

# GETTING CITIZENS INVOLVED: CIVIL PARTICIPATION IN JUDICIAL DECISION-MAKING IN KOREA

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*Korea introduced civil participation in criminal trials (jury trials) for the first time in the nation's history on January 1, 2008. The Korean jury system incorporates both the U.S.-style jury system and the German lay assessor system to assess the actual experience of citizen participation in trials during the initial five year experimental phase. This Article first delineates the background history of the introduction of the jury system in Korea and explains the relevant legal provisions. Then the Article discusses problems that have arisen, implications for the future, and important remaining research questions based on the experience of the first year of the system. The Article concludes with cautious optimism that jury trials in Korea will, even if in a very limited scope, change fundamental aspects of criminal trials in general, and modify the role of the judge, the trial strategies of both prosecutors and defense attorneys, and the evidentiary rules that are applicable to court proceedings.*

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## I. INTRODUCTION

Lay participation in judicial decision-making is not uncommon in most parts of the world. More than forty countries within the common-law tradition use the jury system, and a number of civil-law countries practice other forms of civil participation.<sup>1</sup> The prevalence of civil participation in judicial decision-making around the world has been recently noted,<sup>2</sup> and jury scholars have paid considerable attention to the adoption of different forms of jury trials in Asian countries.<sup>3</sup> In

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<sup>1</sup> See generally Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury* (listing common-law countries with jury systems and civil-law countries, such as Denmark and Austria, which have implemented different variations of the jury system), in *WORLD JURY SYSTEMS 3* (Neil Vidmar ed., 2000).

<sup>2</sup> See, e.g., Valerie P. Hans, *Jury Systems Around the World*, 4 *ANNU. REV. L. SOC. SCI.* 275, 276 (2008) (noting the emergence and persistence of lay citizen participation in the justice system of numerous countries); Richard O. Lempert, *The Internationalization of Lay Decision-Making: Jury Resurgence and Jury Research*, 40 *CORNELL INT'L L.J.* 477, 478 (2007) (contrasting past criticisms of jury systems to the recent adoption of jury systems by many countries).

<sup>3</sup> See, e.g., *The Jury is Out*, *ECONOMIST*, Feb. 14, 2009, at 70 (contrasting the curbing of jury trials in Europe with their expansion in Asia); Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 *CORNELL INT'L L.J.* 315, 317 (2007) (comparing the Japanese and U.S. jury systems); Frank Munger, *Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand*, 40

particular, Korea has been in the center of the discussion because its recently introduced jury trials most closely resemble the jury system as it is practiced in the United States.

Different socio-cultural forces may drive a country's decision to adopt a system that is completely foreign to its legal tradition. Korea's experience can be easily compared to Japan's, partly because they share a fundamentally similar legal system<sup>4</sup> and have experimented with similar legal reforms over the past few years.<sup>5</sup> Yet the two countries have different driving forces and have, in the end, adopted different legal reforms. In general, Korea's approach, which includes legal education reform<sup>6</sup> and introduction of the jury system, more closely resembles the system of the United States. Some may see this as a result of a stronger American influence in contemporary Korean society.<sup>7</sup> Others see it as a big stride in realizing a broader revolution in the reform of the criminal procedural system in Korea,<sup>8</sup> which represents an outgrowth of

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CORNELL INT'L L.J. 455, 457 (2007) (studying the evolution of constitutionalism and citizen participation in Thailand's legal and political system).

<sup>4</sup> The shaping of the modern Korean legal system was heavily influenced by Japan, which in turn largely incorporated the German system. CHONGKO CHOI, *LAW AND JUSTICE IN KOREA: NORTH AND SOUTH* 160-62 (2005).

<sup>5</sup> The introduction of the American-style law school and civil participation in judicial decision-making has been paramount among the reform measures implemented in both countries. *See generally* JUDICIAL SYSTEM TRANSFORMATION IN THE GLOBALIZING WORLD 6-7, 382-83 (Dai-Kwon Choi & Kahei Rokumoto eds., 2007) [hereinafter JUDICIAL SYSTEM TRANSFORMATION].

<sup>6</sup> For a discussion on the reform of legal education in Korea and in Japan, see Setsuo Miyazawa, Kay-Wah Chan & Ilhyung Lee, *The Reform of Legal Education in East Asia*, 4 ANN. REV. L. & SOC. SCI. 333 (2008).

<sup>7</sup> *See* Thaddeus Hoffmeister, *South Korea Signs On*, 30 NAT'L L.J. 27, Apr. 2008 (citing Hiroshi Fukurai as suggesting that the interest in juries in Korea arose from social changes due, in part, to the growing influence of the United States).

<sup>8</sup> *See* Kuk Cho, *The Ongoing Reconstruction of the Korean Criminal Justice System*, 5 SANTA CLARA J. INT'L L. 100, 101 (2006) [hereinafter Cho, *Ongoing Reconstruction*] (noting the "momentous changes in the theory and practice of criminal procedure" over the past two decades); Kuk Cho, *The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea*, 30 DENV. J. INT'L L. & POL'Y 377, 380-88 (2002) (outlining the Korean criminal procedure after democratization).

significant changes that Korean society has undergone during the past two decades.<sup>9</sup>

On January 1, 2008, the Act for Civil Participation in Criminal Trials [*Gukminui hyeongsajaepan chamyeye gwanhan beopryul*] (the “Act”) went into effect. There is no doubt that the Act has opened a new era of criminal procedure in Korea. The new jury system will bring about fundamental changes in judicial decision-making in Korea, which has traditionally been managed only by professional judges. The jury trial in Korea will also bring about changes in the way criminal trial proceedings are conducted in general. It is also expected to create more sophisticated evidentiary rules for criminal trials.

Although the Act represents a huge departure from the previous system, it was discussed and implemented in a relatively short period of time. The Korean National Assembly passed the Act in 2007, and it became effective less than a year later. The new Japanese jury system [*saiban-in seido*], on the other hand, was enacted in 2004 for implementation in May 2009.<sup>10</sup> Considering that Korea has never operated a jury trial, while Japan has had experience with a quasi-jury system,<sup>11</sup> Korea’s quick move to adopt the jury system is quite striking.

The main purpose of the new jury system in Korea is twofold: to reinforce the democratic legitimacy of the judicial process, and to enhance the transparency and credibility of the judiciary.<sup>12</sup> Japan’s *saiban-in* system, in contrast, was introduced to promote the public’s

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<sup>9</sup> For a comprehensive discussion on societal changes in Korea and reform measures in law, see Tom Ginsburg, *Introduction: The Politics of Legal Reform in Korea*, in LEGAL REFORM IN KOREA 1 (Tom Ginsburg ed., 2004).

<sup>10</sup> On the Japanese lay assessor system, see Kent Anderson & Emma Saint, *Japan’s Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL’Y J. 233 (2005) and Ingram Weber, *The New Japanese Jury System: Empowering the Public, Preserving Continental Justice*, 4 E. ASIA L. REV. 125 (2009).

<sup>11</sup> The Japanese used jury trials for fifteen years—from 1928 until 1943. Fukurai, *supra* note 3, at 321; see also Junho Kim, *The Challenges and Outlook of Trial by Jury in Korea*, 8 J. KOREAN L. 455, 457-66 (2009) (tracing the development and eventual demise of the prewar jury system in Japan).

<sup>12</sup> Gukminui hyeongsajaepan chamyeye gwanhan beopryul [Act for Civil Participation in Criminal Trials], Law No. 8495, June 1, 2007, art. 1(1) [hereinafter the Act].

understanding of the judicial system and to raise their confidence in it.<sup>13</sup> It is clear, by simply looking at these provisions, that Korea's adoption of the jury system was mainly driven by participatory democratic concerns. For Koreans, the right of jurors as legitimate judicial participants seems to take priority over the right of the accused to be tried by a group of peers.<sup>14</sup>

This participatory democratic concern led Korean reformers to design their system largely based on the American jury system, whereas Japan followed the German lay assessor model. However, the current Korean jury trial system is a probationary model. Even though the Act was promulgated within a short period of time for almost immediate implementation, Korean reformers were cautious enough to build in a five-year experimental phase, beginning in 2008, to assess the actual experience of citizen participation in trials.<sup>15</sup> In 2013, the final format and scope of the system will be determined.

Although Korea's jury system for criminal trials has been discussed in a few English scholarly journals,<sup>16</sup> a systematic analysis of the law and its practice has not yet been made. This article attempts to fill the gap. Part II of the article delineates the background and history of the Korean legal system, and explains the relevant legal provisions. Part III discusses the problems that have arisen, implications for the future, and

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<sup>13</sup> Saiban-in no sanku suru keiji saiban ni kan suru hōritsu [Act Concerning Participation of Lay Assessors in Criminal Trials], Law No. 63 of 2004, art. 1, translated in Anderson & Saint, *supra* note 10, at 236.

<sup>14</sup> In the United States, by contrast, the right to be tried by a group of peers was the main driving concern as specified in the U.S. Constitution and Bill of Rights. U.S. CONST. art. 3, § 2; U.S. CONST. amend. VI. See generally JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 22-33 (2000) (discussing the debate over local juries at the time of the ratification of the U.S. Constitution).

<sup>15</sup> In Sup Han, *Hangukui baesimwonjaepan* [Criminal Jury Trials in South Korea: Issues and Initial Experiments], 50 SEOULDAEHAKGYO BEOPHAK [SEOUL L.J.] 681, 695 (2009).

<sup>16</sup> See Kuk Cho, *The 2007 Revision of the Korean Criminal Procedure Code*, 8 J. KOREAN L. 1, 14-16 (2008) (outlining the new jury system and its influences); Kim, *supra* note 11, at 467-75 (arguing that the Korean jury system has potential to be successful, but will require the people's support and respect for jury verdicts).

important remaining research questions based on the experience of the first year of the system in Korea.

## II. JURY TRIALS IN KOREA: HISTORY AND LAW

Korean history shows very little record of discussion on civil participation in judicial decision-making prior to 2000. From the establishment of the Judicial Officer Training Institute [*Beopgwanyangseongso*] in 1895<sup>17</sup> and throughout the Japanese Occupational Period, professional judges were the main decision-makers in the judiciary. Although the introduction of the jury system was discussed in 1947 shortly after liberation from Japanese rule, it never gained serious attention because post-liberation Korea simply inherited the criminal justice system of the colonial era.<sup>18</sup>

During the early years of the Korean Republic, the most important issue for the judiciary was its independence from other branches of the government. Previously, under the authoritarian regime from 1961 to 1987, the judiciary essentially served the interests of the dictator and did not gain the trust of the public.<sup>19</sup> When the democratization of Korean society escalated in 1987, the idea of an independent judiciary was gradually realized. Despite this, the judiciary continued to be criticized for other reasons: being too elitist and self-serving.<sup>20</sup> Indeed, Korea's three pillars of the legal profession [*beopjosamryun*]<sup>21</sup>—the judiciary, the prosecution, and the bar—are highly selective groups that share a sort of “family” mentality because they are trained in a single institution and maintain similar career paths.<sup>21</sup>

In Korea, professional judges are appointed by the chief justice of the Supreme Court of Korea and had previously enjoyed high respect and trust from the public after they graduated from high-ranked law faculties

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<sup>17</sup> The Judicial Officer Training Institute was Korea's first professional educational venue for law.

<sup>18</sup> Kim, *supra* note 11, at 468-69.

<sup>19</sup> Han, *supra* note 15, at 688.

<sup>20</sup> Kyong-Whan Ahn, *Beopjjoinui insajedo* [*Personnel Management in the Legal Profession*], in BEOMNYULGAUI YULLIWA CHAEGIM [ETHICS AND RESPONSIBILITIES OF THE LEGAL PROFESSION] 192, 196 (Seoul Nat'l Univ. College of Law ed., 2003).

<sup>21</sup> JUDICIAL SYSTEM TRANSFORMATION, *supra* note 5, at 140.

and passed the judicial exam.<sup>22</sup> People began to distrust the courts, however, mainly because the judicial processes and decisions were obscure and unknown to the public, and judgments sometimes appeared to be biased in favor of the rich or the powerful at the expense of justice and fairness. For example, judges have been accused of not making proceedings accessible and understandable to citizens.<sup>23</sup> In addition, practicing attorneys share the view that judges extend preferential treatment [*jeongwanyeu*] to judges-turned-attorneys who were former colleagues or superiors.<sup>24</sup>

Concern over professional judges' dogmatic judgment and their monopoly on fact-finding motivated the introduction of jury.<sup>25</sup> As Korean society became more democratized, the administration of justice came to be seen as a public service. A sense of entitlement to high-quality judicial service increased.<sup>26</sup> Single-minded judges who received the standardized education under the government-run Judicial Research and Training Institute and followed similar career paths were no longer regarded as providing a high quality service. This may explain why the jury system and legal educational reform have become the two most important goals of the judicial reform movement.

In 1999, the Judicial Reform Steering Committee, organized by the Supreme Court of Korea, discussed a long-term plan for the introduction of a jury trial system. The real change occurred, however, during the Roh Moo Hyun administration, known as the "Government of Participation."<sup>27</sup> During his presidency, the Judicial Reform Committee [*Sabeopgaehyeok wiwonhoe*] was created and organized under the Supreme Court on October 28, 2003. Under this new committee, the judiciary changed its earlier stance and became very supportive of civil participation. On December 15, 2004, the Presidential Committee on Judicial Reform [*Sabeopjedogaehyeok chujinwiwonhoe*] was established

<sup>22</sup> Ahn, *supra* note 20, at 197-201.

<sup>23</sup> Han, *supra* note 15, at 689.

<sup>24</sup> Jae Won Kim, *The Ideal and the Reality of the Korean Legal Profession*, 2 ASIAN-PAC. L. & POL'Y J. 45, 51 (2001).

<sup>25</sup> MI SUK PARK ET AL., GUKMINCHAMYEOJAEPANE DAEHAN CHAMGWANMIT JOSAYEONGU [A STUDY OF THE JURY TRIAL SYSTEM IN KOREA] 44 (Korean Institute of Criminology ed., 2008).

<sup>26</sup> Han, *supra* note 15, at 689.

<sup>27</sup> Cho, *Ongoing Reconstruction*, *supra* note 8, at 109.

to implement the recommendations of the Judicial Reform Committee.<sup>28</sup> In 2005, the Presidential Committee drafted a plan for civil participation in criminal trials. The National Assembly began discussing the draft act in April 2006, and the act was passed one year later. Korea, thus, has established a jury trial system within a relatively short period of time.

### III. THE ACT FOR CIVIL PARTICIPATION IN CRIMINAL TRIALS

An overview of the main provisions of the Act is provided below.

#### A. *Constitutionality*

Article 27(1) of the Korean Constitution stipulates “the right to trial according to law by judges qualified and appointed under the Constitution and relevant Acts.”<sup>29</sup> This may pose a constitutional challenge to the jury system because the Constitution only gives one the right to be tried by a *judge*. The debates on the constitutionality of the jury system are not conclusive at this point.<sup>30</sup> It is precisely due to the possibility of this constitutional challenge that the Act allows the criminal defendant to choose whether or not to have a jury trial.<sup>31</sup>

If the defendant agrees to a trial by jury, he or she must submit that intention in writing to the court.<sup>32</sup> The defendant may choose, however, not to have a jury trial.<sup>33</sup> In that situation, the court must check with the

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<sup>28</sup> Prominent leaders among the reformists are elite reform-minded judges who have extensively studied the American jury system, as well as a group of social scientists who conducted and studied mock jury trials. SABEOPJEDOGAEHYEOKCHUJINWIWONHOE BAEKSEO [THE WHITE PAPER OF THE PRESIDENTIAL COMMITTEE ON JUDICIAL REFORM] 34 (2006).

<sup>29</sup> DAEHANMINGUK HEONBEOP [CONSTITUTION OF THE REPUBLIC OF KOREA] (1987), translated at <http://english.court.go.kr/home/english/welcome/republic.jsp> (last visited Oct. 28, 2009).

<sup>30</sup> Young Sol Kwon, *Baesimje, Chamsimjeui doipnoneuiwa geu heonbeopjeokhapseong munje* [Constitutional Issues in the Proposed Adoption of Jury System in Korea], 26 BEOPGWA SAHOE [L. & SOC'Y] 97 (2004); Sung Gi Hwang, *Hangukeseoeui chamsimjewa baesimjeeui heonbeopjeokhapseong* [The Constitutionality of the Jury or Lay Judge System in Korea], 26 BEOPGWA SAHOE [L. & SOC'Y] 123 (2004).

<sup>31</sup> The Act, art. 5(2).

<sup>32</sup> *Id.*, art. 8(2).

<sup>33</sup> *Id.*, art. 5(2).

defendant to see if the choice is valid.<sup>34</sup> The court itself may, in some circumstances, decide not to conduct a jury trial, such as when jurors, juror candidates, or their families or relatives face possible danger to their life, liberty, or property, or when an accomplice of the defendant refuses to be tried by jury.<sup>35</sup> As such, the defendant's choice of a jury trial cannot be construed as a right under the Korean Constitution. Judges' decisions to exclude civil participation are subject to appeal.<sup>36</sup>

The constitutionality issue also affects the legal consequences of a jury verdict. Under the Act, jury verdicts are only advisory in nature.<sup>37</sup> This means that the judge may enter a contrary finding to a jury verdict. Furthermore, the main fact-finding authority still remains with the judge. However, during the second phase of implementation (after the year 2012), jury verdicts may carry a binding authority; then the constitutionality of the jury trial will become a real issue. Some scholars view the current jury system as consistent with the constitutional guarantee of trial by an impartial judge as long as certain conditions are met: (1) the defendant chooses a jury trial; (2) the judge has the authority to invalidate an improper guilty verdict by a jury; and (3) appeal of the jury verdict is possible.<sup>38</sup>

### B. *Jury Composition*

A big issue in implementing the jury trial system was whether to adopt an American-style jury system or a German-style lay assessor system. In general, reform-minded law professors and civil society strongly supported the American model. Those who were in favor of the American jury system usually advocated that the number of jurors should be set at twelve.<sup>39</sup> On the other hand, those who were in favor of the German lay assessor model tried to limit the number of civil participants.<sup>40</sup> The court was not receptive to the idea of an American-style jury, regarding it as being too participatory, and thereby too

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<sup>34</sup> *Id.*, art. 8.

<sup>35</sup> *Id.*, art. 9(1).

<sup>36</sup> *Id.*, art. 9(3).

<sup>37</sup> *Id.*, art. 46(5).

<sup>38</sup> Han, *supra* note 15, at 691.

<sup>39</sup> *Id.* at 692.

<sup>40</sup> *Id.*

intrusive to the judiciary.<sup>41</sup> Instead, the plan contemplated by the judiciary allowed three to five lay persons, guided and instructed by three professional judges.<sup>42</sup> Finally, the Korean model drew on both the American and German systems, with five to nine jurors depending on the case.

The number of jurors varies according to the severity of the case and the defendant's plea. In cases where the defendant may receive capital punishment or life imprisonment, there are nine jurors.<sup>43</sup> In cases where the defendant pleads guilty to most of the indicted counts, there are five jurors.<sup>44</sup> In all other cases, there are seven jurors.<sup>45</sup> The prosecution and the defense may also change the number of jurors if both sides agree.<sup>46</sup> By allowing for flexibility in the number of jurors, the Korean jury system takes into account the divergent views regarding jury composition. It will allow Korean jury scholars to engage in future empirical testing, based on Korean data, to draw conclusions about the proper number of jurors.<sup>47</sup>

Another issue in implementing the Korean jury system involved what to call the civilian participants. Several titles, such as "judicial participants" [*sabeop chamyecoin*] and "citizen judges" [*simin jaepanwon*], were suggested.<sup>48</sup> Civil society favored the term "citizen judges" because it would make citizens who participate in jury trials feel honored and would encourage voluntary participation.<sup>49</sup> On the other hand, the judiciary favored "judicial participants," which was ultimately rejected because of its passive connotation.<sup>50</sup> In the end, the title "jurors" [*baesimwon*] was adopted for two reasons: (1) the Korean model largely

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<sup>41</sup> *Id.* at 692-93.

<sup>42</sup> PARK ET AL., *supra* note 25, at 55.

<sup>43</sup> The Act, art. 13(1).

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

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*, art. 13(2).

<sup>47</sup> Sang Hoon Han, *Gukmin ui hyeongsajaepanchamyejedo ipbeopnonui* [*Legislative Discussions on Civil Participation in Criminal Trials*], 30 BEOPGWA SAHOE [L. & SOC'Y] 303, 305 (2006).

<sup>48</sup> Han, *supra* note 15, at 693-94.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*, at 693.

incorporated the American jury ideal, and (2) the term was widely known to the public due to their exposure to the American media.<sup>51</sup>

### C. *Juror Qualification*

To serve as a juror, one must be a Korean citizen over the age of twenty<sup>52</sup> and must not meet any of the criteria for disqualification, exclusion, exemption, or excuse.<sup>53</sup> Because jurors are engaged in judicial decision-making, they may be regarded as quasi-governmental officials. Therefore, the same provision for disqualification that appears in Article 33(1) of the State Public Officials Act [*Gukga gongmuwonbeop*] was incorporated in the Act.<sup>54</sup> In addition, because jurors may be regarded as quasi-judges, the reasons for exclusion or challenges that are applicable to professional judges were also introduced to the Act.<sup>55</sup>

The criteria for exemption from jury duty also posed another issue. Soldiers, police officers, and firefighters are exempted because of their essential public function.<sup>56</sup> Some other professions were also excluded due to concerns about the separation of powers. For example, the president, National Assembly members, and the highest officials in the executive branch are ineligible to serve as jurors.<sup>57</sup> Lawyers (including judges and public prosecutors) are excluded because they may exercise

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<sup>51</sup> *Id.* at 694.

<sup>52</sup> The Act, art. 16.

<sup>53</sup> *Id.*, art. 17-20.

<sup>54</sup> Compare *Gukga gongmuwonbeop* [State Public Officials Act], Law No. 1325, Apr. 17, 1963 (amended Feb. 6, 2009, as Law No. 9419), art. 33(1) with the Act, art. 17.

<sup>55</sup> Additional articles were also adopted into the Act from other acts. For instance, Article 19 of the Act is identical to Article 17 (Reason for Exclusion) of the *Hyeongsa sosongbeop* [Criminal Procedure Code], Law No. 341, Sept. 23, 1954 (amended Dec. 21, 2007, as Law No. 8730) [hereinafter the CPC], and Article 28(1) of the Act is similar to Article 18 (Reason for Challenge and Person Entitled to Apply for Challenge) of the CPC.

<sup>56</sup> The Act, art. 18 (7), (8).

<sup>57</sup> *Id.*, art. 18 (1), (2), (3).

undue influence during deliberation due to their superior knowledge of the law.<sup>58</sup>

Jurors may also be excused from service upon the discretion of the judge.<sup>59</sup> The Act specifies that the following persons may be excused from jury duty: (1) those who are over the age of seventy; (2) those who have been juror candidates within the last five years; (3) those who have been indicted on felony charges and the legal proceeding against them has not been concluded; (4) those who may be irreparably harmed if they serve as jurors; and (5) those who are severely ill or handicapped.<sup>60</sup>

#### D. *The Scope of Jury Trials*

The jury trial is limited to murder, manslaughter, rape, robbery, bribery, kidnapping, and crimes involving narcotics.<sup>61</sup> Only the most serious crimes were selected to be subject to jury trials because these crimes may get more public attention and require thoughtful deliberation. There was also a debate about expanding the scope of the jury trial to include property crimes.<sup>62</sup> Additional crimes may be added during the experimental period. For instance, some criminal cases being tried by the three-judge panels, as specified in the Supreme Court Rule on Civil Participation in Criminal Trials [*Gukminui hyeongsajaepan chamyeo e gwanhan gyuchik*], may also be tried by jury.<sup>63</sup>

The reason that jury trials have been limited in scope is that the Korean court at the moment does not have enough human and material resources to handle massive jury trials.<sup>64</sup> In addition, if all criminal cases are eligible for jury trials, it will be burdensome for the court to explain

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<sup>58</sup> *Id.*, art. 18. Law professors, however, are not explicitly mentioned in the Act. “Lawyer,” in the narrow sense of the term in the Korean language, refers only to a practicing lawyer, not a law professor.

<sup>59</sup> *Id.*, art. 20(7).

<sup>60</sup> *Id.* art. 20.

<sup>61</sup> *Id.* art. 5(1).

<sup>62</sup> Sang Hoon Han, *Gukminchamyoeojaepanjedoe jeongchak bangan* [Recent Developments and Suggestions for the New Civil Participation in Criminal Trials System in Korea], 106 JUSTICE 483, 505-06 (2008).

<sup>63</sup> Gukminui hyeongsajaepan chamyeo e gwanhan gyuchik [Rule for Civil Participation in Criminal Trials], Sup. Ct. Rule No. 2107, Oct. 29, 2007, art. 2 [hereinafter the Rule].

<sup>64</sup> PARK ET AL., *supra* note 25, at 191.

to jurors all the elements of the crimes and to set forth the discovery methods concerning jury trials.<sup>65</sup>

In the case of sex crimes, the issue raised was whether jury trials can still be held when the victim refuses to appear in court, even though the defendant chooses to be tried by jury. In these cases, victims of a sex crime have sometimes been examined behind a partition to protect their privacy.<sup>66</sup> Video or other transmission methods have been used to examine witnesses if they are likely to experience extreme distress when testifying in the presence of a defendant.<sup>67</sup>

### E. Pretrial Preparatory Conference

Jury trials follow the basic criminal procedure outlined in the revised Criminal Procedure Code (the “CPC”), and the Act only concerns processes that are specific to jury trials.<sup>68</sup> Article 266-5 of the CPC provides that the court may assign a case to a preparatory conference prior to a trial for efficient and focused examination. The preparatory conference allows each party to develop its argument through means such as submitting a summary of its arguments and making a plan for proving its argument to the court.<sup>69</sup> Unlike other criminal cases, the court must hold a pretrial preparatory conference if the defendant chooses a jury trial.<sup>70</sup> The preparatory conference is open to the public in principle<sup>71</sup> and is generally concluded prior to jury selection.<sup>72</sup>

As the examination of evidence in the preparatory conference will be pivotal in determining the success of the jury system, this conference is an important feature of the process. It enables the court or the parties to

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<sup>65</sup> Han, *supra* note 62, at 505.

<sup>66</sup> PARK ET AL., *supra* note 25, at 192. *See, e.g.*, Decision of March 31, 2008 (2008Gohap78) (Pusan D. Ct.).

<sup>67</sup> PARK ET AL., *supra* note 25, at 180. *See, e.g.*, Decision of June 17, 2008 (2008Gohap396) (Seoul C.D. Ct.). These alternative examination methods are explained in Article 165-2 of the CPC.

<sup>68</sup> The Act, art. 4.

<sup>69</sup> The CPC, art. 266-5.

<sup>70</sup> The Act, art. 36(1).

<sup>71</sup> *See* The CPC, art. 266-7(4) (providing that the preparatory conference will be open to the public except if the procedure is likely to be hindered if open to the public).

<sup>72</sup> The Rule, art. 27.

exclude nonprobative or inadmissible evidence before trial.<sup>73</sup> Moreover, rather than factual reports that are produced at the investigative level, evidentiary discovery focuses on anticipated testimony by witnesses at the trial stage.

At the end of a preparatory conference, the court may decide not to conduct a jury trial.<sup>74</sup> The number of jurors may be fixed at five if the defendant has admitted guilt on some indicted counts.<sup>75</sup> However, because neither the plea bargain nor the arraignment system exists in Korea, defendants who plead guilty may still have a jury trial, and the verdict process is not waived in that situation.<sup>76</sup>

#### F. Voir Dire

A potential jury panel is summoned randomly from a district area.<sup>77</sup> The district court maintains the jury pool based upon the National Resident Registration System.<sup>78</sup> Because all residents in Korea over the age of eighteen must register under the system, the jury pool may be regarded as comprehensive enough to include all potential jurors in a local area.

Juror candidates are first screened by a questionnaire that the court sends to determine whether they may be excluded or excused; candidates must respond faithfully unless they have legitimate reasons not to

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<sup>73</sup> The CPC, art. 266-9(1).

<sup>74</sup> The Act, art. 9(1).

<sup>75</sup> *Id.* art. 13(1).

<sup>76</sup> *Id.* art. 43. Korean criminal procedure does not separate the trial proceeding and the sentencing proceeding. The judge conducts the trial procedure, including the examination of evidence, even if the defendant admitted guilt. The court, however, may apply a summary trial procedure when the defendant makes a confession on charges in a public trial courtroom. The CPC, art. 286-2. In a summary trial procedure, hearsay evidence may be admitted because the court is deemed to have acquired the consents from the public prosecutor and the defendant. *Id.* art. 318-3. Courts apply this shortened procedure to accelerate the trial procedure and to minimize administrative cost; however, it does not absolve the trial proceeding itself, like in the case of plea bargaining or the arraignment process in the United States.

<sup>77</sup> The Act, art. 23(1).

<sup>78</sup> *Id.* art. 22(1).

respond.<sup>79</sup> The court must send to the prosecution and the defense counsel, two days prior to the jury selection date, a list of juror candidates containing information such as name, gender, and date of birth.<sup>80</sup> If the court plans to use the questionnaire during *voir dire*, it must deliver copies of juror responses before the jury selection date to both parties.<sup>81</sup>

Jury selection is conducted in private and must consider juror candidates' privacy and reputation.<sup>82</sup> Unlike in the United States, this process is not open to the public. Jurors are called only by numbers that the court provides.<sup>83</sup> The Korean jury system allows either the judge or the parties concerned to conduct *voir dire*. Judges can conduct *voir dire* to check the qualification and capability of the juror candidates. Prosecutors, defendants, or defense attorneys can request judges to conduct *voir dire*, and judges can allow prosecutors or defense attorneys to conduct *voir dire* themselves.<sup>84</sup>

The Korean jury system allows both a challenge for cause and a peremptory challenge. Like in the United States, parties may exercise unlimited challenges for cause.<sup>85</sup> Immediate objections to the court's denial of challenges for cause can be made to the court.<sup>86</sup> Each party may exercise peremptory challenges five times when nine jurors are selected, four when seven jurors are selected, and three when five jurors are selected.<sup>87</sup> Peremptory challenges must not be conducted in a manner that is prejudicial or discriminatory.<sup>88</sup> The way challenges are conducted resembles the "jury box system," as opposed to the "struck jury system"<sup>89</sup>—in other words, juror candidates who take the place of

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<sup>79</sup> *Id.* art. 25.

<sup>80</sup> *Id.* art. 26(1).

<sup>81</sup> *Id.* art. 26(2).

<sup>82</sup> *Id.* art. 24(2), (3).

<sup>83</sup> The Rule, art. 19.

<sup>84</sup> The Act, art. 28(1).

<sup>85</sup> *Id.* art. 28(3).

<sup>86</sup> *Id.* art. 29(1).

<sup>87</sup> *Id.* art. 30(1).

<sup>88</sup> The Rule, art. 21(1).

<sup>89</sup> Sang Hoon Han, *Gukmineui hyeongsajaepanchamyeoe gwanhan beopryulsang baesimwonseonjeongjeolchaewi naeyonggwa geomto* [A Study on Jury Selection Process of "Civil Participation in Criminal Trials Act" in Korea], 19 HYEONGSAJEONGCHAEK [CRIM. POL'Y] 65, 72 (2007).

dismissed jurors must go through the same *voir dire* process from the beginning.<sup>90</sup> The court may not inform the parties which of the jury members are alternate jurors until the trial is concluded and the jurors retire for deliberation.<sup>91</sup>

### G. Trial Process

The jury trial is presided over by a three-judge panel.<sup>92</sup> It usually begins immediately after jury selection.<sup>93</sup> The prosecution and the defense sit opposite each other,<sup>94</sup> and the jury sits between the judges' bench and the prosecution and defense tables.<sup>95</sup> The witness stand is located directly opposite the jury.<sup>96</sup>

The trial begins with the presiding judge's identification question to the defendant,<sup>97</sup> followed by the prosecution's opening statement, the defense's opening statement, and the presiding judge's summary of the issues.<sup>98</sup> Before beginning the examination of evidence, the presiding judge may allow the prosecutor and defense counsel to make statements relating to alleged facts, plans for proving them, and other matters.<sup>99</sup> The defendant is only questioned after the presentation of other evidence,<sup>100</sup>

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<sup>90</sup> The Act, art. 31.

<sup>91</sup> The Rule, art. 22. The court may select up to five alternate jurors for the event of a vacancy. The Act, art. 14(1).

<sup>92</sup> Cases falling under capital punishment, life imprisonment with or without labor, or imprisonment for not less than one year, which are mostly within the scope of the jury trial, are considered by a three-judge panel. Beopwonjojikbeop [Court Organization Act], Law No. 3992, Dec. 4, 1987 (amended Dec. 27, 2007, as Law No. 8794), art. 32(1).

<sup>93</sup> The Rule, art. 29.

<sup>94</sup> The Act, art. 39(2). Before the revision of the CPC in 2007, the defendant sat in front of the bench facing the judges, separate from his or her counsel. The 2007 revision moves the defendant's seat next to that of the defense counsel. The CPC, art. 275(3).

<sup>95</sup> The Act, art. 39(3).

<sup>96</sup> *Id.* art. 39(4).

<sup>97</sup> The CPC, art. 284.

<sup>98</sup> PARK ET AL., *supra* note 25, at 252-53.

<sup>99</sup> The CPC, art. 287(2).

<sup>100</sup> The revised CPC drastically changed the prior practice of questioning a defendant before the investigation of evidence. *See id.* art. 296-2 (permitting the examination of the defendant after the examination of evidence).

such as witness and victim statements and the results of scientific investigations. After both parties have examined the evidence, the prosecution and defense make their final statements. Trials are conducted in a timely manner;<sup>101</sup> for example, if two or more days are required, the court remains open every day, unless an unavoidable situation dictates otherwise.<sup>102</sup>

While offering juror protection, the Act limits jurors in various ways including their involvement during the court proceeding. For instance, jurors are not involved in the court's review of the admissibility of evidence.<sup>103</sup> However, they may ask a presiding judge to ask the defendant or the witness certain questions, and they may take notes during the trial with permission of the judge.<sup>104</sup> In addition, jurors are prohibited from discussing the matters before deliberation, collecting information or independently investigating the case.<sup>105</sup> They must not disclose details of jury deliberation to anyone,<sup>106</sup> and no person can contact jurors for the purpose of obtaining confidential information, except for research purposes after the completion of a trial.<sup>107</sup> Jury tampering and threatening are regarded as serious criminal offenses and are severely punished.<sup>108</sup> The court must protect the privacy of jurors<sup>109</sup> and may sequester the jury if necessary.<sup>110</sup>

#### H. *Jury Verdict Process*

Before the jury begins deliberation, the presiding judge summarizes for the jurors the criminal complaint, applicable law, arguments made by the prosecution and the defense, admissibility of evidence, and in some cases, the evidence.<sup>111</sup>

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<sup>101</sup> *Id.* art. 267-2(1).

<sup>102</sup> *Id.* art. 267-2(2).

<sup>103</sup> The Act, art. 44.

<sup>104</sup> *Id.* art. 41(1).

<sup>105</sup> *Id.* art. 41(2).

<sup>106</sup> *Id.* art. 58.

<sup>107</sup> *Id.* art. 51.

<sup>108</sup> *Id.* arts. 56, 57, 59.

<sup>109</sup> *Id.* art. 52.

<sup>110</sup> *Id.* art. 53.

<sup>111</sup> *Id.* art. 46(1).

The verdict process combines the U.S. and German systems to reduce the possibility of a hung jury. The applicability of both systems to the Korean situation will be tested during the experimental phase. Interestingly, the verdict process can be divided into two stages in which the first half more closely resembles the U.S. system and the second half the German system.

Like the American model, the Korean model allows lay people to deliberate in secret. Without the participation of the judges, jurors first discuss the guilt of the defendant and try to reach a unanimous verdict.<sup>112</sup> If half of the jurors agree, however, the jury may choose to hear the judges' opinion.<sup>113</sup> This latter aspect is a departure from the American model; it resembles more closely the German system, in which the lay assessors and the judges discuss the defendant's guilt together. The only difference is that listening to the judges' opinion at this stage is not mandatory but optional.

If the jurors cannot reach a unanimous verdict in the first stage, then they *must* hear the judges' opinion.<sup>114</sup> Unlike American judges, who may give further instructions to a deadlocked jury but cannot express an opinion,<sup>115</sup> Korean judges provide their opinions directly to the jurors in this second stage. However, judges should not make a statement of guilty or not guilty.<sup>116</sup> After the judges and the jurors have discussed the guilt of the defendant together, the jurors, again without the presence of the judges, render a verdict based on a simple majority.<sup>117</sup>

Overall, the Act seems to reduce the possibility of a hung jury and enhance the accuracy of the verdict. However, without knowing exactly what happened during deliberation, the two-phase verdict process may not provide helpful guidance as to which system, American or German, is more effective. Practically speaking, the effectiveness of the verdict depends on whether thoughtful deliberation in the first stage can be guaranteed. In the Korean model, there can never be a hung jury in the end, because a verdict is made by a simple majority vote and there are always an odd number of jurors.

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<sup>112</sup> *Id.* art. 46(2).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* art. 46(3).

<sup>115</sup> *Allen v. United States*, 164 U.S. 492, 501 (1896).

<sup>116</sup> The Rule, art. 41(5).

<sup>117</sup> The Act, art. 46(3).

To some observers, the decision-making process in the second stage may be too lax. One explanation is that the Korean model was designed to provide more opportunity for lay people to participate in sentencing deliberation because public distrust of the judiciary in criminal trials had focused on the sentencing issue.<sup>118</sup> Since jurors can convict a defendant by a simple majority, more chances will be available for them to get involved in sentencing.<sup>119</sup>

Determining the sentence is another aspect of the German lay assessor system that is reflected in the Korean system since Korean jurors participate in sentencing deliberation together with the judges. The Act specifies that in cases where the jury finds the defendant guilty, jurors discuss the sentence with the judge and submit their opinion.<sup>120</sup> The presiding judge must explain to the jurors the scope of punishment and the conditions for sentencing before deliberation begins.<sup>121</sup> The Act does not specify the decision-making method in sentencing discussions. Majority rule was not adopted, because the sentencing procedure is highly technical and requires scientific and professional knowledge, and it was felt that lay people's decisions might run counter to more objective and professional sentencing standards.<sup>122</sup>

The jury's verdict is advisory and does not bind the judges' ultimate decisions regarding either guilt or sentencing.<sup>123</sup> However, it can reasonably be anticipated that judges will not disregard it easily. First, the presiding judge must disclose the jury verdict to the defendant at the time of rendering judgment, and if the judgment differs from the jury verdict, the judge must explain to the defendant the reason for the discrepancy.<sup>124</sup> Second, the jury verdict, and any discrepancy between it and the judge's ruling, must be written down in the final judgment.<sup>125</sup> Moreover, the National Court Administration of the Supreme Court strongly recommends that judges respect jurors' opinions whenever

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<sup>118</sup> Han, *supra* note 47, at 313.

<sup>119</sup> *Id.*

<sup>120</sup> The Act, art. 46(4).

<sup>121</sup> *Id.*

<sup>122</sup> Han, *supra* note 47, at 314.

<sup>123</sup> The Act, art. 46(5).

<sup>124</sup> *Id.* art. 48(4).

<sup>125</sup> *Id.* art. 49.

possible. As one American commentator has observed, judges will be under intense pressure to agree with the jury verdict.<sup>126</sup>

The CPC provides for appeal of the verdict by either party, like in other criminal cases.<sup>127</sup> Unlike in the United States, the prosecutor can appeal an acquittal verdict entered by the jury.<sup>128</sup> The higher court can review the discrepancy between the jury's and the judges' opinions; so when such a discrepancy occurs, either the prosecution or the defense is likely to appeal.

There are strong incentives to appeal a jury verdict under the current system, as it practically guarantees the parties an opportunity for a retrial. The appellate court can review both factual and legal matters<sup>129</sup> and the trial court procedure applies *mutatis mutandis* to trial on appeal.<sup>130</sup> These features in the Korean system will create problems in the long run. Because the appellate courts will not have juror participation, jurors' fact-finding in the trial court may become useless; this endangers the effectiveness of the jury system altogether.

### I. *Jury Research*

In order to further the study of the jury trial procedure, the Supreme Court has established the Judicial Participation Planning Board.<sup>131</sup> This board, among other things, may conduct mock trials, videotape and analyze real jury trials, run educational sessions for the legal practitioners involved, and host academic seminars about the subject.<sup>132</sup> Determination of the ultimate forms of civil participation in trials after

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<sup>126</sup> Y. Euny Hong, *South Korea Holds First Ever Trial by Jury*, FRANCE 24, Feb. 12, 2008 (quoting Sean Hayes's statement that "[i]f the jury gives a guilty verdict, the judge is going to have overwhelming pressure to agree").

<sup>127</sup> The Act does not specify the higher court's authority to review a jury verdict. Unless otherwise specified, according to Article 4 of the Act, other laws such as CPC apply to jury trials.

<sup>128</sup> PARK ET AL., *supra* note 25, at 343.

<sup>129</sup> See the CPC, art. 357 (allowing an appeal "in cases where the judgment of the first instance is not satisfactory").

<sup>130</sup> *Id.* art. 370.

<sup>131</sup> The Act, art. 54(1).

<sup>132</sup> *Id.* art. 54(2).

the experimental period will be made by the Committee on Civil Judicial Participation, which will be set up by the Supreme Court.<sup>133</sup>

#### IV. JURY TRIALS IN PRACTICE: LESSONS LEARNED IN THE FIRST YEAR

Between January 1 and December 31, 2008, 225 cases in which defendants chose jury trials (nineteen cases per month) were filed and sixty cases were tried.<sup>134</sup> In eighty-nine cases, the defendant withdrew the request for a jury trial, and in sixty cases, the court denied the request. Sixteen cases were pending. Proponents of the reform movement had expected around 100 to 200 trials would be held in the first year,<sup>135</sup> but the number of trials was much lower.

The three most common crimes that were tried by juries were murder (35%), bodily injury resulting from robbery (28%), and sexual offense (13%). Among the eighteen district courts around the country that held jury trials,<sup>136</sup> the courts outside the Seoul Metropolitan Area more actively held jury trials.

The Supreme Court maintains a policy of speedy trials in order to minimize the social costs associated with jury trials. As a result, almost all cases were concluded in a single day in court, beginning with *voir dire* and ending with the jury verdict.<sup>137</sup> Only four cases took more than two days in court. While this practice is understandable given the need to save time and costs, it is sometimes criticized as being too hasty.<sup>138</sup> On average, jury trials resolved cases approximately one month sooner

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<sup>133</sup> *Id.* art. 55(1).

<sup>134</sup> The first-year statistics provided herein derive from reports compiled in GUKMINEUI SABEOPCHAMYEO [CIVIL PARTICIPATION IN JUDICIAL DECISION-MAKING] 587-614 (In Sup Han & Sang Hoon Han, 2008).

<sup>135</sup> Han, *supra* note 15, at 695.

<sup>136</sup> See PARK ET AL., *supra* note 25, at 203 (providing data on eighteen district courts that held jury trials).

<sup>137</sup> Based on one study, it took ten hours and forty-two minutes on average for conclusion of jury trials: one hour and forty minutes on average for *voir dire*, six hours and thirty-eight minutes for open trial, and two hours and thirteen minutes for jury deliberation. PARK ET AL., *supra* note 25, at 23.

<sup>138</sup> Su-Hyun Lee, *Justice is Swift for Novice Korean Jurors*, N.Y. TIMES, July 17, 2008, at A11.

than bench trials from the date of filing to the jury verdict (2.49 months and 3.3 months respectively, the latter figure based on 2007 data).<sup>139</sup>

About half of the time, juries participated in sentencing only, as the defendant had already admitted guilt. It has been observed that, over time, more and more defendants who choose a jury trial are pleading not guilty.<sup>140</sup> Defendants pleaded not guilty in thirty-one cases (52%). In the majority of these cases, the jury found the defendants guilty. In four cases, however, the defendants were found not guilty on some counts, and in two cases, the defendants were acquitted on all counts.

Juries considered a variety of issues. In addition to sentencing, juries considered self-defense, excessive self-defense, mental and physical incapacity due to mental disease or intoxication, credibility of witness testimony and accomplice confessions, admissibility and probative weight of DNA tests among other issues.

State-appointed counsel [*gukseon byeonhosa*] represented defendants in forty-six cases, while private attorneys were retained in fourteen cases.<sup>141</sup> Under the Act, a criminal jury trial requires defense counsel, so if the defendant cannot retain a lawyer, the court must appoint one *ex officio*.<sup>142</sup> In 2006, the Supreme Court established a roster of standing members of state-appointed counsels [*gukseonjeondam byeonhosa*] who exclusively take such cases;<sup>143</sup> these Korean-style public defenders have taken twenty-seven out of forty-six state-appointed defense cases in jury trials.

The jury verdicts and the judge's rulings matched in fifty-three of the sixty cases (88.3%). In most cases in which the verdict and the ruling did not match, the jury verdict was not guilty and the judges' verdict was guilty. In all cases where the verdict and the ruling did not match, the higher court upheld the conviction.

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<sup>139</sup> Han & Han, *supra* note 134, at 588; PARK ET AL., *supra* note 25, at 115.

<sup>140</sup> Han & Han, *supra* note 134, at 587.

<sup>141</sup> *Id.*

<sup>142</sup> The Act, art. 7.

<sup>143</sup> Seongyoon Jeong, *Gukseonjeondam byeonhosa jeonguk hwakdae* [Expansion of State-Appointed Counsels Throughout the Nation], BEOPRYULSIMNUM [THE LAWTIMES], Nov. 1, 2005, available at <https://www.lawtimes.co.kr/LawNews/News/NewsContents.aspx?kind=ISU&serial=17453> (last visited Oct, 28, 2009). See also the CPC, art. 33 (listing circumstances under which the court will appoint a defense counsel).

A relatively high rate of appeal to higher courts was observed. Appeal was made in fifty-two cases (87%). Among these appeals, both parties appealed in twenty-eight cases, the prosecution alone appealed in seven cases, and the defense alone appealed in seventeen cases. Few of the appeals were successful; two-thirds have been dismissed.

Jury delinquency has not been a serious problem, although only 29.7% of the jurors summoned were present in *voir dire* in 2008.<sup>144</sup> If unreachable jurors and cancelled cases are not counted, the real attendance rate was 59%.<sup>145</sup> The real attendance rate is also reportedly increasing over time. The average number of juror candidates summoned per trial was 143.1, and the average number of juror candidates attending the jury selection per trial was 42.4.<sup>146</sup> The average number of jurors (including alternate jurors) per trial was 9.1.<sup>147</sup> As of November 2008, the actual selected jurors were well distributed in terms of sex, age, and social groups: 28.5% office workers, 13.3% small business owners, 19.8% housewives, 7.2% students, and 31.2% others. People in their 30s formed the highest proportion of jurors. The attendance rate of women is reportedly increasing.

Based on a post-trial survey, most jurors (95.2%) were generally satisfied with the jury trial, especially with the open trial proceeding. A majority of jurors (84%) said that they understood all or most of the trial procedure. The most frequently mentioned difficulties were the length of the trial and the difficulty understanding legalese. Most jurors reported that they focused attentively during the trial and actively expressed their opinions during deliberation.

Only one and a half years have passed since the introduction of the jury trial in Korea, and thus it would be premature to draw any final conclusions. However, I would like to provide my observations at this point, summarize various problems that have been identified, and make suggestions for future improvements.

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<sup>144</sup> PARK ET AL., *supra* note 25, at 23.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See Han & Han, *supra* note 137, at 589-90 (reporting that 474 jurors, including alternates, participated in fifty-two jury trials as of November 2008).

### A. *Effective Management of Jury Trials*

Under the Act, when a case is filed at a branch court and the defendant chooses a jury trial, the trial docket must move to a district court where a jury trial division is established.<sup>148</sup> In theory, forum shopping may occur if the defendant thinks sentencing at the branch court will be more stringent than at the district court. Whatever the reality is, more unified or harmonious sentencing among trial courts is recommended to prevent forum shopping.

For an effective and focused proceeding, it is necessary to ensure the presence of witnesses. Considering the courts' willingness to minimize the length of time jurors must serve, securing the presence of witnesses will be critical. In addition, to minimize juror delinquency and to promote participation by jurors, an adequate level of juror pay is necessary.<sup>149</sup> Right now jurors are paid 100,000 won (US \$80) per day. This may not look like low compensation, compared with the U.S. practice. However, serving more than twelve hours in court is not uncommon, due to the court's intention to conclude the case in a single day.<sup>150</sup> In the future, the court schedule as well as juror pay must be adjusted to make it more convenient for the jury.

### B. *Clarity of Jury Instructions*

One study found that Korean judges instruct juries well on principles such as the right to remain silent, adjudication based on evidence, and presumption of innocence.<sup>151</sup> The same study, however, also found that the judges were not nearly as clear in their explanations of the elements or degrees of a crime such that jurors sometimes had difficulty during

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<sup>148</sup> The Act, art. 10. The Korean court system is composed of one Supreme Court, five High (appellate) Courts, and twenty District Courts (including the Seoul Family Court and the Seoul Administrative Court) and their forty-two Branch Courts. JUDICIAL SYSTEM TRANSFORMATION, *supra* note 5, at 6.

<sup>149</sup> Eric Seo, *Creating the Right Mentality: Dealing with the Problem of Juror Delinquency in the New South Korean Lay Participation System*, 40 VAND. J. TRANSNAT'L L. 265, 284 (2007).

<sup>150</sup> In a jury trial that I observed in Seoul, the jury returned the verdict around 1:00 a.m. Many jury trials conclude late in the evening.

<sup>151</sup> PARK ET AL., *supra* note 25, at 44.

deliberations.<sup>152</sup> For instance, in a case where the defendant was indicted on a count of “bodily injury resulting from robbery,” the court only gave the jury instruction on that single count.<sup>153</sup> Under prevailing case law, however, the court could have recognized a “quasi-robbery”<sup>154</sup> without revising the indictment, because a “quasi-robbery” is treated as an “abridged fact” [*chuksosasi*] (or a “lesser included offense” in U.S. criminal law) of the original “bodily injury resulting from robbery” count.<sup>155</sup> Because the jurors did not receive jury instructions on both “bodily injury resulting from robbery” and “bodily injury resulting from quasi-robbery,” the jurors found the defendant not guilty.<sup>156</sup> As a result, some critics argue that the jurors’ right to determine facts about the quasi-robbery was infringed due to the court’s inadequate jury instructions.<sup>157</sup> Recently, the Daejun High Court held that a trial court erred in failing to give a full explanation of evidence related to the diminished capacity of the defendant.<sup>158</sup>

Some scholars have suggested that to increase effective jury instructions, obscure legal terminology must be replaced by easier terms, and standardized jury instruction manuals need to be developed.<sup>159</sup>

### C. *Acceptance and Effectiveness of Jury Decisions*

As one commentator aptly writes, one of the major challenges in successfully implementing a jury system is the difficulty in educating and preparing the country for verdicts that seem to run contrary to the

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<sup>152</sup> *Id.* at 260-62.

<sup>153</sup> Decision of April 17, 2008 (2008Gohap11) (Chunchun D. Ct.). *See also* PARK ET AL., *supra* note 25, at 260 (discussing the instructions given to the jury).

<sup>154</sup> A quasi-robbery occurs when “a thief uses violence or intimidation in order to resist recovery of stolen property, to escape arrest, or to obliterate a trace of the crime.” Hyeongbeop [Criminal Code], Law No. 293, Sept. 18, 1953 (amended July 29, 2005, as Law No. 7623), art. 335.

<sup>155</sup> Decision of April 17, 2008, *supra* note 153.

<sup>156</sup> *Id.*

<sup>157</sup> PARK ET AL., *supra* note 25, at 262.

<sup>158</sup> Decision of May 28, 2008 (2008No123) (Daejun High Ct.), at 7-8.

<sup>159</sup> Gidu Oh, *Baesimwonui pandanneungryeok* [*The Ability of Juries to Find Fact*], 96 JUSTICE 124, 133 (2007).

mainstream values and beliefs of Korean society.<sup>160</sup> This ultimately comes down to the question of whether Korean juries are indeed proper decision-makers.

The Korean press suggests that Koreans may be too emotional for a jury system to work.<sup>161</sup> The first jury trial in Korea, held in Daegu, is an illustrative case.<sup>162</sup> The case involved a twenty-seven-year-old man who was charged with robbing and assaulting a seventy-year-old woman in her home.<sup>163</sup> The defendant admitted robbing the woman, but said that he did it because he needed the money to pay debt collectors who were threatening him and his younger sister.<sup>164</sup> The prosecution urged the jury to apply the law regardless of the young man's predicament, while the defense argued for leniency. In the end, the jury unanimously returned a guilty verdict, but set aside the thirty-month jail sentence.<sup>165</sup> The judge accepted the jury's recommendation even though the suspension of the sentence was unusual considering the severity of the offense.<sup>166</sup> Some commentators believe that the jury was sympathetic because the defendant's sister attended the trial with her infant child.<sup>167</sup>

Whether Korean lay jurors are too emotional is a question that requires empirical testing. This testing, however, may be difficult due to regional differences and the possibility that regional ethos may influence court proceedings. Frank Munger, in his studies of Thailand's legal system, has warned of a possible mismatch between distinctive traditions and socialization practices in Asian nations and citizen participation in legal decision-making.<sup>168</sup> He notes that jury systems, while removing people from their personal connections with others, include them in decision-making bodies with strangers with whom they are formally equal—a practice that is inconsistent with typical patterns of social

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<sup>160</sup> Hoffmeister, *supra* note 7.

<sup>161</sup> Patrick W. Border, *Jury Trial, Korean Style*, 12 HAW. B. J. 27-28 (Aug. 2008).

<sup>162</sup> Decision of February 12, 2008 (2008Gohap7) (Daegu D. Ct.).

<sup>163</sup> *Id.* at 2.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 5.

<sup>166</sup> *Id.* at 4-5.

<sup>167</sup> PARK ET AL., *supra* note 25, at 118.

<sup>168</sup> Munger, *supra* note 3, at 468-69.

interaction in some Asian nations such as Thailand.<sup>169</sup> The same principle could be applied to Korea.

In close-knit local communities where people share a common mentality, a jury verdict may be based on regional consciousness rather than on more objective legal criteria. Several observers have warned of problems in advancing regional power allocation in the judiciary, in parallel with the executive branch.<sup>170</sup> They have suggested that the jury system is better suited to an “anonymous society” than to an “acquaintance society” and should, therefore, first be introduced in big cities rather than in rural communities.<sup>171</sup>

#### D. *Simultaneous Verdict Determination and Sentencing*

In a Korean jury trial, jurors determine the verdict as well as the sentence.<sup>172</sup> This is one of the most striking differences between the Korean and the U.S. model, even though the overall procedure is modeled on that of the United States. This difference creates unintended evidentiary problems.

In a bench trial, issues of relevancy or admissibility of evidence do not create a serious problem because the judge can consider all evidence presented and independently make determinations. Lay participation, however, completely alters the process.

In Korean jury trials, procedures for verdict determination and sentencing are not separately managed. Therefore, 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, whether the defendant was carrying a dangerous weapon, the number of blows causing the bodily injury, or the defendant’s prior criminal record—may influence the jurors’ ruling on the facts. This evidence also affects the

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<sup>169</sup> *Id.* at 469.

<sup>170</sup> Jong Cheol Kim, *Toronmun: Gukmine uihan jaepan: Hangukeseoeui chamsim baesimdeui ganeungseong* [Comment: Trial by Lay People: The Possibility of Lay Assessor and the Jury System in Korea], 25 BEOPGWA SAHOE [L. & SOC’Y] 103, 105 (2003).

<sup>171</sup> Woo Cheol Shin, *Gukminui hyeongsajaepan chamyee gwahan beopryule daehan gwangyeon* [Some Thoughts on the Bill of Lay Participation in Criminal Trials], 31 BEOPGWA SAHOE [L. & SOC’Y] 109, 129 (2006).

<sup>172</sup> The Act, art. 46(4).

concentrative nature and the effective management of the court proceeding.<sup>173</sup> Moreover, any failed defenses raised by the defendant may psychologically affect lay jurors such that a guilty verdict may also negatively affect the sentencing phase.<sup>174</sup> Thus, it is worth considering whether dividing jury trials into two separate phases, one to determine the verdict and the other for sentencing, is a better approach.

### E. *Implications for Criminal Procedure Reform*

Article 312(3) of the CPC provides that police dossiers (i.e., reports) shall not be used as evidence if the defendant or his attorney contests the contents of the dossiers on the grounds that they do not match what the defendant stated during the interrogation.<sup>175</sup> Normally, the court accepts the indictment and the evidence produced by the public prosecutor. A jury trial, however, allows parties to participate in oral arguments so as to address the “trial by dossiers” [*joseojaepan*] situation in which truth-finding depends heavily on the dossiers submitted by parties rather than on cross-examinations in the courtroom. Since the jurors do not read written evidence such as dossiers, their influence at trial has been diminished.

Prior to the new rules under the CPC, the court conducted proceedings in accordance with the judges’ schedules, holding sessions separately in two-week intervals. These sessions took approximately two months to conclude. Pretrial preparatory conferences were rarely conducted. In addition, defense counsel was not able to review the evidence until after the public prosecutor presented it in court. In sum, the court generally did not recognize the discovery process.

Under the new rules, however, the ways the court conducts proceedings are expected to change. The new rules require prosecutors to disclose information. Defendants or their attorneys have the right, once the prosecution has filed a case, to review or copy the documents or materials that prosecutors have kept regarding the case, including the documents they will submit as evidence.<sup>176</sup> Defense attorneys must also

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<sup>173</sup> PARK ET AL., *supra* note 25, at 310.

<sup>174</sup> Shin, *supra* note 171, at 126.

<sup>175</sup> The CPC, art. 312(3).

<sup>176</sup> *Id.* art. 266-3(1).

deliver materials related to the defendant's alibi or insanity defenses.<sup>177</sup> Except in the case of unavoidable circumstances, if a trial requires two or more days to complete, it should be held on consecutive days.<sup>178</sup>

Improvements to processes such as oral proceedings, adjudication based on evidence, and discovery are all part of the revolution in criminal procedure and must be realized regardless of the introduction of jury trials. These goals, however, were rarely realized in bench trials. Thus, the jury trial system is significant because it will, even if in a limited scope, help bring about these changes in Korea's criminal procedure.<sup>179</sup> It will be very difficult to say that these principles apply only to jury trials. Once they are firmly incorporated in jury trials, the spillover effect will influence all other cases.

#### F. *Empirical Jury Studies Enhancement*

The introduction of the jury system has opened possibilities for empirical research on judicial decision-making. Even before the Act, several scholars conducted mock jury studies to examine how citizens understand new and complicated legal terms when they confront them for the first time and how professional and lay judges communicate within a mixed tribunal. For example, one study found that anchors influenced the decisions of both actual judges and mock juries composed of college students.<sup>180</sup> The study also found that biases, as determined by the anchoring heuristic, were more pronounced in the decisions of the mock jury groups than in the decisions of the actual judges.<sup>181</sup>

In another study, one official jury and two shadow juries convened in a mock trial.<sup>182</sup> Despite the initial vote splits at the beginning of deliberation, all three juries reached unanimous verdicts of acquittal at

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<sup>177</sup> *Id.* art. 266-11.

<sup>178</sup> *Id.* arts. 267-2(2).

<sup>179</sup> Han, *supra* note 15, at 701.

<sup>180</sup> Kwang B. Park, Sang Joon Kim & Mi Young Han, *Effects of Cognitive Heuristics on the Decisions of Actual Judges and Mock Jury Groups for Simulated Trial Issues*, 11 KOR. J. PSYCHOL. & SOC. ISS. 59 (2005).

<sup>181</sup> *Id.* at 80.

<sup>182</sup> Kwang P. Park et al., *Social Conformity and Cognitive Conversion During Jury Deliberations: A Content Analysis of Deliberation Arguments in the First Officially Simulated Jury Trial in Korea*, 19 KOR. J. SOC. & PERS. PSYCHOL. 1, 6 (2005).

the end.<sup>183</sup> The study concluded that the mock jurors reached unanimous verdicts not because the minority jurors capitulated to social pressure, but because they acquired reasonable doubt about the guilt of the defendant based on the convincing arguments of the majority jurors.<sup>184</sup>

Legal and psychological scholars have conducted many empirical studies using mock juries. Because the National Court Administration is willing to support such studies, the general atmosphere for conducting these studies is ripe. In addition, all aspects of the trials are currently recorded or videotaped, with the exception of jury deliberations.<sup>185</sup>

A number of intriguing studies based on methodologies other than psychological are also being conducted. For example, one study is an ethnographic study that follows all of the jury trials, observing and analyzing the speech strategies each participant employs.<sup>186</sup> The small number of jury trials and their short (one-day) duration create a supportive research environment for such a study.

Judge-jury agreement is also a promising area for empirical inquiry. These studies are greatly needed due to the mismatch between advisory jury verdicts and court judgments, which will create a problem if the Korean legislature decides to make jury verdicts binding. If many cases are mismatched, the effectiveness of the jury trial will be put into question. What legal or nonlegal factors have contributed to such mismatches is an issue that empirical jury studies are expected to illuminate.

## V. CONCLUSION

The introduction of jury trials will allow lay people to directly contribute to core judicial decision-making. The new system is expected to enhance the democratic legitimacy of trials by improving the transparency of the judicial process, thereby strengthening the public's faith in judicial decisions. Ultimately, the jury system may promote the

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<sup>183</sup> *Id.* at 7.

<sup>184</sup> *Id.* at 14, 16.

<sup>185</sup> The Act, art. 40(1).

<sup>186</sup> Jae-Hyup Lee, *A Legal Anthropological Study on Cultural and Interactive Aspects of People's Participation in Criminal Trials* (Korea Research Foundation Grant KRF-2008-327-B00665, 2009) (ongoing research, on file with author).

“legal frame of mind” and a culture of rational decision-making among the general public.<sup>187</sup>

The existing system of contention and arguments projected toward the bench will change to a system where the parties present their cases to the jury in a lucid way that is easy to comprehend. To this end, more empirical studies are needed to analyze the differences between jurors’ and judges’ adjudicating processes. In doing so, both oral advocacy techniques and a jury’s decision-making capabilities will improve.

Jury trials in Korea will certainly change fundamental aspects of criminal trials, such as modifying the role of the judge, the trial strategies of both prosecutors and defense attorneys, and the evidentiary rules that are applicable to court proceedings. Thus, the initial five-year experimental period will be critical in building a new basis.

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<sup>187</sup> An ongoing debate among Korean socio-legal scholars is how to define the legal consciousness of Koreans. Earlier generations of scholars such as Pyong-choon Hahm characterized Koreans to be affective, harmony-oriented, and dispute averse, and his thesis was widely known to western scholars. See generally PYONG-CHOON HAHM, *KOREAN JURISPRUDENCE, POLITICS, AND CULTURE* (1986). Later scholars questioned his methodologies or dismissed his thesis altogether. For a balanced assessment of Hahm’s thesis, see generally Chulwoo Lee, *Talking About Korean Legal Culture: A Critical Review of the Discursive Production of Legal Culture in Korea*, 38(3) *KOR. J.*, Autumn 1998, at 45. Whether the jury trial experience reinforces or changes the legal consciousness of Koreans as demonstrated in these studies will be an interesting research question.