

Reflections on the Korean Jury Trial*

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Abstract

Korea's experience with its new jury system offers many lessons for those interested in juries and jury reform worldwide. Aiming for a unique jury system that was ideally suited to Korean citizens and their legal system, those who crafted Korea's jury incorporated elements of both classic jury systems and mixed tribunals. Initially, the jury deliberates on guilt independently of the judge, but the procedure includes optional as well as mandatory opportunities for the presiding judge to advise the jury during its deliberation. The Korean jury delivers an advisory rather than binding jury verdict. These and other features of the Korean jury system are analyzed and contrasted with practices elsewhere. The unique procedures associated with Korean jury trials offer a natural experiment and deserve continuing serious study.

KEY WORDS: Korean jury trial; jury studies; jury; judge; legal reform; juror's guide; bifurcated trial; deliberation; deliberative democracy

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I. Reflections on the Korean Jury Trial

The introduction of a new jury system in Korea has engendered considerable interest among policymakers and legal scholars. The jury systems of many other countries have been in place for decades if not

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centuries.¹⁾ Jury trials are firmly entrenched within their legal systems. Trying to assess what role the institution of the jury plays in the contemporary legal and political systems of these countries is challenging because of the difficulty of disentangling historical, political, social, and legal factors. What is more, many jury trial practices in these countries were instituted generations ago, when trials and juries were quite different. Traditions and habits are hard to break, even if contemporary trials in modern times might benefit from novel approaches.

Korea's bold step of introducing a jury system, and doing so in the absence of any national history of lay citizen participation in law, is valuable on a number of fronts. Instituted for the twin purposes of encouraging greater democracy in Korea and generating more legitimacy for the Korean courts,²⁾ Korea's jury system can also illuminate for other countries the value of new approaches to the jury trial. It creates a natural experimental laboratory for this democratic institution. And indeed, Korea's jury system is a unique blend of the traditional common law jury and the mixed court. A panel of three judges presides over the trial, in which an all-citizen jury sits in a separate jury box, hears evidence, and decides on the guilt of the accused.³⁾ Under some circumstances, the judge(s) may meet with the jury to discuss the case prior to the jury's verdict. Jurors also express their opinions about sentencing in a joint discussion with the judges. However, these jury judgments are advisory; the judges make the binding decision on verdict and sentencing. Studying Korea's experience with this hybrid approach will help us evaluate the plusses and minuses of the mixed court and the traditional jury.

In this essay, I'd like to share my reactions to Korea's new jury institution from the perspective of a jury scholar. During a recent sabbatical, I was able to travel to Seoul, Korea to study the new system. In preparation, I reviewed research findings on the first five years of the Korean jury. Once

1) WORLD JURY SYSTEMS (Neil Vidmar ed., 2000); Valerie P. Hans, *Jury Systems around the World*, 4 ANN. REV. L. & SOC. SCI. 275 (2008); Nancy S. Marder, *An Introduction to Comparative Jury Systems*, 86 CHL-KENT L. REV. 453 (2011).

2) GukminuiHyeongsajapanChamyeye gwanhhan beopryul [Act on Civil Participation in Criminal Trials], Act No. 8495, June 1, 2007, art. 1 (S. Kor.) [hereinafter The Act].

3) The Act, *supra* note 2, arts. 12(1), 46.

in Seoul, I had valuable opportunities to discuss the Korean system with judges, lawyers, and scholars. I learned a great deal from these discussions.

The most vivid and lasting impressions stemmed from my courtroom observations of three jury trials, two in Seoul Central District Court and one in Seoul Northern District Court. Two cases involved assault; another dealt with a criminal charge of larceny. The cases appeared to be typical of the sorts of cases that Korean citizens now evaluate as jurors.⁴⁾ The energy and excitement of the participants and the observers in the courtroom were palpable. One measure of public interest was that following jury selection, citizens who had not been selected to serve on the actual jury were invited to stay at court and serve collectively as a “shadow jury” that would listen to the evidence, deliberate, and reach a verdict in the case.⁵⁾ A significant number of citizens chose to do so, indicating the value they placed on the opportunity to participate in the Korean jury system. In this way, Korean citizens resemble citizens in the United States and other countries with established jury systems. After their jury duty, the majority of American jurors are positive about their service.⁶⁾

II. The Juror’s Guide

One of the first notable features of the Korean jury trial was that in each of the cases that I observed, the court distributed to the jurors and the shadow jurors a juror’s guide, a written overview of the case and the jury trial procedure. Professional judges in the court prepare a juror’s guide for every Korean jury trial. After the jury is selected, the presiding judge reads

4) Kim Sangjoon, Park Jaihyun, Park Kwangbai & Eom Jin-Sup, *Judge-Jury Agreement in Criminal Cases: The First Three Years of the Korean Jury System*, 10 J. EMPIRICAL LEGAL STUD. 35, 40-41 (2013) (indicating that robbery, assault, theft, rape, and similar crimes were required to be heard by 7-person juries and that 7-person juries accounted for half of the jury trials in the first three years).

5) Lee Jae-Hyup and his colleagues have undertaken a fascinating series of research articles examining the experiences of these shadow juries. See Lee Jae-Hyup, Woo Jisuk, Rhee June Woong, Choi Jeong Min & Shin Hyunki, *What’s Happening in the Jury Room? Analyzing Shadow Jury Deliberations in Korea*, 13 J. KOREAN L. 41 (2013) (S. Kor.).

6) Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 285-86 (Peter Litan ed., 2000).

selected portions of the guide aloud in the courtroom, before the trial begins.

The juror's guide in one of the assault cases I observed is reproduced in the Appendix to this article, with names and some identifying information changed or removed to protect the actual defendant's privacy. (*See* Appendix, Juror's Guide.) The juror's guide begins with a summary of the facts of the case, written by the court, along with a preview of the arguments and the evidence that each side is planning to present. It includes the law that the defendant is alleged to have violated, along with several other relevant legal rules. It offers some information about the defendant and his or her background. It includes a description of the trial procedure, including guidance on the deliberation. And perhaps most pragmatically important to the individuals who have been selected to sit on the jury, it provides an estimated time schedule for the trial, including start and end times for the presentation of evidence, parties' arguments, deliberations, and breaks.

The juror's guide is an intriguing innovation. Considering the fact that most Korean jurors have little background in courts, trials, and law, the juror's guide serves as a useful vehicle for presenting an overview of the case, the trial procedure, and the relevant legal principles. Although I have reservations about some of the details included in the juror's guide, which I describe below, the juror's guide is a remarkable invention designed to introduce Korean citizens to the tasks they will undertake as jurors in a specific case.

In most common law jury countries, jury commissioners and their staff conduct a general jury orientation about the role and tasks of the jury, attended by all the jurors who appear at the courthouse for jury service on any particular day.⁷⁾ As part of their orientation, jurors may watch a video, hear lectures by judges or jury staff, and receive a juror handbook providing general information about a juror's role and responsibilities. At

7) JURY TRIAL INNOVATIONS 37-38 (G. Thomas Munsterman, Paula L. Hannaford & G. Marc Whiteheads eds., 2d ed. 2006) (hereinafter JURY TRIAL INNOVATIONS) (describing the approaches that American courts take to juror orientation). Some courts make their orientation videos available online. For example, *see* Online Juror Orientation, <http://www.courts.ca.gov/documents/la-man.pdf> (Superior Court, Los Angeles, CA). A California juror orientation video may be viewed on YouTube: <https://www.youtube.com/watch?v=vQO70n1Rejw>.

trial, the judge makes brief welcoming remarks to the jury, and the attorneys provide a general picture of their cases in opening statements.

But what makes Korea's juror's guide stand out is the way that it combines in a single document general information with specific case details and legal rules. It is rare for an American judge to provide the jurors with an initial overview of the substantive law in the specific case that the jury will decide. Instead, judicial instructions about the law typically come at the very end of the case, just before the jury retires to deliberate. This approach might have made sense historically, when trials were short and law was less complex. The practice is also consistent with the adversary nature of common law trials, where the judge takes a more passive role and leaves the presentation of evidence to the litigants.⁸⁾

Today, however, especially in more complex and lengthier trials, the method of instructing jurors in the law only at the end of the evidence presentation does a serious disservice to jurors who are forced to hear reams of evidence without knowing the legal rules they will eventually apply.⁹⁾ People are better able to understand information if it is put in appropriate context.¹⁰⁾ Korea's juror's guide is likely to be more helpful to lay citizens than a general jury orientation, because it includes a presentation of applicable law in the particular case to be decided, along with a focused presentation of the key facts and legal determinations that the jury is expected to make.

One objection to adopting Korea's juror's guide might be that it is time-consuming to prepare. However, I asked a group of Korean judges how long it took to prepare a typical juror's guide for jurors in their cases. In contrast to my expectations, they reported that the time spent was relatively

8) STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* (1984).

9) AM. BAR ASS'N, *PRINCIPLES FOR JURIES AND JURY TRIALS* 29 (2005) (hereinafter *ABA PRINCIPLES FOR JURIES AND JURY TRIALS*). Principle 6(C)(1) recommends preliminary instructions, including instructions on elements of the charges and claims, in jury trials. *See also* Vicki L. Smith, *The Feasibility and Utility of Pretrial Instruction in the Substantive Law*, 14 *LAW & HUM. BEHAV.* 235 (1990).

10) "The value of preliminary instructions is consistent with the finding that people receive information more effectively if they understand in advance the context in which they will be required to evaluate or analyze that information, and repetition can enhance recall." *ABA PRINCIPLES FOR JURIES AND JURY TRIALS*, *supra* note 9, at 33.

modest. They explained that models of the juror's guide were available from other cases. What is more, prior to the start of the jury trial, much of the information that will be included in the juror's guide is already known to the parties and to the court, so it is not difficult to assemble the necessary information.

Korea's juror's guide shows how the concept might be employed in a wide range of trials to assist jurors with their decision making. Of course, it is unlikely that a juror's guide prepared exclusively by the judges would be adopted wholesale in common law countries with a strong adversarial tradition. A collective document, produced by the parties with input and approval of the judge, is more in keeping with adversary principles.

In some complex trials in the United States, courts and attorneys are now experimenting with just such a collaborative device. Jury notebooks are produced through the joint efforts of the parties and include some of the same types of information that are included in Korea's juror's guides.¹¹⁾ Case overviews, lists of witnesses along with the subject of their testimony, key documentary evidence, definitions of technical terms and more may be included. This sort of collaborative approach is described in the National Center for State Courts' compendium, *Jury Trial Innovations*,¹²⁾ and is recommended in the American Bar Association's *Principles for Juries and Jury Trials*.¹³⁾

The use of these jury notebooks remains rare, and its impact has not been extensively studied, but it has significant promise. One mock jury experiment that I conducted with B. Michael Dann and David Kaye varied whether participants had access to jury notebooks, checklists, and other trial innovations.¹⁴⁾ People rated the jury notebooks as the most helpful

11) ABA PRINCIPLES FOR JURIES AND JURY TRIALS, *supra* note 9, at 91.

12) JURY TRIAL INNOVATIONS, *supra* note 7, at 102-03.

13) ABA PRINCIPLES FOR JURIES AND JURY TRIALS, *supra* note 9, at 91. Principle 13 (B) reads: "Jurors should, in appropriate cases, be supplied with identical trial notebooks which may include such items as the court's preliminary instructions, selected exhibits which have been ruled admissible, stipulations of the parties and other relevant materials not subject to genuine dispute." With the court's approval, parties may add materials to the notebook over the course of the trial. *See also* AM. BAR ASS'N, SPECIAL COMMITTEE ON JURY COMPREHENSION, JURY COMPREHENSION IN COMPLEX CASES 34-37 (1989); Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, 41 Ct. Rv. 12, 16-17 (2004).

14) B. Michael Dann, Valerie P. Hans & David H. Kaye, *Can Jury Trial Innovations Improve*

innovation, with 92 percent of the mock jurors saying that the notebooks aided them in remembering and understanding the case.¹⁵⁾ Our research study found that when jury notebooks were provided along with other trial innovations, the combination of these novel techniques increased comprehension of scientific evidence.¹⁶⁾

III. Unitary Trials

Although in principle I applaud the juror's guide as a useful vehicle to improve jury decision making, one potential hazard emerges because the Korean jury trial is a unitary trial that combines guilt and sentencing phases in one proceeding.¹⁷⁾ Korean judges informed me that a unitary trial makes trial proceedings shorter and more efficient, which helps to ensure the defendant's right to a speedy trial and makes it easier for citizens to serve. The juror's guide, which jurors are given at the start of the case, contains information relevant to both guilt and sentencing. The prosecution and defense incorporate evidence and arguments about both guilt and sentencing in their case presentations.

Although it may be more efficient, the unitary trial raises a potential problem. Information about the defendant that is potentially relevant to sentencing may be communicated to the jurors who have yet to decide on the defendant's guilt, increasing the possibility that jurors will use information relevant to sentencing to decide on guilt. What is more, when a defendant has a criminal record, that information is typically included in the unitary trial and in the juror's guide because of its relevance to sentencing.

Scientific research in other countries has convincingly demonstrated the biasing effects of knowledge of a defendant's criminal record.¹⁸⁾ A decision

Juror Understanding of DNA Evidence? 90 JUDICATURE 152 (2007).

15) *Id.* at 155.

16) *Id.*

17) The Act, *supra* note 2, art. 46.

18) Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357-58 (2009) (summarizing the multiple ways in which criminal record information about

maker may directly infer guilt in the current case if the defendant has been convicted of an earlier offense. Or, the route may be more indirect. The decision maker might make negative inferences about the defendant's character based upon the fact that he or she has a criminal record. Research has shown that when people learn about one negative feature of an individual, they generalize and are more likely to assume that the individual has other bad characteristics. Another way that a defendant's criminal record may affect guilt decisions stems from the fact that the meaning of information is interpreted contextually. If a defendant has a criminal past, the meaning of the evidence against the defendant may shift to appear more incriminating. When the defendant has a criminal record, the threshold of conviction may also be lowered, leading decision makers to be willing to convict on less evidence.

In their observational study of the videotaped deliberations of 18 Korean shadow juries, Lee Jae-Hyup and his collaborators discovered that in half of the deliberations they analyzed, jurors incorporated sentencing-related matters into the discussion of the defendant's guilt.¹⁹⁾ In addition, about one of every five jurors mentioned the defendant's criminal record during their guilt phase deliberations.²⁰⁾ In most cases, jurors recognized the inappropriate mixing of guilt and sentencing matters and stopped the discussion. Although it is reassuring that juries attempted to police their members, the frequency of discussion of criminal record and other sentencing matters during deliberations about the defendant's guilt raises concern.

One remedy is to bifurcate or divide the unitary trial. In a bifurcated trial, the jury first considers evidence and arguments relevant to the guilt or liability of the defendant. If the defendant is found guilty or liable, a second sentencing phase (in criminal trials) or a damages phase (in civil trials) begins.

In the United States, a bifurcated approach was adopted in death penalty trials beginning in the 1970s.²¹⁾ Before that time, death penalty trials

the defendant influences fact finders).

19) Lee et al., *supra* note 5, at 64-65.

20) *Id.* at 65.

21) DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR. EQUAL JUSTICE AND THE

in most states resembled Korean unitary jury trials. Prosecutors and defendants presented combined cases on guilt and sentencing, and the jury retired to decide both at the same time. However, the fact that a death penalty trial was unitary created problems for many defendants. Defendants who wanted to exercise their right not to testify about guilt or innocence were precluded from giving testimony about sentencing.

Existing death penalty trial procedures were found to violate the U.S. Constitution in 1972.²²⁾ States then adopted bifurcated procedures in which the guilt or innocence of the defendant is determined first. If the defendant is convicted of capital murder, a separate hearing on sentencing commences. Although research from interviews with capital jurors reveals that they sometimes consider the upcoming sentencing decision as they decide on guilt, the intermixing of guilt and sentencing factors in bifurcated trials is surely less than it would be in unitary trials.²³⁾

Bifurcation is also employed occasionally in civil trials, although it is not required.²⁴⁾ The judge may order bifurcation to promote efficiency or to avoid prejudice. Typically, in these instances, the civil jury first decides the defendant's liability. Then, if liability is found, the same jury hears additional evidence and argument on damages in a subsequent proceeding. Some object to bifurcation in the civil context, worrying that it undermines the civil jury's ability to decide the case fairly and on the totality of the evidence.²⁵⁾ In contrast, bifurcating the presentation of evidence in a

DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 8 (1990) (describing practice of unitary trials in capital cases); RAYMOND PATERNOSTER, ROBERT BRAME & SARAH BACON, *THE DEATH PENALTY: AMERICA'S EXPERIENCE WITH CAPITAL PUNISHMENT* (2007).

22) *Furman v. Georgia*, 408 U.S. 238 (1972).

23) William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1093 (1995) (finding that three-fourths of the capital jurors interviewed reported that judges' sentencing instructions "simply provided a framework for the decision most jurors had already made."). *Id.* at 1093.

24) Fed. R. Civ. P. 42 (b). Separate Trials. Rule 42 (b) reads as follows: "For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial."

25) RICHARD H. FIELD, BENJAMIN KAPLAN, KEVIN M. CLERMONT & CATHERINE T. STRUVE, *CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE* 244-45 (11th ed. 2014) (discussing separation of claims and trials); JURY TRIAL INNOVATIONS, *supra* note 7, at 104-05 (§ 4.8. Bifurcation or Trifurcation of Trial Procedures); Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-*

criminal trial avoids potential bias, particularly from the defendant's criminal record.

IV. Judge-Jury Interaction in the Korean Jury Trial

Another striking contrast offered by the Korean advisory jury system is the way in which it structures the interaction of the judge and the jury. Lay participation systems around the world vary dramatically in the roles assigned to lay and professional decision makers and the opportunity for interaction between them.²⁶⁾ In the United States, jury trial procedures are designed to preserve the jury's independence from the trial judge. All communications from the judge to the jury during the trial are carefully regulated and recorded. Private discussions between jurors and the judge outside the presence of the parties are considered to be improper.²⁷⁾ If these communications are found to be prejudicial, they could result in a successful motion for a new trial, or in overturning the verdict on appeal.²⁸⁾

In the United States, judge-jury communications during the jury's deliberations are often necessary, but they must follow a prescribed path. Consider the procedure for addressing juror questions in the state of Delaware:

Splitting Devices Defeat the Jury's Role, 26 U. Tol. L. Rev. 505 (1995) (asserting that bifurcation undermines the jury's fact finding role); Stephan Landsman, Shari Diamond, Linda Dimitropoulos & Michael J. Saks, *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 Wisc. L. Rev. 297 (reporting findings from a mock jury experiment in which defendants whose cases were heard in bifurcated trials prevailed more often on liability, but when they were found liable, had to pay higher damages, compared to defendants whose cases were heard in unitary trials).

26) WORLD JURY SYSTEMS, *supra* note 1; Hans, *supra* note 1; Marder, *supra* note 1.

27) Consider, for example, this section from the Delaware Trial Handbook § 26:2. Communication with Jurors. "[I]t is improper for the trial judge to communicate with the jurors in the absence of counsel. Contact with a jury by a judge, however, will only require a mistrial or new trial if such conduct was prejudicial. Discussion with a juror by a judge or court personnel about ministerial matters generally is deemed not prejudicial." (footnotes deleted). DAVID L. FINGER & LOUIS J. FINGER, DELAWARE TRIAL HANDBOOK (online edition, no date), available at <http://www.delawgroup.com/de-trial-handbook/>.

28) *Id.*

In criminal cases where the jury sends the judge a note, any communication between the trial judge and the deliberating jury implicates the defendant's right to the assistance of counsel, the right to be present when the jury is instructed, and the right to be tried by an entire panel of properly instructed jurors. Thus, the [Delaware] Supreme Court has set forth the following procedure: Before the jury retires to deliberate, the trial judge should instruct the jurors to communicate any questions regarding matters not personal to a particular juror in writing through the foreperson. The jury should be instructed that any notes are to be given to the bailiff for delivery to the trial judge. Upon receiving a note from the jury, the judge should notify counsel immediately. The note should be marked as a court exhibit and made part of the record. The colloquy between counsel and the trial judge with regard to answering the note should also be part of the record. The trial judge should inform counsel of the court's proposed response on the record and provide counsel with an opportunity to object or otherwise be heard. Finally, the trial judge's response to the jury's note should be delivered in open court, on the record, with all jurors, the defendant and counsel present.²⁹⁾

The American system of jury trials reflects a wariness about allowing unregulated and unmonitored judge and jury interaction. The importance of protecting the jury's political independence from the judiciary has been recognized since the earliest days of the American colonial period.³⁰⁾ This historical background shaped early forms of the American jury trial. The historical context also helps to explain the asymmetry in judges' ability to overturn jury verdicts in American criminal trials. Judges may set aside jury convictions if they conclude they are inconsistent with the law and the evidence. However, in the United States, the jury's verdict of acquittal is sacrosanct. Judges may not set acquittals aside.

In marked contrast to the American system that shields the jury from the judge, the mixed tribunal systems in many European countries are

29) *Id.*

30) NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 41-56 (2007).

designed to maximize the interaction of lay and professional judges.³¹⁾ In decision making bodies composed of both lay judges and professional judges, the members sit at the same bench, hear evidence, and deliberate together to reach a collective verdict in the case. There are extensive opportunities to discuss the case together, at the start of the trial proceedings, during breaks, and in final deliberations. Sanja Kutnjak Ivković identifies it as a “unique” form of lay participation since “professional judges have an opportunity to ‘correct’ the views of lay judges and explain the law; at the same time, lay judges have the opportunity to ‘correct’ the professional judge’s view by bringing the fresh approach of an average citizen.”³²⁾ Thus, in theory, the mixed tribunal benefits from the diversity of experiences and perspectives, and the chance for mutual influence.

However, Ivković and others who have studied the operation of mixed tribunals have found that the influence appears to go predominantly one way. The professional judges tends to be most influential and to dominate the proceedings. That is understandable given the professional judge’s greater expertise and experience.³³⁾ Empirical studies in which both professional and lay judges evaluate the contributions of lay judges indicate that lay judges are not very active during trials or in deliberations.³⁴⁾ Decisions are often unanimous and lay judges rarely outvote professional judges, even though the numbers are often in their favor.³⁵⁾ Lay judges, however, generally express positive reactions to their experiences; most say afterwards that their contributions were important.³⁶⁾

Falling between the two extremes, the Korean advisory jury system combines an independent phase of jury fact finding with opportunities to

31) SANJA KUTNJAK IVKOVIĆ, *LAY PARTICIPATION IN CRIMINAL TRIALS: THE CASE OF CROATIA* (1999).

32) Sanja Kutnjak Ivković, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, 40 *CORNELL INT’L L.J.* 429, 432 (2007).

33) Ivković discusses status characteristics theory, which predicts that because judges typically have higher social status and greater task-relevant expertise, they will exert the greatest influence in the group. *Id.* at 436-37.

34) *Id.* at 440-41.

35) *Id.* at 440-45.

36) *Id.* at 444.

interact with judges under specific circumstances. It offers a unique variation in the judge-jury relationship. Following the presentation of evidence at the trial, the Korean jury retires to deliberate about the guilt of the defendant independently and in secret, as occurs in the classic jury system. However, in contrast to the classic jury procedure, the judge may join the deliberation under two circumstances, one optional and the other required.³⁷⁾ First, if a majority of the jury requests the judge's presence, to answer specific questions or to provide other guidance, the presiding judge may join the deliberation. Second, if the jury cannot reach a unanimous verdict on guilt, the jury is required to hear the perspectives and guidance of the presiding judge.

This limited judge-jury contact during deliberation is not recorded, so it is difficult to know exactly what the joint discussion entails, and how that relates to changes in jury verdicts. Korean judges informed me that the judge's input is supposed to be limited to explaining factual and legal issues, rather than providing his or her own opinions about what the verdict should be.³⁸⁾ In the shadow jury study by Lee and his colleagues, an associate judge joined the jury deliberation when it was requested or required. Lee and his colleagues analyzed videotapes of the interactions, and identified different types of commentary by judges, some of which fell outside this boundary.³⁹⁾ Most of the time, judges provided information relating to the case at hand, including information about how similar cases might be treated by the courts. However, some judges did offer their own opinions on issues in the case. In one case, the judge's opinion was expressed quite forcefully, and all of the jurors subsequently changed their positions so that they were now in line with the judge's views.⁴⁰⁾ Overall, after the judge's intervention, jurors changed their positions a little less than a third of the time.⁴¹⁾ Korean judges reported that a recent survey they conducted found that both judges and jurors in actual cases were favorably

37) The Act, *supra* note 2, arts. 46(2), 46(3).

38) Discussion with judges from Seoul Central District Court, Seoul, Korea (Sept. 12, 2014) (hereinafter Discussion with judges) (audio recording on file with author).

39) Lee et al., *supra* note 5, at 65-66.

40) "[I]f the defendant is found not guilty under the circumstances, we can say that justice does not prevail in this case." *Id.* at 66, n.76.

41) *Id.* at 66, tbl. 10.

inclined toward the judge's intervention in jury deliberations.⁴²⁾ The shadow jury project found that the judge's assistance during deliberation was a positive and significant predictor of the shadow jurors' perceptions of the fairness of the trial.⁴³⁾

I hope that this distinctive intervention will be carefully studied, by gathering statistics on the frequency and impact of the intervention in actual trials and by other methods such as post-trial surveys and the use of shadow juries. How frequently do jurors request the judge's assistance? Are there particular types of cases or legal or factual issues that commonly lead to requests for guidance? How often are jurors unable to reach a unanimous decision on their own, and thus experience the required judicial intervention? How are judges influenced by what they hear during the jury deliberation? Answers to these questions in Korea will be of value not only to Korean judges, juries and policymakers, but also to those of us in countries with other systems who are interested in exploring ways of assisting lay jurors.

It's interesting to contrast the Korean judge-jury interaction procedure with a novel approach in the United States to deal with juries that are having difficulty arriving at a verdict. If American juries inform the court that they are deadlocked, the most typical response is for the judge to instruct the jury about the importance of arriving at a unanimous decision and to send them back to the deliberation room to try again. However, in a handful of states, judges presiding over trials in which juries cannot agree unanimously on a verdict have another option. In this procedure, the judge informs the jury that if they believe it would be helpful, they may ask to receive additional legal instruction from the judge and/or additional

42) Discussion with judges, *supra* note 38.

43) Woo Jisuk, Rhee June Woong & Lee Jae-Hyup, *The Effects of Trial Procedure Factors and Deliberation Factors on Shadow Jurors' Perceptions about the Fairness of Jury Trials in Korea*, paper presented at the Third International Conference on Empirical Studies of Judicial Systems, Academia Sinica, Taipei, Taiwan (Sept. 5-6, 2014). This is the English version of a paper that was originally published in expanded form in Korean: see Woo Jisuk, Rhee June Woong & Lee Jae-Hyup, *Jaepanui Gongjeongseonge daehan Insige Yeonghyangul Michinun Yoine daehan Yeongu* [*The Effects of Trial Procedure Factors and Deliberation Factors on the Perception of Fairness about the Trial – Based on Shadow Jurors' Experiences at Jury Trials in Korea*], 54 SEOULDAEHAKGYO BEOPHAK [SEOUL L. J.] 261 (2013) (S. Kor.).

argumentation from the attorneys on the issues that divide them.⁴⁴⁾ The trial judge may elaborate on the relevant law; and the parties may be allotted additional time to focus on the problematic issues and explain their positions more fully and more clearly to the jury. Consider the rule in Indiana:

If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.⁴⁵⁾

Jury requests for additional assistance and additional instruction and argumentation are part of the trial record. This type of intervention is more compatible with the common law's strong adversary system. Even so, it is controversial and by all accounts remains rare.⁴⁶⁾ Although the American Bar Association's *Principles for Juries and Jury Trials* maintains that the "procedure, when carefully guided by wise judicial discretion, does not unduly invade the sanctity of jury deliberations or transform the trial judge to the status of fact finder,"⁴⁷⁾ others object on the grounds that it may compromise jury independence and the confidentiality of jury deliberations. Criminal defense attorneys have also raised objections. They argue that if the jury cannot decide, the prosecution has not made out its case.

44) ABA PRINCIPLES FOR JURIES AND JURY TRIALS, *supra* note 9, at 121-24; JURY TRIAL INNOVATIONS, *supra* note 7, at 162-63.

45) IND. R. CT. JURY R., RULE 28. *See also* ABA PRINCIPLES FOR JURIES AND JURY TRIALS, *supra* note 9, at 122.

46) JURY TRIAL INNOVATIONS, *supra* note 7, at 162-63.

47) ABA PRINCIPLES FOR JURIES AND JURY TRIALS, *supra* note 9, at 122.

V. Advisory Jury Verdict

A final characteristic I would like to discuss is Korea's choice to make the jury's verdict advisory rather than binding.⁴⁸⁾ The motivation is said to stem from constitutional concerns; because the Korean constitution specifies that a judgment must be made by a judge, the use of lay citizens to arrive at verdicts might violate the constitution.⁴⁹⁾ Additionally, because most Korean citizens have little or no experience with law, the courts, and jury decision making, some have argued that an advisory verdict is most appropriate at this point in time.⁵⁰⁾ Interestingly, during the first three years of the Korean jury system, juries' advisory verdicts and judges' verdicts were the same in nine out of ten jury trials.⁵¹⁾ The 2013 review of Korea's jury system concluded that the experiment had been successful and recommended that henceforth the jury verdict be "de facto binding."⁵²⁾

In the United States, advisory juries that provide nonbinding decisions are employed in a few limited circumstances. In the criminal justice system, they are found in the small number of states that give the judge rather than the jury final authority to decide on capital punishment. In these states (which include Alabama, Delaware, and Florida), juries make a binding decision on the guilt or innocence of the defendant; they may also determine the existence of one or more aggravating factors if those make the defendant eligible for capital punishment. However, their vote on whether the defendant deserves a life or death sentence is only advisory to the trial judge, who makes the binding determination.⁵³⁾ Research on the

48) The Act, *supra* note 2, art. 46(5).

49) DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 27(1) (S. Kor.).

50) See discussion in Lee et al., *supra* note 5.

51) Kim et al., *supra* note 4.

52) Press Release, Supreme Court, Kukmin Sapöþ Ch'amyöwiwönhoe - Kukminch'amyöchaep'an Chetoüi Ch'oechonghyöngt'ae Kyölchöng [Citizens' Participatory Trial Review Committee Decides on the Final Form and Scope of Citizens' Participatory Trial] (Mar. 6, 2013) (S. Kor.), *available at* <http://eng.scourt.go.kr/supreme/news/NewsViewAction2.work?currentPage=9&searchWord=&searchOption=&seqnum=75&gubun=702>.

53) Valerie P. Hans, John H. Blume, Theodore Eisenberg, Amelia Courtney Hritz, Sheri Lynn Johnson, Caisa Elizabeth Royer & Martin T. Wells, *The Death Penalty: Should the Judge or*

overlap of jury advisory recommendations and judge sentencing shows that in the majority of cases, judges and juries agree.⁵⁴⁾

Researchers have interviewed jurors who give advisory sentences in capital cases.⁵⁵⁾ When their decision was only advisory, jurors felt less responsible for the sentencing decision, and they reported deliberating more quickly and less thoroughly, compared to jurors whose decision was binding.⁵⁶⁾ This pattern raises concern about whether Korean jurors react similarly to giving an advisory rather than a binding verdict.

Judges also have the discretion to empanel advisory juries in some American civil cases.⁵⁷⁾ They may do so to enlighten themselves about the community's perspective on the case. However, the jury's advisory verdict is not binding. Judges must find the facts and the law independently. There is little systematic analysis of the use of advisory juries in either the criminal or the civil context. We don't know whether the apparently lesser engagement evident in capital juries that make advisory sentencing recommendations are also found in civil advisory juries. That is all the more reason why in-depth research on Korea's advisory jury would be valuable to policymakers and jury scholars around the world.

VI. Conclusion

Korea's experiment with a new form of citizen participation in law holds considerable promise. By all accounts, in the first several years of its operation, the Korean advisory jury system has functioned very well. It has generated greater transparency in the legal system. The citizens who have

the Jury Decide Who Dies? J. EMPIRICAL LEGAL STUD. (forthcoming).

54) *Id.*

55) Bowers, *supra* note 23.

56) *Id.* at 954-60 (jurors in hybrid states felt less responsible than jurors in states in which their decision was binding); *id.* at 973-77 (finding that jurors in hybrid states deliberated more rapidly, compared to states in which they made binding decisions).

57) Fed. R. Civ. P. 39 (c)(1) specifies that in "an action not triable of right by a jury, the court, on motion or on its own may try any issue with an advisory jury..." For an insightful discussion of advisory juries, see Shari Seidman Diamond & Francis Doorley, *What a (Very) Smart Trial Judge Knows about Juries*, DEPAUL L. REV. (forthcoming).

participated as jurors have become more educated about law and the justice system in action, and overall have come away with favorable impressions of their experience. Whether it will ultimately fulfill its twin goals to encourage greater democracy in Korea and to generate more legitimacy for the Korean courts remains to be determined, but there are many positive signs. What is more, careful scientific analysis of Korea's experiences with its unique form of lay participation will inform not only policymakers in Korea but also students of the jury around the globe.

Appendix

Juror's Guide

[Case no. 2013GoHap497: Case concerning the violation of the Act on the Enhanced Punishment of Certain Crimes (Assault on Drivers Operating Motor Vehicles)]

2013. 9. 4.

Seoul Central District Court, the 28th Criminal Division

Table of Contents

- I. Facts of the Case
- II. Trial Schedule and Cautionary Notice
- III. Evidentiary Proceedings
- IV. A Guide to Criminal Proceedings and Rules of Evidence
- V. A Guide to Jury Deliberations

※ Notice

1. The purpose of the Juror's Guide is to provide assistance to jurors in their better understanding of the trial procedures and the rights, duties, and functions of the juror.
2. Jurors may take notes on the Juror's Guide but may not look at the notes of fellow jurors. The Juror's Guide may not be taken outside the Courthouse.
3. The Juror's Guide is collected by the Court following the conclusion of the trial proceedings and subsequently discarded.

I. Facts of the Case

1. Summary of the facts charged and applicable provisions

Defendant	LEE JY (male / age: 54)
Victim	PARK CS (male / age: 55 / Bus driver)
The Facts Charged	<p>At approximately 21:20 on April 17th 2013 and inside the city bus no.103-1, which was operating near Non-hyun Middle School located at 600 Non-hyun-dong Namdong-gu Incheon city, the defendant provoked the victim Park, a 55-year-old bus driver, for reasons that the victim did not properly respond when the defendant asked for directions. After the victim stopped and parked the bus, the defendant and the victim engaged in physical altercation. At 21:34 of the same said date, the defendant approached the victim (who had at the time resumed the operation of the bus) from behind and kicked the right part of the victim's face once and inflicted injuries upon the victim consisting of facial bruising of the right side requiring approximately 2 weeks of medical treatment etc.</p> <p>Thus, the defendant inflicted bodily injury upon a driver operating a motor vehicle.</p>
Charged Crime and Applicable Provisions	<ul style="list-style-type: none"> ● Charged Crime : Violation of the Act on the Enhanced Punishment of Certain Crimes (Assault on Drivers Operating Motor Vehicles) ● Applicable Provisions : Act on the Enhanced Punishment of Certain Crimes, Article 5-10 Paragraph (2) <ul style="list-style-type: none"> ■ Act on the Enhanced Punishment of Certain Crimes, arts. 5-10 (Enhanced Punishment of Assault on Drivers Operating Motor Vehicles) <ul style="list-style-type: none"> ① Any person who <u>assaults or intimidates a driver operating a motor vehicle</u> shall be punished by imprisonment for a term of no more than five years, or be fined an amount of no more than twenty million won. ② In cases where the crime referred to in paragraph (1) results in the bodily injury of any other person it shall be punished by imprisonment for a term of no less than three years, and in cases where the same said crime results in the death of any other person it shall be punished by imprisonment for a term of no less

than five years, or for life.

※ The Prosecutor's Office has indicted the defendant on the charges of the violation of Article 5-10 Paragraph (2) of the Act on the Enhanced Punishment of Certain Crimes. Therefore, jurors must first decide whether the actions of the defendant in fact constitute a violation of Paragraph (2) of the Article. If it is found that the actions do not constitute the crime of the infliction of bodily harm as proscribed by Paragraph (2) of the Article, the jurors must then decide whether it constitutes the crime of assault under Paragraph (1) of the same Article.

2. Arguments of the Defendant and his Counsel

The defendant acknowledges that he approached the victim with the intention of kicking him. But as the foot of the defendant never made contact with the victim, the defendant cannot acknowledge the Facts Charged put forth by the Prosecution insisting that the victim was bodily injured as a result of the kick. The defendant had in fact engaged in a physical altercation with the victim while the bus had come to a stop beforehand, and it may have been that the victim's injury resulted from that altercation.⁵⁸⁾

3. The Legal Issues of the Case

A. Whether during the operation of the bus, the foot of the defendant had in fact made contact with the victim's face; and if so, whether the victim had been bodily injured as a result of that fact.

B. If the foot of the defendant had not made contact with the victim's face, whether the defendant's act of attempting to kick the victim itself constitutes an act of assault.

58) The fact of the existence of a physical altercation during the bus stop in the Facts Charged was merely inserted to help explain the circumstances surrounding the assault of the victim by the defendant. Therefore, jurors must note with caution that even if it is found that the defendant had in fact inflicted bodily injury upon the victim during a stop, the defendant may not be found guilty for that reason.

4. *Associated Legal Principles and Jurisprudence – Whether acts directed at but not making direct contact with another person’s body could constitute an act of assault*

A. The Concept of Assault under Criminal Law⁵⁹⁾

The concept of assault refers to the use of material force against the body of another person.

The subject of assault must always be the body of a person. Therefore, the simple use of material force directed against objects does not constitute assault. For example, the act of throwing human feces at another person’s yard, or the act of kicking at another person’s front door or a locked room door while using abusive language does not by itself amount to an act of assault under criminal law.

However, if the use of material force is directed at the body of a person, it need not necessarily reach, touch, or make contact with the body of that person itself. For instance, throwing a rock to hit the ground right in front of the victim’s feet, throwing a rock at the victim’s person but missing, brandishing a knife in a small, closed room which the victim is also in, or driving dangerously close to the victim as if to hit him/her with the vehicle all sufficiently amount to an act of assault. Of course, even in such instances, the use of material force must pose a significant enough threat of bodily harm to the person of the victim so as to induce substantial fear. For instance, if a rock thrown at the victim falls woefully short and far from that victim’s person, it does not pose the significant amount of threat of bodily harm required to constitute an act of assault.

B. Judicial Precedents

■ Assault in the context of the crime of assault refers to the use of material force against the body of another person, and does not necessarily require the exercised force to make contact with the victim’s person. Thus, acts such as, for instance, approaching the victim using abusive language

59) HYEONGBEOP JUSEOG - GAGCHIG VOL. 3 [COMMENTARIES TO CRIMINAL LAW, SPECIAL PART VOL. 3] 268-269 (2006) (S. Kor.).

while brandishing hands, feet, or objects as if to strike the victim, or throwing objects at the victim, all constitute the illegal use of material force amounting to assault under criminal law even if there was no direct contact made with the victim's person. (Supreme Court, 89Do1406, Feb. 13, 1990).⁶⁰⁾

II. Trial Schedule and Cautionary Notice

1. Trial Schedule

[AM 11:00 ~ 11:40]

- ① Jurors sworn in under oath, notification of the right to refuse testimony to the defendant, confirmation of the defendant's personal information
- ② Opening statement of the Prosecution
- ③ Defendant's plea and the opening statement of the Defense Counsel
- ④ Brief overview of the pleadings by the Prosecution and Defense

[PM 1:30 ~ 6:00]

- ⑤ Witness examination: CS Park (victim), JH Lee (eyewitness), JW Choi (investigating police officer)
- ⑥ Examination of evidence (documentary and physical evidence etc.)
- ⑦ Interrogation of the defendant and the closing statements of the Prosecution and Defense, final statement of the defendant
- ⑧ Jury deliberations and delivery of verdict (sentencing discussions with the Judges in case of guilty verdict)
- ⑨ Sentencing of the Court

60) However, the Supreme Court in the above 89Do1406 judgment found that the actions of the defendant did not constitute an act of assault. This was due to the fact that the Facts Charged put forth by the Prosecution did not include a reference to any specific acts on part of the defendant which could constitute assault such as the display or exercise of force with the apparent intent of striking the victim. The Prosecution merely stated facts of the defendant using abusive language.

2. *Cautionary Notice to Jurors*

A. Jurors may not directly question or interrogate the defendant or witnesses. Jurors may submit a written note of questions to the presiding judge after raising their hands when the presiding judge inquires whether the jurors have any questions. The presiding judge will question the defendant or witness on behalf of the jurors.

B. Jurors may take notes of whatever items or facts they deem important to the case on the memo sheet placed before them. Jurors may take their notes to the deliberation chambers and consult them after the pleadings have concluded, but must take all caution to ensure that the contents of their notes are not disclosed to other fellow jurors except during deliberation. All notes and memo sheets are collected and discarded by the Court following the conclusion of the deliberations.

C. Jurors may not leave the trial chambers during the hearings, and may not arbitrarily leave the deliberation chambers or discussion chambers before the deliberations, verdict determination, or the sentencing discussions have been fully concluded.

D. Jurors may not discuss the case with other persons or disclose their opinions of the case before the commencement of the deliberations, and shall not breach the confidentiality of the deliberations and discussions.

III. Evidentiary Proceedings

1. *Interrogation of witness – requested by prosecutor*

No.	Witness	Memo
1	Park, CS	
2	Lee, JH	
3	Choi, JW	

2. Evidence Documents

A. Requested by Prosecutor

No.	Evidence	Purpose of proof	Memo
1	Protocol of statement (Park, CS)	Statement on victim's damage	
2	Protocol of examination of a suspect	Defendant's confession on facts charged	
3	Diagnostic certificate for injury	Victim's injury	
4	Black box - recorded visual image	Recorded image of alleged crime	
5	Inquiry on criminal records	Defendant's criminal record	
6	Written agreement	Agreement between defendant and victim -sentencing material	
7	Investigation report	Witness Lee JH's statement Choi, JW's statement (written by police)	

B. Requested by Defense Counsel

No.	Evidence	Explanation	Memo
1	Inquiry on facts (Yeonsu Medical, Orthopedics)	Explanation of victim's diagnostic certificate of injury	

IV. A Guide to Criminal Proceedings and Rules of Evidence

1. *Criminal Proceedings - Prosecution - Indictment - Facts charged*

- Criminal Proceedings: Procedure to judge whether a defendant has committed a crime and to decide corresponding punishment if the defendant is found guilty.
- Criminal Proceedings begin with prosecution, and a prosecutor's file of lawsuit against defendant. In order for a prosecutor to prosecute, he should submit a documentation called an indictment to the court.
- Jurors shall judge whether the facts charged are accepted.

2. *In dubio pro reo*

- Constitution and Criminal Procedure Act prescribe a defendant's innocence until the conviction is confirmed.
- Therefore, in order to convict a defendant, a prosecutor assumes the burden of proof, not a defendant.

3. *Defendant's right to refuse to make statements*

- A defendant has the right not to make statements against his own will.
- A defendant may remain silent during the trial, and may only answer inquiries he wants to.
- Despite a defendant's refusal to make statements, he should not be treated adversely.
 - For example, even if a defendant does not respond to an inquiry asking if he has assaulted a victim, the defendant's silence shall not be taken as evidence of the defendant's assault.

4. *Rules of Evidence*

A. Concept

- A trial based on evidence refers to a trial in which the defendant's conviction is dependent only on evidence submitted to the court.

- Evidence includes witnesses' and defendant's statements, articles of evidence, and evidence documents.
- Conviction should not be based on the following, as they are not regarded as evidence:
 1. Statements of the prosecutor and defense on how to judge evidence.
 - Ex) When the prosecutor, defense or defendant insist ○○ is truth, ○○ should not be accepted by the court as fact merely because it is supported by prosecutor/attorney-at-law's statement without judgment on other evidence.
 - However, the prosecutor and defense's statement can serve as a reference in judging evidence/fact.
 2. Hearsay from newspaper and TV on the case in question.

B. Precautions on Evidence Examination

- Once a prosecutor or an attorney-at-law raises an objection that the other party's inquiry or witness's statement is unlawful during the trial, the court shall examine the evidence.
 - If the objection is accepted, the corresponding inquiry or testimony is unlawful, and the inquiry/testimony is null and void *ab initio*.
 - If the objection is dismissed, the jury shall not discuss nor speculate about the inquiry/testimony during deliberation.
- If the court makes inquiries to a witness or a defendant, the intention is to clarify relevant facts, and not to present its opinion. Therefore, both parties shall not speculate about the court's intention but focus on facts clarified through inquiries.

C. Level of proof - proof beyond reasonable doubt

- **A guilty verdict** should be given when the proof of a statement of facts by the prosecutor is **beyond reasonable doubt**.
 - In other words, the proof of a statement of facts by the prosecutor is not required to prove all facts 100% to the extent that there is absolutely no doubt. It means that the defendant can be adjudged to be guilty if it is no longer reasonable to regard defendant as innocent according to experience and common sense.
- Whereas, a judgment of acquittal should be made when there is doubt that the defendant might be guilty according to his experience and

common sense. This is 'reasonable doubt' and the prosecutor's proof is insufficient to acknowledge guilt, and thus a not-guilty verdict should be given.

5. Principle of free evaluation of evidence

A. Concept

- Principle of free evaluation means that the standard of reliability of evidence is not regulated by law, but by the discretion of judges.
- Jurors may decide at their discretion whether the evidence is reliable, the value of evidence and which evidence is probative among the evidence presented according to their experiences and common sense.
- The same standard should be applied to all witnesses, regardless of sex, age, occupation, and religion, and no prejudice is allowed.

B. Principle of decision (evaluation)

- Take into account every investigated evidence in the decision thoroughly,
- Examine mutual relations of evidence from every aspect, evaluate them comprehensively, and prove them elaborately,
- Decide the probative value of evidence according to experience and rule of logic.

C. Matters to be attended to in making decisions

- Do not form a hasty opinion from the evidence and do not admit finding of facts contrary to the evidence.
- Be able to make a reasonable explanation for accepting one piece of evidence and turning down the other when the evidence is contradictory.
- There should be a sufficient explanation when admitting circumstances opposite to what can be normally acknowledged.
- Do not neglect the possibility of other reasoning by adhering to certain reasoning when several kinds of reasoning are possible in the process of evaluating evidence and you should give an account of turning down other reasoning.

6. *Credibility of testimony of witness*

- When making decisions on whether the testimony of the witness is reliable or not, jurors can use their own knowledge and life experience and also take the following questions into consideration.
 - Did the witness have a chance or the ability to see, hear or understand the facts about which he/she testified?
 - How accurately did the witness remember and describe the incident?
 - Did the witness understand the question and promptly respond?
 - What was the attitude of the witness while testifying?
 - Was the testimony of the witness affected by a personal relationship with persons involved in the case, such as the defendant, or by interests of the result of the case?
 - Considering other evidence, was the testimony from the witness persuasive?
- Confirm step by step whether the witness understood the facts accurately, remembered them correctly and brought back his/her memory in court properly.
- Even if there are inconsistent or contrary parts in the testimony of the witness, one cannot assert that the witness is completely unreliable, as human recognition ability and memory are limited. It is possible to acknowledge some part of the testimony of the witness and distrust the other part and also trust or distrust the whole part.
- Considering these standards of evaluation, one should make one's own decision on which evidence is reliable and which is unreliable.

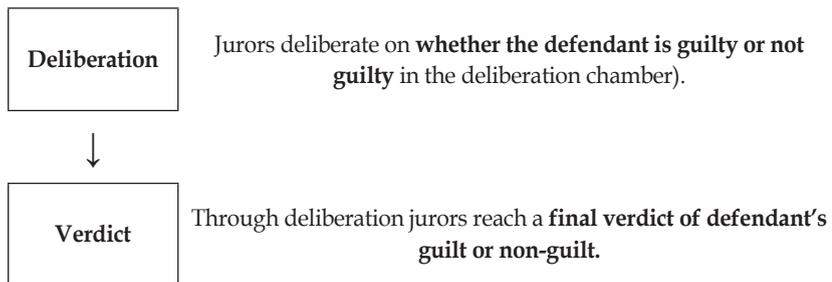
7. *Confession and corroborating evidence (corroboration)*

- When the confession of a defendant is the only evidence against him, the confession shall not be taken as evidence of guilt. (Article 310 of Criminal Procedure Act)
- However, if there is corroborating evidence of the confession, you must decide whether the defendant's confession is true, according to the evidence submitted by the prosecutor.

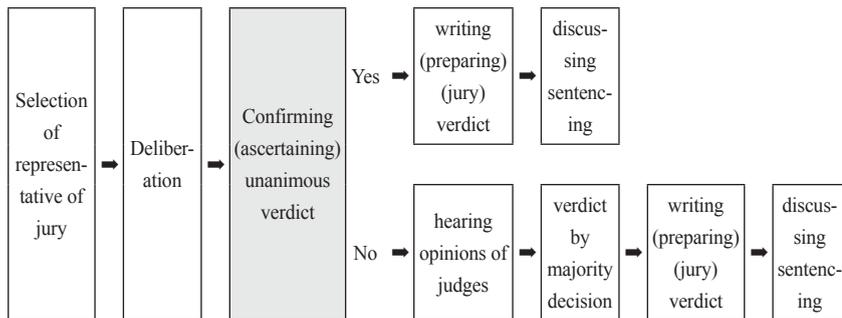
8. *Standard of sentencing and decision of sentencing length*

- When admitting the facts charged as guilty, a proper sentencing should be made. The Committee of Sentencing which is established by Part VIII of Court Organization Act sets a standard of sentencing which can be referred to by judges to determine a reasonable sentence. The standard of sentencing carries no legal binding force, but is a recommended standard; however, judges shall respect the standard of sentencing and if a judgment pronounced differs from it, the written judgment shall include reasons therefore.

V. Guide to Jury Deliberations



【Process of deliberation procedure】



1. Selection of foreman of jury

- First, jurors select the foreman of the jury.
- The foreman of the jury plays a role in:
 - presiding over the deliberation;
 - asking for admission to the deliberation chamber;
 - requesting judges' opinion;
 - asking for submission of evidence;
 - aggregating the results of the verdict;
 - preparing and delivering the jury verdict.

2. Deliberation procedure

- Jurors take part in deliberation.
 - **listen to other jurors' opinion attentively.**
 - **fully state one's own opinion.**
- Foreman of jury presides over deliberation.
 - distributes **equal chances to jurors for statements.**
 - enable jurors to **make sufficient statements.**
- Jurors abide by the rules (principles) of deliberation.
 - **should not become emotional** and should make a fair judgment.
 - discuss based on the **evidence seen (presented) in the court and judges' explanation.**
 - When the opinions are divided into guilty and not-guilty, try to reach **unanimous decision** through discussion and persuasion.
- At the request of the majority of the jurors, the opinion of the court may be heard.
 - The foreman of the jury sends a request to the court.
 - The jurors inquire of the court the necessary matters.

3. Confirmation of the unanimous verdict

- The jurors express their opinions on whether the defendant is guilty or not guilty.
 - The jurors clearly express their opinions on whether the defendant is

guilty or not guilty.

- The foreman of the jury counts the votes on whether the defendant is guilty or not guilty.
 - The foreman of the jury clearly confirms the individual opinions of each and every one of the jurors.
 - The votes are counted assortatively per crime.
- When a unanimous verdict comes down, the foreman of the jury writes down the verdict and notifies the court.
 - The foreman of the jury writes down the verdict.
 - The jurors sign and seal the verdict.
 - The foreman of the jury puts the written verdict in an envelope and conveys it to the court.
- When a unanimous verdict has been reached on only some of the charges, follow-up deliberation process is continued on the remaining charges.
 - The foreman of the jury writes the verdict only on charges on which a unanimous verdict has been reached.

4. Majority verdict

- When a unanimous verdict on whether the defendant is guilty or not guilty cannot be reached, the opinion of the court must be heard.
 - The foreman of the jury contacts the court.
 - The jurors inquire of the court the necessary matters.
- After hearing the opinion of the court, the deliberation process is continued.
 - After hearing the opinion of the court, the foreman of the jury presides over the deliberation process.
 - The jurors again deliberate about their opinions on whether the defendant is guilty or not guilty through discussion and persuasion.
 - The foreman of the jury presides over the process, allowing for sufficient discussion among the jurors.
- When the verdict has been reached, the foreman of the jury writes down the verdict and notifies the court.
 - The foreman of the jury writes down the number of those who voted “guilty” and the number of those who voted “not guilty” in the verdict.

- The jurors sign and seal the verdict.
- The foreman of the jury puts the written verdict in an envelope and conveys it to the court.

When the verdict has been reached, please immediately notify the court of the fact that the decision has been reached by phone or by the staff on standby outside the deliberation room.

5. Sentencing Discussions (in case of a guilty verdict)

- When a guilty verdict has been reached, sentencing discussions are conducted with the court.
 - The procedure is for expressing opinions on the reasonable sentence to be imposed on the defendant.
 - The range of punishment and sentence conditions explained by the court are consulted.
 - Jurors who have voted not guilty also participate in the sentencing discussions.

6. Matters of note

○ Election of the foreman of the jury

- The jurors must elect the foreman of the jury after moving to the deliberation room and consulting each other.
Juror No. 1 assumes the position of moderator and gives advice on how to elect the foreman. If electing a foreman is difficult, contact the court and the foreman shall be appointed by the court.
- The foreman assumes the role of presiding over the deliberation process, requesting the control of the entrance and exit of the deliberation room, requesting the opinion of the judges, requesting that evidence be provided, tallying up the results of the deliberation, writing down the verdict including the results of the deliberation process, and conveying the verdict to the court. When presiding over the deliberation process, the foreman should particularly pay attention so that all jurors are allowed to sufficiently state their opinions and that all jurors are fairly distributed chances to express their opinions.

○ Deliberation process

- The verdict must be by the unanimous decision of the jurors.
The law requires unanimity because there is a high possibility that the truth may be found in the process of discussing and persuading each other to reach a unanimous decision. Therefore, if opinions are divided on whether the defendant is guilty or not, please do your best to reach a unanimous decision through discussion and persuasion. You should exchange thoughts and judgments with open hearts and respect the opinions of others in the process of deliberation.
- However, speaking at length and disclosing voting plans from the beginning may impede having open discussions. You should not give up your proper opinion in order to end the deliberation quickly. You should not change your opinion simply because the other jurors do not agree. However, do not hesitate to change your opinion when you deem the opinion of the other jurors to be reasonable.
- There is no special rule to conducting the deliberation process, but a more efficient process may include the following steps: the first possible method is that each juror speaks his or her individual conclusion, and these conclusions are collected. After collection of the conclusions, the opinions of the jurors are heard, and conclusions are again collected. If a unanimous verdict cannot be reached, conclusions may be collected again after discussions. Another possible method is that the opinions of each juror are heard, jurors discuss, conclusions are collected, and if a unanimous verdict cannot be reached, conclusions are again collected after discussions.
The foreman of the jury should keep in mind that each juror be fairly given chances to express his or her opinion.

○ Hearing the opinion of the court

- In the deliberation process to reach a unanimous verdict, when the opinion of the court becomes necessary, the opinion of the court may be heard at the request of the majority of the jurors. If the jury cannot reach a unanimous verdict even after making the utmost effort to do so, the jury may render a majority verdict; however, the opinion of the court must be heard in advance. Keep in mind that there are two chances to request the opinion of the court. One is optional; one is mandatory.

○ Examination of the contents of trial

- If there are matters that need to be examined in the process of the deliberation, you may ask the court about specific details. If the contents of witness testimony or articles of evidence need to be examined, you will be allowed to examine them at your request.
- If there is disagreement between jurors concerning specific details in the testimony of witnesses or the defendant, it is advisable that you ask the court and examine the facts rather than simply relying on memory or notes.

○ Sentencing Discussions

After the verdict on the guilt or innocence of the defendant has been determined, in the case of a guilty verdict, the members of the jury may discuss with the court the sentence to be given to the defendant and express opinions on the issue. Therefore, you should immediately notify the court after determining the verdict.

The court will inform you of the procedures that follow.

