

Court Recording Methods and Their Implication on Criminal Trial Procedure: Focusing on Digital Audio Recording Model's Potential to Facilitate Concentrated-Hearing in Korea

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Abstract

Three new models of court recording system (Computer-Assisted Transcription Model, Digital Audio Recording Model, and Video Recording Model) have emerged in the U.S. in response to the inherent shortcomings of the traditional transcript. Among those, the Korean Supreme Court in 2015 partially adopted the Digital Audio Recording Model with the hope to further galvanize the movement toward 'courtroom-oriented judging' envisioned in the 2007 revision of the Korean Criminal Procedure Act.

This article accounts for different ramifications of the new models on criminal trial procedure. And through the comparative analysis of the hybrid structure and the current practice of the Korean criminal trial, the author argues that while the entrenched 'discontinuous hearing' is negating the positive effect of the adoption, still the audio recording can be utilized as an avenue for vitalizing 'concentrated hearing' set forth in the 2007 revision by alleviating judges' burden on court-record-production and discouraging trial participants from relying on written records. The author also argues that the Video Recording Model is worth exploring not only for its conduciveness to appellate review, media communication and education within the judiciary, but also for its capability to encourage vigorous 'in-courtroom advocacy' which is the essential prerequisite for 'courtroom-oriented judging.'

KEY WORDS: Court Record, Transcript, Digital Audio Recording, Video Recording, Criminal Trial Procedure, The Korean Criminal Procedure Act, Courtroom-Oriented Judging, Continuous/Concentrated Hearing, Transparency, Public Confidence

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I. Introduction: Significance of Court Recording Policies

It is easy to depreciate court recording methodology and think of it as a mere documentation of what had happened in courtrooms. However, numerous examples illustrate far-reaching ramifications of a significant policy change regarding court records.¹⁾

For instance, until 1971 in Massachusetts when the ‘de novo trial system’ was the norm, the nonexistence of official transcripts of the initial bench trials was pointed out as one of the root causes of the ‘evisceration of procedural due process.’²⁾ The subsequent phase out of the ‘de novo trial system’ between 1987 and 1994 accompanied ‘strengthened court record production and management system’ as well as public access thereto.³⁾

Also, the nature of first instance courts’ recording method affects the scope of appellate review. As more and more trial courts in the United States favor digital audio recording or video recording over traditional transcript, whether appellate courts will continue to exhibit wide deference to trial courts’ findings of fact has attracted scholarly attention.⁴⁾

Sometimes, policy changes in court recording system are geared toward mollifying public outcry for ‘cost and time efficient courts.’ The innovative video trial recording system adopted 30 years ago in Kentucky courts was then conceived as an integral part of countermeasures against severe budget restraint and burdensome backlogs.⁵⁾ Similarly, numerous courts in

1) As early as in 1953, David W. Louisell and Maynard E. Pirsig wrote “The practice in American courts of making a verbatim record of the proceedings . . . can exert a vital and even dominating influence on the formulation of philosophy of adjudication” (WILLIAM E. HEWITT, *VIDEOTAPED TRIAL RECORDS: EVALUATION AND GUIDE* xxi (The National Center for State Courts, 1990); David W. Louisell & Maynard E. Pirsig, *The Significance of Verbatim Recording of Proceedings in American Adjudication*, 38 Minn. L. Rev. 29 (1953-1954)).

2) See JEROME S. BERG, *ROUGH JUSTICE TO DUE PROCESS: THE DISTRICT COURTS OF MASSACHUSETTS 1869-2004* 52, 66 (2004).

3) *Id.*, at 98-99, 144-145.

4) See, e.g., Mary E. Adkins, *The Unblinking Eye Turns To Appellate Law: Cameras in Trial Courtrooms and Their Effect on Appellate Law*, 15 *Journal of Technology Law & Policy* 65 (June, 2010) [hereinafter *Unblinking Eye*]; See, e.g., Bernadette Mary Donovan, *Deference in a Digital Age: The Video Record and Appellate Review*, 96 *Virginia L. Rev.* 646 (2010).

5) WILLIAM E. HEWITT, *supra* note 1, at 41-42.

the western part of Malaysia in 2009 introduced new 'Court Recording and Transcription' (CAT) equipment to deal with delays and backlogs in their trial system.⁶⁾

Furthermore, some judges in the United States assert that, by adopting more transparent recording system of trial proceedings, the judiciary can also embrace the outside demand for more professional and courteous judicial conduct of judges.⁷⁾ They believe that such change could help judges focus on the proceedings while on bench.⁸⁾

This article is premised on the author's staunch belief molded by the experience on the bench in Korean criminal courts that court recording method, in Korea too, is one of the 'sweet spots' in judicial policy area. The recent adoption of the new digital audio recording system in Korean courts has the potential to galvanize a profound change in criminal trial practice and move it one more step toward 'courtroom-oriented judging' as set forth in the revision of the Korean Criminal Procedure Act in 2007.

To explain my view, I will first overview various current court recording systems in the United States where relevant researches are rigorously conducted (Chapter II), and then discuss the implications and the prospect thereof (Chapter III). I will then explore court recording methods in Korea and examine ramifications of the recent policy shift on Korean criminal trials (Chapter IV, VI). During the course of this discussion, I will describe the peculiar fabric of the Korean criminal trial system so that readers can better understand and appreciate the significance of the policy shift (Chapter V). Finally, I will conclude by explaining why further exploration of video recording in Korea is imperative (Chapter VII).

6) See The World Bank, Malaysia: Court Backlog and Delay Reduction Program, A Progress Report (Aug. 2011), available at <https://openknowledge.worldbank.org/bitstream/handle/10986/16791/632630Malaysia0Court0Backlog.pdf?sequence=1> (last visited Apr. 19, 2016, 13:15 PM).

7) Thomas W. Brothers, *The Video Record*, 39 *The Judges' Journal* 46 (Winter, 2000).

8) *Id.*

II. Overview of Current Recording Models in the U.S.

1. *Traditional Transcript*

Conventional court records in the U.S. consist of paper text transcripts with the necessary supporting exhibits and ancillary paper.⁹⁾ Transcripts are produced by court reporters. Court reporters are, functionally speaking, stenographers, and they are either court employees or, more often than not, contractors with respective courts. They usually sit in courtroom hearings to create a draft transcript and subsequently complete the task outside the court's supervision.

The full costs of transcript production are passed on to the litigants, and court reporters subsist on fees paid by them. On one hand, court reporters are often known for facing the predicament of delayed payment. On the other hand, the scarcity of resources and the lack of the court's supervision on the transcript-production-process result in backlogs as later discussed in this article.

2. *New Models*

1) *Computer-Assisted Transcription Model*¹⁰⁾

This model refers to a group of court recording systems characterized by presence of the following two common components: (i) a computerized court reporting equipment;¹¹⁾ (ii) a highly skilled and trained professional court reporter who is capable of operating such equipment.¹²⁾

9) Elizabeth C. Wiggins, *What We Know and What We Need to Know About the Effects of Courtroom Technology*, 12 Wm. & Mary Bill Rts. J. 774 (2004).

10) Fredric, I. Lederer, *The Effect of Courtroom Technologies on and in Appellate Proceedings and Courtrooms*, 50(4) Defense Law Journal 779 (Winter, 2001).

11) Keith A. Gorgos, *Lost in Transcription: Why the Video Record Is Actually Verbatim*, 57 Buff. L. Rev. 1067-70 (2009).

12) Mark V. Green et al., Report of the Study Committee on Trial Transcripts 41 (Submitted to the Justice of the Supreme Judicial Court of Massachusetts on June 30, 2003), available at <http://www.mass.gov/courts/docs/trialtransrep.pdf> (last visited Apr. 19, 2016, 13:18 PM).

This model strives to produce real time transcripts of court proceedings by maximizing the speed of stenography. Typical equipment used in this model includes steno-shorthand keystrokes, instead of alphabet letters on keyboards, and they help users convert the keystrokes into text by providing a customized dictionary whereby each set of keystrokes corresponds to a particular text.¹³⁾

Another equipment used in this model is called stenomask¹⁴⁾ or silencer,¹⁵⁾ a specially designed mask into which a court reporter enunciates what participants say in the courtroom as the trial is going on. Special interpretation software then recognizes the reporter's words and transforms the phonetic signals into written words on the stenograph.¹⁶⁾ This particular type of the model is often called 'voice writing.'¹⁷⁾

This model has later evolved to incorporate another feature which provides each participant in a trial a discrete access to real-time transcription for his/her personal bookmarking and annotating.¹⁸⁾ The following four components are necessary in order to make such live access to transcripts possible in the contemporary courtroom setting: (i) a digital transcript form; (ii) a display equipment, such as computer screen; (iii) a software that enables input of marks and annotations to transcripts; (iv) a control panel that isolates each person's version of transcripts in order to prevent the collision among the marks and annotations and preserve the official version.

2) Digital Audio Recording Model

Transcripts are superseded by digital audio files in courts that adopt the Digital Audio Recording Model. Electronic systems which are capable of capturing, storing, managing, copying, and disseminating audio information are set up in courtrooms.¹⁹⁾ Some systems are also capable of tagging digital

13) Gorgos, *supra* note 11, at 1068-1070.

14) *Id.* at 1066.

15) Lederer, *supra* note 10.

16) *Id.*

17) *Id.*

18) See WILLIAM E. HEWITT & JILL BERMAN LEVY, COMPUTER AIDED TRANSCRIPTION: CURRENT TECHNOLOGY AND COURT APPLICATIONS 6, 55 (The National Center for State Courts, 1994).

19) Green et al., *supra* note 12, at 43.

logs and annotations to audio files.²⁰⁾ The court-record-production-process is drastically simplified down to 'audio recording,' and the area of concern shifts from the transcription itself to the operation and management of these electronic systems.

This model merely requires a multi-channel digital recording system that comprises of the following two components: (i) multiple microphones affixed at certain locations in a courtroom; (ii) a digital storage of the recorded files with convenient access thereto. A compact disk onto which recorded audio files are burned is often the final form of official court records.²¹⁾ Whether to have the records transcribed for future usage is a decision left for each participant.

3) Video Recording Model

The Video Recording Model refers to a sophisticated technical system that includes the following two components: (i) multiple sets of video cameras and microphones; (ii) a control panel. This model is designed to capture the proceedings in a visualizable way.²²⁾ A typical system has a multi-channel control panel with each channel corresponding to the video coverage of each different trial participant, such as the presiding judge, prosecutors, attorneys, defendants and witnesses. Each video channel can be isolated from other channels for a discrete review, and it is bundled with the audio feed from corresponding microphones. Users can type in indexes and logs via software with references to the date and time at each pertinent point of proceedings for the convenience of review.²³⁾

This system is in the midst of perpetual evolution as technology develops. For example, a cutting edge comprehensive system can generate and record a synthesized video display that simultaneously contains multiple video feeds from different video channels including the feed from

20) Lizabeth L. Patterson, *Transition from Audiotapes to Digital Technology in the Federal Immigration Courts*, Institute for Court Management Court Executive Development Program Executive Summary May 2000, para. 8 (Jun. 29, 2010), available at <http://www.ncsc.org/~media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2000/Digital%20Technology.ashx> (last visited Apr. 19, 2016, 13:20 PM).

21) Green et al., *supra* note 12, at 43-44.

22) *Id.* at 48; Hewitt, *supra* note 5, at 6.

23) Hewitt, *supra* note 5, at 8.

visual presenter or courtroom multimedia player.²⁴⁾ Rearranging the synthesized video display is also possible in some systems, and each video feed is capable of being selectively zoomed-in, with hyperlinked indexes of procedural events.²⁵⁾ The indexes can be infused into an electronically submitted brief as citations. This can link the reviewer to the exact corresponding video footage of the trial within a click of mouse.²⁶⁾ The system used in Japan for the *Saiban-in-saiban* has a voice recognition program incorporated in it, so the system can produce a transcript draft automatically and encode it in the recorded video footage as subtitles.²⁷⁾

The Video Recording Model was initiated in the Madison County Circuit Court in Richmond in 1982 and then was expanded throughout the state of Kentucky, making her the first state in the U.S. to have video footage as official court records. The second state to adopt this method at a major scale was Michigan.²⁸⁾ The Kentucky courts also used the video footage, as opposed to the transcript made on it, as the instrument for appellate review, whereas the Michigan courts kept relying on court reporters to produce transcripts from the video footage for appellate review when needed.²⁹⁾ The former model is can be referred as ‘the Kentucky model,’ and the latter, ‘the Michigan model.’³⁰⁾

24) See Jefferson Audio Video Systems, Inc., CENTRO audio video processor Installation and Operation, available at http://www.javs.com/downloads/centro_user_manual.pdf (last visited Apr. 19, 2016, 13:22 PM).

25) *Id.*

26) *Id.*; Lederer, *supra* note 10, at 783-784.

27) Takafumi Koshinaka et al., *Saiban-in saiban muke Onsei Ninshiki System [Voice Recognition System for Japanese Lay-Judge Trials]*, Vol.63 No.1 NEC Giho 49 (2010), available at <http://jpn.nec.com/techrep/journal/g10/n01/pdf/100112.pdf#search=%E9%9F%B3%E5%A3%B0%E8%AA%8D%E8%AD%98%E3%82%B7%E3%82%B9%E3%83%86%E3%83%A0+%E8%A3%81%E5%88%A4%E5%93%A1> (last visited Apr. 19, 2016, 13:24 PM).

28) Hewitt, *supra* note 5, at 3-7; See Michigan State Court Administrative Office, Michigan Trial Court Standards for Courtroom Technology, Section 1: Standards for Digital Video Recording Systems, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/ct_stds.pdf (last visited Apr. 25, 2015, 09:00 AM).

29) Hewitt, *supra* note 5, at 41-43, 57-59.

30) *Id.*

III. Prospect of Recording Models in the U.S.

1. Problems of Traditional Transcript

1) Errors and Editing

28 U.S.C. 753(b),³¹⁾ also known as the Court Reporters' Act, which confers both the authority and the responsibility to produce verbatim records on court reporters, seeks to prevent disputes and questions of veracity as to what occurred at trials, particularly in criminal trials.³²⁾

However, the efficacy of the Court Reporters' Act remains dubious. A classic study in 1988, which compared transcripts by court reporters against automatically recorded video footage on actual cases in the U.S. District Court for the District of Arizona, noted an average of nearly 8 errors per single-spaced page of transcripts. Among the errors were missing words, missing phrases, switching of words, and major alteration of sense. The study concluded that court reporters are human beings, and human beings have a powerful compulsion to interpret and understand what they hear in their own ways. As a result, the court reporter often goes beyond what is heard and transcribes it into what he/she feels the witness meant to say, and in some cases even 'cleans up' the speech of the witness.³³⁾

Most errors are hardly apparent on the surface. But even when errors seem conspicuous, additional legal battle is often raised to ascertain the true line behind the transcript, and tremendous judicial resources are consumed

31) It stipulates "Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. . ."

32) Gorgos, *supra* note 11, at 1061-62.

33) William Gillespie & Gary Shank, Saint Meinrad College, *Technological Innovation and the Quality of Court Records: Comparing Accuracy of Automatic Videotape Recording Systems With Court Reporters*, paras. 5-9, 17, 27, Jefferson Audio Video Systems, Inc., JAVS School, (2002), available at http://web.archive.org/web/20030419210822/http://www.javs.com/courts/feedback/gillespie_shank.html (last visited Apr. 19, 2016, 13:23 PM) [hereinafter Gillespie & Shank]; Donald E. Shelton, *Video Court Reporting: The Time Has Come*, 42 *The Judges' Journal* 32-33 (Winter, 2003); Gorgos, *supra* note 11, at 1082-84.

along the way. For example, in a U.S. Circuit Court case in 2007, the trial court had leveled up the sentence on distribution of illegal drug based on the findings of 'relevant purchases as a part of the same *course* of action.'³⁴⁾ However, a statement by the prosecutor was transcribed as "[The defendant] then got his cocaine from somewhere else. [With respect to] the two purchases that [witness A] testified about, the *course* of that cocaine was a different *course*."³⁵⁾ The Circuit Court, after explaining possible alternatives to the word '*course*,' concluded that, "while the first *course* in the transcript should obviously have been *source*, it was unclear whether the second *course* was erroneously transcribed or not," making it unclear whether the purchases were made as a part of the same *course* of action, and vacated the trial court's sentencing.³⁶⁾

Moreover, the conclusion of the aforementioned study in 1988 also reveals 'the issue of editing.' Editing is a readability-improving process that includes corrections, eliminations, rearrangements, restorations of speech, and usage of punctuation, interruptions, parentheses, etc.³⁷⁾ It is deemed to be a pervasive practice among court reporters in the U.S.³⁸⁾ As much as the reporters vehemently advocate the editing practice, the significant value judgments that take place in the course of editing and their impact on the meaning of the written words pose a grave question to scholars and practitioners, especially because the line between those value judgments and the task of the 'trier of fact' is inescapably blurred.^{39) 40)} Also, appellate

34) *United States v. McGowan*, 478 F.3d 800, 802-03 (7th Cir. 2007); Gorgos, *supra* note 11, at 1082.

35) McGowan, *supra* note 34, at 803; Gorgos, *supra* note 11, at 1082.

36) McGowan, *supra* note 34, at 803; Gorgos, *supra* note 11, at 1083.

37) Gorgos, *supra* note 11, at 1087-88, 1092, 1100.

38) *Id.*

39) *Id.* at 1090.

40) The guidelines for federal district court reporters stipulate that they should transcribe "an accurate record of words spoken in the course of proceedings," and also that "in the interest of readability, however, false starts, stutters, uhms, and ahs, and other verbal tics are not normally included in transcripts," "but such verbalizations must be transcribed whenever their exclusion could change the statement's meaning." (Federal Judicial Center, Revised Guidelines for The Preparation of Transcripts 7 (1982), reprinted in J.M. GREENWOOD ET AL., *A COMPARATIVE EVALUATION OF STENOGRAPHIC AND AUDIOTAPE METHODS FOR UNITED STATES DISTRICT COURT REPORTING* 143 (1983)).

judges have no other means than relying on transcripts even when the issue is a factual one: i.e., whether the decision at trial level is upheld by evidence. The influence of the editing by court reporters thus extends to appellate courts.

2) *Limitation of Written Medium*

In addition, the inherent limitation in transforming nuanced verbal information into written medium poses another fundamental problem, the problem which is exacerbated by the existence of nonverbal components in testimonies, both vocal and kinetic.⁴¹⁾

Although nonverbal paralinguistic information partakes in human communication, much of that information has no “written counterpart.”⁴²⁾ And even with the nonverbal information that has corresponding written counterpart, court reporters usually fail to capture or illustrate the subtleties thereof.⁴³⁾ Parenthetical notation, such as [spreads both arms], is rarely be utilized, nor does it suffice as a qualitative description.⁴⁴⁾ Yet science and technology have widely confirmed the importance of the nonverbal components in communicative information, and heavy reliance on ‘cold papers’ in fact-finding is repudiated more and more. It is often considered a savvy among trial judges both in Korea and in the U.S. that decisive testimony often occurs when a witness demonstrates a wide array of body language. Even with advocacy, demonstrative methods are often highly significant. It all points to the crucial importance of nonverbal information in a courtroom setting which cannot be fully transcribed.

3) *Cost and Backlogs*

The cost of transcripts from court reporters in the U.S. has been a perennial problem. In 2003 in Tennessee, where no court procedure existed for the litigants to obtain the official court record, a six hour transcript by a

41) See, e.g., Gorgos, *supra* note 11, at 1106-09.

42) See, e.g., John L. Barkai, *Nonverbal Communication from the Other Side: Speaking Body Language*, 27 San Diego L. Rev. 102 (1990); Gorgos, *supra* note 11, at 1109.

43) Ronald K.L. Collins & David M. Skover, *Paratexts. +*, 44 Stan. L. Rev. 537 (1992); Gorgos, *supra* note 11, at 1071.

44) Gorgos, *supra* note 11, at 1071.

privately hired reporter cost between \$1,500 and \$3,850.⁴⁵⁾ In 2016 in Massachusetts, where 'Transcription Services' does exist, a six hour transcript by a transcriber still normally cost around \$900.⁴⁶⁾ Back in 1981-1982 when the state of Kentucky experienced a revenue shortfall, court reporters were even urged to delay submission for fee bills for pauper transcripts.⁴⁷⁾

Moreover, training for stenographic transcription takes an average of forty months of full-time stringent training which results in extremely high attrition rates, thereby leading to insufficiency of court reporters.⁴⁸⁾⁴⁹⁾

It is worth noting that the court in Kalamazoo, one of the first to supersede transcripts with video recording in Michigan, was experiencing a tremendous backlog in transcript production.⁵⁰⁾

2. *Evaluating New Models*

1) *Computer-Assisted Transcription Model*

The Computer-Assisted Transcription Model focuses on addressing the cost and backlog problem with minimal adjustments to the preexisting practice. Thus, this model could be considered as an easily adoptable choice for judicial policy makers and court administrators.

However, a serious defect of this model results from its inability to enhance accuracy and to tackle the fundamental limitation of written medium. In fact, this model can even deteriorate the already problematic inaccuracy, and also complicate both the transcript-production-process and the reporter-training-process.⁵¹⁾ Sometimes proofreading is incorporated in this model in order to prevent the deterioration, but in such case the

45) Brothers, *supra* note 7, at 45.

46) Massachusetts Court System, *available at* <http://www.mass.gov/courts/court-info/trial-court/exec-office/ocm/deposit-delivery-cancellations-final-payment.html> (last visited Apr. 19, 2015, 13:45 PM).

47) Hewitt, *supra* note 5, at 42.

48) *See* Gillespie & Shank, *supra* note 33, para. 24; Gorgos, *supra* note 11, at 1081.

49) Don J. DeBenedictis, *Excuse Me, Did You Get All That?: Electronic vs. Shorthand Reporting in the Courtroom*, 79 A.B.A. J. 84 (1993); Gorgos, *supra* note 11, at 1081.

50) Hewitt, *supra* note 5, at 42.

51) Green et al., *supra* note 12, at 42; Gorgos, *supra* note 11, at 1070.

additional expense could offset the cutback in cost and time savings that this model sought to achieve in the first place.⁵²⁾

2) Digital Audio Recording Model

The Digital Audio Recording Model has been widely adopted in the U.S. in recent years. For instance, the Study Committee on Trial Transcripts in Massachusetts Supreme Judicial Court in 2003 suggested that all courts in the state of Massachusetts move to this model.⁵³⁾ Also, most federal district courts have adopted the Digital Audio Recording Model since the Federal Judicial Conference approved this model as a legitimate form of official court recording in 1999.⁵⁴⁾ In 2010, three district courts went further to make these audio files accessible to public online following the Federal Judicial Conference's endorsement thereof.⁵⁵⁾ Two of the three courts even provide 'live' service.⁵⁶⁾

The upside of this model is its capability to diminish disputes over the accuracy of court records without major adjustments to the current system. For courtrooms that already have electronic recording equipment, they simply need an upgrade to the digitized system. Although hiring digital audio court monitors may be necessary, their job is simple and requires little training which does not incur much expenditure.⁵⁷⁾

Although additional transcription may take place in case of an appeal in some courts, still the number of needed transcription falls substantially, thereby allowing stenographers to focus on appealed cases and speed up the transcription.⁵⁸⁾ The accuracy of court records is beyond comparison with written transcripts, since verbal as well as non-verbal vocal information would all be captured with its full nuance in the audio file.

The downside of the Digital Audio Recording Model would be the

52) Green et al., *supra* note 12, at 42; Hewitt & Levy, *supra* note 18, at 17.

53) Green et al., *supra* note 12, at 58.

54) The Third Branch News, *More Federal Courts Move to Offer Digital Audio Recordings Online*, United States Courts (Nov. 2010), available at <https://groups.google.com/forum/#!topic/openhouseproject/UXrDGpqalo4> (last visited Apr. 19, 2015, 13:47 PM).

55) *Id.*

56) *Id.*

57) Green et al., *supra* note 12, at 46-47.

58) *Id.* at 47, 51.

following: (i) its inability to capture kinetic para-linguistic information; (ii) more saliently, poor accessibility for review. Despite efforts such as incorporating logs, indexes and scroll bars with various functions to the audio file to make it easier to locate particular event in the file, judges and attorneys can face serious inconvenience and have to spend significant time in reviewing an audio file even with the help of a supplementary transcript. Therefore, this model requires a value judgment concerning this tradeoff between benefits of enhanced accuracy and inconvenience for review.

3) *Video Recording Model*⁵⁹⁾

The idea of adopting the Video Recording Model is attracting more attention recently.⁶⁰⁾ The presence of numerous pilot projects and substantial literature supporting this model indicates the favorable undercurrent.⁶¹⁾

The Video Recording Model's unparalleled capability to record and capture events in courtrooms far outweighs that of the Computer-Assisted Transcription Model or the Digital Audio Recording Model. Given the gravity of non-vocal information in human communication, the Video Recording Model's exclusive capability to capture such information is highly significant. The following additional virtues of video recording are also noted: (i) usefulness of the footage in responding to media reports and

59) A discrete issue of so-called 'posing' was excluded from the discussion since it is more salient in televising or live-casting the trial rather than video recording the trial (*see, e.g.*, PAUL THALER, *THE WATCHFUL EYE: AMERICAN JUSTICE IN THE AGE OF THE TELEVISION TRIAL* ch. 5 (1994)).

60) The exact number of courts utilizing the video recording system is somewhat difficult to ascertain since data varies from literature to literature (*see, e.g.*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice, *State Court Organization 2004-2007*, available at <http://www.bjs.gov/content/pub/pdf/sco04.pdf> (last visited Apr. 19, 2016, 13:32 PM); *see also* Digital Audio/Visual Recording Technology (DART) Committee, Final Report and Findings APPENDIX 5 (Submitted to the Iowa Judicial Council on Dec. 30, 2009), available at <http://www.ncsc.org/Topics/Court-Management/Court-Reporting/Resource-Guide.aspx> (last visited Apr. 19, 2016, 13:33 PM) [hereinafter DART]; *see also* Hewitt, *supra* note 5, at 6-7).

61) Fourteen U.S. federal district courts are participating in the three-year-period digital video pilot project of the Federal Judiciary as of April, 2015 (The Clerk's Office of the United States District Court for the District of Massachusetts, *Guide to Information Resources for Media Representatives and the Public* 2 (May 2013), available at http://www.mad.uscourts.gov/general/pdf/mediapublicguide0102609_000.pdf (last visited Apr. 19, 2016, 13:34 PM); The Third Branch News, *Overview of Pilot*, United States Courts, available at <http://www2.ca3.uscourts.gov/conference/materials/2014/AOPC%20-%20Cameras%20in%20courts%20pilot.pdf> (last visited Apr. 19, 2016, 13:38 PM)).

public interest thereby less relying on public news media cameras which may have adverse effects when present in courtrooms;⁶²⁶³ (ii) usefulness of the footage in education both within and without the judiciary when used as supplementary materials in seminars and classes;⁶⁴ and (iii) usefulness of the footage in monitoring judges and preventing them from engaging in aberrant judicial conduct while on bench.⁶⁵

On the other hand, the Video Recording Model shares the Digital Audio Recording Model's shortcomings in terms of accessibility. For judges and attorneys, reviewing a video file itself can be more time-consuming than reviewing the transcript made from the same video file. However, the shortcomings are toned down in the Video Recording Model for the following reasons.

First, when searching, moving a scroll bar on a video clip skimming through images is more convenient than doing that on an audio clip without images. Therefore, locating a relevant scene from a video file can be easier than locating a relevant situation from an audio file. Especially when interlocked with visual index system, appellate judges would be able to pinpoint the disputed part more swiftly.

Second, video files are more conducive to intuitive contextualization than audio files, helping reviewers comprehend a particular in-courtroom situation with the visual information of the entire courtroom. Not only appellate judges but also stenographers who subsequently watch the video file for supplementary transcription can benefit from this trait.

On the other hand, a major drawback of this model, as of now, is the significant expense that is needed to furnish the courtroom with the essential equipment: the video recording system.⁶⁶ The Video Recording

62) Brothers, *supra* note 7, at 46.

63) This is a different discussion from the 'TV camera in the courtroom' issue. In the Video Recording Model, the footage to be released to media can be subject to judges' selection. The regulations on the access to written court records are imposed on the recorded footage, too. Therefore the level of concern about editing and manipulation is incomparably lower than having TV cameras in courtrooms.

64) Brothers, *supra* note 7, at 46.

65) *Id.*; Gorgos, *supra* note 11, at 1113.

66) The audiovisual set-up cost was reported to be \$40,000-\$50,000 per courtroom in Michigan in 2003 (Green et al., *supra* note 12, at 48), and \$27,737-\$32,737 per courtroom in

Model also requires heavier reliance on court monitors than the Digital Audio Recording Model, and the relative complexity of court monitors' task will translate into higher job training costs.

3. *Prospect of the Video Recording*

If a choice between the Computer-Assisted Transcription Model and the Digital Audio Model is a call for a value judgment as mentioned above in Section 2-(2), a choice between the Digital Audio Model and the Video Recording Model would be more of a balancing test. Although, for now, wide adoption of the Video Recording Model appears unlikely due to the expensive furnishing costs, I would argue that the comparative advantages of video recording over audio recording will gradually become more compelling as the transition from traditional transcripts to audio recording draws to a close.

As the Digital Audio Model becomes more dominant, ironically the poor accessibility issue of audio files would become more compelling, which in turn would draw more attention to the video recording system's convenient accessibility. Once the Video Recording Model is recognized as an alternative, the investment in relevant technology would increase and the furnishing cost of the video recording system would level down as technology advances. It then would boil down to the matter of 'optimal replacement timing' depending on the trajectory of the furnishing cost.

IV. Court Recording Methods in Korea

1. *Traditional System*

Traditional criminal trial records in Korea have been far from verbatim. Conceptually, in accordance with the Korean Criminal Procedure Act (hereinafter the KCPA),⁶⁷⁾ trial records consist of the following two

Iowa in 2009 (DART, *supra* note 60, at 24-25).

67) Hyoungsasongbeop [Criminal Procedure Act], Act No. 341, Sept. 23, 1954, revised by Act No. 8496, Jun. 1, 2007 (entered into force on Jan. 1, 2008) (S. Kor.).

components: (i) indicators of each procedural passage of in-courtroom hearings,⁶⁸⁾ (ii) statement-records that contain questions and answers from the questioning of witnesses and defendants.⁶⁹⁾

In actual proceedings, the part (i) is usually dictated by the presiding judge's linguistic action. However, on the trial record, the action would be described with abstract and standardized expressions, often times using borrowed words from the black letters in the KCPA.

For example, each hearing (other than the initial one) in a Korean criminal trial begins with the presiding judge informing the defendant of the essential contents of the court record from the previous hearing of that trial.⁷⁰⁾ In the actual courtroom setting, the judge would verbally announce what he/she deems to be the essential contents, or present the official court record itself to the defendant so that the defendant can read it. However, the court record that documents this activity would fail to capture what the judge actually announced verbally or what action the judge actually took. Instead, the standard expression of "*at this moment, the presiding judge informs the defendant the essential contents of the last hearing's court record*" would be all that is shown on the record.

The part (ii) of the court record is a rather typical feature in countries that have adopted the methodology of transcribing spoken words. The shortcomings of the transcript methodology in the U.S. discussed in Chapter III. Section 1. (1) and (2) are applicable to the Korean court records as well.

2. Recent Policy Shift

Effective from January 1, 2015, the Supreme Court of Korea departed from traditional court recording system by partially adopting digital audio recording. On December 22, 2014, the Supreme Court revised 'Rules on Stenography/ Audio-Recording/Video-Recording in the Criminal Trial Courtroom' and inserted a new clause (Article 2-2) making it mandatory,

68) See the KCPA Article 51-(2).

69) See the KCPA Article 48.

70) See the KCPA Article 48-(3).

with few exceptions, to digitally audio-record all testimonies.⁷¹⁾ The recorded audio file is to be incorporated into the official court records. In the same month, the Supreme Court published and distributed to all members of the judiciary 'A Manual for Courtroom Audio Recording.'⁷²⁾

The less typical component of this newly introduced regime compared with the aforementioned Digital Audio Recording Model is that, in contested cases, the additional production of the stenograph of in-courtroom testimonies is also mandatory and the stenograph is to be incorporated into the official court records along with the audio file.⁷³⁾

The Supreme Court of Korea articulated that the purpose of this recent policy shift is 'to enhance transparency in trials' and 'to promote substantiality in hearings.'⁷⁴⁾ The Supreme Court went further to lay out another goal as 'to channel the judicial resource previously invested in written traditional court records into in-courtroom fact-finding' and 'to pursue courtroom-oriented judging.'⁷⁵⁾ The Supreme Court's articulation underscores the continuum of reformation in the criminal trial system which was initiated by the major revision of the KCPA on June 1, 2007 to

71) *Gongpanjeong aeseoeui soggi/nogeum/youngsangnoghwaae gwanhan yaegyū (jaehyoung 2007-5)* [Rules on Stenography/Audio-Recording/Video-Recording in Criminal Trial Courtroom], Supreme Court Rules on Trials No. 1185, Nov. 20, 2007, amended by Supreme Court Rules on Trials No. 1149 (entered into force on Jan. 1. 2015) (S. Kor.) [hereinafter *Rules on Recording*].

72) The National Court Administration of the Supreme Court of Korea, *Beobjungnoegeum-maenyuel* [Courtroom Recording Manual] (2014) (S.Kor.) [hereinafter *Manual*]; Hyung Jin Kim, Jeong Whan Kim & Jae Suk Lee, *Jaepangirok mit joseo eh gwanhan silmu gaesun bangan yeongu* [Research on the Measures to Improve the Trial Affairs Regarding Trial Records and Court Reports] 40 (The Judicial Policy Research Institute, 2015) (S. Kor.) [hereinafter *Research to Improve Trial Records*]

73) *Rules on Recording*, *supra* note 71, Article 4-2-(1), Article 5-2.

74) The National Court Administration of the Supreme Court of Korea, *Beobjungnoegeumeui jooynaeyong 2* [Key Points of Audio Recording in Courtrooms], 2015 *Hyoungsajaepanjangyeonsu Jaryojip* [Materials for Training Criminal Presiding Judges] (The Judicial Research and Training Institute, 2015) (S. Kor.) [hereinafter *Key Points*]; See also Donghyuk Kang, The National Court Administration of the Supreme Court of Korea, *Beobjungnoegeumdeung byunrongirok habrihwabangan 3* [Measures to Rationalize Court Record Through Audio Recording], 2014 *Sabeobbaljeoneuluihan beobkwansemina Jaryojip* [Materials on Seminar for Progress in Judicial System], (The Judicial Research and Training Institute, 2015) (S. Kor.) [hereinafter *Measures to Rationalize*]; See also *Manual*, *supra* note 72, at 7-8.

75) The National Court Administration of the Supreme Court of Korea, *Key Points*, *supra* note 74.

remedy the fallacy of the past judicial practice once criticized as ‘trial by dossiers.’ Under the old practice, judges had long been accustomed to the truncated judicial decision making process that relies heavily on written statements produced by the investigative authorities or the lower courts rather than in-courtroom advocacy. To a certain extent, the idea of relinquishing the grip on traditional court records may have left some judges feeling anxious about the new court recording system. The following probe into the underlying dynamics of the Korean criminal trial system in Chapter V would provide the backdrops for a fuller-understanding of their anxiety.

V. Underlying Differences : Dynamics of the Korean Criminal Trial System

The substance of the revision of the KCPA in 2007 can be summarized as the heightening of the adversarial aspect of the Korean criminal trial system. The revision further vitalized the ‘hybrid’ trait of the system, which already had many adversarial elements infused into the *instruktionsmaxime*⁷⁶⁾ structure. By heightening the adversarial aspect, the revised KCPA ultimately sought to enhance transparency in the system, and one of the paths to achieve that goal was through departing from the old practice of so-called ‘discontinuous hearing,’ which will later be discussed in this article, and establishing ‘continuous hearing’ or ‘concentrated hearing’ (hereinafter concentrated hearing).⁷⁷⁾ Many expected that the establishment of ‘concentrated hearing’ would initiate a virtuous circle comprised of the following: (i) ‘less dependency on written court records’; (ii) ‘courtroom-oriented fact-finding’; (iii) ‘courtroom-oriented advocacy’; (iv) ‘courtroom-oriented judging as a whole’; (v) ‘enhancement of transparency and procedural justice in first instance courts’⁷⁸⁾; (vi) and ultimately, ‘improved

76) See JAE SANG LEE, *HYOUNGSASOSONGBEOP* 42-46 (9TH ed. 2012) (S. Kor.).

77) See the KCPA Article 267-2, Article 318-4-(1).

78) For a deeper discussion regarding ‘procedural justice’ see Tom R. Tyler & Jonathan J. Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 *Psychology, Public Policy, and Law* (2014); see also Conference

public confidence in the judicial system.’

However, some of the structural factors in the criminal system are inhibiting that departure from the old practice. I will explain (i) what the structural characteristics of Korean criminal trials are, (ii) how the so-called ‘discontinuous hearing’ practice was entrenched under that structure, and (iii) how they create the hindrance.

1. *Scope of Appellate Review*

The KCPA, since its initial enactment in 1954, has always entitled both the prosecutor and the defense attorney the right to appeal on factual grounds after the trial in the first instance court.⁷⁹⁾ Contrary to the U.S. intermediary appellate proceedings where no additional evidence is admissible and much deference is given to first instance courts on factual matters,⁸⁰⁾ the intermediary appellate courts (hereinafter appellate courts) in Korea are vested with the authority to review the evidence submitted in lower courts. They can also examine new evidence including new witnesses.⁸¹⁾ In most cases, when vacating lower courts’ decision, Korean appellate courts are required to render its own judgment on the merits rather than just remanding them.⁸²⁾

In practice, in tandem with this liberal approach of the KCPA, appellate court judges in Korea had traditionally enjoyed unfettered fact-finding authority with little deference to first instance courts.⁸³⁾ Lower courts’

of Chief Justice, Conference of State Court Administrators, *Resolution 12 In Support of State Supreme Court Leadership to Promote Procedural Fairness*, available at <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07312013-Support-State-Supreme-Court-Leadership-Promote-Procedural-Fairness-CCJ-COSCA.ashx> (last visited Apr. 19, 2016, 13:40 PM).

79) See the KCPA Article 361-5.

80) WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 170-71 (5TH ed. 2011); Adkins, *Unblinking Eye*, *supra* note 4, at 72-73.

81) See the KCPA Article 370, Article 364-(3).

82) See the KCPA Article 364-(4), (6).

83) See LEE, *supra* note 76, at 757-759; See also Tahney Lee, *Hyoungsadandokjaepanaeseouei gongpanjoongsimjouwuijuhk beobjungsimriuei siljae* [In-courtroom Decision Making in Criminal Trial by a Panel of Single Judge] 44-45 (*Hyoungsabeb yeonguhoi*, The Courtnet for the Supreme Court of Korea, uploaded on Jun. 21, 2012 8:21 AM) (S. Kor.) [hereinafter *Decision Making*].

decision on factual matters was occasionally overturned even without examining new evidence at appellate level.

This practice faced criticism because it meant that lower courts' first hand decision on witness credibility could be overturned after reviewing only the transcripts which, obviously, lack non-verbal information and nuances of testimonies. However, it remained as the norm since no written rule specifically discouraged it until November 24, 2006, when the Supreme Court decision in the 2006Do4994 case spelled out 'principle of direct questioning' and reined in the appellate courts' leeway to overturn lower courts' decision on factual matters. Subsequent decisions in cases such as 2008Do4449,⁸⁴⁾ and 2011Do5313 repeatedly affirmed the doctrine and declared:

When considering differences in credibility determination methods of the first instance court and the appellate court in light of the principle of direct questioning (which the KCPA adopts as an element of the trial priority principle): unless there are unique circumstances to perceive that a first instance court's finding on the credibility of a first instance witness testimony is (clearly erroneous) (in light of the contents of the first instance judgment and the evidences investigated legitimately by the court); or exceptional cases where maintaining the first instance determination on the credibility of a first instance witness statement is noticeably unjustifiable (based on the results of the first instance evidence examination and additional examination conducted by the final day of the oral argument of the appellate court); the appellate court should not reverse the first instance judgment concerning a witness testimony on grounds that the first instance court's finding on the testimony differs from that of the appellate court's findings.⁸⁵⁾

Since the 2006Do4994 Supreme Court decision, Korean judiciary has witnessed a significant but gradual shift toward more deference to lower courts' finding on witness credibility and, by extension, on factual matters

84) Supreme Court [S. Ct.], 2008Do4449, Jul. 29, 2010 (S. Kor.).

85) Supreme Court [S. Ct.], 2011Do5313, Jun. 14, 2012 (S. Kor.).

as a whole. However, this shift is still an ongoing process, and appellate courts currently demonstrate a level of disparity in interpreting the boundary between the ‘principle’ and the ‘exception’ stipulated in the 2006Do4994 decision.⁸⁶⁾

2. Responsibility for Record Production

Unlike the U.S. wherein most trial judges regard court-record-production-process to be in the administrative realm that has no bearing on judges, the KCPA holds both registry clerks and trial judges accountable for record production and the accuracy thereof. In Korea, a registry clerk first makes a draft record of hearings,⁸⁷⁾ and then both the registry clerk and the judge presiding over the trial should sign or stamp their names on each hearing’s record.⁸⁸⁾ The signed or stamped court record is to be available to the attorneys and defendants at nominal cost, and during the subsequent hearing they must be informed of the essential contents of the record from the previous hearing.⁸⁹⁾⁹⁰⁾ At the moment, attorneys and defendants can request modification and raise objections to the specific content of the record.⁹¹⁾ The court record should also mark any such requests or objections raised along with the judge’s opinion regarding them.⁹²⁾

In order to fulfill this task efficiently, most Korean first instance courts have traditionally assigned typically one registry clerk and one stenographer to each ‘judge’ or ‘panel of judges’ (collectively, hereinafter trial judge).⁹³⁾ This intra-organizational structure facilitates a climate where a group of

86) For instance, Seoul Southern District Court, which was the intermediary appellate court in the aforementioned Supreme Court 2011Do5313 case, overturned the first instance court trial judge’s finding that the core witness’s testimony was credible, only to trigger the Supreme Court’s decision to reverse and remand the case back to the appellate court (Seoul Southern District Court [Dist. Ct.], 2010No2062, Apr. 14, 2011 (S. Kor.).

87) See the KCPA Article 51-(1).

88) See the KCPA Article 53-(1).

89) See the KCPA Article 55-(1).

90) See the KCPA Article 54-(2).

91) See the KCPA Article 54-(3).

92) See the KCPA Article 54-(4).

93) Usually it is from one to two years.

'trial judge(s), a registry clerk and a stenographer' assigned together can communicate and interact during the court-record-production-process. In addition, stenographers in Korean courts are court employees, with few exceptions, and many of them are judicial officials appointed under the authority of the chief judge of the jurisdictional appellate court. In principle, whenever a trial judge hears a case, the assigned stenographer would sit in the courtroom, draft a transcript, and submit it to the assigned registry clerk. The clerk then would incorporate it into his/her draft of the official court record for the eventual signature of the trial judge.

Therefore, the above provisions of the KCPA and the intra-organizational structure of the court work in concert to encourage Korean trial judges to embrace a larger sense of responsibility in the court-record-production-process.⁹⁴⁾

3. *Discontinuous Hearing: Reliance on Written Words*

Sharing courtrooms among trial judges has been the norm for more than 60 years in Korea, whereas in the U.S. the sheer idea of this makes a trial judge lament for losing his/her own courtroom.⁹⁵⁾ The following reasons explain why judges in Korea have been more comfortable with this idea.

Due to the heavy caseload, each first instance court trial judge in Korea traditionally has been presiding over dozens of trial hearings on a given day. Unlike the U.S. system, arraignment is an alien concept to the Korean criminal system, and every case has to be tried even when the defendant admits the charged set of facts. As a result, the vast majority of the cases that Korean trial judges hear would be 'trials.' This is different from the equivalent state courts in the big cities of the U.S. where the majority in terms of the number of cases would be plea hearings and pre-trial conferences.

Every judicial decision on the merits of criminal trials in Korea requires

94) See The National Court Administration of the Supreme Court of Korea, Manual, *supra* note 72, at 3.

95) William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 Suffolk U. L. Rev. 80 (2006-2007).

a judgment directly written by trial judges in its full form before the time period for filing appeals,⁹⁶⁾ which leaves no room for substitutes such as a verbatim record of oral pronouncement as in the U.S. or a registry clerk's official report as in Japan, nor a room for selective elaboration on appealed cases as in Germany. In a case of conviction, the written judgment in Korea should contain the following: (i) the constituent facts of the offence (findings of the facts); (ii) the list of essential evidence supporting them; (iii) the relevant criminal statute (applied or breached provisions).⁹⁷⁾ In a case of acquittal, no legal requirement exists as to the specific content of the judgment. However, in practice, these written judgments have evolved to be extensive, going beyond the legal requirements to lay out the detailed analysis of written dossiers or transcripts of witness testimonies regarding the factual matters. This practice has been partially ascribed to the lack of substantiality in in-courtroom hearing, which leaves trial judges feeling compelled to defend their decision on factual matters on the thorough overhaul of written record in the face of the jurisdictional appellate review.⁹⁸⁾ This is manifested in the comparatively long judgments of acquittal in Korean criminal trials, occasionally reaching more than a hundred pages trying to spell out every blind spot of dossiers,⁹⁹⁾ which otherwise could have been made more concise resorting to the vivid record of in-courtroom cross examination telling its own story.

Consequently, Korean trial judges spend enormous working hours in

96) See the KCPA Article 38, Article 42.

97) See the KCPA Article 323-(2).

98) In this context, the Korean Supreme Court in the past promulgated rules encouraging trial judges to channel the time and effort preoccupied in writing judgments towards in-courtroom practice. The first rule, *Pangyulseo jaksunghangsikuei gaesuhnueil uihan chamgosahang* [Reference for Reforming Judgment Writing], Supreme Court Rules on Trials No. 316 (S. Kor.) was promulgated on Feb. 7, 1991, and the second rule, *Pangyulseo jaksunghangsike gwanhan kwonjangsahang* [Recommendation for Judgment Writing], Supreme Court Rules on Trials No. 625-1 (S. Kor.) was promulgated on Aug. 20, 1998, reiterating the concern that judgment writing is usurping trial judges' time for in-courtroom practice.

99) Citing that this practice has stretched to an excessive extent, two casebooks have been published with the sole purpose of curtailing the length of written judgments (See THE NATIONAL COURT ADMINISTRATION OF THE SUPREME COURT OF KOREA, MOOJOEPANGYUL GANIWHA SARYEJIP [JUDGMENT SIMPLIFICATION IN THE CASES OF ACQUITTAL] (2007) (S. Kor.); THE SUPREME COURT LIBRARY OF KOREA, GANGYELHAN PANGYUL SARYEJIP (HYOUNGSA) [JUDGMENT WITH CONCISION IN CRIMINAL CASES] (2010) (S. Kor.)).

their office rooms, which lead to comparatively less hours in courtrooms. For example, before the Korean Supreme Court's announcement of 'the principle of at least two hearing days a week' in 2003,¹⁰⁰⁾ most Korean trial judges did not hold hearings more than one day a week and instead invested the rest of the week in writing decisions and reading briefs. Thus, sharing courtrooms that would otherwise be abandoned for the remainder of the week was not abnormal but actually reasonable.¹⁰¹⁾

In this setting, if a case turned out to be a highly contested one wherein several witnesses were to be called to the stand, the trial judge had to face the predicament of locating an extra vacant courtroom for the protracted hearing and then setting aside corresponding in-office-room working hours. The conventional resolution to this troubling situation (troubling because you as a judge are deprived of that in-office-room working hours needed to write decisions) would be to break the hearing into a set of shorter hearings with a smaller number of witnesses and to schedule these short hearings with two to three week intervals between them.¹⁰²⁾ The judge then could squeeze each short hearing into that particular day of the week when the courtroom was originally assigned to him/her, the day when the hearings of dozens of his/her cases were expected to be held, thereby adhering to the preexisting allocation of the working days. This practice is referred to as 'discontinuous hearing.'¹⁰³⁾¹⁰⁴⁾

The interest in trial judges' quantitative productivity also plays a significant role. In civil trials, the number of cases had exploded in the past few decades in Korea,¹⁰⁵⁾ and judges have relied on 'managerial judging

100) See THE SUPREME COURT OF KOREA, SABEOPYEONGAM [ANNUAL JUDICIAL STATISTICS] 142 (2014) (S. Kor.).

101) It would be interesting to note that, historically, the practice of 'trial by dossiers' had been understood to be the preceding cause for the short in-courtroom hearings, not vice versa, but once entrenched, the practice of 'discontinuous hearing' deriving from that short in-courtroom hearings had a boomerang effect to confine trial judges in scarce judicial resources.

102) Lee, *Decision Making*, *supra* note 83, at 3-4.

103) *Id.*

104) It is named 'discontinuous hearing' because from the standpoint of respective cases the hearing becomes discontinuous.

105) During the 53 year span between 1954 and 2007, annual caseloads grew 69 times whereas number of judges grew only 19 times. (*Sabeobbaljunjaedan* [Judicial Development

strategies' to cope with the situation.¹⁰⁶⁾ Metrics have been often utilized to promote these strategies. The spillover effect of this atmosphere has influenced judges in the criminal division as well to take into consideration the backlog of caseloads when scheduling their trials. Thus, criminal trial judges are reluctant to set aside in-office-room working days which would likely decelerate the fast-flowing stream of case management.¹⁰⁷⁾

The consequence of 'discontinuous hearing' is heavy reliance on court records by all trial participants in their respective ways. By the time of the subsequent hearing, which would be two or three weeks from the last hearing, trial judges need to refresh their memories and familiarize themselves with the relevant content of the testimonies from the previous hearings in order to preside over the case. Therefore, reviewing the court's transcript is necessary, and the judge has to sometimes render the ultimate factual finding relying exclusively on the transcript. Prosecutors and defense attorneys similarly rely on court records and often are reluctant to prepare for the subsequent hearing until the date thereof approaches. By then, the completed court record from the last hearing will be ready to be copied and 'reflected upon,' as opposed to be 'scrutinized.' In this fashion, advocacy becomes subordinated to court records, effectively replacing the actual performance in the courtroom at the time of the hearing. A competent lawyer in actuality therefore is supposed to care much about how testimonies 'look' on court records. In other words, attorneys need to consider how statements would 'feel' when they are 'read' on a written medium.¹⁰⁸⁾ Many

Foundation], *Sabeobbuei Ujhelwa Ohneul Gurigo Naeil (sang)* [Yesterday, Today and Tomorrow of the Judiciary (Vol. 1)] 143 (2008) (S. Kor.); Nak Hee Hyun, *Managerial Judging in Korean Civil Litigation: Comparative Perspective 23* (Not published, submitted to Harvard Law School Graduate Program as a requisite for 2012-2013 LL.M. degree, archived in Harvard Law School Library as a part of 'The Red Set' in Historical & Special Collections) (*descriptions of 'The Red Set' available at <http://hls.harvard.edu/library/historical-special-collections/the-collections/the-red-set/>* (last visited Jun. 15, 2016, 11:50 AM) [hereinafter *Managerial*].

106) Hyun, *Managerial*, *supra* note 105.

107) See Tahney Lee, *Hyungsadandokjaepanaeseouei gongpanjoongsimjoouei juhk beobjungsimriuei siljae hoogi* [Postscript to In-courtroom Decision Making in Criminal Trial by a Panel of Single Judge], 2014 *Jaepansilmoohyeongu* 336-338 [Trial Practice Research] (Gwangju District Court, 2015) (S. Kor.) [hereinafter *Postscript*]

108) *Id.* at 321; see also The National Court Administration of the Supreme Court of Korea, *Manual*, *supra* note 72, at 3.

disputes arise from this 'look' and 'feel' of court records, inducing trial judges to invest substantial amount of their demanding working hours in examining the accuracy of the records of their own trials.¹⁰⁹⁾ As already discussed in Chapter V. Section 1., the predated appellate review methodology relying on trial transcripts has kept lower court judges even more sensitive about this issue.

As mentioned at the beginning of Chapter V., the goal of the revised KCPA is to facilitate transparency in the Korean criminal trial system through 'courtroom-oriented judging' that should be supported by 'courtroom-oriented advocacy' and 'courtroom-oriented fact-finding.' To find facts based on in-courtroom performance and in-courtroom presentation of evidence, judges should come to the findings before their vivid memory of those performance and presentation fade out. In this sense, 'concentrated hearing' is essential to 'courtroom-oriented judging.' On the other hand, the practice of 'discontinuous hearing' runs squarely counter to 'courtroom-oriented judging.' 'Discontinuous hearing' is only possible because judges count on written court records to refresh their memories. That is why the revised KCPA aimed at repudiating 'discontinuous hearing,' and tried to increase Korean trial judges' in-courtroom sitting hours.

However, how much change since the revision of the KCPA in 2007 in the direction of 'concentrated hearing' actually has taken place remains unclear. Comprehensive overhaul after the revision is yet to be carried out. In a survey done by the National Court Administration of the Supreme Court of Korea in 2010, 48.8% of the judge respondents pointed out 'lack of the prosecutor's competence' as the obstacle to 'courtroom-oriented judging,' 21.2% of them, 'overwhelming number of cases and lack of time to prepare, etc.,' and 13.5% of them, 'shortage of courtroom facilities and stenographers,' the result which suggests difficulties in the progress toward 'concentrated hearing.'¹¹⁰⁾ In 2016, absolute majority of single-judge panels in first instance courts, who actually handle most of the criminal trials

109) See Lee, *Decision Making*, *supra* note 83, at 44-45.

110) THE NATIONAL COURT ADMINISTRATION OF THE SUPREME COURT OF KOREA, GAEJUNG HYOUNGSASOSONGBEOP SEONGWABOONSEOK [ANALIZING THE RESULT OF THE REVISED CRIMINAL PROCEDURE ACT] 18 (2010) (S. Kor.).

nationwide,¹¹¹⁾ still hold hearings no more than two days a week,¹¹²⁾ barely meeting the standard proposed 13 years ago by the Korean Supreme Court. This figure indicates that the ‘concentrated hearing’ practice has not been fully established yet since complicated contested trials usually take more than two days of hearing.

4. *Argument against the Policy Shift and the Rebuttal*

The recent policy shift by the Supreme Court of Korea is in part a measure to respond to the seeming stalemate and to further the reformation envisioned in the 2007 revision of the KCPA. The new audio recording system’s policy objectives, articulated as the facilitation of ‘courtroom-oriented judging’ and the enhancement of ‘transparency,’ are both integral links of the virtuous circle mentioned in Chapter V.

However, given the afore-described unique dynamics of the current Korean criminal trial practice crystallized as ‘discontinuous hearing,’ concerns about the negative effects of this new regime have been noticed throughout the judiciary.¹¹³⁾ For instance, in one of the surveys carried out during the test period of the Supreme Court’s new regime, approximately 40% of the judge respondents expressed their worries about the increased

111) 268,823 criminal trial cases were newly indicted in 2014 in Korea. Out of them, 247,400 cases, which is more than 92%, were handled by the single-judge panels (THE SUPREME COURT OF KOREA, SABOPYEONGAM [ANNUAL JUDICIAL STATISTICS] 655 (2015) (S. Kor.)).

112) Out of total 71 single-judge panels in all 5 first instance courts in Seoul, only 2 panels hold hearings three days a week, and the rest, less than two days a week (See *Seoulchoongangjibangbeopwon Beopkwansamooboondam mit gaejungilampyo* [Seoul Central District Court Organizational Chart] 12 (The Courtnet of the Supreme Court of Korea, 2016. 6. 7.) (S. Kor.); see also *Seouldongboojibangbeopwon Beopkwansamooboondam mit gaejungilampyo* [Seoul Eastern District Court Organizational Chart] 3 (The Courtnet of the Supreme Court of Korea, 2016. 5. 9.) (S. Kor.); see also *Seoulnamboojibangbeopwon Beopkwansamooboondam mit gaejungilampyo* [Seoul Southern District Court Organizational Chart] 4 (The Courtnet of the Supreme Court of Korea, 2016. 5. 23.) (S. Kor.); see also *Seulseoboobjibangbeopwon Beopkwansamooboondam mit gaejungilampyo* [Seoul Western District Court Organizational Chart] 4 (The Courtnet of the Supreme Court of Korea, 2016. 5. 20.) (S. Kor.); see also *Seoulbookboojibangbeopwon Beopkwansamooboondam mit gaejungilampyo* [Seoul Northern District Court Organizational Chart] 3 (The Courtnet of the Supreme Court of Korea, 2016. 6. 13.) (S. Kor.)).

113) See The National Court Administration of the Supreme Court of Korea, Manual, *supra* note 72, at preface.

workload.¹¹⁴⁾ One of the reasons for the increase was spending more time reviewing the audio file instead of the written documents.¹¹⁵⁾

The basis for the argument against the audio recording can be twofold: (i) its poor accessibility and inconvenience for review; and (ii) a prediction of decrease in case-disposal rate at first instance courts.

The first part is an inherent downside of the Digital Audio Recording Model as discussed in Chapter III. Section 2. (2), but the influence can be particularly sweeping in Korea given the judges' current heavy reliance on transcripts. When exacerbated by the features of colloquial language (ellipsis, repetitions, fillers, false starts, contracted forms, etc.) and by the shortcomings in recording process (noise, indistinctiveness, mechanical failure, etc.), reviewing the recorded audio file should be cumbersome, disturbing and time-consuming.

Nevertheless, this part of the argument fails to bring into consideration the normative perspective on fact-finding. For appellate judges, the 2006Do4994 Supreme Court decision mandates them to refrain from finding facts without the first-hand observation of direct questioning. Even in exceptional cases where appellate judges need to measure up their own factual findings against trial judges,' reviewing audio files, instead of written transcripts, would better accord with the Supreme Court decision, the former being closer to the original first-hand observation. For first instance court trial judges, the principle of direct questioning values their first-hand observation itself, not their reflection on the records of the questioning, and even when used in refreshing their own memories, transcripts, compared with audio files, further estrange them from the original experience through errors, editing and limitation of written medium.

The second part of the argument deserves more heedful consideration. Compared with the countries that have discrete organs for relatively minor crimes in their criminal court system (summary courts in Japan, magistrates' courts in the U.K., *Amtsgericht* in Germany, federal magistrate judges in the U.S., etc.), the Korean criminal court system, with its unilinear institutional structure and proceedings, is less flexible in allocating its resources and

114) See Kim et al., *Research to Improve Trial Records*, *supra* note 72, at 49.

115) *Id.*

balancing out new procedural needs.

Owing to the 'break-into-shorter-parts' strategy, 25 single-judge panels in Seoul Central District Court was able to dispose of 16,079 case trials in 2014.¹¹⁶⁾ That is an average of 12.3 case trials per judge per week with only two hearing days. Under the same circumstances, if the full-fledged transformation from 'discontinuous hearing' into 'concentrated hearing' without written court records was to take place, an immediate slowdown in the entire criminal trial system would be inevitable because, from a trial judge's standpoint, it would mean dealing with one case at a time and moving onto the next case only when the decision on the merits is rendered. Scheduling more than 12 cases in two hearing days would be unrealistic in the first place. Therefore, a rather incremental change, accompanied with other institutional reforms and diversification of proceedings, is deemed more appropriate in order to prevent a drastic increase in backlog.^{117) 118)}

While this makes the magnitude and breadth of the change that audio recording instantly can bring about quite murky, it is the author's view that implementing this new court recording system has created a new window of opportunity for Korean trial judges who seek to further concentrate their hearings. A caveat which should be added to the notion of 'incremental change' is that, without a clear sense of how the final version of the 'courtroom-oriented judging' works in actuality, trial judges can easily lose track, and even their presumable consent itself, of the movement during this slow and tedious process. This is why it is important that trial judges in Korea be given an opportunity to vividly experience the new trial procedure in its entirety as laid out in the KCPA. In light of this, the significance of the adoption of the digital audio recording system is that it has tapped into the potential that can be utilized in selected cases as an avenue for such experience for trial judges.

116) See THE SUPREME COURT OF KOREA, SABEOPYEONGAM [ANNUAL JUDICIAL STATISTICS] 886 (2015) (S. Kor.).

117) See Lee, *Decision Making*, *supra* note 83, at 1.

118) See Lee, *Postscript*, *supra* note 107, at 313-14, 326-30.

VI. Projected Ramification of Audio Recording in Korea

The question now turns to how exactly the new system can be utilized. The answer to that question should begin with ‘alleviating the excessive preoccupation of first instance court judges on the production of court records.’

1. *Alleviating the Burden*

Although the new policy of the Korean Supreme Court still dictates that trial judges in first instance courts must produce stenographs of in-courtroom testimonies in contested cases,¹¹⁹⁾ the existence of the digital audio file could relieve judges of the concern about the accuracy of written court records. In case of a dispute arising from alleged errors of a stenograph of a first instance court, it is unlikely that appellate judges will make their decisions without listening to the relevant part of the audio file, given that the audio file itself is a part of the official record. Once appellate judges start replaying the audio file, then no stenograph would trump that audio file in terms of probative value.

The stenograph, of course, would still retain its value in helping judges contextualize the given part of the audio file. In other words, appellate judges would still skim through stenograph because they cannot afford to spend much time listening to every minute of the entire audio recording. However, for this usage, appellate judges do not need ‘pinpoint accuracy’ on stenograph. And if the dispute was on how a particular statement during the first trial should be interpreted in given context, then appellate judges would ultimately have no choice but to listen to the entire audio recording. In any case, lower court judges’ effort to assure the accuracy of the stenograph would be devoid of practical benefit. In other words, the benefit of first instance court trial judges’ pouring extra effort into reviewing the stenograph for the purpose of appellate review becomes irrelevant so long as every part of the stenograph is subject to comparison

119) *Rules on Recording*, *supra* note 71, Article 4-2-(1).

with the audio file. This in turn can relieve lower court judges from the burden of producing detailed stenograph.

2. *Incentivizing Concentrated Hearing*

1) *Swaying the Balance*

From the standpoint of respective trial judge in Korea, the determination as to whether to hold onto the old practice of ‘discontinuous hearing’ or to embrace the alternative would depend on how much the new court recording system sways the preexisting balance between the cost and benefit of the old practice.

For first instance court trial judges, the cost of holding onto ‘discontinuous hearing’ will increase due to the digital audio recording. Even if judges were to hold on to the old practice of refreshing their memory by consulting court records from the previous hearings, listening to all the audio files would be improbable given the time needed in doing so. As a result, the old stenograph would still have to be used. However, now that you have the audio file, such reliance on stenograph always bears the risk of the discrepancy between the stenograph and the trumping audio file.¹²⁰⁾ If a trial judge misperceives a factual matter based on an erroneous stenograph, the discontent attorney can debunk such misperception in the appellate procedure using the audio file.

On the other hand, the benefit of ‘discontinuous hearing,’ which is ‘maintaining current case-disposal rate by dealing with multiple cases simultaneously,’ will be neutralized to some extent by increased number of disputes and appeals regarding the discrepancy between the stenograph and the audio file.

The increased cost and decreased benefit of ‘discontinuous hearing’ could be parlayed into triggering the move toward the new practice. Once trial judges depart from the old practice and shift to ‘concentrated hearing,’ they no longer need to depend on the troublesome stenograph to refresh their memory. Hearings will be held continuously without the need to

120) In other words, the trial judge would be blindsided when crucial non-verbal information is found only in the audio file and not shown on the stenograph, or when erroneous information permeate into the stenograph.

diverge their attention to other cases, so taking notes for the judgment-writing would suffice.

However, the intrinsic, and the often overlooked, cost of that departure would be the trial judge's own discomfort from adopting an unfamiliar decision making process. Korean trial judges could be criticized for unfortunately lacking sufficient experience with the in-courtroom decision making process which requires acute observation of the manner by which witnesses testify and the capability to react instantly to what transpires within the courtroom.

2) *The Variables*

The aforementioned fluctuation of cost and benefit could be factored in differently according to some variables. The positive aggregation would be maximized in contested trials with relatively mid-level complexity which usually requires less than ten days of hearing. But if the hearing lasts longer, it would be difficult for the trial judge to maintain a strong grip on the case without relying on stenograph or detailed notes. On the other hand, if the case is simple enough to be concluded in a day of hearing, the need for the court record would not come into the picture in the first place.

Competence of in-courtroom advocacy by both the prosecutor and the defense attorney is also another important variable. If either side strongly requests an interval before moving on to the next hearing for the purpose of his/her own preparation, and if the trial judge feels that ignoring such request would result in poor examination or cross-examination of evidence originating from the unpreparedness of the requester, the judge would rightfully be reluctant to set aside that request because he/she does not want to tame a judicial decision without fully addressing germane legal or factual issues. This variable is especially important in Korea because 'triers of fact' in the Korean criminal trial system are usually the trial judges, as opposed to the jurors.¹²¹⁾ Some Korean trial judges have a tendency to regard the practice from both the prosecution and the defense to be lagging behind the reformation in criminal trial procedure initiated by the revision of the KCPA in 2007 and take the incompetency of advocacy one of the

121) See Lee, *Postscript*, *supra* note 107, at 300-01.

major obstacles to overcome.¹²²⁾

3. *Facilitating Courtroom-Oriented Advocacy*

Interestingly, audio recording itself, if combined with continuous hearing, could be a part of the long-term remedy for the incompetency of in-courtroom advocacy. Prosecutors and attorneys will be bereft of the tool (transcript) and the time (interval) to recover from a poor in-courtroom performance. They will have to more carefully observe in-courtroom testimonies since they can no longer rely on judge-vouched documentation of those testimonies. They will have to engage and respond more actively in the courtroom by, for example, raising objections because the trial judge's decision making process is in full operation at the moment and, consequently, turning the tide after the judge has already anchored a preliminary diagnosis will be much more cumbersome.

4. *A Change in the Appellate Court's Deference?*

The shift in appellate reviewing methodology raises another question regarding the attitude of appellate courts toward lower courts on factual matters. Some could postulate reduced deference to lower courts' finding on witness credibility since appellate judges themselves can listen to vivid testimonies on audio files, which would run counter to the doctrine set forth in the 2006Do4994 Supreme Court decision.

However, empirical observations from the U.S. since 1990 have demonstrated the opposite result. The Kentucky state court appellate judges actually have reversed lower courts' factual findings less frequently since the introduction of video recording, citing that the footage of testimonies helped them better understand lower courts' decisions.^{123) 124)}

122) *Id.* at 297; See also Lee, *Decision Making*, *supra* note 83, at 12-13.

123) JAMES A. MAHER, *Do Video Transcripts Affect the Scope of Appellate Review? An Evaluation in the Kentucky Court of Appeals* 52 (The National Center for State Courts, 1990).

124) This is especially meaningful, because video recording provides even stronger instrument than audio recording which can be utilized for the purpose of reversing lower courts' findings if the appellate judges see that untenable.

No evidence so far has suggested any adverse effect related to the deference issue in the U.S. or in Korea.

5. Transparency and Procedural Justice Issues

In a modern trial setting where hearings are open to the public, facilitating ‘courtroom-oriented judging’ is tantamount to enhancing procedural transparency in judicial decision making. In this sense, audio recording bolsters transparency by nudging Korean judges toward embracing the ‘concentrated hearing’ which is a vital prerequisite for ‘courtroom-oriented judging.’ Also, the awareness among judges themselves of being audio-recorded may simply induce them to engage in more professional and courteous judicial conduct while on bench.¹²⁵⁾ These changes in turn will contribute to improving public confidence in the Korean criminal trial system as a whole by fostering a sense of procedural justice.

VII. Conclusion

1. Court Recording Models and Their Ramifications

In the U.S., three new models of court recording system have emerged in response to various problems of the traditional transcript. Of the three models, the shift toward the digital audio recording model is becoming predominant across the U.S. with increasing indications of openness toward the video recording model.

These new court recording models in the U.S. each entail different policy ramifications, some of which can be amplified and analyzed under the fabric of the Korean criminal trial system and under the long term agenda of its reformation. In particular, the recent policy shift of the Korean Supreme Court toward digital audio recording will likely contribute to fostering a more favorable environment for ‘concentrated hearing’ and

¹²⁵⁾ The National Court Administration of the Supreme Court of Korea, Manual, *supra* note 72, at 3.

'courtroom-oriented judging' envisioned in the revision of the KCPA in 2007 by alleviating trial judges' burden on court record production, incentivizing a departure from the old practice of 'discontinuous hearing,' and facilitating courtroom-oriented advocacy. At its best, digital audio recording can be utilized by trial judges as an avenue for a vivid experience of how the new trial procedure set forth in the revision works in its entirety.

2. *Future Exploration of Video Recording in Korea*

As argued in Chapter III. Section 2. (3), the video recording model could be the next generation court recording system in the long run. On top of its conduciveness to appellate review, monitoring, media communication, and education both within and without judiciary, it could further encourage vigorous in-courtroom advocacy of all trial participants by endowing themselves and, by extension, their office or their client with the most vivid record of their own performance. The sheer acknowledgement of the fact that their in-courtroom performance would be subject to a later review would induce them to orient their advocacy around the courtroom.

However, the furnishing cost as of now makes early adoption of this model improbable in Korea. That is why I believe that Korean courts should explore video recording on a pilot project basis apart from the stream toward audio recording.¹²⁶⁾

126) The possibility of full adoption of the Video Recording Model in Korea remains for the future discussion. Just to briefly mention, that discussion should include the topics such as (i) how to adjust the intra-court organizational structure, (ii) whom to assign the task of court monitoring, (iii) when and how to allow video transcription. Regarding (i), one option is to establish a division exclusively in charge of transcription, with stenographers assembled under it, rather than assigning them to respective trial judge. Regarding (ii), one could re-conceptualize registry clerks' role as court monitors. Regarding (iii), one of the options is to allow video transcription, in principle, only after an appeal is filed, so as to reduce the caseload and concentrate conserved resources on those appeals for expedited transcription process. In exceptional circumstances, such as in highly sophisticated cases with protracted hearings, multiple stenographers could be assigned to cooperatively work on one case, either during or after the trial, which could make possible swift production of transcripts.

