

Judge-Jury Interaction in Deliberation: Enhancement or Obstruction of Independent Jury Decision-Making?

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Abstract

In the Korean jury system, jurors deliberate without interference of anyone, except when they cannot reach a unanimous verdict, in which case they must hear the judge's opinion. If jurors convict the defendant, they also deliberate with the judge on sentencing and provide their opinions. This unique feature of the Korean jury system provides rare opportunities to examine the interaction of the lay people and judges in deliberation. Through direct observation and the content analysis of the shadow jury deliberations on actual cases in Korea, we will examine whether the judge's intervention was helpful in jury decision-making or hampers the independent judgment of the jury. The result shows the collaborative deliberation amongst jurors and judges in sentencing, and in some cases in conviction, will mutually benefit both. In turn, jurors will retain the credibility of the judiciary while the judges will reflect upon their decisions in accordance with the legal consciousness of the lay people.

Key words

Jury; judge; deliberation; shadow jury; Korea

Resumen

En el sistema de jurados de Corea, los miembros del jurado deliberan sin interferencia de nadie, excepto cuando no pueden llegar a un veredicto unánime, en cuyo caso deben escuchar la opinión del juez. Si los miembros del jurado

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condenan al acusado, también deliberan con el juez a la hora de dictar sentencia y expresan sus opiniones. Esta característica única del sistema de jurados de Corea ofrece pocas oportunidades para examinar la interacción del jurado popular y los jueces durante su deliberación. A través de la observación directa y el análisis del contenido de las deliberaciones del jurado en la sombra sobre casos reales en Corea, se analizará si la intervención del juez fue útil en la toma de decisiones del jurado o dificulta su independencia de criterio. El resultado demuestra que la deliberación entre los miembros del jurado y los jueces a la hora de dictar sentencia, y en algunos casos al declarar culpable al acusado, beneficia a ambos. A su vez, los miembros del jurado conservan la credibilidad del poder judicial, mientras que los jueces van a dictar sentencia teniendo en cuenta la conciencia jurídica del tribunal popular.

Palabras clave

Jurado; juez; deliberación; jurado en la sombra; Corea

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1. Introduction

Jury trials were first introduced in 2008 in Korea.¹ The Korean jury system, as envisaged in the Act for Civil Participation in Criminal Trials of 2007 [*Gukminui hyeongsajaepan chamyoeo gwanhan beopru*] (hereinafter the Act), incorporates elements of both the U.S.-style system and the German lay assessor system to be implemented during an initial five-year experimental phase (Han 2009).² The idea of utilizing the two primary styles of lay participation was to experiment with each of them in the Korean context in order to come up with the most appropriate model.

Since its introduction in 2008, a total of 1,464 jury trials were held by the end of the year 2014, and the number of jury trials has consistently increased from year to year (NCA 2015).³ The rapid increase in the number of jury trials demonstrates the successful implementation of the jury system. Indeed, the evaluation by the Committee on Civil Judicial Participation (the "Committee") on the performance over the 5-year experimental period was generally positive. The Committee recommended a final format of the Korean jury system to the National Assembly, which was meant to facilitate the jury system. It consists of some major changes to the system in relation to the jury deliberation. First, the jury verdict becomes *de facto* binding, meaning the court must respect the jury verdict, unless it is clearly contrary to the Constitution or statutory law. The jury opinion on the sentencing remains advisory. Second, the decision-making rule of the verdict is strengthened to require a three-fourths majority to reach a verdict.⁴ If the 3/4 majority is not reached, the court nevertheless renders a judgment with reference to the jury opinions. Third, the number of jurors can either be seven or nine, but not five.⁵ Upon this recommendation, the Minister of Justice submitted a bill revising the existing Act.⁶

As reflected in the recommendation by the Committee, the past five years of experiences were evaluated as a success, and the jury system is expected to be improved and more widely used. Indeed, the jury verdicts and the judge's rulings matched in 92.8% of the time (NCA 2015).⁷ This is a much higher matching rate than that observed in the U.S. studies (Kalven and Zeisel 1966, Eisenberg *et al.* 2005). Such a high matching rate may increase the general public's belief in the jury system, one of the most important legislative purposes of the Korean jury system.⁸ Moreover, the national statistics show that relatively small gaps were found between the majority opinion of the juries and the sentencing judgment. In 89.3% of the cases, the majority of sentencing opinions of the jury and the sentencing judgment did not differ much – two years of imprisonment at most (NCA 2015).

¹ For a general overview of the background and history of the Korean jury system and the relevant legal provisions, see Lee, J. (2009) and Lee (2010).

² During this period, the jury verdict is advisory. A major reason why the jury verdict in Korea is advisory is to avoid a potential constitutional challenge. Because Article 27(1) of the Korean Constitution gives one the right to be tried by a judge, a binding jury verdict may conflict with this right by putting the fate of the defendant in the hands of lay people. (Daehanminguk Hunbeob [Constitution of the Republic of Korea] 1987).

³ The number of jury trials was 64 in 2008, 95 in 2009, 162 in 2010, 253 in 2011, 274 in 2012, 345 in 2013, and 271 in 2014.

⁴ Currently, jurors can render a verdict based on a simple majority. The Act, art. 46(3).

⁵ Depending on the severity of the case and the defendant's plea, the number of jurors in a Korean jury trial can be five, seven, or nine. The Act, art. 13(1). In practice, five jurors were seldom used (6.4%) (NCA 2015).

⁶ On December 31, 2013, the Ministry of Justice posted a bill for public comments. Beopmubu Gonggo 2013-288. At the time of this article's publication, legislation is under review by the National Assembly for passage.

⁷ Among the 105 cases in which the verdict and the ruling did not match, the jury verdict was not guilty and the judges' verdict was guilty in 97 cases. For an empirical analysis of the jury-judge decision matching, see Kim *et al.* (2013).

⁸ The two main legislative purposes were to increase democratic participation of the lay people and to enhance the credibility of the judiciary. The Act, art. 1(1).

The main reason for the public distrust of the judiciary in criminal trials before the introduction of the jury system in Korea has to do with the discrepancy between the court judgment and the public's legal consciousness, including sentencing, so infusing lay perspectives into the court judgments is regarded as the most important function of the jury system. The important question then, is how the lay perspectives are infused with the professional judgments. Given the non-binding status of the jury verdict in the Korean jury system, the verdicts do not directly affect the final disposition of the case. There are several ways the common sense of the lay people interacts with the professional judgments, however. First of all, jurors are provided with a case overview, which includes information related to the case summary, relevant criminal codes and previous judgments.⁹ So jurors are assisted by the bench. In addition, more direct interaction is made during the deliberation itself, because oftentimes the judge and the jury discuss the case together.

One of the most distinctive features of the Korean jury system is that the judge must provide information or opinions during the jurors' conviction deliberation when the jurors cannot reach a unanimous verdict.¹⁰ Jurors can also request the judge's opinion by a majority vote any time during deliberation.¹¹ This means that many jury verdicts end up being reached after jurors' discussion with the judge. So it may be likely that these judge interventions during deliberations will shape the final verdicts. In this context, the high matching rate of jury verdicts and court judgments may be a reflection of the joint deliberation when the jury is deadlocked.

This unique feature of the Korean jury system provides rare opportunities to examine the interaction of the lay people and the judge in deliberation. Some may worry that the intervention of judges may hinder the jurors' independent judgment, and consequently, make jurors dependent on the judge's opinion (Lee, E. 2009). Although the law mandates that judges not make a statement of guilty or not guilty when they discuss the trial with the jurors,¹² we cannot rule out the possibility of influence, without knowing exactly what is happening during deliberation.

Will the judge's intervention enhance the jurors' understanding of the case and the law, and subsequently lead to an informed and reasoned verdict? Or will it unduly interfere with their independent decision-making? When the opinions of jurors and judges drastically differ, how are jurors to reconcile such a discrepancy? What are the main areas of disagreements? Will there be a situation of jury nullification in the Korean jury system? This paper explores these questions through direct observation and the content analysis of the shadow jury deliberations in actual cases in Korea.

2. Method

The present article used the data we collected for the shadow jury deliberation study¹³ that was conducted in two phases, between November 2010 and July 2011 (18 cases),¹⁴ and between January 2012 and June 2012 (20 cases).¹⁵ Two types of shadow jury groups were selected. One group was composed of juror candidates who were not selected during the *voir dire* ("research jury"). Another group was composed of people who were recruited by the court to serve as shadow jurors

⁹ Providing a case overview is a unique feature of the Korean system. Although it is not specified in the Act, this has been the consistent practice of the court.

¹⁰ The Act, art. 46(3).

¹¹ Judges provide their opinions to the jurors, although they should not make a statement of guilty or not guilty. After the judges and the jurors have discussed the guilt of the defendant together, the jurors, again outside of the presence of the judges, render a verdict based on a simple majority. The Act, art. 46(2) and art. 46(3).

¹² Gukminui hyeongsajaepan chamyeo e gwanhan gyuchik, art. 41(5).

¹³ This study was commissioned by the National Court Administration of the Supreme Court of Korea.

¹⁴ The results of the first phase study were published in Lee *et al.* (2013a).

¹⁵ The results of the second phase study were published in Lee *et al.* (2013b) and Woo *et al.* (2013).

(“participatory jury”).¹⁶ In any given trial, therefore, one or two shadow jury groups were studied other than the real jury. We tried to match the number of the shadow jury to that of the real jury. However, it did not always match, due to the availability of the juror candidates who were willing to serve as shadow jurors.

We were first interested in the quality of deliberation. The participatory jury was relatively younger, more homogeneous, and more knowledgeable in law than the research jury: e.g., students attending the same law school, workers in the same workplace, or trainees at the Judicial Research and Training Institute. However, there was no meaningful difference in gender distribution between these two jury groups.

We tried to make the environment of shadow jurors and that of real jurors as similar as possible. The shadow jury sat through the trial, retired and then reached a verdict in parallel to the real jury. They were also given the case overview, just like the real jurors. They were assigned different rooms for deliberation in secret. When the judge’s intervention was needed, an associate judge of the three-judge panel went into each room to discuss the case with the shadow jurors.¹⁷ The shadow jurors remained until the final court judgment was rendered, oftentimes until late at night.¹⁸

Our research team was composed of lawyers and social scientists assisted by graduate students. We observed the trials from the beginning to the end, and then videotaped the shadow jury deliberations. We conducted a content analysis of the jury deliberation and investigated which factors might have influenced the nature of the deliberation. We paid attention to the jurors’ demographic characteristics, their level of motivation in participating, political views, and also the composition of the jury such as the number of the jurors, their gender, profession, and how homogeneous or diverse the jury was. The role of the foreperson and his or her interaction with participants in debate and discussion was also noted. We also took survey questions from the shadow jurors three times at different stages: pre-deliberation, post-deliberation, and post-judgment. We created verbatim transcripts of 13 deliberations, and conducted 6 in-depth interviews with shadow jurors after deliberation.

3. Rationality in jury deliberation

We are first interested in knowing how Korean jurors discuss fact-finding and sentencing and whether any meaningful deliberation happens in the process before investigating whether the judge’s intervention enhances or hampers the jurors’ deliberation. In other words, we examined the quality of deliberation of Korean jurors first.

In order to describe the dynamics of jury deliberation and its rationality, we used six criteria: instruction comprehension, evidence review, factual focus, systematic participation, informational influence, and the exclusion of emotion.¹⁹ These six criteria were further divided into 20 variables for measurement. More importantly, we compared the performance of the two shadow jury groups. We believed the participatory jury would be a good reference group for the research jury because they were younger, more educated, and had stronger cognitive wants (e.g., more interested in the trial or the jury system), so their quality of deliberation would be

¹⁶ In Korea, a number of district courts around the country started a “shadow jury program” in September 2010, in order for people to actually experience the judicial process through voluntary participation. The court intended to improve the public perception of the judiciary’s credibility through this program. So far the program has been successfully administered. The Seoul Central District Court, for instance, has administered the shadow jury program more than 30 times since January 2011. More than 400 people volunteered to become shadow jurors. (Seoul Central District Court 2011). We categorized this shadow jury group as “participatory jury” in our study.

¹⁷ All jury trials in Korea are conducted by a three-judge panel.

¹⁸ In one instance, the jury deliberation was completed around 3:00 am.

¹⁹ The first five criteria are very similar to those used in Devine *et al.* (2007).

higher. If the research jury's quality of deliberation was not substantially inferior to that of the participatory jury, then we could project that the real jury's quality of deliberation would be at an appropriate level because the research jury was regarded as the most approximate reflection of the real jury.

There are five variables that were derived from our direct observation of the deliberation process: the misunderstanding of legal concepts, the mixing of conviction/sentencing elements, the number of times evidence was cited, the amount of speech, and the amount of emotional speech. These were measured by the amount of speech by the jurors. For example, the misunderstanding of legal concepts means the amount of speech where the jurors were confused about the legal concepts such as the beyond a reasonable doubt or "*dolus eventualis*" (awareness of the likely outcome of an action). All the other variables were derived from the survey response. For instance, the level of understanding the law in the proceeding and jurors' recollection of the judge's instruction were measured by asking "[w]as the judge's instruction or explanation as to the law of the case difficult" and "[w]as it difficult to recollect the judge's instruction during deliberation" respectively.

Overall, our observations and analysis reveal that the 'research jury' did not seem inferior to the 'participatory jury' in terms of the rationality of jury deliberation even though the participatory jurors were younger, more educated, and more interested in the jury system to begin with. In terms of the t-test, the research jury scored less in 3 variables and more in 4 variables. In all other 13 variables, no statistically meaningful differences were found (Lee *et al.* 2013b).

On the one hand, the research jury more frequently mixed the conviction elements with the sentencing elements in deliberation, made more emotional statements, and relied less on evidence in discussion. On the other hand, the research jury tended to recall the judge's instruction better and paid closer attention to the court proceedings. They also participated more actively in the deliberation and considered other jurors' opinions more widely and openly (Lee *et al.* 2013b). Although in general the research jury did not seem inferior to the participatory jury in terms of the rationality of jury deliberation, the results also suggest there is room for improvement for better jury deliberation.

This analysis of the quality of deliberation suggests that jurors understand the judges' instructions well, and understand and recollect the evidence of the case well. Generally, jurors speak sufficiently and participate in deliberation actively. The deliberation proceeded in an open and equitable manner. However, they tend to pay closer attention to the court proceedings rather than to the deliberation while finding facts, and this tendency leads to less evidence-based discussion. In some cases, a few jurors dominated the deliberation process and emotional factors often dominated the deliberation.

4. Intervention of Judge in Deliberation

Based upon the findings of the previous section on the deliberation quality, we now focus on how the judge's intervention during deliberation affects jurors' decision-making. The three areas in which the research jury scored less than the participatory jury (mixing conviction/sentencing elements, more emotional statements, less reliance on evidence) are very relevant in our discussion on the jury-judge joint deliberation. While some of these weaknesses of the research jury deliberation can be self-corrected, we can expect that these tendencies can be changed through the intervention of the judge in the deliberation. Indeed, many Korean judges who have presided over jury trials have stated that jurors asked for the judge's opinion because they had difficulty differentiating the factual determination and the legal interpretation (Moon 2013). Moreover, the sentencing procedure is highly technical and requires scientific and professional knowledge, so jurors may need more guidance from the judge.

4.1. *Misunderstanding the legal concepts and mixing conviction/sentencing elements*

Jurors typically confuse or misunderstand the key legal concepts and principles, such as 'presumption of innocence,' 'beyond a reasonable doubt,' '*dolus eventualis*' and consequently misapplied them during the deliberation. About 11.2% of the jurors we studied showed this tendency. One study found that Korean judges were not always clear in their explanations of the elements or degrees of a crime (Park *et al.* 2008). Another study suggested replacing obscure legal terminology with plain Korean language and to develop standardized jury instruction manuals to improve effective jury instructions (Oh 2007). A recent empirical study shows that a change in the jury instructions, such as adding more explanations and examples, made a difference in jurors' understanding of legal concepts such as "beyond a reasonable doubt" (Kim *et al.* 2011).

4.1.1. On beyond a reasonable doubt

Juror #1: When we decide the matter of guilt, I think about the defendant as a person...his/her life...how the life can be changed by our decision. Considering all the circumstances, I personally think the defendant stole the purse...

Juror #2: You think the defendant committed a crime.

Juror #1: But there is no positive material evidence. Without such evidence, when we return the verdict...what if the person did not steal it?...how much will he suffer emotionally? That's what I am concerned about.

Juror #3: Yes, I think so too.

Juror #1: I think there is a 99% chance that the defendant did commit a crime.

Juror #3: Yes, but that 1% chance...

Juror #1: If there is 1% chance he did not commit a crime, and if this can be confirmed, I would like to support that 1% chance. For his life. (Case II-14)²⁰

As the juror above mentions, jurors tend to require a higher level of burden of proof than judges. Unlike judges who decide criminal cases on a daily basis, jurors have never been in a situation in which their judgments can decide somebody's fate. This pressure makes jurors extra-cautious in finding the defendant guilty. At the same time, they have been exposed to a popular TV drama that features a state-of-the-art scientific investigation of crime and they frequently expect a high level of material evidence.

4.1.2. On presumption of innocence

In the next case, the dominant theme of the deliberation was the presumption of innocence. On the one hand, the jurors seemed to ask for almost 100% burden of proof and they assumed that circumstantial evidence must be excluded from consideration. Therefore, any evidence presented by the prosecution was discarded if it did not confirm guilt. On the other hand, for victims' actions, some matters unrelated to the case were used as a basis; such as "a pregnant woman drank and smoked" or "the victim herself might have inflicted a searing wound by a cigarette." Anything that may not have supported the victim's statements was also discarded. The judge tried to remedy the error:

Juror #3: This wound can be fabricated later.

Judge: Is that a reasonable doubt?

Juror #3: It is based on experience.

Judge: The wound does not seem to come from the cigarette spark.

²⁰ Case II-14 refers to the case number 14 that we observed in our Phase II study. The numbering throughout this article follows the same rule.

Juror #2: It was ten days after the victim was wounded, but the wound looks like a rash.

Judge: Then it was a bit seared. Then you can admit the battery but other things were inflated?

Juror #1: The burden of proof rests on the prosecution, right?

Judge: It seems much skewed (inclined). It is impossible to prove 100% when there is only the defendant and the victim. The statements of the defendant must be considered rationally by comparing the statements of the victim. You can only admit the battery but nothing else? The doubt must be reasonable.

Juror #6: The victim said she was drunk while she was pregnant.

Judge: (interrupting) That is her propensity, but can it be a reason not to believe what she was saying?

Juror #6: She was thinking about abortion, I guess....

Judge: Her behavior may be blameworthy but that does not make her statement less credible. The presumption of innocence does not mean the prosecution must prove the guilt 100%. If the defendant's argument is not reasonable, the victim's statement can be credible. If it is credible, this can be accepted as evidence.

Juror #4: I think the principle [of the presumption of innocence] we st[uck] to was too rigid, then.

Judge: Sometimes the principle can hinder finding the truth. Actually, defendants choose jury trials because jurors, as non-professionals, tend to adhere to the principle too much. They request an unduly high level of proof. (Case II-18)

Judge: Actually the presumption of innocence, I think, can be too skewed. Prosecution should establish the guilt beyond a reasonable doubt. Where there are only the victim's and the defendant's statements available without positive proof, however, the prosecution cannot establish the guilt 100%. If we require the prosecution to produce evidence that can establish the guilt 100%, almost all the defendants will be acquitted. Of course the presumption of innocence is the fundamental principle in criminal procedure. But sometimes jurors stick to the principle too rigidly by requesting too [great a] level of proof, and this eventually leads to the acquittal of the defendant. Of course the opposite result can occur as well. (Case II-18)

Even though the judge's role is not to convince or persuade the jurors to reach a verdict in a particular direction, we may expect that the judge's intervention will contribute to lessen jurors' strict adherence to the presumption of innocence principle and the level of proof required to rebut the presumption.

4.1.3. On *dolus eventualis*

In Korea, jurors are provided a case overview in writing from the beginning of the trial²¹ so their understanding of the legal concepts and relevant statutory provisions can be enhanced. But the way they are presented is sometimes complicated without an explanation by the judge. A frequent example is the defendant's criminal intent, as is illustrated by the following exchange. Here, the judge explains that the scope of intent is broader than what lay people might think, using the legal terminology '*dolus eventualis*.'

Judge: There exists an area in between definite intent and negligence: a person is aware that some event will occur. Let's assume that I live in a high-rise apartment with a veranda. Someone passes by underneath the veranda. I drop something, without pointing at a particular person. Even though I did not intend to injure someone, I am aware someone might be hit in a congested city in such a situation. Someone can die. I realize if I drop a very heavy object, someone might be accidentally hit and killed. So even though you don't have definite intent to kill, if

²¹ A sample case overview (or juror's guide) that is used in a Korean court can be found in the Appendix in Hans (2014).

you do an act knowing that your act can possibly lead to someone's death, you have intent to kill by *dolus eventualis*.

Juror #3: How can we determine whether a person is aware of such a possibility?

Judge: That's why we need to examine the objective circumstances. If you look at the case overview material the court provided, under the section 'intent to kill,' you can see relevant Supreme Court cases and an explanation about how to make decisions in this matter. The motive of crime, types of weapons used, method of the crime, wounds, and other relevant circumstances can provide a basis to ascertain the defendant's subjective intent. (Case I-7)

After the judge retired, jurors once again discussed the intent to kill. One juror started to broaden the scope of the intent and accepted the defendant's guilt by using the concept of *dolus eventualis*.

Juror #1: I thought this matter over. Anyway the arrow was turned toward the victim whether or not it was definitely aimed at him. At the victim's testimony, what was contested was whether the arrow passed over his head. The arrow hit the wall about 2 meters above the ground. If we assume the defendant is about 180 cm tall, without his avoidance, he could have been hit. The defendant, at the moment he shot the arrow, must have known, even if [sub]consciously, that the arrow might hit the victim and kill him. So under the *dolus eventualis*, I can accept his intent to kill. (Case I-7)

4.1.4. Mixing conviction/sentencing elements

In Korean jury trials, procedures for verdict determination and sentencing are not separately managed. Frequently, evidence that is relevant to sentencing is introduced before the jury reaches its verdict. Evidence that is not necessarily relevant in determining the verdict—such as diminished capacity due to intoxication, the number of blows causing the bodily injury, or the defendant's prior criminal record—may influence the jurors' ruling on the facts. Some have suggested dividing jury trials into two separate phases, one to determine the verdict and the other for sentencing (Han 2008, Park 2012).

We examined whether sentencing-related matters were used by jurors in rendering judgment on the guilt of the defendant. If sentencing issues were introduced by jurors during the deliberation on guilt, we considered whether this was corrected through deliberation: in other words, whether the jurors recognized they were mixing sentencing issues in the conviction phase of the trial, and if they deliberately stopped doing that. Among the cases we observed in the first phase of the study, for instance, jurors mixed sentencing matters into the conviction deliberation in 9 cases (50%). However, 8 of these cases were corrected through deliberation, as in the example below:

Juror #5: I think the defendant is guilty, based on what I saw during trial. But if the defendant is found guilty, he will face an aggravated sentence.

Juror #3: The crime the defendant committed requires aggravation, it's true. But right now, we are supposed to decide whether the defendant is guilty or not. Other matters must be discussed during the sentencing deliberation, after we find the defendant guilty. (Case I-5)

At the individual level, we also looked at each juror's situation to determine how many of them mixed together the distinct matters of conviction and sentencing during deliberation. In our first phase study, for instance, sixteen (14.2%) out of 113 jurors mixed them in arguments (see Table 1). Twenty-two (19.5%) jurors mentioned the defendant's criminal record during the conviction deliberation.

Table 1: Frequency of Combining Conviction and Sentencing Considerations

Variables	Value	Frequencies (%)
Confusion of Guilt-Sentencing	Yes	16 (14.2%)
	No	97 (85.8%)
Mentioning prior Criminal Records	Yes	22 (19.5%)
	No	91 (80.5%)
Total		113 (100.0%)

Source: Lee *et al.* (2013a)

This illustrates that jurors sometimes reach the conviction verdict by considering sentencing matters. It is because the conviction and the sentencing proceedings are not separated in the Korean jury trial. Therefore when the jurors are not sure of the defendant's guilt, some minority jurors join with other jurors for the guilty verdict by lowering sentencing, even though they think the defendant is innocent. Similarly, in Arizona civil jury cases, the jurors who opposed liability argued for lower awards than some other members who favored liability. This so-called 'fusion' or 'spillover' from damages to liability judgments occurs when jurors use damage information to judge the likely negligence of the defendant's actions (Diamond *et al.* 2012).

It is not easy for the jurors to separate conviction and sentencing, even though the judge instructs them not to consider them together. Empirical research has demonstrated the biasing effect of the information related to the sentencing, especially the criminal record of the defendant (Eisenberg and Hans 2009). However, mixing the factual determination with the sentencing judgment is not only a problem for jurors. Judges likewise may not always separate the factual determination factors and the sentencing factors in their judgments.

4.2. Emotional statements

It is generally believed that each deliberation should be guided by logic and reason rather than emotion. However, emotions do play important roles in decision-making in general (Damasio 1994) as well as within a legal setting in particular (Feigenson and Park 2006). Moreover, excluding emotion completely would be very difficult in practice, and may not even be desirable. In our study, about 23% of jurors made sympathetic comments and exhibited emotional attitudes. Comments such as "if the defendant is found guilty, the defendant and his family may experience hardship," or "the defendant's miserable early childhood and upbringing contributed to the commission of the crime"²² show jurors' emotion. As the juror in the excerpt below mentions, the consequence of the verdict is often considered with emotions:

Juror #4: It would be difficult for me to punish (by verdict) the defendant simply as a matter of law, knowing there exists no mechanism in our society to support the defendant's living after he comes back from prison. Can we the people make judgment on the defendant strictly on the basis of law? Even if we hold the defendant guilty, we should be cautious in considering adequate sentencing for the defendant. (Case I-9)

A judge mentions that jurors' sympathetic attitudes are often manifested during sentencing deliberation.

Judge: It is rare to see jurors' opinions on sentencing converge like this. I typically get sentencing opinions in murder cases from 10 years in prison to ... even 2 1/2 years in prison with suspension. Jurors tend to be swayed by defendants' stories

²² In the United States, jurors in capital cases are permitted to consider such 'mitigating circumstances' in the sentencing phase. For further discussion on jury sentencing in the U.S., see Hans *et al.* (2015).

that they were wrongfully charged. Such jurors might be sympathetic to the defendant and even think the defendant should be the victim instead. That's why the jurors provide opinions like the suspended sentence. (Case I-12)

Generally speaking, the jury deliberation is based not only on the legal reasoning and the evidence, but also on non-legal factors. For example, the personal factors of the defendant or the family surroundings may sometimes be considered and may not unduly affect reasonable judgment. One scholar divided the deliberation process into the rational deliberation model and the relational deliberation model. He argued that emotion can oftentimes deepen the discussion and induce more participation (Ryfe 2002). Empathy is said to enhance the seriousness of a juror's commitment to the deliberation process (Pettys 2007). So the involvement of emotion will not create a problem in all cases.

Juror #1: As I said before, it is an emotional appeal. six years ... I think three years after the full reduction is still too harsh. The function of punishment is rehabilitation, right? I don't think the defendant will be rehabilitated after serving the sentence. I think he will be much more rehabilitated in a society than in prison. First of all, the prison has not functioned well for him; he has not been rehabilitated after serving prison many times. In terms of the habitual character of the crime, hmmm..., I think the evidence establishes the habitual crime. But the reason why I did not accept the habitual character was that, because of his limited cognitive function, he could not think that he was violating the law. So I did not think he was habitually stealing. But the law should not discriminate in application; it should be applied with a fair and objective standard. In that sense, I can recognize the habitual character. However, three years is so harsh ... even after the discretionary reduction ... I have a lot of difficulty in rendering a decision like this.

... I remember an American movie, is it "Born to Kill"? It looks like the jury system was created to infuse common sense, the way the community feels. In the movie, jurors deliberated so hard, emotionally, I mean. In the end, the jurors made an emotional decision, and the defendant was acquitted. (Case I-13)

Sometimes this anecdotal or empathetic consideration will make the issue clearer and help to legitimize jurors' conviction determination. Therefore, the emotional factor will not hinder the reasoned decisions but clarify in the particular context.

Our inquiry was not focused on the frequency of the emotional statements. Rather, we were particularly interested in evaluating whether jurors found it difficult to make a legally correct decision due to their emotions. We tried to evaluate this undue influence in making a legally correct decision. Our observation suggests that jurors' emotions sometimes obstructed their ability to make decisions. In the case of the "diminished capacity," jurors frequently recognize it in order to lower sentencing, instead of finding the fulfillment of the legal elements.

Juror: I would like to accept the diminished capacity but it is not easy. The defendant looks like a habitual criminal. If we do not recognize the diminished capacity, he will be sentenced to more than six years. I think this is too severe, so I would like to vote for not guilty because of this harsh sentencing. I know I may be emotional. If I should exclude the emotional consideration, I would rather go for a guilty verdict and try to reduce the sentencing. But I still think the defendant's behavior does not seem to qualify as a habitual crime, so at the moment I would like to vote for a not-guilty verdict. I haven't completely made up my mind, so I will think about it more. (Case I-13)

The juror in the above case finds it difficult to reach a guilty verdict because the sentence imposed will be unduly severe if the habitual crime is recognized. The discrepancy of laypeople's perception of the proper sentence and the actual sentence imposed by the court is explained by a judge in the following segment:

Judge: Finding the diminished capacity is difficult. Indeed there are many gray areas. As the prosecution pointed out, the diminished capacity argument sometimes functions as a tool to reduce the sentencing, especially when the law requires a stringent sentencing. For instance, the minimum sentence for the bodily injury resulting from robbery is seven years. If the court gives a full reduction, it

could be reduced to three and one-half years without suspension. But there are many types of it. Let's say a college kid who got drunk from a Christmas Eve party tried to steal something at a convenience store. The clerk saw it and in the course of preventing the kid, got bruised. By definition, a bodily injury occurred resulting from robbery. Three and a half years in prison for that college kid even after the full reduction ... rather harsh punishment for the kid. So in that case, the court asks "Did you get drunk? So drunk that you did not know what you were doing?" In this way, the diminished capacity due to intoxication can be used to further reduce the sentence. I don't think it is a right thing to do, but is frequently practiced. I think the diminished capacity argument might have been introduced at today's case as a tool for reducing sentencing. So I suggest you to think about this matter not from the perspective of sentencing. Insanity must only be accepted when the defendant suffers a total lack of awareness or control of his action. If the defendant suffers a lesser amount of awareness or control, then the diminished capacity can be accepted. (Case I-9)

As we have seen, sentencing is one of the most frequent areas where the juror's sympathy and emotions are engaged. Indeed the public distrust of the judiciary in criminal trials had focused on the sentencing issue, so lay participation in sentencing deliberation was inevitable from the start (Han 2006). It has long been claimed that some Korean judges make sentencing decisions arbitrarily and so are not consistent. In the following deliberation segments, jurors discuss the sentencing with a judge. The judge then admits the existence of a discrepancy between the public perception of the proper sentencing and the mandatory sentencing, but explains this may have more to do with some 'populist' special laws enacted by the National Assembly.

Juror #1: The nature of the crime is not trivial and the defendant has committed larceny a number of times in the past, but I don't think he committed a crime serious enough to put him in prison for seven years or longer. So I cannot vote for guilty of the bodily injury resulting from robbery.

Juror #2: I think so too, like most jurors in this room.

Juror #1: For example, even if committed as a self-defense, those who kill a person in self-defense will only serve a minimum of three years. Stealing 40,000 won (USD 40) and beating a person, then the defendant is sentenced to seven years? That's absurd. (Case I-12)

Juror #2: Oftentimes politicians who were convicted with bribery or something receive ten years in prison. Then after a few years, they are released, and then reinstated. Now a seven-year prison sentence for the defendant in this case, in comparison with these people, seems to be unduly harsh. All sentencing decisions must be equitable, but I am not sure the court rightly applies this principle.

Judge: In some sex crimes, especially the widely publicized ones, sentencing decisions for more than ten years of prison are not rare. This sentencing may be higher than some murder cases. I am not saying murder cases, in all cases, must be punished more severely than sex crimes. But I cannot deny some special laws have been promulgated in response to public opinions, and therefore have generally stricter sentencing provisions. For example, An Act of Punishment of Violence, etc. has it that for most crimes under the Act, the minimum sentence is one year or two years or three years. So if someone raises disturbance at night with a bat and injures someone, he may face a three-year sentence. (Case I-18)

Through this deliberation process, lay people can raise their opinion that the sentencing provisions in some laws are not in line with their legal consciousness, and they have subsequently brought about occasional acquittal of the defendants. This apparent mismatch of the jury verdict and the law has functioned as a *de facto* nullification. Records show that there is little discrepancy between jurors' opinions and the judge's sentencing decisions (NCA 2015). It may be that the judges take the jurors' opinions into consideration, or it may be that the jurors and the judges independently tend to reach similar conclusions about sentencing. It also led to an

opportunity for lawmakers to reflect on their views in the revision of the sentencing provisions.

4.3. Change of opinion

Judge intervention in the deliberation can enhance jurors' understanding. Our results indicate that there are few undue influences of the judge's explanation and opinion on the juror's independent decision-making. In considering the effect of judges' participation on jury panels as a whole, there was only one case where all jurors changed their opinion about the defendant's guilt after the judge's intervention. In two cases, half of the jurors changed their opinions. One or two jurors changed opinions in three cases. But in almost all the other cases, each juror's position on the defendant's guilt did not change.

On the individual level, we have divided judges who intervened at the jury deliberation into three groups in accordance with the style of their discussion with jurors: (1) information-delivering type; (2) opinion-introducing type; and (3) conclusion-inducing type (See Table 2).²³ The percentages of judges, respectively, were 64.6% (information-delivering type), 29.2% (opinion-introducing type), and 6.2% (conclusion-inducing type). Notably, when the judge was a conclusion-inducing type, all jurors changed their decisions after discussions with the judge. In the case of opinion-introducing type judges, 30.3% of jurors changed their positions. In the case of information-delivering type judges, 23.3% of jurors changed their decisions. Therefore, the evidence indicates that when a judge interjects his or her opinion strongly during the deliberation, jurors are more likely to follow the judge's opinion, although we cannot provide any conclusive generalization due to the limited number of cases.

Table 2: Jurors' change of positions and the type of judges in deliberation

			Jurors Changed Position?		Total
			Yes	No	
Types of Judges	Information-Delivering	Frequency	17	56	73
		%	23.3%	76.7%	100.0%
	Opinion Introducing	Frequency	10	23	33
		%	30.3%	69.7%	100.0%
	Conclusion Inducing	Frequency	7	0	7
		%	100.0%	.0%	100.0%
Total		Frequency	34	79	113
		%	30.1%	69.9%	100.0%

$\chi^2 = 17.871, df = 2, p = .000$

Source: Lee *et al.* (2013a)

To illustrate the possibility of influence of the judge on the jury deliberation, in one instance, a judge expressed his opinion after hearing jurors' opinions and the supporting evidence. He distinguished assault with apprehension and mentioned that assault is easily accepted. Eventually the judge's explanation led to jurors'

²³ If the judge simply provides the information related to the case at hand or informs jurors about how similar cases are handled by courts, such style is regarded as "information-delivering." If the judge provides his or her opinion by saying "I think..." or "[I]n my opinion,..." then we categorized it as "opinion-introducing." When the judge's opinion is expressed strongly, then it is regarded as "conclusion-inducing." On one such occasion, the judge said "if the defendant is found not guilty under the circumstances, we can say that justice does not prevail in this case."

acceptance of guilty of assault. The judge then explained that jurors and the judges thought similarly on the guilt of the defendant.

Judge: I will explain the legal concept of assault and arrest. Assault is straightforward. If someone makes another apprehended by whatever means, assault is established. There are many ways to make people apprehended, by words or by actions. Did the victims get apprehended before leaving the elevator or did they leave without apprehension? If the former, then there is assault. But here they left the elevator. That may be what the defendant intended. He may have wanted to tie the hands of the victims with the cable string so that they could not move.

Juror #4: It is problematic to tie them with a cable string. Even if he did, this will not lead to a situation to restrain the victims.

Judge: Restraint is a different concept that is beyond the scope of assault. If the victims are restrained, then the arrest applies. The crime of arrest means restraining a person from moving; assault in most cases stops before arrest. Generally a person assaults another tries to move or does something, then after assault, he will take other actions. In that case, the arrest applies. Suppose someone assaults in order to arrest, but couldn't. The victim ran away, being apprehended. Assault is established when someone is apprehended by whatever means. It is one of the least serious crimes, which can be easily thought of. (Case I-7)

Several changes occurred after the introduction of the jury system to court proceedings in Korea. The prosecution and the defense must present their cases in order to convince the jury using simpler terminology in a more concentrated and adversarial manner than non-jury trials. At the same time, however, jurors evaluate the professionals in the courtroom (judges, prosecutors, and the defense attorneys) when they form opinions about the case. Our survey result indicates the role of the judges is a determining factor in shaping the jurors' perception of the fairness of the trial (Woo *et al.* 2013). So when jurors think they would be more assisted by the judge during the deliberation, their recognition of the fairness of the trial improved.

Besides this positive effect of the judge's intervention, we have noted another aspect of interaction. Sometimes judges are affected by jurors as well. The judge's statement below implies that the influence can go in both directions, including from the juror to the judge.

Judge: I went downstairs and thought about it. After I watched three jurors (out of five) having difficulty accepting the habitual character of the crime, I thought maybe the court has been too lenient in accepting it. Recognizing the habitual character makes such heavy impacts on the defendant. (Case I-13)

Through interaction with lay jurors during the deliberation, judges can re-examine the matters that are often overlooked or missed if they discuss the case only with professional judges. This two-way influence will then further the legislative purpose of the Act, that is, joining common sense and lay perspectives with professional judgment. Indeed, many presiding judges of the jury trial have indicated they were impressed by jurors' performance in the jury room, as is manifested in the segment below.

Judge: Four people are in favor of not-guilty and one person finds the defendant guilty....The result is similar to that of our judge panel. One judge found for guilty....Our panel has held about ten jury trials, and over 200 jury trials countrywide. Some worried about how well jurors perform their duty, as they are not professionally trained. But if we look at the results, jury verdicts match with court decisions nine out of ten times. As we hold more jury trials, we judges come to realize that the jury system is quite a good institution. Of course, it is an arduous process, but jurors become more knowledgeable about the law and understand better about the trial process. In turn, courts can get [the] public's opinion which can be useful for judgment. (Case I-7)

5. Conclusion

In this paper, we tried to infer the actual jury deliberation process from examining shadow jury deliberations. We found the quality of deliberation of the Korean shadow jury was generally high. Misunderstanding law and the intermingling of facts relevant to conviction or sentencing were not as frequent as many people expected. Moreover, when such problems occurred, they were most often corrected through the intervention of other jurors or judges. Most judges were helpful in assisting jurors to reach a verdict in the jury room. They provided explanations on the key legal principles with examples and cases, answered jurors' questions about difficult legal concepts, and interacted with jurors in discussing appropriate sentencing. With judges' proper guidance and oversight, jurors were less likely to mix conviction and sentencing considerations. In addition, juror deliberations on sentencing provided the opportunity to combine the common sense of the lay people with the judge's decision-making.

In Korean jury trials, the judge's intervention during the deliberation of jurors seems to have functioned to enhance the jurors' informed judgments, rather than to obstruct their independent judgments. The results show that the collaborative deliberation amongst jurors and judges in sentencing, and in some cases in conviction, will mutually benefit both. In turn, jurors will contribute to the credibility of the judiciary while the judges will reflect upon their decisions in accordance with the legal consciousness of the lay people.

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