



# Korean citizen participation in criminal trials: The present situation and problems<sup>☆</sup>

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## Abstract

As citizen participation in criminal trials was first introduced in 2008, it is advisable to keep the present form of an all-citizen jury system rather than introduce or adopt aspects of the Continental mixed tribunal system because the former system makes the best use of the meaning of Article 1 of the Act of Citizen Participation in Criminal Trials in Korea. Though previously professional judges participated in the deliberation process, under the current system, the new procedure should allow only jurors to engage in deliberations and render verdicts, with sentencing still left to professional judges. The new law should also eliminate a consent agreement required for a defendant in jury trial, thereby making jury trial mandatory for certain classes of heinous crimes like murder or even political crimes; juvenile cases, however, may still be excluded from jury trial. In addition, the exclusion right of the court should also be recognized, but the current comprehensive rule (Article 9 (1) (3)) should be eliminated. It is necessary for the jury verdict to have legal binding force such that the prosecutor cannot appeal the acquittal if the verdict was decided unanimously. Lastly, as for the use of victim participation programs, it is enough to simply allow victims to make statements as witness. This year, on March 6, 2013, the revised system of civil participation in criminal trials has been ready based on the evaluation of the current system by the Committee on Civil Judicial Participation, which was comprised of members from the judiciary, the academia, and civil organizations. The new amendment will be submitted to the National Assembly within this year.

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## 1. Introduction

Act on Citizen Participation in Criminal Trials (hereinafter referred to as “the Act”) which altered Korea’s judicial landscape was enacted in the Republic of Korea (ROK) on April 30, 2007 and the Act enforced on January 1, 2008. The Act, however, has a transitional phase<sup>1</sup>; the first five years of its implementation from 2008 to 2012 are considered as an initial experimental phase in order to assess citizens’ experiences in the adjudication of criminal trials. Because of this, rather than introducing a finalized form of either a jury system or a mixed judge system (under which professional judges and citizens deliberate together), the courts adopted a lay participation system that combined judicial elements from both lay adjudication forms in order to evaluate and assess this novel arrangement. This year, on March 6, 2013, the revised system<sup>2</sup> of civil participation in criminal trials has been ready based on the evaluation of the current system by the Committee on Civil Judicial Participation, which was comprised of members from the judiciary, the academia, and civil organizations. The new amendment will be submitted to the National Assembly within this year.

The organization of this paper is as follows: first it will examine the background of Civil Participation in Criminal Trials (hereinafter referred to as “the CPCT”), its procedural outlines, and the extent of civic participation during the first four years of jury experimentation. The paper then tries to identify a number of problems in the current system and make strategic procedural recommendations to improve citizens’ legal participation in Korea’s criminal trials. And some examinations on the Japanese Lay Judge System will be also included in this paper.

## 2. Backgrounds of adopting the civil participation system in Korea

### 2.1. Public distrust of the criminal justice system

This section examines public opinions on the criminal justice system and perceptions of citizen participation in the criminal process.

The Korean Legislation Research Institute conducted a national opinion survey in 2008 and published its results (shown in Table 1), revealing a deep distrust on Korea’s investigative agencies and court systems. The majority of respondents identified the government prosecution as the most distrusted governmental agency in Korea (63.0% for “mostly distrust” and “never trust” categories), while half of the respondents thought that the courts’ decisions were generally fair (51.3%) and 44.6% said that the courts’ decisions were unfair. Nearly two thirds of respondents felt that money or material wealth significantly influences life in Korean society,

<sup>1</sup>The following statement of the Globalization Committee of Jurists makes the purpose of the Act clear: “If the new system works successfully in the test operation, the jury system or other civil participation systems will be adopted. If there are, however, many issues, then the original judicial arrangements are to resume”(Gukhoe Beopjesabeopwihonhoe [Legislation and Justice Committee of National Assembly], Gungminui Hyeongsajaepane Gwanhan Beomnyuran Simsabogoseo [Report of Examination on the Bill for Civil Participation in Criminal Trials], 2007, p. 21). [http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill\\_id=032954](http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=032954)(accessed 26.04.12).

<sup>2</sup>Its main contents are as follows: (1) Maintain a current trial system by jury form; (2) Introduce the new system that can send the defendant to a jury trial forcibly; (3) When the first verdict does not come to unanimity, the second verdict is decided by qualified majority (three-fourths). And if the verdict is ended in a hung jury, a judge hands down a decision without the verdict; (4) Give the virtual binding force (respect the verdict) to the verdict of the jury (Gungminsabeopchamyeo Wiwonhoe, Gungminchamyeojaepanjedoeui Choejonghyeongtaekcoljung [The Committee on Civil Judicial Participation, The Final Form of Citizen Participation Trials], March 6, 2013).

Table 1

Korean citizen's opinions & perceptions of the criminal justice system.<sup>a</sup>

Question 1) How much do you agree with the adage, "Money is All Mighty," <sup>b</sup> as it is recognized in Korean society?			
Strongly agree	25.5%	Somewhat agree	39.8%
Somewhat disagree	23.4%	Strongly disagree	11.3%
Question 2) How much does political and financial pressure affect trial outcomes?			
Greatly affect	49.2%	Somewhat affect	46.4%
Seldom affect	4.0%	Never affect	0.4%
Question 3) Do you think that it is advisable that public opinion may reflect on the trial proceedings?			
Extremely advisable	14.8%	Quite advisable	61.9%
Hardly advisable	21.7%	Never advisable	1.5%
Question 4) Do you think that in general, the court's decisions are fair?			
Very much fair	4.0%	Mostly fair	51.3%
Mostly unfair	38.8%	Never fair	5.8%
Question 5) How much trust do you have for the following institutions?			
Answers	Police	Prosecution	Court
Very much trust	1.4%	1.3%	4.1%
A little trust	37.4%	35.7%	51.2%
Mostly distrust	50.4%	49.9%	36.8%
Never trust	10.8%	13.1%	7.9%
Question 6) What do you think is the biggest reason of distrusting the criminal justice system?			
Corruptions of judicial officers and privileges of former officers <sup>c</sup>		48.4%	
Dissatisfaction on court's decision		22.9%	
Authoritative judicial system of professional judges		20.5%	
Press report		6.9%	
Others		1.3%	

<sup>a</sup> Sang-yoon Lee, Se-jeong Yi, 2008 Gukminbubishik Chosayeongu (Burok) [A Research on the 2008 Korean People's Legal Consciousness(Supplement)], Hanguokbubjaeonguwon [A Korea Legislation Research Institute], 2008, p.46, pp. 78–91 (This Survey was completed by 3007 general citizens).

<sup>b</sup> This question suggests that if a rich person commits a crime, he/she can easily be acquitted, whereas a poor person will certainly be convicted for the same crime. Specifically, the phrase refers to a particular event in October, 1988, soon after the Seoul Olympic Games, when 12 prisoners on trial in Seoul ran away during their transport to Daejeon Prison. 4 of the prisoners stole the police's guns and ran away for 8 days staging a hostage situation in a private residence in Seoul. The incidence resolved itself when two prisoners committed suicide, one shot dead by the police, and the other one arrested. By request of the criminals, the entire incident was broadcasted live on National TV across the country. The main culprit, Ji, Kang-heon who was a habitual burglar (took about 5000 dollars) was disgruntled with the sentence of 7 years' imprisonment with hard labor and 10 years' protective custody in the second trial. He let out his pent-up anger toward legal injustice and unfairness in the trial and left a famous message called "All mighty is the dollar [Yujeonmujoe Mujeonyujoe]" while standing against the police.

<sup>c</sup> A habitual practice in judicial circles. In case of resigning a judge to be a lawyer, the junior judges are supposed to rule in favor of the case accepted by the senior lawyer.

implying that money could in fact be used to "purchase" justice in Korea's courts (65.3%). Thus, it is not surprising to discover that nearly all respondents thought that political pressure and financial power may influence trial outcomes (95.6%).

Responding to what is perceived to be great injustices and inequities in the criminal justice system in Korea, three quarters of respondents stated that it is desirable for public opinion to be incorporated into, or reflected in, trial proceedings (76.7%). These results indicate that the current criminal justice system, along with an entire cross-section of government institutions, have lost the faith and trust of the citizenry. The results may also indicate the Korean people's

strong desire or support for the possible introduction of legal reforms and democratic measures in order to eliminate judicial corruption and abuse of power in the current justice system.<sup>3</sup>

## 2.2. *Public desire for more direct democracy*

Korea is committed to liberal democratic ideals such as rule of law, democracy, national sovereignty and independence, ever since the revised Constitution was introduced in 1987, which codified judicial independence and established the Constitutional Court.<sup>4</sup> Although the new judiciary represented a significant separation from the past as it became an important governmental institution with its power vested in the people, the Korean government has never actually allowed citizen participation in any legal decision-making process. The fact that the Korean judiciary has never responded to the needs and demands of the people in this way erodes public perceptions of its legitimacy, fairness, objectiveness, and transparency, as suggested by the results of the 2008 national opinion survey.

Under such tenuous circumstances, the discussion on civil participation in criminal trials began in earnest under a slogan called “the Realization of Direct Democracy,” in order for the courts to regain their institutional legitimacy. The central purpose of this national slogan was to outline the creation of a lay adjudication system that would enable ordinary citizens’ direct participation in the judicial process. Although Korea has established the independence of the judiciary to a certain extent since modern democracy was established in 1987,<sup>5</sup> judicial corruption largely persisted. Therefore, one of effective remedies to the current judicial problem was to introduce the jury system and allow common citizens’ participation in criminal trials. Lay participation in criminal trials was thought to expose and eliminate the chain of collusive ties between political players and economic elites. The system of lay adjudication also helped to realize the due process of criminal procedure and ensure the safeguard of basic civil rights through direct legal participation of the citizenry in criminal trials.

As a result, as presented in the Article 1 of the Act in Korea, the primary aim and its ideological basics are to establish democratic legitimacy in jurisdiction. The independence of the judiciary was already established, but conducting fair trials under that current system could be hardly expected by courts or professional judges’ wills only in Korea. Therefore, Korea selected a Jury System which common people directly participate in the trials to establish fair trials rather than to take Continental Mixed Jury System (CMJS) which has less direct participation level of people. Thus, it seems more like a judicial revolution by people to adopt Jury Trial System in Korea.

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<sup>3</sup>Korean jury trial law in the Article 1 of the Act emphasizes the rationale behind the introduction of the new system as a means of “enhancing democratic legitimacy in the criminal process.”

<sup>4</sup>In-seop Han, *Kangukniokeru Baisininsuibanno Donyuto Shiko-Shihoukaikakuno Bunmyakuno Nakade* – [Introduction and Practice of Jury System in Korea: In the Context of the Reform of Jurisdiction], In: Goto Akira Hen[Akira Goto (Ed.)], Higashi Ajianiokeru Shiminno Keijshihousanka [Civil Participation in Criminal Trials in East Asia], 2011, p. 218.

<sup>5</sup>There was a great nation-wide democratic and anti-dictatorship movement started by the Korean public during June 10–29, 1987, commonly known as the “June Pro-democratic Resistance Movement.” It was through this popular movement that the constitutional amendment allowing a direct presidential election system was realized, paving the way for democratizing ROK.

### 3. The introduction of the new jury system

At first, some negative and skeptical views emerged among the citizenry on the new jury system, arguing that, because Article 27 of the Constitution stipulates that “All citizens shall have the right to be tried in conformity with the Act by judges,” not the jury, the introduction of the American-style jury trial where jurors determine trial outcomes is considered unconstitutional. Making a jury trial an option, however, helped to avoid the constitutional question and scrutiny. At the same time, much more positive views emerged on the debates of two types of lay adjudication systems: (1) a Continental mixed tribunal system; and (2) an all-citizen jury system.<sup>6</sup> Of the two options, more people began to support the jury system, but a combined version of the two systems was also debated and discussed. Many arguments also centered around the question of whether or not other civil participation systems should be applied and other aspects of the proposed jury system might pose additional constitutional questions or problems.<sup>7</sup>

#### 3.1. Views supporting lay participation trial systems

It is generally believed that the Continental mixed tribunal system is likely to minimize the level of civic participation in criminal trials due to the presence of professional judges in the deliberative process. On the other hand, the all-citizen jury system falls on the opposite end and serves to maximize citizen participation. Both lay participation systems, nevertheless, serve as a venue to confer deliberative experience and offer legal education to citizen participants.<sup>8</sup>

The jury system, however, is expensive to manage and poses more complexity and time-consuming procedures in maintaining the integrity of participatory democracy, including the intricate rule of jury selection at *voir dire*, jury foreperson selection or nomination, preparation of the judge’s jury instruction for deliberation, and even judicial efforts to exclude impermissible evidence from jurors, such as jury sequestration and other exclusionary measures. Thus, it is most ideal if the jury system is only applied to the select group of most serious and violent criminal cases, while the mixed continental system is applied to other less serious criminal matters.<sup>9</sup>

In order to establish a truly democratic judicial system founded upon popular sovereignty, the jury system is a much better choice than the Continental mixed tribunal system, as the former would be relatively free from the influence of authoritative professional judges, thereby allowing jurors to reach a verdict through their own independent deliberation.<sup>10</sup>

<sup>6</sup>In the survey consigned by the Supreme Court in December of 2003, agreement reached 81.3% (Daebeopwon Sabeopjiwonsil [Legislation Support Center of the Supreme Court], 2008 nyeon-2011 nyeon Gungminchamyeojaepan Seonggwabunseok [Analysis Report of Citizen Participation Trials for 2008–2011], February, 2012, p. 40).

<sup>7</sup>Although the unconstitutional view disappeared since the Act was enforced in 2008, there, in fact, has not been any appeal or sue for violation of the Constitution.

<sup>8</sup>Jin-yeon Jung, *Gukminchamyeojaepaneseo Hangukhyungbaesimjedoeui Doepu* [Introduction of Korean Jury System in Citizen Participation Trial], *Soongsildaehak Beopjeongnonmun* 15ho [Sungsil Law Review 15], Feb, 2006, p. 20.

<sup>9</sup>Wan-ju Choi, *Gungminui Sabeopchamnyeojedo Doipsi Goryeohal Sahang* [Some Considerations on Introducing Civil Participation in Criminal Trials], *Gungminui Sabeopchamnyeongongcheonghoejaryo* [Proceeding of the Public Hearing on Civil Participation in Criminal Trials Hosted by the Supreme Court], March 22, 2004, p. 229.

<sup>10</sup>Yeong-cheol Yun, *Hamnijeogin Gungminui Sabeopchamnyeojedoe Gwanhan Sogo* [A Study on Rational Civil Participation in Criminal Trials], *Hyeongsajeongchaeg Yeongu* 16gwon 2ho [Korean Criminological Review 16:2], 2005, p. 273.

The deliberation of the Continental mixed tribunal system, on the other hand, is supervised and guided by the professional judge, relegating citizen participants to a subordinate role of being mediators during the deliberative process. Overall, then, the adoption of judicial elements from the jury system is much more advisable than the Continental mixed court system for ensuring full civic participation in Korea.<sup>11</sup>

### 3.2. *Constitutional discussions*

In order to maintain popular sovereignty and to protect defendant's basic rights, both the jury and Continental civil participation systems offer very important constitutional challenges in Korea.<sup>12</sup> In the idealized form of popular sovereignty, the fundamental idea of civil participation in law should be a quite a constitution-friendly concept in Korea as well.<sup>13</sup>

Civic participants in jury trial are asked to examine and assess, not legal questions, but factual evidence and testimony. On the other hand, participants in the Continental system may be asked to consider more than factual evidence due to the fact that both the professional and lay judges must deliberate together in order to render a judgment, creating possible constitutional problems.<sup>14</sup>

Article 27 (1) of the Constitution specifies that "all citizens shall have the right to be tried in conformity with the Act by judges qualified under the Constitution and the Act." And article 101 (3) also specifies that "Qualifications for judges shall be determined by the Act." Therefore, without revising the Constitution, Continental mixed system as well as jury system can be permitted only with some revisions of Court organization.<sup>15</sup> And the lay participation system recognizes authoritative effects of juror's verdict, and thus this aspect of lay participation cannot be considered as violation to Article 27 (1) of the Constitution.<sup>16</sup>

### 3.3. *Unconstitutional discussions*

Under the current Constitution, adopting either the jury or Continental mixed court system is considered to violate Article 27 (1), thereby requiring a revision to the Constitution to incorporate the lay participation system.<sup>17</sup> If professional judges were to follow jurors' decision, they

<sup>11</sup>Byeong-jik Cha, *Baesimjaepanjedoui Jiji* [Support for Jury System in Criminal Trials], Gungminui Sabeopchamnyeo Gongcheonghoejaryo [Proceeding of the Public Hearing on Civil Participation in Criminal Trials Hosted by the Supreme Court], March 22, 2004, p. 226.

<sup>12</sup>In-seop Han, *Kankokuno Gokuminsanyosaiban(Gakkai kara Mita Kankokuno Gokuminsanyosaiban* [Korean Jury Trial from the Academic Community Viewpoints], Hougakusemina 664gou[Hougaku Seminar Review 664], April, 2010, p. 39.

<sup>13</sup>Sang-jun Kim, *Gungminui Sabeopchamnyeo Daehan Heonbeopjeokhapseong* [The Suitability of the Constitution in Civil Participation in Criminal Trials], Gungminui Sabeopchamnyeo Gongcheonghoejaryo [Proceeding of the Public Hearing on Civil Participation in Criminal Trials Hosted by the Supreme Court], March 22, 2004, pp. 125–126, p. 156.

<sup>14</sup>This opinion is a major view in Korean Constitutional Circle (Gyeong-geun Kang, Heonbeop [Constitution], 2004, p. 636. Hui-yeol Gye, Heonbeopgag [Constitution], 2007, p. 559. Yeong-seong Kwon, Heonbeopgagwonnon [Constitutional Principle], 2010, p. 801. Cheol-su Kim, Heonbeopgaggaeron [Introduction of Constitution], 2005, p. 775. Yeong Heo, Hangukheonbeopnon [Korean Constitution], 2012, p. 358. Seong-bang Hong, Heonbeopgag [Constitution], 2010, p. 630. Nak-in Seong, Heonbeopgag [Constitution], 2012, p. 538.

<sup>15</sup>Jong-su Lee, *Siminui Sabeopchamnyeo Gwanhan Heonbeopjeok Geomto* [The Constitutional Examination on Civil Participation in Criminal Trials], Beopgwa Sahoe, Je25go[The Law and Society Review 25], Dec, 2003, pp. 25–28.

<sup>16</sup>*supra* note 1, p. 4.

<sup>17</sup>Gi-tae Hong, *Beopgwa Sahoe Ironhakhoe 2003nyeondo Chugyehaksuldaehoe Jijeongtoronmun*[Designated Discussions of Theory Society on Law and Society in the Autumn Conference, 2003], BEOPGWA SAHOE JE25HO[Law and Society Review 25], Dec, 2003, pp. 97–101.

would violate Article 103 of the Constitution, which specifies that judges shall rule independently according to their conscience and in conformity both itself and other relevant laws.<sup>18</sup>

As stated earlier, the current Constitution only allows qualified judges to hold trials.<sup>19</sup> Lay participants in criminal trials are not considered as professional judges and are thus disallowed from participating in criminal adjudication.<sup>20</sup> In order for ordinary citizens to participate in criminal trial, legal procedures must be changed. Although the jury trial is most direct and powerful one among citizen participation systems in terms of participatory democracy, it needs to change the whole legal procedure. It is almost impossible to adopt the new systems in the present situation; therefore, a gradual adoption of Continental mixed tribunal system is advisable.<sup>21</sup>

#### 4. The outlines of the Korean-style jury trial system

##### 4.1. *The scope of jury trials and applicability*

The CPCT is applicable to various cases of crimes stipulated in the Penal Code, including intentional murder, homicide resulting from an intentional act, robbery combined with rape, and bodily injury or death resulting from robbery or rape.<sup>22</sup> In addition, the system is applicable to cases of bribery, embezzlement of national treasury, abduction, inducement, habitual robbery, theft, deadly attack on a driver, and other crimes stipulated in the Act on the Aggravated Punishment of Specific Crimes; breach of trust, acceptance of a bribe and other crimes stipulated in the Act on the Aggravated Punishment of Specific Economic Crimes; and specific instances of robbery and rape stipulated in the Act on the Punishment of Sexual Crimes and Protection of Victims. Cases specified by the Rules of the Supreme Court among cases under jurisdiction of a collegiate panel are also applicable to lay adjudication, including attempted crime, crime instigation, aiding and abetting, preparation, and conspiracy of these and other cases to be examined in combination with the above-mentioned cases. As a result of the revision of the Supreme Court Rules in 2009, rape, robbery, specific robbery, and robbery hostage, all of which are stipulated in the Penal Code have been added to the targets of jury trial.

In reality, however, a jury trial is not always held for all of these applicable cases. If a criminal defendant does not wish to be tried by a jury, or when the court decides to exclude citizen participation in trials, defendants are then tried without one. Before a trial, the defendant submits a written intention to the court and states whether or not he/she agrees to a jury trial. Even after submitting the written intention, the defendant is allowed to withdraw it at three pre-

<sup>18</sup>Dae-gwon Choi, *Gungminui Sabeopchamnyeou-Mueosi Munjeimga?*[What's the Matter?: Civil Participation in Criminal Trials], Gungminui Sabeopchamnyeou Gongcheonghoejaryo [Proceeding of the Public Hearing on Civil Participation in Criminal Trials Hosted by the Supreme Court], March 22, 2004, pp. 17–18.

<sup>19</sup>Yeong-seol Kwon, *Gungminchamnyeojedowa Heonbeop*[Civil Participation System and the Constitution], Gungminui Sabeopchamnyeou Gongcheonghoejaryo [Proceeding of the Public Hearing on Civil Participation in Criminal Trials Hosted by the Supreme Court], March 22, 2004, pp. 48–49.

<sup>20</sup>Seok-jo Jang, *Gungminui Sabeopchamnyeojedoui Heonbeop Jeokhapseong* [The Suitability of the Constitution in Civil Participation System in Criminal Trials], Gungminui Sabeopchamnyeou Gongcheonghoejaryo [Proceeding of the Public Hearing on Civil Participation in Criminal Trials Hosted by the Supreme Court], March 22, 2004, pp. 107–108.

<sup>21</sup>Gun Yang, *Gungminui Sabeopchamnyeou-Chamsimje 3dangye Doimnon*[Civil Participation in Criminal Trials: 3-Step Introduction of Continental Civil Participation System], *Beopjo Review* 52(2), 2001, pp. 65–67.

<sup>22</sup>By the revision (Law No. 11155) made on January 17, 2012, the range of the criminal cases to be handled by jurors will be largely extended (by Court Organization Act, Article 32-1) (will be enforced on July 1, 2012). According to the Act, the range of the cases will be extended from the major offenses like capital punishment to minor offenses like over 1-year imprisonment (Court Organization Act, article 32(1):3).

trial stages: (1) before the court decides to hold a trial by citizens or to exclude civil participation, (2) before the termination of the trial preparation period, or (3) before the first date of trial. Concerning the applicable instance, although it is controversial, the majority in the judicial circles support lay participation to be valid only for the trial court of first instance.<sup>23</sup>

There has been a question that the scope of target cases seems too narrow, but the range is extended to all crimes with a punishment of imprisonment for one year or more by the revision of the Act (see the note 22). In addition, as for the option of the defendants for jury trial, some serious cases like heinous crimes and politically-related corruption cases must be adjudicated in jury trial. The exclusion right of the court may be recognized, and yet the current comprehensive rule (Article 9(1)(3)) should be eliminated. Especially, in cases where defendants demand jury trials in order to prove their innocence, the court must not exclude them.

#### *4.2. Jury composition and juror qualification*

The number of jurors in jury trial varies according to the severity of the crime and the defendant's plea. The panel of nine jurors adjudicates crimes where the defendant may receive the death penalty and life imprisonment with or without labor. In other cases applicable to the CPCT, seven jurors participate in a trial. If, however, either the defendant or the defense attorney pleads guilty to most of the indicted charges during the pre-trial conference procedure, the number of jurors can be reduced to five. Moreover, when the court recognizes certain special circumstances, it can then regulate the number of jurors between seven and nine, provided that both parties (i.e., the prosecutor and the defendant or defense attorney) agree to such a change. The court can also appoint five alternate jurors.

To serve as a juror, one must be a citizen of the ROK and over the age of twenty. Korean citizens, who are not eligible, comprise: (a) those who are governmental officials or employees, including President of the ROK, National Assembly members, judges, prosecutors, and defense attorneys; (b) those who were considered to be mentally or physically incompetent; (c) stakeholders of the victim, defendants, and other related parties with legal grounds for being excluded from jury service; and (d) those who are excused from jury duty for extraneous reasons.<sup>24</sup> In addition, there are some professions to be reconsidered as qualified jurors: the clergy and law professor. I believe that it is appropriate for them to be exempted from jury duty.

#### *4.3. Jury trial procedures*

To ensure efficient and focused examination during jury trial, preparation procedures should be taken prior to trials. Through the evidence examination program, the court must narrow down issues and exclude non-probative evidence. Following the termination of pre-trial procedures, a trial is opened with the attendance of judges, jurors, alternate jurors, prosecutors, and defense attorneys. During the trial, jurors and alternate jurors may ask a presiding judge to question the defendant or witnesses. With the permission of the presiding judge, jurors and reserve jurors may also take notes during the trial. Jurors and reserve jurors, however, are prohibited from committing the following acts: (1) leaving the courtroom during a trial, (2) discussing the matters pertaining to the trial and expressing their views about the matters before deliberation, or collecting information and independently investigating the case outside the

<sup>23</sup>See CPCT Act, arts. 8–9.

<sup>24</sup>*Id.*, arts. 12–21.

court, (3) participate in the court's review of the admissibility of evidences, and (4) ask questions directly to the defendant or witnesses.<sup>25</sup>

#### 4.4. *Deliberation and verdict processes*

According to the CPCT, only jurors can hold a deliberation to determine whether the defendant is guilty or not guilty. After the jurors reach a unanimous guilty verdict, professional judges then participate in discussions on sentencing and express their own views concerning appropriate punishment. If jurors cannot reach a unanimous verdict, they must hear the judges' opinion. After jurors heard the opinion, the judges must allow the jurors to render a verdict on a basis of a simple majority. The jury's verdict, however, is of an advisory nature and does not bind the judges' ultimate decision regarding either guilt or sentencing. At the same time, one can reasonably anticipate that the judges will not easily disregard the jury's decision. To ensure this, the Act stipulates that the presiding judge must disclose the jury decision to the defendant at the time of rendering the final judgment. If the judgment differs from the jury decision, the judge must explain to the defendant the reason for the discrepancy. In addition, the jury decision and any discrepancy from the judge's ruling must be specified in the final judgment.<sup>26</sup>

As stated earlier, if jurors cannot reach a unanimous verdict, they are required to hear the judges' opinion, thereby introducing the outside influence into the jury's decision-making process. And the content of judges' "opinions" may directly or indirectly affect jurors' decisions in the end. Therefore, it may be reasonable to eliminate the judge's intervention from jury deliberation. Also, jurors' verdicts should ultimately be recognized as carrying a legal binding force rather than just having an advising effect on the final trial outcome.

#### 4.5. *Protection and penalty of juror*

No one shall make contact with a juror or an alternate juror purposely to influence in any way the trial or to obtain confidential information that the juror or alternate juror has acquired in the course of performing his/her official duties. No one shall get in contact with a person who has ever served as a juror or an alternate juror purposely to obtain any confidential information that they have acquired in the course of performing his or her duties, but I believe that *this regulation shall not apply to cases where such information is necessary for research on jury decision and deliberation*. When the presiding judge finds that a juror or alternate juror is threatened, or is likely to be threatened, to be harmed by the defendant or any other person or when fair trial or deliberation is threatened, or is likely to be threatened, to be obstructed, the judge must take measures for protection, separation, accommodation, and other measures necessary to ensure the safety of the juror or alternate juror.

Any juror or alternate juror who divulges confidential information known to him/her in the scope of his/her duties shall be punished with imprisonment with prison labor for not more than six months or by a fine not exceeding three million won. A person who has ever served as a juror or an alternate juror and divulges confidential information known to him/her in the scope of his/her duties shall be also punished, but this punishment shall not apply to cases where a person provides such information to give cooperation necessary for research.<sup>27</sup>

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<sup>25</sup>*Id.*, arts. 38–45.

<sup>26</sup>*Id.*, art. 46.

<sup>27</sup>*Id.*, arts. 50–53, 58.

While it is the jurors' duty to keep case-specific knowledge and private information confidential, it seems to be more advisable to share jurors' opinions, ideas, or general experiences freely on trials and deliberations. Sharing these types of information would provide wonderful opportunities of legal education for the public. Moreover, general information on jury experiences can be helpful for future lay participants to engage critically in jury trials and deliberations.

## 5. Some other issues

There are two critical issues that were not mentioned in the Act: (1) lay adjudication of juvenile criminal cases and (2) potential uses of victim participation in criminal trials. The following section identifies problems and makes suggestions and remedies for them.

### 5.1. *Juvenile delinquent cases*

Under the current lay participation system, jury trials for juvenile delinquents aged between 14 and 18 can take place as long as the offenders agreed to be tried as such and the court does not choose to exclude it.<sup>28</sup> Of course, the use of jury trial in the juvenile case requires the greater national debates and consensus on the fair and just proceeding of the juvenile justice system. However, it is necessary that the Juvenile Justice should be considered prior in terms of protecting juveniles when civil participation system is introduced to the juvenile justice. Thus, there are lots of points to reconsider and adjust because civic participation trials as a form of the jury system are not appropriate in the juvenile justice. Especially, I believe that the current jury trials as a form of the lay participation system are not proper for juvenile cases. Today, although the presiding judge and lawyer explain to the jury about relevant laws pertaining to juvenile offenses, applicative meanings, and provisions of protective treatments for juveniles, it is often difficult for jurors to understand intricacies of each individual juvenile case or recognize the appropriate protective treatments. Article 58 (1) of the juvenile law states that trials of "juvenile criminal cases shall be conducted in a spirit of kindness and gentleness toward the juvenile offender." Since professional judges and lay judges (like juvenile experts in Juvenile Courts of England, France and Germany) can use their experiences by offering suggestive measures with respect to juvenile protection and rehabilitation, the use of the continental mixed system is better suited to juvenile cases. In addition, I would like to suggest that we had better adopt the closed-door jury trial system by Continental mixed system for the Juvenile Justice, aside from the adult criminal justice. Because of procedural deficiencies, juvenile delinquents have rarely applied for jury trial. It is estimated that approximately 10 juvenile cases have been adjudicated in the jury trial for the last four years.

### 5.2. *Victim participation in jury trial*

There has been a global tendency to put stress on Restorative Justice, and Korea is also no exception. But one should more cautiously consider how much courts should recognize victims' rights to make statements in criminal trials.<sup>29</sup> In Korea, the Victim's Statement of Opinion as a

<sup>28</sup>See Jong-sik Choi, *Beomjoesonyeone Daehan Gungminchamnyeojaeapanui Munjejeom*[Juvenile Criminal Cases and Civil Participation Trails], Hyeongsabeopyeongu Je20gwon 4ho [Criminal Law Review 20:4], 2008, pp. 377–400.

<sup>29</sup>Eun-mo Lee, *Hangugui Choegeun Hyeongsasosongbeop Gaejeongui Donghyanggwaja Gwaje –Hyeongsasosongbeop Ilbugaejeongbeomnyuraneul Jungsimuro-*[The Tendency of the Current Revision of Korean Criminal Procedure Act], *Je1hoe Chuo Daigaku and Hanayang Digaku Gondong Simpojeom Bogojip* [Proceeding of the 1st Co-Symposium of Chuo-Hanyang Universities], February 16, 2011, pp. 60–69.

constitutional right is provided in the Constitution (Article 27 (5)).<sup>30</sup> And the Criminal Procedure Act (CPA) enables victims to participate in the trials as a *witness* in such case where victims apply for attending the trials.<sup>31</sup> Namely, the court allows victims or their legal representatives (e.g., spouses and/or biological relatives, including siblings if victim is deceased) to participate in trials and make statements as a *witness* if the victims apply for it. Furthermore, the court can provide the victim with opportunities to speak about both the emotional and material damages caused by the defendant in their testimony. In some cases, the court can decide to exclude the application of jury trial altogether, when the victim of a sexual violence does not want to have one, even if the accused had applied to be tried by one.<sup>32</sup> The court can also change jury trial into a collegial bench trial in order to protect the victim of a sexual crime even if a case is pending in the jury trial.<sup>33</sup>

Because of a public demand that the victim be allowed to participate in an equal capacity in criminal cases (including jury trials),<sup>34</sup> the Ministry of Justice submitted to the Korean National Assembly on July 14, 2011 a revised bill incorporating the victim participation provisions that have been present in the Japanese Criminal Procedure Act. The bill extended the provision for “the Victim Participation System” including the right to attend court hearings, interrogate witnesses related to sentences, participate in the accused examination, and have a final statement in court. But the bill was automatically discarded by closing of the 18th session of the National Assembly.<sup>35</sup> Another revised bill may be submitted and examined during the 19th session.

Given the fact that victims have increasingly begun to demand their active participation in criminal proceedings, it is important to consider the rules and regulations for conditions under which they can do so, realizing that victim participation will have a considerable effect on the nature of the jury trial vis-à-vis regular criminal trials given the different arrangements. For example, the victim’s direct testimony and personalized statement may be more likely to exert greater emotional influence over the content of jury deliberations.<sup>36</sup> Moreover, victims’ excessive participation may go against both the Principle of Equality of Arms in criminal trials regulated in CPA and the Principle of Innocent Presumption (Article 27 (4))<sup>37</sup> provided in the Constitution. Of course, the Constitution provides the Principle of Innocent Presumption and the Right of Victim to make statements, but the former principle should not be violated by the latter right. Therefore, it is more appropriate to provide victims the right to make statements as *witnesses* in criminal trials in light of the Principle of Innocent Presumption, Due Process of Law, and the Principle of Equality of Arms. As long as prosecutors’ rights and roles are secured, it is not advisable to establish a new law to allow victims to examine witnesses and the

<sup>30</sup>“A victim of a crime shall be entitled to make a statement during the proceedings of the trial of the case involved as under the conditions prescribed by Act.”

<sup>31</sup>Hyeongsasongbeop [Criminal Procedure Act] Articles 294-2.

<sup>32</sup>This regulation was newly established on January 17, 2012 and enforced in July, 2012 (the article 9(1) (3) of the new Act of CPCT).

<sup>33</sup>The act was enforced in July, 2012 (article 11(1) of the new Act of CPCT).

<sup>34</sup>See Gyun-seok Jo, *Hyeongsajaepanjeolchaeoseoui Beomjoepihaeja Changajedoui Doipbangan*[The Way to Adopt and Implement the Victim Participation System], *Pihaejahakyeongu 18-1ho* [Victimology Review18-1], March, 2010, pp. 5–29. Gwang-min Park, *Pihaejachangajedoui Baramjikhhan Doipbangan* [A study on the Introduction of Victim Participation System], *Pihaejahakyeongu 18-2ho* [Victimology Review 18-2], Dec, 2010, pp. 105–128.

<sup>35</sup>The National Assembly of the ROK, available at [http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill\\_id=ARC\\_B1F1S0X7O1E4A1I9Q1V2M5Z4I2S3O1&list\\_url=/bill/jsp/MooringBill.jsp%3F](http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=ARC_B1F1S0X7O1E4A1I9Q1V2M5Z4I2S3O1&list_url=/bill/jsp/MooringBill.jsp%3F) (accessed 10.05.13).

<sup>36</sup>Gwang-min Park, *supra* note 34, p. 111.

<sup>37</sup>“The accused shall be presumed innocent until a judgment of guilt has been pronounced.”

accused directly beyond their basic rights to make statements as a witness provided in the current CPA. Furthermore, one should more cautiously consider victims' rights to make statements in jury participating criminal trials. In criminal trials, prosecutors take on the burden of proof toward the fact of criminal action, but it seems unfair that victims are allowed to examine witnesses and defendants directly. Although it is quite understandable to see the basic aims and objects of victims' participation system, criminal trials should justly guarantee the Principle of Innocent Presumption, Due Process of Law, and the Principle of Equality of Arms for defendants. If the principles are broken, it can be dangerous for criminal trials to lean on inquisitorial systems or kangaroo courts. Hence, it is enough to simply allow victims to make statements as *witness* in order to find truth in criminal trials.

## 6. Implementation in the civil participation trials system

The next section finally examines the performance of jury trials for the first five years of operation from 2008 to 2012 (partly 2011). The statistical information shows the defendants' application to jury trial, breakdowns of jury adjudication by crimes, trial outcomes, the pattern of verdict agreements between lay and professional judges, and the rate of appeals by the prosecutors.

Table 2 shows that 848 cases were tried by jury trials from 2008 to 2012. A total of 2216 criminal cases, i.e., 5.3% out of the whole available cases (41,675),<sup>38</sup> were applied to jury trials, but only 848 cases (38.2%) were accepted. The withdrawal rate by the defendants was not low, but most were due to a change of mind on the part of the defendant.<sup>39</sup> Approximately 56% of the cases applied to the jury trial were not accepted. But, as Table 2 indicates, the total number of jury trials has steadily increased each year; the number of criminal cases that applied for the jury trial in 2011 was 484 and the actual number cases tried by a jury was 253 – more than half of all applications. The rate of exclusion and withdrawal in 2011 was the lowest during the five year period. As the applicable cases are expected to increase since 2014 when the revised Act is

Table 2

Applications for the civil participation system and actual implementation (2008–2012).<sup>a</sup>

Applications	Settled				Not settled	
	Subtotal	CPCT	Excluded by court	Withdrawn by defendant		
2008	223 (100.0)	215 (92.3)	64 (27.5)	61 (26.2)	90 (38.6)	18
2009	336 (100.0)	308 (91.7)	95 (28.3)	75 (22.3)	138 (41.1)	46
2010	437 (100.0)	413 (94.5)	162 (37.1)	75 (17.2)	176 (40.3)	70
2011	484(100.0)	494(102.1)	253(52.3)	63(13.0)	178(36.8)	60
2012	726(100.0)	670(92.3)	274(37.7)	124(17.1)	272(37.5)	121
Total	2216 (100.0)	2100 (94.6)	848 (38.2)	398 (17.9)	854 (38.5)	121

The data after 2009 include cases carried over the previous years.

<sup>a</sup> Table 2–8, footnote 43, pp. 1–46 (7 pieces of the most crucial data are selected and analyzed here from the whole material). And the statistics of 2012 in Table 2 is shown in the footnote 38.

<sup>38</sup>Gungminsabeopchamyewiwonhoe [Committee on Civil Judicial Participation], Workshop Jonghaopbogomun [The Report for Workshop], January 18, 2013, p. 73.

<sup>39</sup>Daebeopwon Sabeopjiwonsil [Legislation Support Center of the Supreme Court], *supra* note 6, p. 9.

Table 3  
Breakdown by crime (2008–2011).

Classification	Case (%)	Crime	Case (%)
Murder and the like	192 (33.4%)	Murder	114 (19.9%)
		Attempted murder	78 (13.5%)
Robbery and the like	158 (27.5%)	Robbery and rape	6 (1.0%)
		Robbery and murder	12 (2.1%)
		Robbery and attempted murder	3 (0.5%)
		Robbery and bodily injury	137 (23.9%)
		Bodily injury resulting in death	26 (4.5%)
Sex crime	91 (15.9%)	Rape resulting in bodily injury	57 (9.9%)
		Crimes stipulated in Sexual Violence Punishment Act	34 (5.9%)
Other	87 (15.2%)	Arson resulting in death	2 (0.3%)
		Act on the aggravated punishment, etc. of specific crimes	85 (14.8%)

expected to be enforced, the number of cases tried by jury trials would draw greater attention in the future. Of 574 jury trials (2008–2011), defendants in 167 cases already made confessions (29.0%), while defendants in 407 cases denied criminal charges (71.0%).<sup>40</sup> The findings may suggest that the defendants who insisted on their innocence are more likely to apply for jury trials than those who admitted their guilt, suggesting that defendants who may considered the traditional bench trial system to be inequitable tend to apply for jury trials. Meanwhile, approximately 92% of jury trials concluded in a single day.<sup>41</sup>

Table 3 shows the breakdown of jury trial by types of crimes. Crimes related to murder, robbery, and other violent offenses comprised over a half of the whole crimes adjudicated by the jury. The crime which jury trials were performed most is robbery and bodily injury. As for sex crimes, since the court can decide to exclude the use of juries upon the situations of the victims, the jury tried only 15.9% of cases.

Table 4 presents the result of jury trial outcomes. The Korean government actually stopped executing capital punishment in 1998. Thus, capital punishment has not been applied at all, and the sentence of life imprisonment became the most serious form of punishment in Korea. For the first four years, the jury has decided only 5 cases of life imprisonment. More than three quarters of defendants tried for murder received incarceration (81.3%). Less than two thirds of defendants tried for crimes related to robberies received incarceration (62.5%), followed by bodily injuries (51.8%). Additionally, more than two thirds of defendants tried for sexual crimes were incarcerated (68.1%). Heinous crimes like murder, naturally, resulted in the greatest severity in imprisonment. Suspended sentences accounted for 85 cases, and acquittals were given in 48 cases. In comparison to 2010,<sup>42</sup> one can see that sex crimes and robberies

<sup>40</sup>*Id.*, p. 14.

<sup>41</sup>*Id.*, p. 17.

<sup>42</sup>According to the data until 2010, the robbery and the like were decided as innocent in 8 cases and sex crime were decided as innocent in 9 cases (Chun-hwa Lee, *Seongpongnyeokbeomjoe Daehan Gungminchamyeojaepanui Mun-jejeomgwa Gaeseonbangchaek*[Problems and Reforms in Civil Participation Trials on Sexual offenses], 2011 nyeondo Hangukhyeongsajeongchaekhakhoe Chungyehaksuldaehoe-Gungminchamyeo Jaepanjedo Sihaeng 5nyeoni Seong-kawa Gwaje-Bogojip-[Proceeding of the 2011 Spring Conference Report of the Korean Association of Criminology: the Achievements and Tasks of Civil Participation Trials for 5 Years], May 21, 2011, p. 48.

Table 4  
Breakdown by trial outcomes (2008–2011).

Crime	Number of people	Death penalty	Penal servitude		Suspended sentence	Fine	Acquittal	Other
			Indefinite terms	Definite terms				
Murder and the like	192	0	1	155	29	0	7	0
Robbery and the like	158	0	3	99	32	3	19	2
Bodily injury resulting in death	46	0	0	29	9	1	6	1
Sex crime	91	0	1	62	12	1	13	2
Other	87	0	0	81	3	0	3	0
Total	574	0	5(0.9%)	426(74.2%)	85(14.8%)	5(0.9%)	48(8.4%)	5(0.9%)

Table 5  
Rate of innocence (2008–2011).

Trials by citizens			Regular criminal trials
Total	Partly innocent	Totally innocent	
48 (8.4%)	16 (33.3%)	32 (66.7%)	3.3%

Table 6  
The rate of agreement between jury verdicts and professional judge decisions (2008–2011).

Division	Agreement		Disagreement		Total	
	Case	Rate	Case	Rate	Case	Rate
	520	90.6%	54	9.4%	574	100.0%

comprised the most of 48 acquitted cases. In particular, the acquittal rate for crimes (and increase of 11 cases) like robberies has increased as much 137.5% in 2011.

Table 5 indicates the comparison of the acquittal rate between jury and collegial bench trials. The acquittal rate was 8.4% in all jury eligible cases, and four of them were originally ruled guilty by jurors, but were later found not guilty by professional judge. Consequently, the jury's acquittal rate was 2.5 times higher than that of professional bench trials (3.3%).

Furthermore, there were 50 cases<sup>43</sup> in which jurors originally acquitted defendants, but professional judge later reversed their decisions. If we incorporate these cases into jury acquittals, the jury's overall acquittal rate becomes 17.1% (nearly 5 times higher than that of bench trials). The higher jury acquittal rate means that criminal defendants had more positive outcomes in lay trials than professional bench trials in Korea.

Table 6 shows that jury verdicts and professional judgments agreed in 90.6% of all jury trials. Among discordant cases, 50 cases accounted for instances where the jury decided to acquit but was overruled by the professional judges. The remaining 4 cases received guilty verdicts by the jury but were found not guilty by the professional judges.<sup>44</sup>

<sup>43</sup>Daebeopwon Sabeopjiwonsil, *supra* note 39, p. 25.

<sup>44</sup>*Id.*

Table 7  
Rate of appeals (2008–2011).

Division		The 1st trial	Appeals			Not appeals
			Total	Prosecutor	Defendant	
Jury trials	Case	574	491 (Actual)	288	382	83
	Rate	100%	85.5%	50.2%	66.6%	14.5%
Collegial professional trials	Case	19,305	13,130	4506	11,458	6175
	Rate	100%	68.0%	23.3%	59.4%	32.0%

Table 8  
Judgment of appeals (2008–2011).

Division	Appeals on jury trial decisions			Appeals on regular trial decisions	
	Total	Changed sentence	Reduced sentence	Changed sentence	Reduced sentence
Case (%)	420(100.0%)	83(19.8%)	69(16.4%)	32.2%	24.4%

The high agreement rate between jury verdicts and professional judgments in Korean jury trials may also imply that professional judges participated in the deliberative process and expressed their opinions, to a greater extent in cases where the jury's initial non-unanimous verdicts necessitated the input of judges' professional opinions.<sup>45</sup> The finding thus suggests that professional judges' opinions and perspectives might have exerted significant influence over lay judges' deliberation and verdict.

Table 7 shows the rate of appeals. The overwhelming majority of jury verdicts were appealed (85.5%), which was approximately 20% higher than that of bench trials (68.0%). Both prosecutors and defendants appealed more cases in jury trials than in collegial bench trials. In particular, prosecutors' appeals rate in jury trials reaches twice as higher than regular bench trials, suggesting that prosecutors are particularly dissatisfied with jury verdicts. One may suggest that, from the prosecutors' perspective, jurors' judgment may be perceived to be more generous or even benevolent than that of regular criminal trials.

Table 8 shows the breakdown of appellate reviews and decisions. There is a clear pattern whereby fewer decisions were made on appeals from jury verdicts than from regular trial decisions. The findings show that the rate of appeals in jury trials is much higher than bench trials; however, decisions rendered in jury trials, to some extent, are more respected in the eyes of the appellate court. Moreover, the rate of reversing jury verdict is 23.1%, which is significantly lower than 40.6% for decisions from collegial bench trials.<sup>46</sup>

Meanwhile, there is one particular case, in which jurors reached an acquittal verdict, but the presiding judge reversed it and found the defendant guilty. Nonetheless, when the decision was appealed and the defendant was found to be not guilty in the appellate review. And there is another case that the jurors reached a guilty verdict, but the professional judge decided to acquit the defendant who was later found guilty in the appeal. It is important to realize that the subsequent appellate reviews ultimately agreed with original jury decisions in both cases.<sup>47</sup>

<sup>45</sup>There have been 395 cases (68.8%) that jurors reached a verdict unanimously in the consultation without hearing judge's opinion for last 4 years while there were 179 cases (31.2%) that jurors weren't able to come to unanimous decision and then reached a verdict by majority after hearing judge's opinion (*Id.*).

<sup>46</sup>*Id.*, p. 36.

<sup>47</sup>*Id.*, p. 26.

Moreover, there were 6 cases that acquittal judgments changed into guilty judgments in the appeals trials<sup>48</sup>; the reversal was only found in one case.

Lastly, there was one case in which the Supreme Court ruled the acquittal judgment against the decision of the appellate court, which reversed the jury trial's original acquittal verdict. The Supreme Court decision suggests that, since there was no clear evidence to overturn the original decision, the original decisions of jury trials should have been respected and preserved.<sup>49</sup> The Supreme Court's decision to reaffirm and respect the original decision reached by citizen participants is encouraging for the future proceeding of jury trials in Korea.

## 7. A brief review on Japanese Lay Judge Trial System

Unlike the Korean Jury System, the Japanese Lay Judge Trial System (JLJTS) is closer to the Continental Mixed Jury System (CMJS). Although Korea and Japan introduced their own civic participation systems in criminal trials around the same time, substantively, they are each highly distinct. Korea adopted a type of jury system with the intention to realize democratic legitimacy directly. By contrast, Japan adopted the LJTS which is similar to the CMJS, which gives a relatively low level of civic power in both deliberations and trials. From examining background behind the adoption of each country's new criminal trial system, one sees clearly the differences in cultural, social, and political circumstances that led to their unique inception.

In comparison with the Korean system, the purpose of adopting the LJTS in Japan is "to promote people's understanding and trust on jurisdiction" as clearly described in the Article 1 of Act on Criminal Trials Examined under Lay Judge System (ACTELJS). As long as the aim and object of ACTELJS is concerned, there seems to be no mention of a democratic ideal in the Act.<sup>50</sup> It is said that there is no problem in the current Japanese criminal trial system itself, but it "has not been trusted by people because common people do not understand jurisdiction properly." Therefore to engender greater trust, more civic participation is needed. In other words, the aim and object to adopt the LJTS in Japan is clearly different from Korean's. In Korea, people selected a jury trial system which can be freed from professional judges' influences in order to produce greater democratic legitimacy in the justice system; however, jury verdicts do not carry legal binding force to sidestep the unconstitutional issue. In Japan by contrast, because the jury system does not correspond to "trials conducted by professional judges" in the Japanese Constitution and there are no outstanding problems in its existing criminal trial system, they didn't seem to need adopting jury system in the name of realizing *democratic legitimacy*. Therefore, it was sufficient for the government to adopt a system that is similar to the CMJS. In the end, Korea adopted a jury trial system that was more aligned with its political situation and needs while Japan adopted its system according its own needs.

However, I argue that for both countries the jury system may be more suitable for achieving democratic legitimacy because it can free the adjudication process from professional judges' influence. Unlike European countries with established democracies, Korea that lacks democratic foundations could have not adopted the CMJS, which systematically has lower direct participation level than the jury system.

<sup>48</sup>*Id.*, pp. 28–29.

<sup>49</sup>Supreme Court Case, 2010.3.25. 2009DO14065.

<sup>50</sup>Osamu Ikeda, *Kaisetsu Saibaninhou Dai2han Rippono Keito Kadai* [Commentary on ACTELJS -The Progress and Problems of Legislation- 2Ed.], Kobundou, 2009, p. 4. Keiichi Muraoka, *Saibaninseidoto Sono Tanjyo* [The Lay Judge Trial System and Its Birth], In: Goto Akira Hen[Akira Goto (Ed.)], Higashi Ajianiokeru Shiminno Keijshihousanka [Civil Participation in Criminal Trials in East Asia], 2011, p. 24.

The following are some suggestions to improve problems that have since then surfaced in the LJTS. First, the courthouse should be given the authority to deselect or exclude some complex and technical cases from lay judge trials.<sup>51</sup> The decision will reduce burdens on the lay judges and is also reasonable for judicial economy. Second, the fact that the current ACTELTS forces people to participate in trials as lay judges appears to violate the Japanese Constitution, in particular Articles 13 and 18.<sup>52</sup> This mandatory lay judge duty is more akin to state-imposed compulsory education. Third, it appears to be a questionable — not to mention unrealistic — practice to require current lay judges to keep their duties in life-time secrecy.<sup>53</sup> On this, there needs to be exceptions or revisions to ensure a fairer application of legal consequences should juries violate this clause. This exception is especially pertinent when it comes to using information acquired of and in lay judge trials for academic purposes.<sup>54</sup> Recognizing some exceptions can be also helpful for preventing the professional judges from exerting an unfair influence in the consultation and deliberations process with lay judges. Fourth, although the current LJTS keeps going as it is, professional judges and lay judges together should reach the decision whether it is guilty or innocent, and professional judges should take charge of the decision on weighing offenses, so that lay judges' burden can be reduced. Finally, it does not seem much advisable that the victims are allowed to participate excessively in the lay judge trials.<sup>55</sup> Because the Japanese Code of Criminal Procedure (Article 316-33) recognizes the importance of victim participation<sup>56</sup> in trials much more heavily than in Korea, it would also affect on lay judges' decision in Japan greater than in Korea. Moreover, allowing victims to participate exceedingly may be against the Principle of Innocent Presumption, Due Process of Law, the Right of Silence, and the Principle of Equality of Arms in criminal trials.<sup>57</sup> Therefore, I strongly agree with the opinion<sup>58</sup> that social and financial supports and psychological cares for victims should be the main concern rather than victims' participation in criminal trials.

## 8. Conclusion

It is quite exciting to witness active citizen participation in Korean criminal trials. The jury trial, which started in 2008, has made significant progress during the first five years of its

<sup>51</sup>Teruyuki Imai, *Kankokuno Kokuminsanyosaibanseido-Saibaninsaibanni Ataeru Sisa- [Citizen Participation in Korean Criminal Trials-Suggestions Towards Lay Judge Trial System-]*, *Iususyuppan*, 2010, pp. 90–93.

<sup>52</sup>Article 13: All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs. Article 18: No person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited.

<sup>53</sup>Colin P.A. Jones, *Amerikajin Bengosiga Mita Saibaninseido [The Lay Judge Trial System an American Lawyer has watched]*, *Heibonsha*, 2008, pp. 186–194.

<sup>54</sup>Teruyuki Imai, *supra* note 51, pp. 96–97.

<sup>55</sup>Masaaki Suwa, *Keijisaibanniokeru Higaisiyasankaseidono Mondaiten-Jitsumujoyou Sinno Higaisyakusaini Narieru Monoka* -[The Problems of the Victim Participation System in the Criminal Trial-Can the System be Practically useful for the Support of Victims?], *Shinshudaigaku Hougakuronbunshu* 15:55-90ho[Shinshu University Law Review 15:55-90], 2010, pp. 73–87.

<sup>56</sup>See Masahiko Saeki, *Victim participation in criminal trials in Japan*, *International Journal of Law, Crime and Justice* 38, 2010, pp. 149–165.

<sup>57</sup>See Kai Okumura, *Higaisiyasankaseidoga Motarasita Eikyō* [Influences from Victim Participation System], *Kikan Keijibengo* 61[Quarterly Criminal Defense Review 61], 2010, pp. 32–41.

<sup>58</sup>Setsuo Miyazawa, *Higaisiyasankaseidono Kenpougakuto Bengosirinni-Hutatsuno Mondaitaiki*-[Constitutional Studies on the Victim Participation System and Ethics of Lawyer-Suggestion of Two Problems-], *Kikan Keijibengo* 61 [Quarterly Criminal Defense Review 61], 2010, pp. 68–71.

experiment. The Committee on Civil Judicial Participation on March 6, 2013 has done the revised form of the jury system. And the amendment will be submitted to the National Assembly this year. However, according to the revised form, the original jury trial system will certainly be maintained.

The improvements for Citizen Participation System in Criminal Trials in Korea may be summarized as follows. First, with respect to issues of constitutionality of jury trial in general, the present Constitution was established long before jury trial was introduced, and thus it is necessary for some articles of the Constitution related to lay adjudication to be reexamined and revised to solve any constitutional problems. Second, although the professional judge is required to participate in the deliberative process, such a professional participation should be eliminated and only jurors should be allowed to participate in the deliberation process and decide the guilt phase of the trial. Nonetheless, jurors may be excluded from deciding the penalty phase of the trial to reduce their burden even a little, which will be solely conducted and determined by professional judges. Third, juvenile cases should be excluded from jury trials. Fourth, certain crimes like murder by intention or high crimes of political collusion must be made mandatory to jury adjudication. In addition, the exclusion right of the court should also be recognized, and yet the current comprehensive rule (Article 9 (1) (3)) should be eliminated. Fifth, the victim participation program should be introduced in jury trial cautiously and restrictively. Finally, the jury verdict should be legally binding, especially in cases where the acquittal verdict was reached unanimously, suggesting that the prosecutor should be disallowed to appeal unanimous acquittal verdicts.

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