targets of governmental environmental policies and punishment mechanisms on non-compliance. One year later, *the Act on Special Measures for the Punishment of Environmental Offences* was introduced to enforce criminal law against serious environmental crime. This was a remarkable development in environmental legislation: for the first time, environmental crime was addressed as a criminal offence, warranting stricter punishment.

After the millennium, environmental criminal law continued to be strengthened, with stricter and more complex environmental regulation on the use of chemicals, emission standards, etc. Partly, this change was facilitated by the global consensus on sustainable development. As environmental deregulation during the 1980s and 1990s caused serious damage to the planet, sustainability was adopted as a global policy agenda, calling for more state intervention for environmental protection. This led to a global trend in reinforcing environmental criminal law to promote the rule of law in the environmental sector (Hoffman, 2000). Accordingly, especially after the global financial crisis in 2008, the South Korean government introduced 'green' economic policies—such as green growth and the green new deal—which emphasised the integration of environmental sustainability and economic development. In 2011, *the Act on Special Measures for the Punishment of Environmental*

*Offences* was amended as *the Act on Control and Aggravated Punishment of Environmental Offences* (ACAPEO), granting strengthened authority and enforcement power. In 2019, the law was amended gain to increase financial penalties for environmental crime in the effective confiscation of profits from serious environmental crime.

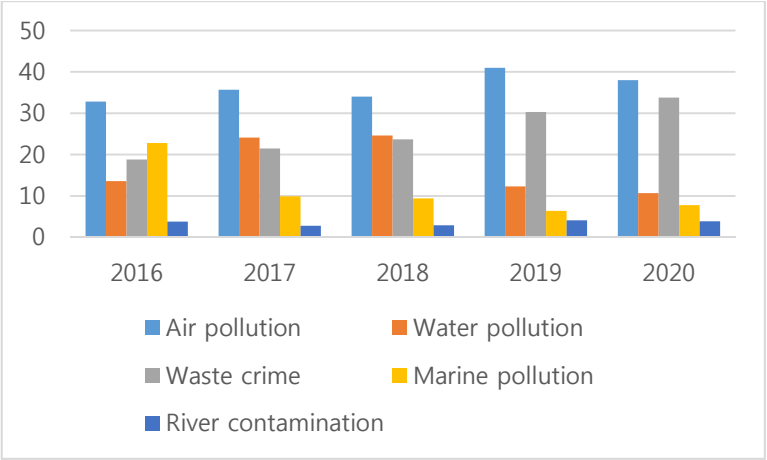
Compared to the past, environmental criminal law in Korea is relatively well established through structural reforms. After serious environmental incidents, the state was pressurised to enhance environmental criminal law. Now it has realigned its policies towards sustainable development. However, it is too hasty to reach the conclusion that Korea is effective in deterring environmental crime. In the following section, an analysis of environmental enforcement and punishment of environmental crime shows that Korea is still struggling with lingering issues that expose the vulnerabilities of its environmental criminal law.

## Enforcement and Punishment

According to a governmental survey, in the past 10 years, the enforcement authority has captured more than 90 per cent of environmental criminals (Institute of Justice, 2022, p. 109). This figure suggests that environmental criminals are more likely to be arrested by the authorities than the perpetrators of other crimes such as murder, violence, etc. More specifically, air pollution and waste crime made up the majority of environmental offences. <Table 3> below summarises the recent trends in environmental crime in Korea.

<Table 3> Trends in Environmental Crime in Korea (Adapted from the Institute of Justice, 2022, p. 110)

(Unit: %)



Based on the same survey, a brief analysis could be conducted. In the past five years, except for 2016, air pollution and waste crime constituted most environmental offences. While the former accounts for more than 30 per cent of the total environmental crime, the latter has increased from 18.8 percent in 2016 to 33.8 percent in 2020. Although more detailed scrutiny is required, this rapid increase in waste crime is alarming and may suggest that profiteering opportunities are plentiful in the waste industry in Korea. Considering the impacts of the global pandemic, this increasing tendency of waste crime may continue as the use of plastics and other wastes exploded globally during this time (Dixon, Farrell and Tilley, 2022).

In 2019, CNN reported that the largest waste dump was piled in Uiseong, a small town in the southeast of Korea. At the time of discovery, 170,000 tonnes of garbage were piled and left neglected. Toxic gas emanating from the waste dump caused fires and contaminated air, land, and water so that local residents, who are mostly old and weak, were affected. Although the dump site was owned by a legal waste processor, it was reported that he deposited 'more than 80 times the amount of garbage permitted at the site' (CNN, 2019). After the media report, criminal justice was pursued against the perpetrators of illegal dumping. However, the ineffectiveness of environmental enforcement in Korea could not be concealed when the local authority failed to monitor or intervene to remove the contaminated site, allowing the illegal activity for years until the media report shone a light on the issue. This is just one example that environmental enforcement is weak in South Korea. Given that environmental law mainly hinges upon compliance-based mechanisms only, it is easier for even legal businesses to avoid environmental regulations and pursue profits until they are sanctioned. Moreover, the level of criminal sanctions against environmental crime is low, which creates opportunities for criminals to infiltrate the environmental sector. According to a governmental source, even if the perpetrators of environmental crime are arrested, 30 per cent of them are usually released with no indictment. Also, among prosecuted cases, more than 50 per cent are concluded with a short order of financial penalties (Institute of Justice, 2022, p. 274).

In addition to the deficiency of effective environmental enforcement and punishment, it appears that criminal justice is not rigorously pursued against high-level personnel or large corporations that are responsible for large-scale environmental contamination. Among many, a prime example would be the Samsung-Hebei Spirit Oil Spill incident in December 2007. On 7$^{th}$ December 2007, in the West Sea of Korea, a crane barge (11,828 tonnes) owned by Samsung Heavy Industries crashed with Hebei Sprit, a crude oil tanker (146,848 tonnes). In the aftermath, 12,547 kl of oil polluted

wetlands and the coastlines, posing a great risk to marine ecosystems, public health, and local economies. This incident is known to the public as the largest oil spill accident in Korean history. Given the widespread, long-term, and severe scale of environmental contamination, villagers living in communities affected by the oil spill are still suffering from physical and mental damages (Lee and Kim, 2021). The law enforcement authority was blamed for their inaction in bringing justice to the responsible corporations, especially Samsung. According to an investigation, it was likely that Samsung was aware of the risks of its operation under unexpected weather conditions. Criminal prosecutions, however, were only made against the captains and crews of the collided vessels, who later pleaded guilty. The owners of the corporation, who should be held accountable for avoiding corporate crime against the environment at the structural level, were not prosecuted. Local communities appealed to the Public Prosecutor's Office to indict Samsung under *the Act on Control and Aggravated Punishment of Environmental Offences*, but no action was taken to bring the concerned CEOs of Samsung to court. Citizens and civil society organisations criticised the government for not taking proactive action against the corporation, alleviating corporate responsibility for environmental protection.

## AMENDING THE SERIOUS ACCIDENTS PUNISHMENT ACT AS A DOMESTIC RESPONSE TO ECOCIDE IN KOREA

### Background and Structure

In parallel to rapid industrialisation, health and safety measures for workers and citizens have been undermined and treated as secondary issues (Eder, 2016). Among OECD countries, Korea has recorded a high incidence of work-related fatalities and injuries (Lee, 2016). However, criminal liability for industrial accidents and work-related casualties is concentrated on low-level safety managers or outsourcing companies, while companies that actually own or run the business avoid criminal investigation. Thus, it is not so surprising that labour unions and social movements have demanded justice to be delivered to higher personnel in corporations, who have avoided criminal charges or only received petty punishments.

In 2011, the government admitted that toxic chemicals like polyhexamethylene guanidine phosphate (PHMG) that are used as humidifier sterilisers were causes of consumers' deaths and diseases. To date, around 6,000 cases of injuries including more than 1,400 deaths related to the use of toxic humidifier sterilisers have been confirmed (Choi and Jeon, 2020). Many of the people injured have been diagnosed with lung damage, and children with growth disorders. Several investigations in this incident revealed that the government's health and safety regulations were colossal failures. Since the 1990s, without proper toxicity tests, humidifier sterilisers that contain toxic chemicals were produced but governmental monitoring was not effective. Even worse, some chemicals used in the problematic products were endorsed as safe by the governmental health agency.

Governmental investigations suggested that the chief management of those chemical producers might be aware of detrimental impacts of toxic chemicals in their products (UN Human Rights Council, 2016). Thus, given the scale of the scandal, the government sought criminal justice by prosecuting some chief executives of companies responsible for the production of toxic humidifier sterilisers. Oxy Reckitt Benckiser was the most culpable company for causing the highest number of casualties—about 80 percent of the total deaths. Even the company was blamed for bribing researchers to manipulate the results of a toxicity test for its humidifier sterilisers.[3] After all, four chief executives were found guilty, but sentencing was glaringly low. Each of them spent only five years in jail for their serious criminal act.

*The Serious Accidents Punishment Act* (SAPA) was borne out of two streams of long-standing civic activism that demanded stricter health and safety regulations for workers and citizens. It addresses two types of serious accidents caused by corporations in workplaces operated by themselves, or by outsourced institutions, or their failures to comply with environmental regulations. In Article 1 of SAPA, the purpose is defined as

> to prevent serious accidents and protect the lives and physical safety of citizens and workers by prescribing the punishment, etc. of business owners, responsible managing officers, public officials, and corporations that have caused casualties in violation of their duties to take safety and health measures while operating businesses or places of business, public-use facilities, or public transportation vehicles or handling materials or products harmful to human bodies.

[3] This was bribery on a serious scale. Oxy Reckitt Benckiser is based in the UK, and it was reported that the UK's Serious Fraud Office (SFO) initiated an investigation into the case. However, the SFO neither declined nor confirmed this operation when the author requested.

The purpose shows SAPA's comprehensive approach to criminalising serious accidents. By introducing SAPA, duties for health and safety protection are structurally transferred 'to the subcontracting business owner *without judging* whether the danger is within the scope of their supervision and management' [emphasis added] (Choi *et al*., 2022, p. 1). <Table 4> summarises the core definitions in the legislation.

Table 4. Core Definitions of SAPA

| Type of Crime | Definition |
|---|---|
| Serious Industrial Accident | Industrial accidents that cause:<br>(a) at least one death<br>(b) at least two injuries in the same accident requiring six months of medical treatment<br>(c) the incidence of at least three cases of occupational diseases due to the same hazardous factor within one year |
| Serious Civic Accident | accidents other than serious industrial accidents, which results from a defect in the design, manufacture, installation, and management of a specific raw material or product, public-use facility, or public transportation vehicle, causing:<br>(a) at least one death<br>(b) at least ten injuries in the same accident requiring two months of medical treatment<br>(c) the incidence of at least ten cases of diseases related to the same cause, which require three months of treatment |

To avoid violating SAPA, business owners and managers-in-responsibility should establish or implement health and safety measures to prevent the aforementioned accidents. Those responsible for serious accidents are deemed liable to receive stronger punishment, including more than one year of imprisonment for accident-related death and hefty financial penalties. Since it only came into force in January 2022, it may be too early to assess the actual outcomes in preventing serious accidents. However, SAPA inarguably casts a light on blind spots and loopholes in the criminal justice system by strengthening corporate responsibility for public health and safety. In particular, its consequentialist approach to serious accidents lowers the threshold to impose criminal charges on businesses, which aims to avoid the problem of intention in criminal prosecution.

### Adding the environment to SAPA

As the research findings suggest, Korean environmental criminal law should be strengthened to hold corporations accountable for serious, large-scale environmental

crime. Like global campaigns to revise the Rome Statue of the ICC, a revision of SAPA can be considered as a viable option to punish ecocide at the domestic level. Considering its purpose, it can be persuasive to add environmental protection to SAPA. This can be done by adding the definition of "serious environmental accident", along with two other types of serious accidents, to the law. Three advantages for amending or 'greening' SAPA can be suggested. First, it helps raise public awareness of ecological sustainability as a core part of corporate responsibility. Second, it may enhance the quality of environmental criminal law by directly addressing business owners or high-level personnel in corporations who have easily avoided criminal penalties for ecological disorganisation. Finally, it may hold the government more accountable and responsive to environmental issues that affect public health and safety.

Although it is subject to debate, the definition of "serious environmental accident" in SAPA can reflect the idea of ecocide. At the same time, it should be harmonised with other environmental legislations, especially *the Framework Act on Environmental Policy*. Thus, it can be provisionally defined as:

> An accident that pollutes water, the atmosphere, biota, and ocean and poses significant risks and harms to ecosystems, flora and fauna

To determine whether such environmental pollution meets a threshold of "serious environmental accident", similar standards for other types of serious accidents can be applied. That means if at least one person dies from an environmental disaster due to business activities, it can be punished as a "serious environmental accident". Given that "serious civic accident" and "serious environmental accident" both aim to protect civilians, their scope may overlap. However, the difference between them is the former addresses accidents that are caused by a *defect* in the design of products or operations of facilities, the latter may bring criminal penalties to corporations for causing ecological disorganisation, regardless of the defect. In this case, the Samsung-Hebei Spirit Oil Spill incident can be framed as a "serious environmental accident", for its killing of marine ecosystems, animals and plants as well as (allegedly) causing diseases to humans. Additionally, considering that to some extent, Korean environmental law punishes pollution that does not involve human casualties, a "serious environmental accident" can include accidents that cause the death of flora and fauna, especially endangered species and the severe destruction of protected areas.

By 'greening' SAPA, not only corporations, but also the government shall bear more responsibilities for ecological sustainability. Like the law sets safety and health duties for business owners, adding "serious environmental accident" to the law can help enforce environmental values and thus, foster the idea of so-called environmental, social, and corporate governance (ESG). This is opposed to market-oriented mechanisms that emphasise voluntary compliance and acceptance of environmental regulations and values, while the governmental authority has faced challenges to establish a causal relationship between corporate activities and environmental pollution. Thus, advocates of a law of ecocide argue that the intent shall not be a threshold to prosecute perpetrators of ecocide. Given that SAPA adopts a similar approach to liability, ecocide can be punished by SAPA by defining specific forms of ecocide as "serious environmental accident". Recalling the typology of ecocide conceptualised in Table 2[4], a green version of SAPA can pursue stronger criminal justice against high-level perpetrators of Group III ecocide (as intentional pollution) and also some cases of Group IV ecocide (as negligent or accidental environmental destruction). These are the potential advantages of greening SAPA to prevent and punish serious environmental destruction.

However, in spite of the potential usefulness of the SAPA in dealing with severe environmental offences, some doubts can be casted on its validity. They may be particularly derived from the fact that the constitutionality of the SAPA has been continuously contested. On 13th October 2022, a law firm filed a request for a court to review of the constitutionality of the SAPA. The plaintiffs of the litigation claimed that definitions of 'the establishment and implementation of a safety and health management system' and 'business or place of business that the business owner, corporation, or institution actually controls, operates, and manages' provided in Article 4 (1) of the SAPA are so vague that the arbitrary application of the law should be prevented by the constitution. Although the constitutionality of the SAPA is beyond the scope of this paper, it should be noted that the application and interpretation of the SAPA through criminal procedures have been in compliance with other criminal law. For instance, not all owners of corporations which violated the law have been prosecuted, after criminal investigations by the government (Kim, 2022).

One may still question whether it is better and more appropriate to enforce the ACAPEO to protect the environment from serious damages. It is true that the legislation imposes strict punishment, such as minimum 3 years up to 15 years of imprisonment

[4] See page 5.

for water contamination. However, the law is not sensitive to mechanisms of environmental contamination by corporations. As previous discussions on crimes of the powerful suggest, white collars can take advantages of avoiding criminal sanctions as they may not be direct perpetrators of crime or their actions are not criminalised in proportionate to damages that those cause. In the ACAPEO, CEOs, high-level personnel, or owners of corporations may be held culpable for environmental offences, but the level of punishment is seriously low. For instance, the only way of punishing corporations by the ACAPEO is financial penalty (up to 100 million Korean won), which can be easily transferred to external costs of business management (Kim, 2018b). Thus, the environmental responsibility of corporations is significantly limited within the scope of the law. It appears that the SAPA, with stronger financial sanctions up to 500 million Korean won, may address this gap. Moreover, the SAPA emphasises duties for the senior management of corporations to protect the environment, as opposed to the ACAPEO. By doing so, the SAPA aims to prevent crimes committed by the powerful by making those who have the power to control corporations responsible for environmental duties. The latter may fall short of the authority to do the same.

## Remaining Issues

However, even if amending the SAPA to punish severe environmental accidents like ecocide, there are some remaining issues for the law to be an effective driver of environmental protection and criminal justice. Three issues are addressed here. First is about difficulties to establish a causal relationship between particular action and environmental damage. Often, environmental crime is characterised as 'victimless', because environmental damages may not be immediately visible and thus (potential) victims of environmental crime cannot take appropriate actions against them (Hamilton, 2021). However, owing to advanced technologies to investigate environmental crime, such as forensic inquiries, and growing voices of environmental campaigns, complexities of environmental offences are being (White, 2012; Ahmed, 2017). Studies have suggested that to pursue criminal justice against environmental crime, specialised, well-trained investigators and laws that can control corporate illegality and redress victims of environmental crime should be in place. Although it may be a long and complicated journey, it would be possible to establish the causality between severe accidents and serious environmental damage, which may fall into the scope of the amended SAPA. The aforementioned cases of serious environmental accidents, like the Samsung-Hebei

Spirit Oil Spill, teach us that criminal justice was not pursued against corporations not because the government failed to establish the causation of the accident. Rather, it was because no effective legislation was in place to hold the government and corporations accountable for environmental protection. Furthermore, victim-centred approach to environmental crime investigation may contribute to identifying mechanisms of victimisation by environmental damages and redressing victims' needs (Jarrell and Ozymy, 2012).

The main purpose of SAPA is to hold corporations accountable and liable for large-scale accidents. Therefore, it is unlikely that it can be applied to state-induced or military-induced ecocide. In other words, state activities that may cause serious ecological disorganisation, which fall into Group I and II of ecocide, will be exempt from environmental responsibility and liability and the status quo will remain. For example, although the Korean military is not engaged in an international war, its peacetime operations have (allegedly) caused serious environmental contamination over several decades. Environmental contamination by military activities in Korea mainly includes land and groundwater contamination, and air and chemical pollution. There are allegations of higher incidences of rare diseases in areas adjacent to military bases and training ranges. For instance, the Kooni firing range nearby a small village in Gyeonggi Province, called Maehayngri, was used by American jetfighters for munitions training for 60 years. Bombing caused chemical and thermal effects in the environment and heavy metals contaminated local ecosystems. Although the base was closed in 2005, local residents living nearby the training area are still suffering from diseases, mental illness, and the loss of the wetlands upon which their livelihoods depend (Kim, 2018a). Local residents have suffered from mental pain as well as financial loss. The military issue is complex when addressing environmental contamination caused by the US military deployed in Korea. According to a special agreement between South Korea and the US, American troops are granted legal immunity from Korean environmental law (Woo, 2006). In this case, new legislation should be introduced rather than amending SAPA to ensure state activities are covered. Similarly, governmental development projects, which may fall into Group II of ecocide, can also be immunised from SAPA. It is because governmental policies are accepted and justified for the common good, and criminal justice is usually not designed to punish state crime against nature (Moloney and Chambliss, 2014). Even if SAPA can be applied to the aforementioned cases, to what extent government officials should be held accountable and liable is a problematic issue.

The last issue is the applicability of SAPA to overseas activities by corporations based in Korea. According to Article 3 of the Criminal Act of Korea, Korean nationals shall be punished by domestic criminal law for their overseas criminal offences. SAPA does not have a specific clause that excludes the application of the nationality principle. In principle, therefore, if "serious environmental accident" is criminalised by SAPA, corporate crime against the environment beyond Korea would deem to be prosecutable by the Korean authorities. However, the Korean government concluded that SAPA should not be extended to overseas corporate crime committed by Korean nationals. According to the Ministry of Employment and Labor, which is the governmental department mainly responsible for industrial accidents, it is not feasible for the Korean authorities to investigate the violation of SAPA abroad beyond the Korean jurisdiction. If this is the case, amending SAPA to include "serious environmental accident" may not be effective in preventing environmentally destructive activities by Korean corporations overseas. For instance, the SK Engineering & Construction (SK E&C), a Korean construction company, built a 74-metres dam (the Senam Noi Dam) in Laos, which could store one billion tonnes of water. This dam collapsed in July 2018 after it failed to endure the heavy rainfall and adjacent villages were submerged. Not to mention the complete destruction of local ecosystems, the disaster caused at least 70 deaths and the displacement of thousands of affected villagers. It was claimed that this colossal disaster was attributed to SK E&C's re-designing of the architecture of the dam to reduce the costs of construction (Hwang and Park, 2021). However, the corporation avoided criminal charges in exchange for financial compensation and the reconstruction of the destroyed dam. The displaced communities, many of them farmers, are living in poverty and mental pain (Baird, 2021). The progress of environmental restoration is much slower, lowering the possibility of the return of affected communities to their past life. Even if SAPA was in place at the time of that crisis, it is unlikely that criminal justice could be pursued against high-level personnel in SK E&C for their misconduct or negligence of safety regulations. This exposes a structural loophole that domestic environmental criminal law encounters. Considering environmental contamination does not recognise man-made borders, however, and to strengthen corporate responsibility for sustainability, the Korean government should take proactive actions against environmentally destructive corporate crime. Even if SAPA cannot be extended to overseas corporate activities, some other criminal sanctions should be imposed.

# CONCLUSION

So far, environmental damage has been regarded as a trade-off for economic development. As political neoliberalism dominates the global policy agenda, the role of the state has been reduced to a guardian of the free market and environmental deregulation has followed. Consequences are costly—climate change is posing a great risk to the survival of the entire human civilisation. In a time of planetary crisis, it is time to reinforce the social control of the economy in line with sustainable development. The state should be a guardian of the planet, not a predatory economy. So far, environmental criminal law has been weak and ineffective in fulfilling its mission. Advocates of a law of ecocide argue that amending the Rome Statue of the ICC to punish corporations for their acts of widespread, long-term, and severe environmental destruction will provide a breakthrough out of the impasse.

South Korea has undergone rapid industrialisation, while marginalising environmental values in governmental policies and social morality. After several man-made environmental disasters, the public awareness of environmental sustainability increased. In particular, citizens' voices demand that owners of corporations are held accountable and responsible for public health and the environment. However, the government has still been lagging in protecting the environment. In parallel, SAPA was introduced to punish serious accidents that involve civilian casualties in workplaces or other spaces. It represented a watershed moment in the history of criminal justice, for its purpose was to impose health and safety protection duties on business owners and high-level personnel in public and private companies.

The analysis contained within this article demonstrates that existing environmental criminal law in Korea has developed in various ways but is being challenged by weak enforcement, especially in cases of serious environmental crime. As a viable alternative to this drawback, amending SAPA to punish ecocide as a "serious environmental accident" was suggested. This way may be seen as a revisionist and self-limited approach to a law of ecocide, given that it can only address some cases of severe environmental destruction. This might discourage advocates of the law of ecocide who may adopt a rather radical perspective on environmental criminal law. However, it appears to be the best viable option to reinforce environmental criminal law while avoiding problems in creating a law of ecocide. The Ultima Ration principle emphasises that criminal law should function as the last resort of the state authority. However, given

one of the roles that criminal law performs is the (re)construction of social norms, it is more than timely to consider 'greening' criminal justice to address large-scale environmental destruction.

The introduction of SAPA in 2021 sent the society a message that serious accidents caused by corporations will not be tolerated. Likewise, amending the law to address serious environmental accidents will signal that the state will treat ecocidal acts as serious criminal offences. Criminal justice during the planetary crisis ought to change. It is to draw a socially acceptable boundary of corporate activities that are compatible with environmental sustainability rather than sacrificing economic development per se. This is taking one more step towards sustainable development.

## References

Agnew, R. (2012). Dire forecast: A theoretical model of the impact of climate change on crime. *Theoretical Criminology*, *16*(1), 21–42.

Ahmed, N. (2017) Proof of ecocide: towards a forensic practice for the proposed international crime against the environment. *Archaeological and Environmental Forensic Science*, *1*(2), 139–147.

Anderson, I. (2022). One people, One Planet; in Peace. UNEP. https://www.unep.org/news-and-stories/speech/one-people-one-planet-peace

Baird, I. G. (2021). Catastrophic and slow violence: thinking about the impacts of the Xe Pian Xe Namnoy dam in southern Laos. *The Journal of Peasant Studies*, *48*(6), 1167–1186.

Belcher, O., Bigger, P., Neimark, B., & Kennelly, C. (2020). Hidden carbon costs of the "everywhere war": Logistics, geopolitical ecology, and the carbon boot-print of the US military. *Transactions of the Institute of British Geographers*, *45*(1), 65–80.

Brisman, A., & South, N. (2014). *Green cultural criminology: Constructions of Environmental Harm, Consumerism, and Resistance to Ecocide*. London: Routledge.

Cao, A. N. and Wyatt, T. (2016). The Conceptual Compatibility Between Green Criminology and Human Security: A Proposed Interdisciplinary Framework for Examinations into Green Victimisation, *Critical Criminology*, *24*, 413–430.

Chandy, N. R. (2021). Criminalising Ecocide: Peace-Time Ecocide and State Responsibility. *Journal on Contemporary Issues of Law*, *7*(9), 52–67.

Choi, J., Lim, S., Park, S., Roh, H., Jin, H., & Lee, C. (2022). The Serious Accidents Punishment Act of South Korea and Its Impact on the Shipping Industry: Toward Sustainability. *Sustainability*, *14*, 1–20.

Choi, Y. J., & Jeon, M. S. (2020). How business interests and government inaction led to the humidifier disinfectant disaster in South Korea: Implications for better risk governance. *Risk analysis*, *40*(2), 240–253.

CNN (2019). "*South Korea's plastic problem is a literal trash fire*". CNN. https://edition.cnn.com/2019/03/02/asia/south-korea-trash-ships-intl/index.html

Colacurci, M. (2021). The Draft Convention Ecocide and the Role for Corporate Remediation. Some Insights from the International Monsanto Tribunal and a Recent Research Proposal. *International Criminal Law Review*, *21*(1), 154–180.

Cusato, E. T. (2017). Beyond Symbolism: Problems and Prospects with Prosecuting Environmental Destruction before the ICC. *Journal of International Criminal Justice*, *15*(3), 491–507.

Dixon, A. C., Farrell, G., & Tilley, N. (2022). Illegal waste fly-tipping in the Covid-19 pandemic: enhanced compliance, temporal displacement, and urban–rural variation. *Crime Science*, *11*(1), 1–11.

Eder, N. (2016). *Poisoned Prosperity: Development, Modernization, and the Environment in South Korea*. London: Routledge.

Europol (2022). *Environmental Crime in the age of climate change: Threat assessment 2022*. The Hague: Europol.

Faure, M. G. (2017). A Paradigm Shift in Environmental Criminal Law. In R. Sollund, C. H. Stefes & A. R. Germani (Eds.), *Fighting Environmental Crime in Europe and Beyond: The Role of the EU and Its Member States*. London: Palgrave Macmillan, 17–43.

Gills, B., & Morgan, J. (2020). Global climate emergency: After COP24, climate science, urgency, and the threat to humanity. *Globalizations*, *17*(6), 885–902.

Hamilton, M. (2021) *Environmental Crime and Restorative Justice: Justice as Meaningful Involvement*. Cham, Switzerland: Springer Nature Switzerland.

Higgins, P. (2010). *Eradicating Ecocide: Exposing the Corporate and Political Practices Destroying the Planet and Proposing the Laws Needed to Eradicate Ecocide*, London: Shepheard-Walwyn Publishers.

Hoffman, J. (2000). Sustainable economic development: A criminal justice challenge for the 21st century. *Crime, Law and Social Change*, *34*, 275–299.

Hwang, J. (2022). *The Road Not Taken: 'Triple Transformation' towards Sustainable Peace in Northern Ireland*. Doctoral Thesis Submitted to the School of History, Anthropology, Philosophy and Politics, Queen's University Belfast.

Hwang, P., & Park Y. (2021). When the Complexity of the Large-Scale Development Project Becomes a Roadblock to Access to Justice. *Business Human Rights Journal*, *6*(3), 592–598.

Institute of Justice. (2022). *Crime White Paper 2021*. Jincheon, South Korea: Institute of Justice. 2021.

International Criminal Court (2020). *Understanding the International Criminal Court*. The Hague: International Criminal Court.

Chung, J., & Kirkby, R. J. (2001). *The Political Economy of Development and Environment in Korea*. London: Routledge.

Jarrell, M. L. and Ozymy, J. (2012) Real crime, real victims: environmental crime victims and the Crime Victims' Rights Act (CVRA). *Crime, Law and Social Change*, *58*, pp. 373–389.

Jarrell, M. L., & Ozymy, J. (2021). Deepwater Horizon, Environmental Justice, and the Prosecution of Federal Environmental Crimes in the US Gulf Coast. *Environmental Justice*, *14*(3), 216–224.

Kim, C. J. (2018a). Bases that leave: Consequences of US base closures and realignments in South Korea. *Journal of Contemporary Asia*, *48*(2), 339–357.

Kim, J. (2018b) Problems and Direction for Revision on Penal Regulations in the Environmental Crime Control Act. *Ilkam Law Review*, *40*, 73–95.

Kim, S. (2022) Review of criminal issues with respect to the application of Act on Punishment of Serious Accidents. *Law Journal*, *77*, 155–183.

Ku, D. (1996). The Structural Change of the Korean Environmental Movement. *Korea Journal of Population and Development*, *25*(1), 155–180.

Le, K., & Nguyen, M. (2020). Aerial bombardment and educational attainment." *International Review of Applied Economics*, *34*(3), 361–383.

Lee, B. (2016). Employment relations in South Korea. In G. J. Bamber, R. D. Lansbury, N. Wailes & C. F. Wright (Eds.), *International and Comparative Employment Relations*. 6th edition. London: Routledge, 266–290.

Lee, J., & Kim, D. (2021). Analysis of the Discriminatory Perceptions of Victims on Damage from Environmental Pollution: A Case Study of the Hebei Spirit Oil Spill in South Korea. *Land*, *10*, 1–12.

Lynch, M. J. (2020). Green criminology and environmental crime: Criminology that matters in the age of global ecological collapse. *Journal of White Collar and Corporate Crime*, *1*(1), 50–61.

Lynch, M. J., Long, M. A., Barret, K. L., & Stretesky, P. B. (2013). Is It a Crime to Produce Ecological Disorganization? *British Journal of Criminology*, *53*, 997–1016.

Moloney, C. J., & Chambliss, W. (2014). Slaughtering the Bison, Controlling Native Americans: A State Crime and Green Criminology Synthesis. *Critical Criminology*, *22*, 319–338.

Monsanto International Tribunal (2017). *Advisory Opinion.* The Hague: Monsanto International Tribunal.

National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (2011). *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling. Report to the President*. National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling.

Pettigrew, H. W. (1971). A Constitutional Right of Freedom from Ecocide. *Environmental Law*, *2*(1), 1–41.

Roberts, A. (1996). Environmental issues in international armed conflict: The experience of the 1991 Gulf War. *International Law Studies*, *69*(1), 538–553.

Robinson, D. (2022). Ecocide — Puzzles and Possibilities. *Journal of International Criminal Justice*, *20*(2), 313–347.

Rose, G. (2022). Environmental Terrorism: A New Prohibited Crime under International Law? *Environmental Policy and Law*, in-press, 1–10.

Ruggiero, V. (2013). *The Crimes of the Economy: A Criminological Analysis of Economic Thought*. London: Routledge.

Ruggiero, V., & South, N. (2010). Green Criminology and Dirty Collar Crime. *Critical Criminology*, *18*, 251–262.

Stop Ecocide Foundation. (2021). *Independent Expert Panel for the Legal Definition of Ecocide*. Amsterdam: Stop Ecocide Foundation.

UN Human Rights Council (2016). *Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes on its mission to the Republic of Korea*. New York: United Nations.

Walters, R. (2013). Eco mafia and environmental crime. In K. Carrington, M. Ball, E. O'Brien & J. M. Tauri (Eds.), *Crime, Justice and Social Democracy*, London: Palgrave Macmillan, 281–294.

Weir, D., & Pantazopoulos, S. (2020). *Feasibility study: An implementation vehicle for the International Law Commission's draft principles on the Protection of the environment in relation to armed conflicts*. Hebden Bridge, England: Conflict and Environment Observatory.

Westing, A. H. (1985). Environmental Warfare. *Environmental Law*, *15*(4), 645–666.

White, R. (2010). Prosecution and sentencing in relation to environmental crime: Recent socio-legal developments. *Crime, Law and Social Change*, *53*(4), 365–381.

White, R. (2012) Environmental forensic studies and toxic towns. *Current Issues in Criminal Justice*, *24*(1), 105–119.

White, R., & Kramer, R. C. (2015). Critical criminology and the struggle against climate change ecocide. *Critical Criminology*, *23*(4), 383–399.

Woo, Y. (2006). Environmental Problems on the U.S. Military Bases in the Republic of Korea: Who Is Responsible for the Cleanup Expenses and Whose

Environmental Standards Will Apply? *Southeastern Environmental Law Journal*, *15*(2), 577–612.

Zierler, D. (2011). *The invention of ecocide: Agent Orange, Vietnam, and the scientists who changed the way we think about the environment*. Athens, GA: University of Georgia Press.

# Perceptions of the Korean Jury System: Current Status and Challenges

*Jaekyung Ahn*
*PhD Candidate*
*Department of Criminology,*
*Korean National Police University, South Korea*

*Yimoon Choi**
*Associate Professor*
*Department of Criminology,*
*Korean National Police University, South Korea*

## Abstract

Jury trials was introduced and enforced in South Korea as of 2008 in order to increasing democratic legitimacy and trust in the judiciary, yet it is facing challenges, specifically low implementation rates and high exclusion rates. Potential reasons for these issues are limitations inherent in the system, low awareness among the public, and the tendency of law professionals to avoid jury trials. This study examined the perceptions of legal professionals, the general public, and jurors using a survey. Results showed that legal professionals do not prefer jury trials and think that jury trials do not fit the current Korean judicial system while the majority of citizens are in favor of the jury system. Based on the survey results, we emphasize the necessity of active efforts for a legislative resolution on the final form of jury trials and its implementation in the court system.

Keywords:
jury trial, Korean jury trial, Citizen's participation in criminal trials, jury, criminal trials

* Direct correspondence Professor Choi; yimoon@police.ac.kr
* http://dx.doi.org/10.36889/IJCJ.2022.006
* Received 23 September 2022; Revised 21 November 2022; Accepted 5 December 2022
INTERNATIONAL JOURNAL OF CRIMINAL JUSTICE, Vol. 4 Issue 2, December 2022, 58-86

# INTRODUCTION

Traditionally, the Korean judicial system has adopted a continental criminal justice system based on the decision-making of judges. All questions of law and fact were decided by judges in South Korea until February 2008, when the country took the bold step of introducing jurors into the judicial system (Valerie, 2014). Prior to the introduction of juries, there was controversy over whether judges were making their decisions independently and fairly, as well as whether justice was being done. In the midst of this, jury trials were introduced as part of judicial reform. The jury trial (also being referred to as "Citizen's participation in criminal trials" in the statutes in Korean) was introduced with the aim of attaining national and participatory democracy and securing the democratic legitimacy of justice. These goals drew keen attention from the public, domestic academia, professionals in the field, and foreign scholars (Park et al., 2019).

The introduction of the jury trial in Korea is perceived as having tremendous achievement in terms of increasing democratic legitimacy and trust in the judiciary (Jeong, 2020). Although empirical data have indicated that Korean citizens are competent to make valid legal decisions, the jury's verdict remains advisory. From 2015 to 2020, the judge's decision and the jury verdict were consistent in 90% of cases conducted through jury trials.[1] These judge-jury agreement rates are higher than those of found in the United States, given that a replication of the Chicago Jury project (Kalven & Zeisel, 1966) by Eisenberg et al (2005) revealed that the rates of agreement between judges' and juries' decision were over 70 percent. The fact that the judge, using his professional expertise, and the jury, using their general knowledge, came to the same conclusion, is evidence that the public is indeed able to reach an expert-level conclusion. Substantial agreement between judges and juries is a promising signal, as such factors implies that the jury's decision on the case are made as close as possible to and capable of supporting either conviction or acquittal (Eisenberg et al., 2005).

Nevertheless, as of 2021, judge exclude 30 percent of jury trial cases for exclusion reasons, 4 cases per 10 cases were withdrawn (Park et al., 2019). Some do not hesitate to make the criticism that the Korean jury system is a staged, token jury system, as it

[1] According to the Supreme Court's state audit data in South Korea, the concordance rate between judges and juries was 95.6% in 2015, 92.5% in 2016, and 93.9 in 2017, 97.2% in 2018, 97.1% in 2019. A member of the Democratic Party received the data from the Supreme Court and disclosed it to the media, available at http://www.dynews.co.kr/news/articleView.html?idxno=601746 (last visited Nov, 17, 2022).

incorporated elements of the U.S jury system and the German lay assessor system. One of the main reasons that the Korean jury system is criticized is that the jury's verdict is advisory rather than mandatory (Kwon, 2017). Although there has yet to be any decision as to whether jury recommendations will ever be mandatory, it seems highly unlikely that the ability of judges to disregard jury recommendations could be successfully eliminated through a constitutional argument (Park, 2010).The Korean constitution specifies that a judgment must be made by a judge, so the use of lay citizens to arrive at a verdict might violate the constitution, as well as the rights of criminal defendants.[2] On the other hand, some insist that since it is stipulated that "the qualifications of judges are determined by the law," it is difficult to find an inevitable reason to limit judges to professional judges. In this point of view, jurors are "national authority that exercises judicial power" which also included in the composition of the court (Son, 2021).

Jury trials have now been held in Korea for 18 years. It is time for an interim evaluation of the current status of the Korean jury trial system, the perceptions of legal professionals, the general public, and jurors, and the limitations of the system. There should be a determination on whether to maintain the jury trial system or to improve the current law and practice. To accomplish these goals, this study used available statistical data to determine the impact of the use of the jury trial in Korea and how the system has performed. If the jury system is inappropriate under the current Korean legal system, that is not associated with greater confidence and trust in the criminal justice system in general, it is necessary to seriously consider whether it is desirable to maintain the system as it is. This study starts from the necessity of systemic inspection of the jury trials and tries to examine the implementation process as a whole. Based on this, the authors suggest specific suggestions that urge specific actions to be taken with regard to policy, practice, and subsequent research.

[2] The Korean constitution specifically says that everyone must be tried by a judge. See: Constitution of the Republic of Korea. Article 27 (1) All citizens shall have the right to be tried in conformity with the Act by judges qualified under the Constitution and the Act.

# KOREAN CITIZEN'S PARTICIPATION IN CRIMINAL TRIALS

## History of jury trials in Korea

South Korea's criminal justice system has undergone rapid changes, from its time as a war-torn colony (Korea was a colony of Japan from 1910 to 1945), to authoritarian rule in the 1970s and early 1980s, to a peaceful, vibrant democracy (Kim, 2019). Korean law was greatly influenced by Japanese law, because the individuals who had acted as members of the judiciary under Japanese colonial rule also constituted the judiciary immediately after the establishment of the Korean government (Lee, 2012). It is undeniable that important changes of legal system and power attribution came with colonial changes of judiciary administration (Lee, 2007). For instance, when the country is annexed to Japan on August 29, 1910, the three-tier, three-instance system was introduced on March 18, 1912. This system remained intact even after the independence of the judiciary was assured by the Constitution of the Republic of Korea promulgated on July 17, 1948 (Supreme Court of Korea, n.d.-b). Also, except in some areas of public law, including administrative law, the Civil Code of the Republic of Korea enacted in 1960 and the Criminal Act enacted in 1958 mostly adopted the principles of Japanese law. At the same time, Korean legal system was also greatly influenced by the common law system as well, which has its basis in the English adversarial system. In particular, in the case of the constitution, the influence of the US military government after liberation, but also the influence of Syngman Rhee, the first president who studied in the United States, a country with British and American law, was greatly influenced. During the U.S. military regime from the liberation in 1945 to 1948, the U.S. law applied to South Korea has been accepted by the Korean legal system mainly in the commercial law and international legislation after the 1960s and 1970s after the Korean War. After the collapse of the Cold War composition in the 90s, with the expansion of US political, economic, social and cultural forces, US legislation began to have an overall impact on our legal system, the extent and strength of its influence also increased (Lee, 2022).

The Republic of Korea adopted the continental inquisitorial system from Japan, which Japan had modeled from Germany (Kwon, 1996). This system relies on a neutral inquiry conducted and controlled by judicial officials, with the ultimate fact-finder in the dispute resolution process being the inquisitorial judge. Judges play a central role in

the collection and evaluation of evidence before the trial begins and determine the weight to be assigned to the evidence based on its reliability and credibility (Ainsworth, 2017). This active role in the inquisitorial system grants the judge more power than in the common law system (Dammer & Albanes, 2014).

Because of incidents of judicial corruption, for example, giving suspended sentences or presidential pardons to corporate leaders, political interference, and bribery (Kwon, 2017), the Korean judiciary formed the Judicial System Development Committee on the 100th anniversary of the Modern History Act in 1993. This committee began to work on judicial reform to combat the widespread public perception of judicial corruption, unfairness, and lack of independence, as well as to provide more transparency. The formation of this committee was continued in the discussions of the Judiciary Reform Promotion Committee, a presidential advisory body formed at the time of the Kim Dae-Jung government (1998-2003). At that time, the committee began discussions on promoting reforms of the judicial system in general, with "a plan for the people to directly participate in trials" as one of the judicial reform issues. It was argued that the competency of Korean citizens had grown enough to entrust part of the trial to them and, in order to ensure the participation of the people in the judiciary, a jury trial system should be introduced. On January 2, 2003, the Supreme Court established a Judicial Reform Committee under its jurisdiction to establish the general direction of the agenda on judicial reform, including citizen participation in the judicial system (Supreme Court of Korea, n.d.-a). Accordingly, the Judicial Reform Committee held 13 plenary meetings on the theme of introducing citizen participation and adopted a proposal in late 2004 (National Judicial Participation Committee, 2013). The proposal suggested that instead of deciding on a single basic model, a first stage of citizen participation in criminal trials should be developed and implemented, and based on the results, the final format should be settled by 2012 at the latest (Judicial Development Committee Expert Member Study Group 1, 2018).

Meanwhile, it was also suggested that it was necessary to establish an organization under the president to systematically promote the proposals of the Judicial Reform Commission. Therefore, the Judicial Reform Committee established a planning and promotion team that studied the jury trial and collected opinions from outside experts and the public (Judicial System Reform Promotion Committee, 2006). Based on this, a bill comprised of 60 sections was written and submitted to Congress, and the "Act on Citizen Participation in Criminal Trials" was enacted on June 1, 2007, with the effective date set for January 1, 2008 (National Judicial Participation Committee, 2013). On

February 12, 2008, finally, the Daegu District Court held the historic first jury trial.[3] The defendant was indicted on charges of robbery and injury, and admitted to robbing an older woman, saying that he did so because he and his younger sister needed money to pay debt collectors who were threatening them. The prosecution urged the jury to apply the law regardless of his predicament, while the defense argued for leniency. In the end, the jury voted unanimously and found the defendant guilty, sentencing him to 30 months of probation. The judge accepted the jury's recommendation.

Despite a great deal of effort by many parties, a permanent constitutional amendment on the inclusion of jury trials in the Korean judicial system has not yet been made (Park et al., 2019). The Supreme Court established the Korean Jury Trial Committee on July 12, 2012, and after about six months, on January 18, 2013, the Ministry of Justice submitted the revised amendment stipulated final format of jury trial to the Committee; ① If unanimity is not reached, the current simple majority jury verdict will be eliminated and the jury verdict will be changed to a majority of 3/4 or more. ② If it is not in violation of the Constitution or laws, etc., in principle, the verdict of the jury will be respected. ③ Jury trials are held at the request of public prosecutors or public prosecutors even if the accused does not file an application.

Nevertheless, the Ministry of Justice independently revised and submitted an amendment to the Korean Jury Trial Committee on June 12, 2014, and the revised measures proposed to reduce or curtail citizen participation in criminal trials; The revised or added contents are ① exclusion from the subject matter of the controversial public office election law violation case, ② granting of the right to apply for exclusion decision by prosecutors, ③ expanding the grounds for rejecting the jury verdict, ④ deletion of citizen participation trial implementation method by court's ex officio rights (Lee, 2015). The government and the Korean Jury Trial Committee failed to reconcile the two proposals, and the 19th National Assembly ended its term of office. In the 20th National Assembly (May 2016~ May 2020), the court and the Ministry of Justice did not submit amendments, and therefore the final format of citizen participation in criminal trials remains undecided.

---

[3] Decision of 12 February 2008 (2008Gohap7) (Daegu District Court.)

## Current status of the jury trial system

According to the Court Administration's analysis, which examined trial records for the 13 years from 2008 to 2020, a total of 7,861 cases have been filed, based on the number of defendants (Table 1, National Court Administration, 2020). There are five types of crimes that can be prosecuted in jury trials: murder, robbery, injury, sexual misconduct, and others. The first four are all considered major crimes.[4] In 2008, the first year of jury trials, the ratio of the number of major crimes were 79.2%. However, it significantly decreased from to 35.9% in 2018. As of 2018, the rates for crimes prosecuted using jury trials were as follows: 20% for murder, 14% for robbery, 4% for injury, 14% for sexual offenses, and 46% for other crimes.

In the second half of 2012, the number of cases eligible for a jury trial increased, because the Act further extended to include certain less serious criminal cases over which a single judge usually presides (Kwak, 2018). Nevertheless, only 3.9% (6,996 cases) of total 181,472 jury trial eligible cases were requested as jury trials, indicating that jury trials were given little consideration. In 2020, the number of applications for jury trials was 865, while the number implemented was only 96 cases. Thus, the implementation rate, excluding the number of unresolved cases, was only 11.1% (=96 cases/865 cases). This is the lowest rate since the jury trial was introduced in South Korea in 2008. A similar trend can be seen in the United States, where even though the right to trial by an impartial jury is provided in the Constitution, the rate of jury trials is only 2% in 2019. As of September 2019, only 1661 (2.08%) of the 79,704 defendants were tried by jury (United States Courts, 2018). A recent study by Salerno (2020) explored the factors behind the disappearing jury trials. The survey revealed that the time and expense of jury trials, as well as pressure received from their lawyers, judges, and mediators were the obstacles in exercising the right to a jury trial. Although there may have been an impact from the COVID-19 pandemic in the past few years, the number of jury trials has been on the decline since 2014.

[4] Limited to first criminal trials following Constitutional court decision of *2008Heonba 12* of 26 November 2009 [2009]

Table 1. Jury trial rate of use

| year | application | Rate of use | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | total | | Jury Trial | | exclusion | | withdrawal | |
| | case | case | percent | case | percent | case | percent | case | percent |
| 2008 | 233 | 215 | 100.00% | 64 | 0.30 | 61 | 0.28 | 90 | 0.42 |
| 2009 | 336 | 308 | 100.00% | 95 | 0.31 | 75 | 0.24 | 138 | 0.45 |
| 2010 | 438 | 414 | 100.00% | 162 | 0.39 | 75 | 0.18 | 177 | 0.43 |
| 2011 | 489 | 494 | 100.00% | 253 | 0.51 | 63 | 0.13 | 178 | 0.36 |
| 2012 | 756 | 676 | 100.00% | 274 | 0.41 | 124 | 0.18 | 278 | 0.41 |
| 2013 | 764 | 797 | 100.00% | 345 | 0.43 | 118 | 0.15 | 334 | 0.42 |
| 2014 | 608 | 611 | 100.00% | 271 | 0.44 | 107 | 0.18 | 233 | 0.38 |
| 2015 | 505 | 526 | 100.00% | 203 | 0.39 | 106 | 0.20 | 217 | 0.41 |
| 2016 | 860 | 784 | 100.00% | 305 | 0.39 | 151 | 0.19 | 328 | 0.42 |
| 2017 | 712 | 794 | 100.00% | 295 | 0.37 | 195 | 0.25 | 304 | 0.38 |
| 2018 | 665 | 624 | 100.00% | 180 | 0.29 | 183 | 0.29 | 261 | 0.42 |
| 2019 | 630 | 625 | 100.00% | 175 | 0.28 | 187 | 0.30 | 263 | 0.42 |
| 2020 | 865 | 775 | 100.00% | 96 | 0.12 | 293 | 0.38 | 386 | 0.50 |
| total | 7,861 | 7,643 | 100.00% | 2,718 | 0.36 | 1738 | 0.23 | 3187 | 0.42 |

Ratio (%): Processing count by reason/Total number of targets* 100
Source: National Court Administration. (2020). Analysis of the results of Citizen's participation in Criminal Trial from 2008 to 2020. SUPREME COURT OF KOREA.

It should be noted that there are many instances in which the court does not accept a request for a jury trial, even if the defendant applied for one. Under the current law, a case might be excluded from being given a jury trial for various reasons, including: when there are concerns about a possible threat against jurors, when a victim in a sexual assault case prefers to have a judge rather than a jury trial, when one or more of a defendant's accomplices object, and not appropriate to have the case tried by a jury.[5] The high exclusion rate (i.e., the number of cases excluded divided by the number of cases for application) also shows that judges are reluctant to allow jury trials. The exclusion rate started at 28.4% (61 excluded cases) in 2008, but was relatively low at 12.8% (63 cases) in 2011, and 17.5% (107 cases) in 2014. Then the rate started to grow

[5] Statutes of the Republic of Korea. Act On Citizen Participation in Criminal Trials. Article 9 (Decision to Exclude) [2007]

to 24.6% (195 cases) in 2017 and soared to 37.8% (293 cases) in 2020 (Figure 1, see also PARK, SEO, & CHOI, 2019).

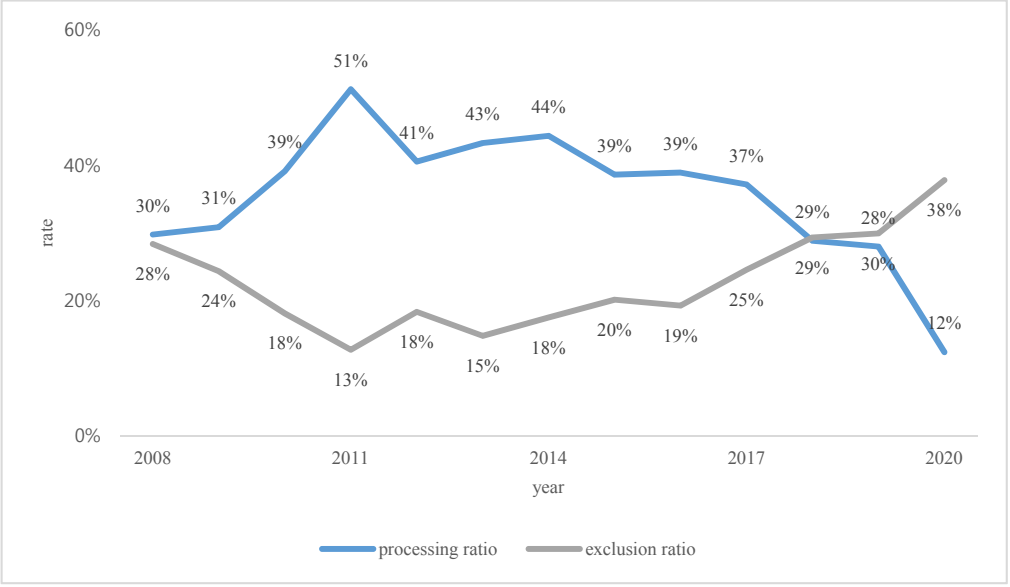



Figure 1. processing and exclusion ratio of jury trial

It is difficult to say that the jury trial is actively carried out in the judicial system in Korea due to its low implementation rate and high exclusion rate. The potential reasons for the decline since the jury trial started can be divided into 1) system limitations, 2) low awareness, and 3) law professionals' preference for conventional trials.

First, the limitations of the system are inherent in the Korean constitution and relevant statutes. The 6th Amendment to the U.S. Constitution provides for the right to a jury trial in criminal cases. On the other hand, in the case of participatory trials in Korea, it is recognized as a privilege rather than a right of the accused. Also, the South Korean constitution stipulates that a criminal defendant has the right to be judged by a judge, and therefore the right to a jury trial is not explicitly guaranteed. This leads to the issue of the legally binding force of a jury's decision, which will be discussed later.

Another potential source of the declining number of jury trials is low awareness among the general public. In a 2011 survey, the percentage of the population who said they "know" what the jury trial system was only 47.1%, less than half (Choi, 2011). According to a 2019 survey, 51.8% of the population answered that they know what the

jury trial is, only a minor increase after an additional decade of jury trials (Park et al., 2019).

Lastly, legal professionals prefer conventional trials to jury trials. Although there are several clauses in the law that stipulate the exclusion criteria for jury trials, an increasing number of exclusion decisions lack an articulable reason. The law stipulates the exclusion criteria for jury trials in Article 9, Clause 1, of the "Act on Citizen Participation in Criminal Trials" as follows: If a juror, an alternate juror, or a prospective juror has difficulties in attending a trial or is unlikely to be able to duly perform his/her duties under this Act because of a violation or likely violation of the life, body, or property of the juror, alternate juror, prospective juror, or any of his/her family members (No. 1); if some of the accomplices do not want a participatory trial and it is considered difficult to proceed to a participatory trial (No. 2); if a victim of any offence prescribed in Article 2 of the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes is committed, or his/her legal representative does not want a participatory trial(No. 3), and if it is considered inappropriate to proceed to a participatory trial due to any other cause or event (No. 4).[6]

In 2019, the Korean Court Administration published a report analyzing the reasons given for exclusion decisions each year. According to the report, the reason given for the largest percentage of exclusion decisions was No. 4, "any other cause or event" (74.1 %), followed by 19.4% for No. 3, and 6.4% for No. 2. Only 0.2% of the exclusion decisions were due to safety threats to jurors or concerns over the adequate performance of duties.

Table 2. Article 9, Clause 1 Cases (Exclusion Reason) Status by Year

| Year | when the juror has difficulties | | when the accomplices do not want | | when a victim of sexual offence does not wish jury trial | | when the case is inappropriate to proceed jury trial | | Total |
|---|---|---|---|---|---|---|---|---|---|
| | case | percent | case | percent | case | percent | case | percent | |
| 2008 | | 0.0% | 10 | 16.4% | | 0.0% | 51 | 83.6% | 61 |
| 2009 | | 0.0% | 20 | 26.7% | | 0.0% | 55 | 73.3% | 75 |
| 2010 | | 0.0% | 8 | 10.7% | | 0.0% | 67 | 89.3% | 75 |
| 2011 | 1 | 1.6% | 3 | 4.8% | | 0.0% | 59 | 93.7% | 63 |
| 2012 | | 0.0% | 2 | 1.6% | 27 | 21.8% | 95 | 76.6% | 124 |

[6] Act on citizen participation in criminal trials, Act No. 14839 [2017]

| Year | when the juror has difficulties | | when the accomplices do not want | | when a victim of sexual offence does not wish jury trial | | when the case is inappropriate to proceed jury trial | | Total |
|---|---|---|---|---|---|---|---|---|---|
| | case | percent | case | percent | case | percent | case | percent | |
| 2013 | | 0.0% | 7 | 5.9% | 37 | 31.4% | 74 | 62.7% | 118 |
| 2014 | | 0.0% | 10 | 9.3% | 37 | 34.6% | 60 | 56.1% | 107 |
| 2015 | | 0.0% | 9 | 8.5% | 39 | 36.8% | 58 | 54.7% | 106 |
| 2016 | | 0.0% | 4 | 2.6% | 31 | 20.5% | 116 | 76.8% | 151 |
| 2017 | | 0.0% | 6 | 3.1% | 45 | 23.1% | 144 | 73.8% | 195 |
| 2018 | 1 | 0.5% | 1 | 0.5% | 28 | 15.3% | 153 | 83.6% | 183 |
| Total | 2 | 0.2% | 80 | 6.4% | 244 | 19.4% | 932 | 74.1% | 1,258 |

Source: Korea Court Administration, Performance Analysis 2019

As mentioned above, No. 4, “any other cause or event,” accounts for most of the exclusion decisions, and this was criticized for being an overly broad and unclear standard, and for resulting in arbitrary exclusions from jury trials (Kim & Sook, 2009). These criticisms led to the Supreme Court made the revision of the “Rules for the reception and handling of Citizens’ Participation in Criminal Trials” on April 7, 2010 (Park et al., 2019). The revised Supreme Court regulations added details to the No. 4 category, specifically the following: if additional prosecutions involving the same case are expected, there is concern about the mental ability of the defendant, or if proceeding to a jury trial might infringe on the defendant's right to a prompt trial (Article 6, Clause 4). These changes at first seemed to have worked, as exclusions under No. 4 declined sharply in 2011. However, this did not last long. The number of cases excluded from jury trials recently increased greatly to 151 in 2016, 195 in 2017, and 183 in 2018. The courts apparently prefer conventional trials over jury trials, based on their use of the broad, abstract exclusion criterion No. 4, which allows them reject an application for a jury trial without a specific reason. Legal experts argue that an exclusion decision based on concerns over delay is an arbitrary judgment of the court, which prevents citizen participation in the judicial process (Sim, 2019).

## Disappearing jury trial: potential reasons

In order to encourage the use of jury trials, it is urgent to improve the jury system and awareness of juries among legal professionals. The more trust they have in jury trials and jurors, the more jury trials will be utilized. However, some Korean law professionals have voiced their doubts about the capacity of lay citizens to decide criminal cases in accordance with the facts and the law (National Judicial Participation Committee, 2013). The main argument is that, unlike the United States, which has a common law system, South Korea has a statutory law system, and so is fundamentally limited in its ability to implement jury trials.

The figures show that legal professionals have been dissatisfied with the verdicts reached in jury trials. According to the research report "2008-2019 Citizen Participation in Criminal Trials," the appeal rate by prosecutors in cases tried by juries was 80.3%, compared with 63.5% in ordinary cases (Ministry of Justice Korea, 2020). Interestingly, the likelihood of a jury's decision being overturned by the appeals court is lower than the likelihood of a judge's decision from a traditional trial being overturned. Only 29.2% (438 cases) of the 1,495 jury trial decisions that were appealed were reversed and remanded. This is 10%p lower than the 41.0% of ordinary criminal trial decisions that were overturned on appeal during the same period. In addition, 25% (374 cases) of the jury trial decisions were reversed and remanded on appeal, and only 17.7 % (264 cases) had the sentence length reduced from what was applied in the trial court. The high appeal rate by prosecutors may be one of the reasons for the debate over the credibility of participatory trials. However, the fact that the reversal rate for jury trial decisions in the Court of Appeals is lower than for conventional trials suggests that the outcomes of participatory trials are in fact reliable.

Sim (2019) has been reported that one segment of legal professionals, defense attorneys, are also reluctant to apply for jury trials. According to a survey conducted by the "Judicial Development Committee," only 7.7% of defendants were advised to apply for a jury trial by their lawyers (National Judicial Participation Committee, 2013). Among defendants who applied for a jury trial, only approximately 25% indicated that an application was made at the recommendation of their defense attorneys.

One of the major concerns that legal professionals have about jury trials is the legal understanding and judgment of the jurors, specifically that jurors would not fully understand the evidence in complex cases, and even if they did, they would not apply the law properly. Contrary to these concerns, it was found that jurors do have a good

grasp of legal concepts, according to Kim et al. (2013). In this study, the researchers examined jury trials conducted during the first three years after the introduction of the jury system in South Korea. They analyzed 323 trials and found that only 0.09% (28 cases) showed judge-jury disagreement, and the complexity of the case did not significantly affect judge-jury agreement. It was also found that jurors were able to understand the evidence and properly serve as fact-finder's when compared with judges.

The jury trial was introduced with the ambitious purpose of enhancing public trust in the judiciary and the democratic legitimacy of trials (Hong, 2014). If legal professionals are not interested in the jury trial, it is unlikely that the system will be able to be revitalized. In order to increase the use of the jury trial and to achieve the goals of implementing this system, it is necessary to analyze how the relevant legal professionals perceive jury trials and what attitudes they have towards them.

The present study attempts to compare the perceptions of legal professionals, jurors, and the general public regarding jury trials. Furthermore, the author discusses how different groups of individuals evaluate jury trials, as well as how much they trust them.

# EMPIRICAL RESEARCH ON PERCEPTIONS OF THE JURY TRIAL

## Materials

The data used in this study are from a research report titled "Koreans' Views on Crime and Justice (XIII) – 10 years of implementation of civil participation in criminal trials, and related policy plan," published by the Korean Institute of Criminology in 2019 (Park et al., 2019). This research investigated the perceptions of the general public, jurors, and legal professionals regarding jury trials. The data collection was conducted in 2019 to commemorate the 11th anniversary of the Korean jury trial. The research data was made publicly available in 2021, and current manuscript re-analyzed based on the published data.

### Judges

For the research report, the researchers observed jury trials and then distributed questionnaires to the judges. After the final verdict of the trial was made, the researchers

collected the questionnaires or requested that they be returned by mail if it was not possible to retrieve them at the site. A total of 19 trials were observed and investigated from May 20, 2019, to July 24, 2019. The first trial observed was at the Daejeon District Court and the last was at the Incheon District Court. In total, 38 questionnaires were collected. Three questionnaires from the Daegu District Court on June 4 were excluded, because the questions and answer options were distinctly different from the final questionnaire. Additional data collection was conducted with questionnaires that were distributed to courts across the country by mail. A total of 23 such postal surveys were conducted. Thus, a total of 61 questionnaires from judges were included in the final analysis.

Prosecutors and defense attorneys

Prosecutors and defense attorneys refused to take surveys after the jury trials. Therefore, questionnaires were sent by mail to the prosecutors in charge of public participation trials in each district prosecutor's office and to the prosecutors who participated in jury trials. The survey period was June 14 to July 18, 2019, and a total of 52 questionnaires were collected. The survey for defense attorneys was conducted from June 21 to August 14, 2019, and a total of 3,892 public defenders and 232 private defense attorneys were surveyed through the Judicial Support Office of the Supreme Court Administration Office. Although it appears that many private defense attorneys responded to the survey, this was not actually the case. Rather, attorneys who were registered as public defenders but who had no experience defending cases before a jury were marked as private attorneys when answering the questionnaire.

Table 3. Demographic information of legal experts in the survey

| Types | | judge | prosecutor | attorney | total |
|---|---|---|---|---|---|
| Gender | male | 44(72.1) | 27(51.9) | 139(57.7) | 210(59.3) |
| | female | 8(13.1) | 24(46.2) | 102(42.3) | 134(37.9) |
| | non-response | 9(14.8) | 1(1.9) | - | 10(2.8) |
| Age | 20s | - | - | - | - |
| | 30s | 21(34.4) | 38(73.1) | 112(46.5) | 171(48.3) |
| | 40s | 21(34.4) | 13(25.0) | 94(39.0) | 128(36.2) |
| | 50s | 6(9.8) | - | 32(13.3) | 38(10.7) |
| | over 60s | - | - | 3(1.2) | 3(0.8) |
| | non-response | 13(21.0) | 1(1.9) | - | 14(4.0) |

| Types | | judge | prosecutor | attorney | total |
|---|---|---|---|---|---|
| work experience | less than a year | 0(0.0) | 1(1.9) | 15(6.2) | 16(4.5) |
| | 1-3 years | 10(16.4) | 1(1.9) | 19(7.9) | 30(8.5) |
| | 3-5 years | 10(16.4) | 2(3.8) | 62(25.7) | 78(22.0) |
| | 5-10 years | 7(11.5) | 27(51.9) | 89(36.9) | 123(34.7) |
| | over 10 years | 22(36.1) | 20(38.5) | 54(22.4) | 96(27.1) |
| | non-response | 12(19.7) | 1(1.9) | 2(0.9) | 15(4.2) |
| | mean | 9.24 | 8.37 | 6.57 | 7.23 |
| | median | 7.00 | 8.00 | 5.00 | 6.00 |

General public and jurors

To investigate the general public's perception of the participatory trial system, a self-reported questionnaire was given to 518 men and 524 women between the ages of 19 and 70. This survey was conducted in the form of an online survey through a research company, and the survey period was from June 21 to August 14, 2019.

In the case of jurors, the research team observed jury trials and questionnaires were distributed to and collected from the jury after the final verdict. The investigation period was from May 20 to July 24, 2019, and jurors in 19 trials in 8 district courts were surveyed. A total of 138 questionnaires were collected and 122 were analyzed, with 16 being excluded because they were collected incorrectly.

Table 4. Demographic information of general public and juror

| Types | | General public | juror |
|---|---|---|---|
| Gender | male | 518(49.7) | 58(47.5) |
| | female | 524(50.3) | 56(45.9) |
| | non-response | - | 8(6.6) |
| Age | 20s | 207(19.9) | 34(27.9) |
| | 30s | 213(20.4) | 21(17.2) |
| | 40s | 210(20.2) | 30(24.6) |
| | 50s | 212(20.3) | 14(11.5) |
| | over 60s | 200(19.2) | 9(7.4) |
| | non-response | - | 14(11.4) |

| Types | | General public | juror |
|---|---|---|---|
| Education | Junior high schools | 14(1.3) | 2(1.6) |
| | Senior high schools | 271(26.0) | 32(26.2) |
| | University | 682(65.5) | 62(50.8) |
| | Graduate school | 75(7.2) | 13(10.7) |
| | Non-response | - | 13(10.7) |

## Methodology

Current study uses statistical tools including the Kruskal-Wallis test, chi-square test, and Analysis of Variance (ANOVA) test. Here, different tools were used to analyze according to the form of the data. The chi-squared and ANOVA used when there is at least one categorical variable and one continuous dependent variable, respectively. Those two statistical tests are used to determine if the relationships among variables between groups that in current data are occurring in the entire population. In addition, the Kruskal-Wallis test (1952), which is a nonparametric approach to the one-way ANOVA, was performed as well when the dependent variable is an ordinal variable and the comparison group is two or more groups.

## Survey results

Perception of jury trials

(a) *Legal professionals*: The perceptions of legal professionals regarding jury trials were examined. It was found that most legal professionals preferred the conventional trial over the jury trial. Specifically, 94.5% of judges, 100% of prosecutors, and 85.7% of defense attorneys indicated that they preferred conventional trials over jury trials.[7]

[7] Although the meaning of word 'prefer' may vary depending on how people interpret it, the authors tend to investigate general public and legal professional perception toward jury trial, thus asking if they hold preferences for trial by jury in the Korean legal system.

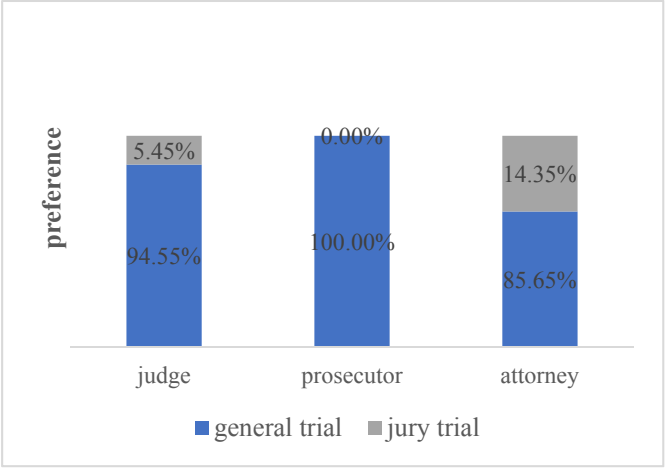



Figure 2. Preferred trial types of legal experts in the survey

Interestingly, as noted, all 52 prosecutors surveyed preferred the conventional trial. This preference of prosecutors is also evident when evaluating the opinions of legal professionals as to whether the jury trial is achieving its original purpose of enhancing the democratic legitimacy and credibility of the judiciary. Judges and defense attorneys felt that jury trials have been achieving their goals, whereas almost all prosecutors felt that they did not. Specifically, judges were the most likely to agree with the statement "the jury trial system is suitable for our judicial system" (44.1%), followed by defense attorneys (32.9%), while prosecutors agreed at a much lower rate (3.3%). Additionally, judges were most likely to agree with the statements that "jury trials secure the democratic legitimacy of the judicial system" (78.0%) and that jury trials "build trust in the law" (76.3%). The item most agreed upon by all three legal professional groups was that the jury trials "contribute to the improvement of public awareness of the law and legal education" (81.1% of judges, 69.3% of prosecutors, and 78.3% of defense attorneys). The Kruskal-Wallis H test was conducted to see if there were any statistical differences between the groups. All survey items were found to be statistically significant, which indicates that there are differences among the three legal professional groups on the survey items.

Table 5. Mean value comparison of the purpose of the jury trial

| survey items | judge | prosecutor | attorney | Kruskal-Wallis test |
|---|---|---|---|---|
| Jury trials are suitable for our judicial system. | 2.36 | 1.69 | 2.24 | H(2)= 31.801*** |
| Jury trials was successfully established within the judicial system. | 2.27 | 1.92 | 2.12 | H(2)=6.769* |
| Contribute to securing the democratic legitimacy of the judicial system | 2.88 | 2.46 | 2.78 | H(2)= 10.313** |
| Contribute to building trust in the law. | 2.88 | 2.27 | 2.74 | H(2)= 19.783*** |
| Contribute to the protection of human rights for the accused. | 2.61 | 2.19 | 2.63 | H(2)=14.431*** |
| Contribute to the improvement of public awareness of law and legal education. | 3.07 | 2.69 | 2.97 | H(2)= 8.108* |

*p<0.05, **p<0.01, ***p<0.001

*(b) General public and jurors:* The general public thought that they had an average level of knowledge about jury trials, as reported in the questionnaires. Specifically, 87.6% of them reported that they "know roughly" about jury trials, 7.3% answered that they "know in detail" about jury trials, and 5.1% answered that they "do not know at all" about jury trials.[8]

In the case of jurors, they were asked if they knew about the jury system before participating in the jury trial. Like the general public, most jurors were unaware of the system until they participated in a trial. The response "knew roughly" about jury trials was the highest with 76.8%, followed by "did not know at all" at 17.3%, and "knew in detail" at 5.7%. Taken together, the general public and the jurors answered "know roughly" the most.

[8] 'Know roughly' in the survey item was meant to 'knowing the existence of jury trial, without complete understanding of it'. Here the author uses the simple phrase 'know roughly' for better readability.

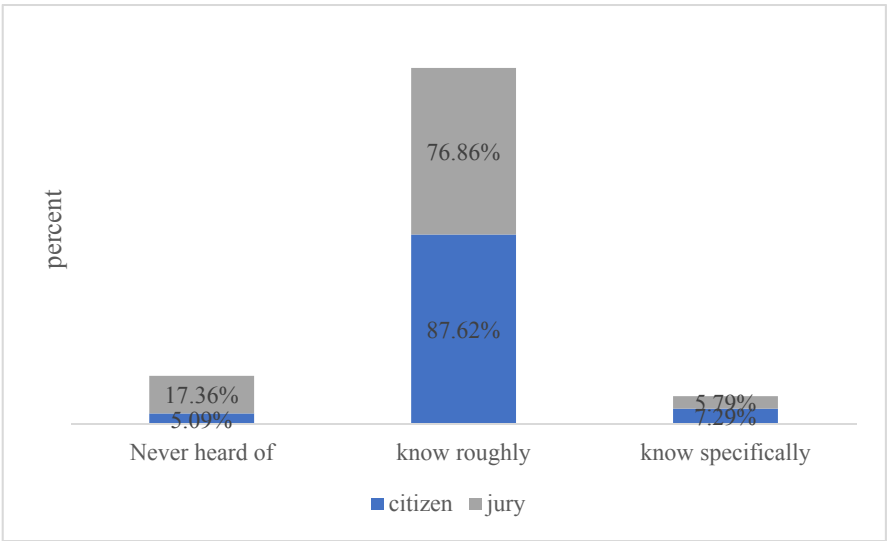



Figure 3. Awareness of the jury trial system

Since awareness of jury trials could vary according to gender, age group, and educational level, the author analyzed whether awareness depended on these demographic variables. It was found that there was a statistically significant difference in awareness according to educational level (*F(3, 1038)=3.01, p=.029*). Specifically, the more educated the citizens were, the more they knew about jury trials. There was no difference in the general public's awareness of jury trials according to gender (*t(1040)=.450, p=.653*) or age group (*F(4, 1037)= 1.081, p=.364*).

Similarly, the jurors' awareness of jury trials prior to their participation also varied only according to educational level ($x^2(9) = 18.114$, p<.05). There was no difference in awareness according to gender and age (ps>.30). The higher the educational background, the lower the percentage of respondents who said they "did not know jury trial at all."

Evaluation of jurors' decision-making process

*(a) Legal professionals:* Legal professionals did not have high confidence in the jury's verdicts. However, prosecutors felt that the jurors' judgment process was less reliable than judges and defense attorneys did. Among legal professionals, 51.2% of defense attorneys viewed the jurors' understanding of complex trials positively, compared to 36.4% of judges, and 9.6% of prosecutors. On the other hand, 80.7% of prosecutors agreed with the statement "jurors made their verdict based on prejudice or emotion," while only 52.4% of judges and 42.5% of defense lawyers did. Additionally,

defense attorneys thought that jurors were more likely to be affected by the judge's "attitudes, speech, and the way the judge conducts the trial." Regarding the influence of prosecutors and defense lawyers, all three groups expected the jurors to be affected (above average 80%), and there was no statistically significant difference among the groups. Finally, regarding whether the jurors were biased, the percentage of legal professionals who answered "no" was higher than those who answered "yes."

Table 6. Mean value comparison of jury decision process by legal experts

| survey items | judge | prosecutor | attorney | Kruskal-Wallis test |
|---|---|---|---|---|
| Even if there is a lot of evidence and a lot of issues, the jury understands it well. | 2.31 | 1.85 | 2.48 | H(2)=29.169*** |
| The jury bases their verdict on preconceived notions or emotions rather than objective evidence. | 2.45 | 2.90 | 2.40 | H(2)=21.094*** |
| The jury takes precedence over the judge's opinion during the trial process. | 2.5 | 2.73 | 2.78 | H(2)=6.922* |
| jurors tend to consider only direct evidence as evidence of guilt. | 2.4 | 2.80 | 2.37 | H(2)=15.567*** |
| The jury lacks objective standards or knowledge about sentencing. | 2.76 | 3.00 | 2.72 | H(2)=6.345* |
| The jury is influenced by the judge's speech. | 2.79 | 3.02 | 3.05 | H(2)=7.002* |
| The jury is influenced by the way the judge conducts the trial. | 2.79 | 3.13 | 3.10 | H(2)=12.795** |
| The jury is influenced by the judge's attitude. | 2.81 | 3.10 | 3.17 | H(2)=13.190*** |
| The jury is affected by the attorney's abilities and the way they plead. | 3.02 | 3.15 | 3.05 | H(2)=1.123 |
| The jury is affected by the prosecutor's ability or the way he pleads. | 3.04 | 3.10 | 3.03 | H(2)=.472 |
| Jurors have a guilty bias. | 2.13 | 2.02 | 2.50 | H(2)=22.954*** |
| Jurors have an innocence bias. | 2.15 | 2.35 | 1.98 | H(2)=15.713*** |

*p<0.05, **p<0.01, ***p<0.001

*(b) General public and jurors:* The opinions of the general public and the jury on the jury deliberation process were somewhat differentiated. The general public were asked to indicate how much the jurors will be able to express their opinion in the verdict. 77.8% of the general public responded that the jurors speak up and express their opinion. In actual trial proceedings, jurors express their opinions more actively than the general

public expected, as 95.5% of jurors stated that they expressed their opinion. Thus, it is found that the jurors were able to fully express their opinions in coming to their verdicts, much more than the general public expected. The difference between the two groups was statistically significant ($x^2(1)=19.58, p<.01$).

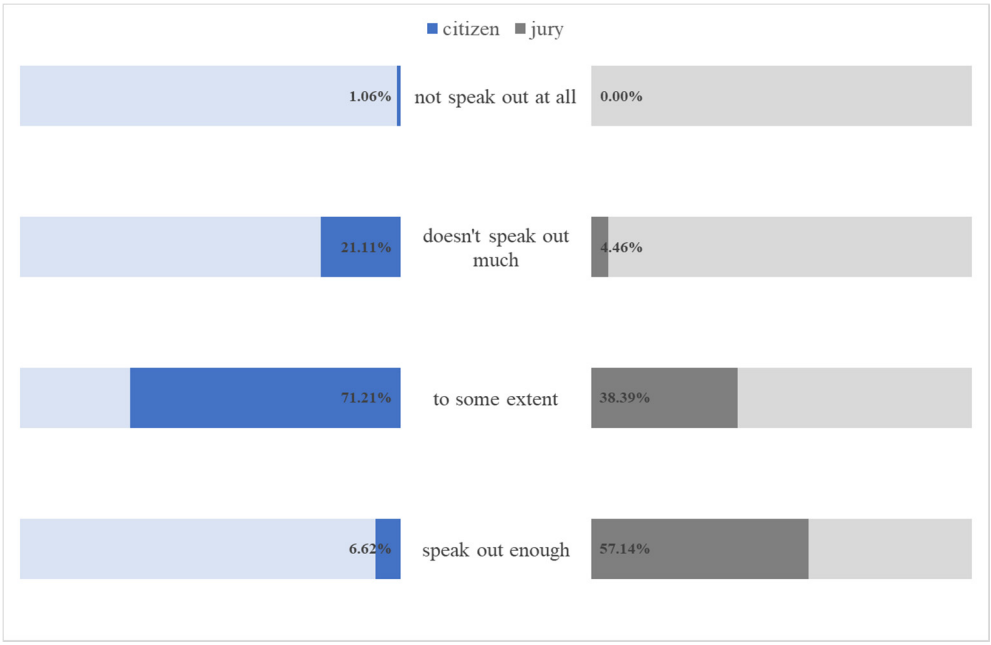



Figure 4. Expectation and actual evaluation of the extent to which the jury expressed their opinion in the verdict

The general public thought that the jury would have difficulties in the trial process. However, compared to the expectations of the general public, where most of them expected that the jurors would have difficulty in reaching a verdict (79.2%), only 65.2% of the jurors answered that it was difficult to come to a verdict of not guilty.

Table 7. Mean value comparison of difficulty of deciding the verdict

| | very difficult | a bit difficult | not difficult | not difficult at all | total | (df) $\chi^2$ |
|---|---|---|---|---|---|---|
| citizen | 133 (12.8) | 692 (66.4) | 204 (19.6) | 13 (1.2) | 1042 (100.0) | (1) 27.23 ** |
| jury | 26 (23.2) | 47 (42.0) | 27 (24.1) | 12 (10.7) | 112 (100.0) | |

n/a(jury): 10, *p<0.05, **p<0.01

Evaluation of the verdicts

*(a) Legal professionals:* Legal professionals were asked to appraise the juries' verdicts. It was found that judges and defense lawyers evaluated jurors' verdicts more positively than prosecutors. Specifically, 80.0% of judges and 85.0% of defense lawyers agreed with the jury verdict "in general," whereas only 46% of prosecutors agreed with it. This trend was also found in jurors' sentencing decisions. While more than half the judges (71.0%) and defense attorneys (76.2%) found the jurors' verdicts reasonable and satisfactory, only 32.7% of prosecutors thought so. Regarding the consistency and predictability of the jurors' verdicts, judges (44.4%, 43.6%, respectively) and defense lawyers (53.1%, 43.8%, respectively) gave more moderate evaluations compared to other questions than the prosecutors (28.8%, 17.3%, respectively).

Table 8. Mean value comparison of jury's' verdict by legal experts

| survey items | judge | prosecutor | attorney | Kruskal-Wallis test |
|---|---|---|---|---|
| *Agree with the jury verdict in general* | 2.89 | 2.37 | 3.00 | $H(2)=30.707^{***}$ |
| *Agree with the jury's sentencing decision in general* | 2.71 | 2.46 | 2.76 | $H(2)=6.520^{*}$ |
| *Jurors' verdict is reasonable and satisfactory* | 2.75 | 2.19 | 2.89 | $H(2)=31.569^{***}$ |
| *Jurors' sentencing decision is reasonable and satisfactory* | 2.62 | 2.37 | 2.69 | $H(2)=7.216^{*}$ |
| *Jury's judgment is consistent* | 2.44 | 2.12 | 2.56 | $H(2)=11.964^{**}$ |
| *Jury decisions are predictable* | 2.4 | 1.9 | 2.43 | $H(2)=18.897^{***}$ |

$^{*}p<0.05$, $^{**}p<0.01$, $^{***}p<0.001$

*(b) General public and jury:* Regarding the final verdict, the opinions of the general public and the jury in actual trial proceedings were differentiated. First, in regards to achieving consensus, only 50.2% of the general public expected that jury members would reach a consensus. On the other hand, in actuality, 67.0% of jurors answered that their jury's final verdict was unanimous (not shown in the table). This shows that jurors produce a unanimous verdict and the figure slighter higher than the expectation of the general public. Meanwhile, in principle, a jury trial must reach a unanimous decision, but there are cases in which disagreements exist. In such a case, the jury can decide by a majority vote after hearing the judge's explanation. Although the court cannot be involved

in the jurors' deliberation process, the judge's opinion can certainly have an influence. Therefore, this study examined how much the jury is affected by the judge's opinion.

It was found that regarding to judges' opinion on the jurors' verdict, the general public expected that the influence of the judge's opinion on the juror's verdict would be high, as 86.4% agreed with the statement "judges affect jurors", while 74.3% of the jurors in actual trial proceedings did so. The difference between the two groups was statistically significant ($x^2(1)=11.64,\ p<.01$). In addition, only 1.06 percent of the general public thought that the judge's influence would not affect at all, while 12.8 percent of jurors agreed.

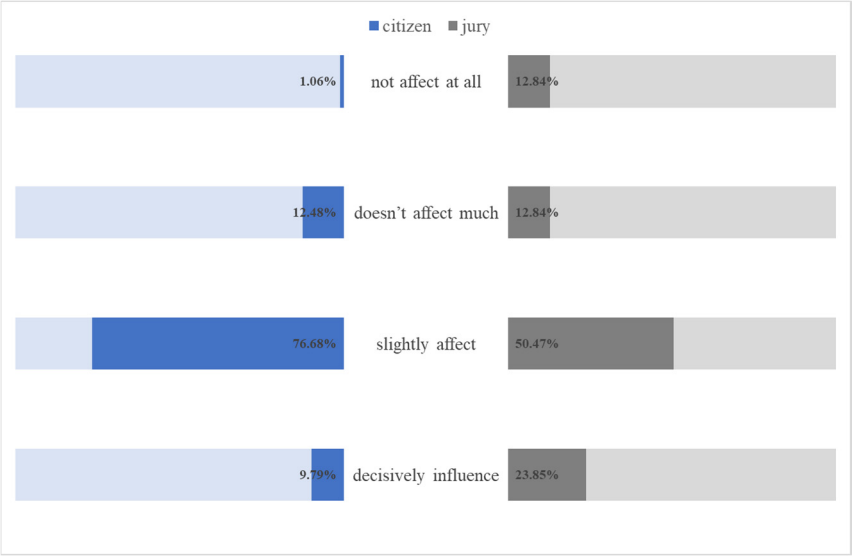



Figure 5. Expectation and actual evaluation of the extent to which the judge influence on the juror's verdict

# CONCLUSION

The purpose of this study was to examine the present state and future of participatory trials in Korea by examining the history, the current situation, and the perceptions of the participants. To this end, based on the available statistical data, the author examined how current jury trials are being operated and we examined how each group that participates in jury trials evaluates the system through a survey of judges, prosecutors,

defense attorneys, the general public, and jurors.

The percentage of criminal cases resolved through jury trials has been decreasing since 2017. The reason for this is that the driving force to perpetuate the system has disappeared, and inherent limitations in the relevant statute, the low public awareness of jury trials, and the reluctance of legal professionals to participate in jury trials are potential factors.

A major limitation of the system is the court's broad discretion to choose conventional criminal trials by arbitrarily refusing applications for trial by jury. This seems to be related to the fact that in South Korea, fact-finding proceedings continue through all levels of the judicial system, from the initial trial stage to the Supreme Court, unlike in the United States, where the opportunity for fact-finding is limited to the initial trial. As a result, it seems that legal professionals believe that there is no substantive benefit to using a jury in the first trial. Likewise, due to the fact-finding proceedings of the judicial system the jury's decision has no binding force but to have an advisory opinion to the judge. Even if the court accepts the jury's decision in the initial trial, there is possibility that this decision will be overturned in the appeals court and Supreme Court. Therefore, jury's advisory opinions carry little legal weight and authority.[9]

The survey results clearly indicate that legal professionals do not prefer that jury trials over conventional trials. A majority of all three groups, defense lawyers, prosecutors, and judges, thought that the jury system was not appropriate for the current judiciary system in Korea and did not favor it. Looking at the legal professionals' evaluations of the jury's verdict, it can be seen that trust in the jury's verdict is still not high. In particular, prosecutors find the jury's judgment process less reliable than do judges and defense lawyers. Finally, legal professionals were not confident in the jury's understanding of complex trials, and in the case of prosecutors, a large percentage believed that the jurors based their decisions on prejudice or emotion.

---

[9] Although current Korean jury delivers an advisory rather than binding verdict, Supreme Court has issued a precedent that requires a court of appeals to give great deference to a jury's verdict (Supreme Court Decision 2009Do14065 Order of 25 March 25, 2010 [Injury by Robbery, Aiding or Abetting Escape of ...the Road Traffic Act Unlicensed Driving]).
*In case where the jury participated in the whole process of witness questioning and the verdict of acquittal by unanimous opinion as to the adoption of evidence such as credibility of witness statement and fact-finding corresponds to the trial bench's belief and is adopted as it is, the first instance court's determination as to the adoption of evidence such as credibility of witness statement and fact-finding should be respected all the more in light of the purport and spirit of the direct and open trial priority unless sufficient, convincing and clearly opposite evidences appear through evidence questioning of the appellate court.*

On the other hand, there were positive views about the jury system itself. A large percentage of legal professionals believed that this system would help to increase the legitimacy, fairness, and transparency of the judicial system. All three legal professional groups believed that jury trials contribute to increased public awareness of the law and legal education. Jurors also indicated that they expressed their opinions thoroughly during the decision-making process, and most of the final decisions of the juries were unanimous, which shows that, contrary to the concerns of legal professionals, the jury can be an independent decision-maker.

The survey results of legal professionals seem rather contradictory. On the one hand, legal professionals do not favor the jury trial and question the jury's decision-making process and their abilities. On the other hand, they believe that the jury trial enhances both democratic participation and public legitimation of legal decision. This contradictory attitude of legal experts implies that they agree with the purpose of the jury trials and its implementation, but still do not favor it in reality. As a result, although the jury's function should be the fact-finding roles, which finds the facts and applies them to the relevant statue or law, but their role in practice is in a very limited scope. It was found that there is a gap between the legislative purpose of the jury trial system and its actual application in the judicial process.

If the system is not supported by legal professionals, it is difficult to expect it to grow in the future. As seen in this study, courts are avoiding jury trials by using various, broad statutory exclusion criteria, and legal professionals are also expressing doubts about the effectiveness of the jury system. The system will be robust only when there is respect for the jury's decision-making process and verdicts.

The biggest characteristic of the general public and the jurors who participated in the actual jury trial was that they did not know much about the system. In particular, close to 20% of those who actually participated as jurors did not know anything about the system until they participated in the jury trial. This suggests that the jury trial itself may feel unfamiliar to the general public even though it has been 10 years since the system was operated. The jury system went into effect in 2008 with the aim of bringing fundamental changes in judicial decision-making in Korea, which has traditionally been managed only by professional judges. Korea's adoption of the jury trial was mainly driven by participatory democratic concerns (Lee, 2009). Therefore, it is preferable for Korean judicial system to enhance awareness of juries among the populace and to inform about the effects of the system–people's trust in the judiciary and the democratic

legitimacy of criminal trials–which were the goals of initiating the jury trial system in Korea.

Despite this seemingly unfamiliar environment, more than half of the jurors said that they were able to express their opinions in the verdict freely. In particular, 6 out of 10 respondents answered that they speak out their opinions enough. Similarly, 7 out of 10 general public thought that the jury would be able to express their opinions well, which also contrary to the expectations of legal professionals that the jury was not able to sufficiently express their opinions on legal matters. In addition, unlike the general public who predicted that reaching a verdict would be difficult for jury (close to 80% predicted that it would be difficult), the number reported by jurors that the verdict is difficult was lower than that (65%).

In the actual judicial process, the jury did not appear to be decisively influenced by the judge's opinion. This is because only 23% of the total jurors reported that judge had a decisive influence on them, and only 12% of the respondents answered 'not at all affected' or 'not significantly affected', respectively. It could be interpreted that the influence received by judges is not at a level of concern, unlike legal professionals. These results suggest that the perceptions of legal professionals and the jury are somewhat different. In this study, when the author asked legal experts whether the jury would be affected by the judge's speech or the way the judge conducts a trial, the results showed that all legal professionals tended to answer ‘yes’ to both questions, and especially in the case of prosecutors and lawyers, the trend was more pronounced.

Some suggestions arose from this study. First, the jury’s verdict should have legally binding force, as currently the jury's verdict is still merely advisory. Negotiations on the binding force of the jury verdict have not yet been concluded and it remains a legislative matter. It should be noted that the jurors’ advisory verdict is contrary to the original purpose of jury trials, namely including citizens' common sense and values in the judicial process. Although the Supreme Court made a meaningful decision[10] several years ago that the verdict of the jury should be respected unless there are sufficient and convincing circumstances that clearly contradict it (Kim et al., 2013), it currently still does not have legally binding force. Considering the original purpose of participatory trials along with the concordance rate between judges and jurors, the public's trust in jury trials, and the responses of jurors shown in the study, jury verdicts may carry a

[10] *Supreme Court of Korea* (2009Do14065), Order of 25 March 2010; *Supreme Court of Korea* (2010Do4450), Order of 3 May 1991

binding authority. Discussion the constitutionality of the jury trial then will become a real issue (Lee, 2009).

Second, it is necessary to create a court or division to be in charge of jury trials. In order to enhance people's trust in the judiciary and the democratic legitimacy of criminal trials, which were the goals of initiating the jury trial system in Korea, a dedicated jury trial division should be established.

Finally, incentives should be put in place to encourage the use of the system. The court should remove as many barriers to jury trials as possible, because after all, no matter how effective a system it is, jury trials cannot be implemented without the support of the people who would actually participate in them. Most importantly, it should be noted that there are drawbacks to entrusting the implementation of the system only to the courts.

## References

Ainsworth, J. (2017). Procedural Justice and the Discursive Construction of Narratives at Trial, *Lingue Culture Mediazioni - Languages Cultures Mediation 4*.

Choi, S. (2011). Four Years of Implementation, a Review on the Participatory Trial System. *Criminal Policy Research 118*.

Dammer, H. R., & Albanes, J. S. (2014). *Comparative Criminal Justice Systems 5th ed.* (Wadsworth).

Eisenberg, T., Hannaford-Agor, P. L., Hans, V. P., Waters, N. L., Munsterman, G. T., Schwab, S. J., & Wells, M. T. (2005). Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's the American Jury. *Journal of Empirical Legal Studies, 2*(1), 171-207. https://doi.org/10.1111/j.1740-1461.2005.00035.x

Hong, S. H. (2014). Änderung über das Gesetz zur Bürger-Teilnahme Entscheidung: die bindende Kraft eines Beschlusses der Geschworenen. *Korean Criminological Review 25.*

Jeong, B. K. (2020). The Achievements and Improvements of the Public Participation Trial System - Focused on jury Review and Verdict. *Journal of Law and Politics research 20*.

Judicial Development Committee Expert Member Study Group 1. (2018). Expansion and Reinforcement of Public Participation in Judicial-Public Participation in Judicial Promotion (Additional Report).

Judicial System Reform Promotion Committee. (2006). *Reform for Advancement of the Judicial System*. White Paper of the Warwin Association for the Promotion of Judicial System Reform.

Kim, H. J., & Sook, H. K. (2009). The Issues of Lay-people Participatory Trial System and Its Reformation. *Chung-Ang Journal of Legal Studies, 33*

Kim, M. S. (2019). *Constitutional Transition and the Travail of Judges: The Courts of South Korea.* Cambridge University Press.

Kim, S., Park, J., Park, K., & Eom, J. (2013). Judge-Jury Agreement in Criminal Cases: The First Three Years of the Korean Jury System. *Journal of Empirical Legal Studies 10.*

Kwak, D. (2018). *A Plan to Optimize Trial Practice for the Purpose of Vitalizing Citizen Participation Trial [Paper presentation]*. Conference on Citizen Participation Trials. Supreme Court of Korea.

Kwon, J. (1996). An Isolation in Systems of Law: Differences Between the Commerical Codes of the United States and Korea. *Loyola of Los Angeles Law. Review 29.*

Kwon, S. (2017). Judicial Reform in Korea: Its Current State and Future Prospects for Development. *JURIS 1*.

Lee, C, W,. (2007). Korea's Modern, Jurisdiction, Authority, *Colonization Modernity of Korea, 67*.

Lee, D. H. (2015). The Achievements and Challenges of the Citizen Participatory Trial in Korea. *The Justice 146*.

Lee, J. (2009). Getting Citizens Involved: Civil Participation in Judicial Decision-Making in Korea. *East Asia Law Review 4*.

Lee. J. (2012). *Japan's Influence on Korea's Judicial Modernization: Examining the Reality of Judicial Modernization by Analyzing Legal Cases in the Late Nineteenth Century*. Univ.-Bibliothek Frankfurt am Main.

Lee, S. (2022). Comparative Legal Research on the Impact of Decisions of the U.S. Federal Court on Those of the Supreme Court of Korea. *Journal of Hongik Law Review 13.*

Ministry of Justice Korea. (2020). *2008-2019 Citizen's Participation in Criminal Trials*. Research Report.

National Court Administration. (2020). *Analysis of the results of Citizen's participation in Criminal Trial from 2008 to 2020.* Supreme Court of Korea.

National Judicial Participation Committee. (2013). *Public Hearing for Determination of Final Form of Korean Citizen's Participation in Criminal Trials*.

Park, M., Seo, J., & Choi, Y. (2019). Koreans View Crime and Justice. 13, 10 Years of Implementation of Civil Participation in Criminal Trials, and Related Policy Plan. *Korean Institute of Criminology and Justice, 19-B0-02.*

Park, R. (2010). The Globalizing Jury Trial: Lessons and Insights from Korea. *American Journal of Comparative Law 58*.

Sim, M. (2019). Legal Issues and Prospects on the Introduction of Citizen Participation Trials in Administrative Litigation. *Soongsil Law Review 43*.

Son, S, S. (2021). Citizen Participatory Trials and the Right to be Tried in Conformity with the Act by Judges. *Constitutional Law 27*.

Supreme Court of Korea. (n.d.-a). *The Judiciary, Reform.* Retrieved from https://eng.scourt.go.kr/eng/judiciary/history/reform.jsp#t105.

Supreme Court of Korea. (n.d.-b). *The Judiciary, History.* Retrieved from https://www.scourt.go.kr/eng/judiciary/history/history.jsp.

United States Courts. (2018). *U.S. District Courts–Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2018*. Retrieved from https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2018.pdf.

Valerie, P. H. (2014). Reflections on the Korean Jury Trial. *Journal of Korean Law 14.*

*International Journal of Criminal Justice*



114 Taebong-no, Seocho-gu, Seoul, 06764, Republic of Korea
https://www.kicj.re.kr/international/



Printed in Seoul, Korea
30 December, 2022

ISSN 2713-5152

# CALL FOR PAPERS

## *International Journal of Criminal Justice*

### AIM AND SCOPE

***The International Journal of Criminal Justice (IJCJ),*** a biannual and peer-reviewed English journal published by Korean Institute of Criminology and Justice (KICJ), facilitates comprehensive analysis and evidence-based research on crime trends in order to make a contribution to national policies for crime prevention and criminal justice policies.

*The IJCJ* will share academic and practical views from home and abroad and play a pivotal role as an international academic forum for domestic and foreign criminal polices.

### SUBMISSION DETAILS

- Manuscripts should be written in English and should be no more than 10,000 words in MS word.
- Please provide an abstract which should be no more than 200 words in length and a maximum of 5 key words.
- All papers should identify all authors and provide their contact information such as phone numbers, full postal addresses, email addresses, affiliations and so on.
- Authors should ensure that they have written entirely original works, and should not publish manuscripts describing essentially the same research in more than one journal.
- Honorarium (USD 2,000 or KRW 2,000,000) will be paid when papers are accepted for publication.
- All manuscripts must be submitted to the managing editor at ijcj@kicj.re.kr.

### AREAS

International Journal of Criminal Justice (IJCJ) invites papers from many different realms of criminology and criminal justice at both regional and global levels. Any issues related to criminology and criminal justice will be welcomed such as:

Community Sanction, Corrections, Corruption & White Collar Crime, Crime Prevention & Protection, Crime Trends, Crime & Deviance, Criminal Investigation, Criminal Law & Policy, Criminal Procedure, Cybercrime, Drug, Terrorism & Organized Crime, Economic & Corporate Crime, Information, Technology & Forensic Science, Juvenile Delinquency, Juvenile Justice, Penology, Police & Policing, Violent Crime.

# International Journal of Criminal Justice

KICJ Korean Institute of Criminology and Justice

9 772713 515003 09
ISSN 2713-5152