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Toward Democracy in Criminal Procedure: The Significance & Limitation of Citizen Participation in Criminal Trials in an Attempt to Accomplish Democracy in Criminal Justice in Korea*

SOONMIN KWON**

Core principles of democracy are important not only in executive and legislative functions, but they are also significant to criminal adjudications. Many countries permit lay citizens to participate in fact-finding and/or sentencing in their criminal justice systems. When a lay person is allowed to judge whether a citizen has violated criminal law, direct democracy is incorporated into criminal justice, and the scope of democracy generally is expanded. Historically, the jury system has evolved as a legal means of expanding the freedom of citizens against political oppression by the state.

The use of citizen juries in criminal proceedings takes fact-finding from professional judges and gives it to private citizens. Those lay jurors reflect the opinions of the members of society, which may be disregarded by professional judges who seek to further governmental interests. The recent movement to allow citizen participation in criminal trials in Korea seeks to fulfill the above purpose. To that end, various improvement strategies are needed to revitalize the system to better accomplish the stated goals.

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I. INTRODUCTION

As modern states embrace the ideology of political democracy, we can determine the extent to which a country has become democratized by examining its criminal law and criminal procedures. Both are yardsticks by which the democratic political maturity of the country can be measured.¹ The extent to which a country has guaranteed the rule of law, the presumption of innocence, respect for human rights, and the transparency of the decision-making process, to name a few, arise as key values in determining the degree of democracy a country has attained.² A truly democratic state would not have a

1. J.D. Bae & S.D. Yi, *CRIMINAL PROCEDURE LAW* 6 (Hongmoon Pub 2006).

2. Nicola Lacey, *Criminal Justice and Democratic Systems: Inclusionary and Exclusionary Dynamics in the Institutional Structure of Late Modern Societies*, CTR. FOR EUROPEAN STUDIES WORKING PAPER SERIES #148, at 2 (2007), <http://www.people.fas.harvard.edu/~ces/publications/docs/pdfs/lacey.pdf>; NICOLA LACEY, *THE PRISONERS' DILEMMA, POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* 7 (Cambridge Univ. Press ed., 2007).

criminal justice system that denies these values. As participatory democracy has spread into the political domain, it has also influenced the criminal justice sector. Citizen participation as jurors in criminal justice has become a prevailing global trend beyond the legal culture of Anglo-American common law and its adversary system.

Even though citizen participation as jurors is an important determinant of the democratic maturity of a state, East Asian countries held negative stances on whether movement toward democracy would include direct citizen participation in criminal justice. Eventually, the institution of citizen or lay jurors in criminal cases surfaced in the mid-to-late 2000s in East Asian countries, including Korea and Japan, which had previously kept a distance from the Anglo-American legal tradition of lay jurors.³ The same trend is also seen in several countries on different continents including Russia, Spain, Mexico, and Croatia, all of which utilize systems of citizen participation in the judicial decision-making process.⁴

The hallmarks of inquisitorial, Civil Law litigation, “[i]nvestigation-oriented – not trial-oriented – criminal procedure, less than desirable protection of the human rights of criminal defendants, cozy relationship between the prosecution and the court, unfairness in criminal trial, etc.,” were consistently singled out as shortcomings of criminal justice in Korea.⁵ Some argued with persistence that the most effective method for addressing the criticisms of the criminal justice system of Korea was to permit citizens to directly (participate?) in criminal trials in the capacity of fact-finders, and thereby earn the trust of the general public.⁶ As a result, the Act for Citizen Participation in Criminal Trials (“ACPCT”) was legislatively adopted in 2007, and Korea has enforced citizen participation in criminal trials since 2008. But, the system adopted by Korea reflects authority of the jury, which is significantly reduced and limited in applicability from that of the traditional common law adversarial systems. Jury decisions are not conclusive. Even a unanimous verdict by the lay jury can be rejected by the professional presiding judge. This limited role for citizen participation in trials is very rare in the cases of comparative law. Therefore, the issues of whether this level of citizen involvement is truly conducive to the accomplishment of democracy in justice, and whether democratic legitimacy can be elevated in its true sense through this

3. Lester W. Kiss, *Reviving the Criminal Jury in Japan*, *Law and Contemporary Problems*, 62 LAW & CONTEMP. PROBS. 261, 261-62 (1999).

4. See Nancy S. Marder & Valerie P. Hans, *Introduction to Juries and Lay Participation: American Perspectives and Global Trends*, 90 CHI.-KENT L. REV. 789 (2015); Ethan J. Leib, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 OHIO ST. J. CRIM. L. 629 (2008).

5. Korea Kookmin Daily, col., (Mar. 26, 2003); *Genetic innocent suspicion and honored Chamberlain*, JOONGANG ILBO [JOONGANG DAILY] (Jan. 7, 2007), <http://news.joins.com/article/2558910> (JoongAng comments on current topics).

6. K. W. AHN & I. S. HAN, *JURY AND CIVIL PARTICIPATION IN THE JUDICIARY* 27 (Jipmoon ed., 2005).

system, pose significant subjects of study in terms of legal theory and comparative law.

This Article attempts to examine the significance of democratic principles in criminal justice, (II), and discusses the degree of citizen participation on juries in criminal trials of Korea, (III). It then analyzes the U.S. jury system and the citizen participation in criminal trials in Korea from the perspective of comparative law, (IV). Lastly, this Article reviews how citizen participation in criminal trials in Korea can contribute to upholding democratic values in criminal justice and offers suggestions for improvement through alternatives, (V).

II. SIGNIFICANCE OF THE PRINCIPLES OF DEMOCRACY IN CRIMINAL JUSTICE

A. RELATIONS AND INTERACTION BETWEEN DEMOCRACY AND CRIMINAL JUSTICE

The term democracy comes from the Greek term *dēmokratia*, which, in a basic sense, can be defined as “the power of the people.”⁷ What that precisely means for any modern system varies by era, context, and the perceptions of the author.⁸ Nevertheless, there is a consensus as to certain essential elements that constitute a modern democracy. For example, Nicola Lacey defines democracy as the manifestation of the will of citizens through participation in the decision-making processes of public domains, respect for human rights, and adherence to due process.⁹ Human rights, lay participation, rule of law, and due process emerge as the key values defining democracy. Citizen participation and deliberation constitute highly critical values of a democracy. Yet at the same time, it is effectively impossible in a modern society for lay citizens to exercise their sovereignty directly. Hence, a decision-making process should be built around deliberation and debate rather than simple majority decision in election or voting.¹⁰

7. Josiah Ober, *The Original Meaning of “Democracy”: Capacity to do Things, Not Majority Rule*, PRINCETON/STANFORD WORKING PAPERS IN CLASSICS (Sept. 2007), <https://www.princeton.edu/~pswpc/pdfs/ober/090704.pdf>.

8. MARIJKE MALSCH, *DEMOCRACY IN THE COURTS: LAY PARTICIPATION IN EUROPEAN CRIMINAL JUSTICE SYSTEM* 20 (Mark Findlay et al. ed., 2009).

9. Lacey, *supra* note 2, at 7-10; Janet Moore, *Democracy Enhancement in Criminal Law and Procedure*, 2014 UTAH L. REV. 543, 563-64 (2014).

10. Graham Smith & Corinne Wales, *Citizens’ Juries and Deliberative Democracy*, 48 POLITICAL STUDIES 51, 53 (2000) (deliberation promotes mutual recognition and respect in democratic society).

Adherence to basic democratic principles is critical to ensuring legitimacy of a judicial system. Criminal justice must be dispensed with democratic legitimacy in its procedure and process of applying and enforcing laws.¹¹ Among the most contested issues in the accomplishment of democracy in criminal justice is whether lay citizens must be allowed to participate directly in trials. Countries and their legal systems reflect much difference in their stances on whether to guarantee the participation of lay citizens in legal decision-making processes, such as fact-finding and sentencing.

Criminal justice operates most democratically when citizens face criminal punishment only when they violate established criminal law, enacted by lay citizens or legislators representing them. Those enactments of law should be stated clearly as to be understandable by all citizens. Ex post facto legislation is not permitted. This is the principle of legality (*nulla poena [um crimen] sine lege*). In addition, criminal trials should be conducted by an independent judiciary, separated from other branches of government. In an enlightened modern criminal justice system, the exercise of penal authority by the state can be justified only when lay citizens are principal agents in forming and applying the norms of criminal law governing his/her community.¹² In that way, the object of state-enforced punishment, the defendant, is a member of the same segment of society as the principal agent of determining guilt and punishment penal authority, a lay jury. Nevertheless, unlike the legislative domain where representatives elected by ordinary citizens make laws, it can be said that a jury trial accomplishes direct democracy only when members of community directly play the role of fact finder. When lay citizens make the determination whether an accused has violated criminal law, direct democracy is enhanced in criminal justice. In that way, the scope of democracy is further expanded,¹³ because the thoughts and voices of ordinary citizens are brought to criminal justice and the self-righteousness and bigotry of professional judges can be controlled.¹⁴

Additionally, lay citizen participation in criminal trials is conducive to enforcing democratic values and promoting social integration.¹⁵ It provides for participation of citizens from diverse ethnic groups, many of which may

11. Jenny Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825, 831-32 (2015).

12. Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 549 (1997).

13. Toby S. Goldbach & Valerie P. Hans, *Juries, Lay Judges, and Trials*, 1 ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 2716, 2716-17 (2014) (arguing that lay juries and lay judges support and enhance democratic political institutions).

14. See Valerie P. Hans, *Introduction: Citizens as Legal Decision Makers: An International Perspective*, 40 CORNELL INT'L. L.J. 303, 307-08 (2007) (citizen participation in criminal trials can enhance the legal system's legitimacy and make it more responsive to community values).

15. George C. Harris, *The Communitarian of the Criminal Jury Trial and the Rights of the Accused*, 74 NEB. L. REV. 804, 809-11 (1995).

have been the object of discrimination. That participation brings an important viewpoint and voice to the adjudicatory process. Those persons subject to criminal prosecution can have more confidence that they are not discriminated against or estranged in the application of legal principles and the determination of punishment when deliberative democracy is reflective of a diverse society. All stated, diverse citizen participation in criminal justice contributes to social integration.¹⁶

B. HISTORY OF THE JURY

In Europe during the Middle-Ages, trial by ordeal was the dominant form of dispute resolution until the jury trial later emerged as a more advanced method determining guilt and innocence.¹⁷ The jury trial as introduced by Henry II saw jurors as something akin to an investigative grand jury. Juries became the nearly exclusive means of discovering truth when Henry III banned trials by battle or ordeal.¹⁸ Originally, jurors acted as self-informing investigators and fact finders.¹⁹ Subsequently, as commerce developed and the population increased, jurors no longer had time to search out facts themselves, and juries became compelled to rely on information submitted at trial rather than discovered by themselves. Thus, jury trials evolved to have adversaries prove their cases to the jury with the presentation of evidence, testimony of witnesses tested by cross-examination, and arguments of adversaries.²⁰ Thus, juries became impartial arbiters, instead of self-informing fact finders, and the jury developed over time into the neutral body that it is today.²¹

Equally important, a jury comprised of private citizens served as a means of protecting the freedom of citizens against political oppression by the state. The origin of the right to a jury trial goes back to the concessions made by King John to his nobles in the Magna Carta of 1215.²² The Magna Carta stipulated that criminal punishment not be imposed without a jury trial in which free men were permitted to participate, so as to protect the life and freedom of free men from absolute monarchs. However, the purpose of the Magna Carta was to reassert the right of English noblemen against the king,

16. See generally Robert M. Bloom, *Jury Trials in Japan*, 28 LOY. L.A. INT'L & COMP. L. REV. 35 (2006); AHN & HAN, *supra* note 6, at 161.

17. George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 585-86 (1997).

18. Edward L. Rubin, *Trial by Battle, Trial by Argument*, 57 ARK. L. REV. 261, 273 (2003).

19. Fisher, *supra* note 17, at 593.

20. Rubin, *supra* note 18, at 277-78.

21. Rubin, *supra* note 18, at 278-79.

22. See PHILIP L. REICHEL, *COMPARATIVE CRIMINAL JUSTICE SYSTEM: A TOPICAL APPROACH* 143 (Vernon R. Anthony et al. eds., 6th ed. 2004).

not to grant that right to English people at large.²³ Nevertheless, the development of the jury system overcame the irrationality of trial by battle or ordeal and protected the rights of free men from the oppression of monarchy.

The jury system initiated in the U.K. saw further expansion and development in the colonial United States. Concerns with the rights of the people in regard to state power led to a belief that it was best to divide authorities previously monopolized by the bench and prosecutors who acted in concert. Judges took on the role of neutrals, instructing the jury on the law, resolving questions of the admissibility of evidence, and ensuring a fair process. The parties, as adversaries, initiated actions, gathered evidence independently, presented it at trial, and made legal arguments. Juries comprised of lay citizens were charged with deciding questions of fact and rendering guilty or not guilty decisions.²⁴

Most of the immigrants to the United States fled from the tyranny of the British kings for political and/or religious reasons. It is quite understandable that they did not expect a fair trial from the U.K. when they lived in a royal colony. Hence, the need for the right to a trial by lay citizens independent of the state power was very significant. In part, therefore, the United States incorporated the jury system in its Constitution to prevent retaliation by the U.K. through judicial process and also to ensure fairness in adjudicatory process.²⁵ Given the above, the jury systems adopted by the U.K. and the U.S. were closely related to the freedom, if not survival, of citizens.

Such a history of use of jury trials seems very odd to Korea because Korea regarded the right to be tried by judges, who are independent legal experts not subjugated by the state or government, as the key constituent of fair criminal justice.²⁶ The U.S. Constitution expressly provides for the entitlement of the accused to a jury trial, whereas the Constitution of the Republic of Korea explicitly stipulates the right to be tried by judges.²⁷ That is because Koreans believed from past experience that professional judges, well-versed and professionally trained in legal matters, could be more objective, fair, and free of personal biases than ordinary citizens. For this reason, challenges

23. *Dialogue on the American Jury: We the People in Action, Part I*, AM. BAR ASS'N DIV. FOR PUB. EDUC. 2, http://www.americanbar.org/content/dam/aba/administrative/public_education/resources/dialoguepart1.authcheckdam.pdf (last visited Oct. 11, 2016).

24. See REICHEL, *supra* note 22, at 170.

25. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 872-75 (1994) (discussing that the Sixth Amendment guarantees every federal criminal defendant the right to jury trial, in part, based on the belief that lay juries would act as a wedge against the enforcement of unfair English laws).

26. Stephen C. Thaman, *Criminal Courts and Procedure*, in *COMPARATIVE LAW AND SOCIETY* 241-42 (David S. Clark ed., 2012).

27. DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] art. 27, para. 1 (S. Kor.) (“All citizens have the right to be tried in conformity with the law by judges qualified under the Constitution and the law.”).

arose that maintained lay citizen participation in criminal trials constituted a violation of “the right to receive a trial by judges” guaranteed in the Constitution. These arguments alleged that the Constitutional Court of Korea’s guarantee of determination by judges refers to the right to be judged by legal professionals.²⁸ As a result, basing a guilty or not guilty decision solely on a jury’s verdict would be considered a violation of the guarantee of the Korean Constitution. This is recognized in the Korean ACPCT which authorizes only an advisory role for juries, as described in the following sections herein.²⁹

C. THE RATIONALE FOR THE INSTITUTIONALIZATION OF LAY PARTICIPATION IN CRIMINAL JUSTICE IN KOREA AND CHARACTERISTICS OF THE SYSTEM: DISTRUST TOWARD THE JUDICIAL SYSTEM AND NEED FOR DEMOCRACY IN JUSTICE

It is widely believed that the most significant factors that brought about the 2007 legislative amendments permitting lay citizens to participate as jurors beginning in 2008 were: 1) distrust toward the court and criminal justice grew in the 2000s; and 2) the “National Participation Government,” launched in 2003, that regarded the “participation” of citizens in state governance as one of its key values.³⁰

“The Survey of National Awareness on the Reformation of Judicial System” conducted in the early 2000s by KBS, a public broadcasting station of Korea, as a precursor to its special feature “Let Us Talk about Korean Society,” found that distrust toward criminal justice was ingrained in many Koreans.³¹ Responses to the question, “Are criminal trials in Korea believed to be fair,” found almost seventy percent of all respondents answering in negative terms. Professional judges were also viewed in negative terms. For example, a considerable number of respondents answered that decisions by

28. The Constitutional Court of Korea decided that because the right to be tried by judges, provided by law and in the Constitution, was predicated on trials by professional judges, the right to be tried by lay citizens participating in a trial could not be deemed to be included within the scope of protection for the right to be tried in conformity with Article 27 Paragraph 1 of the Constitution. Constitutional Court [Const. Ct.], 2008 Hun-Ma 12 (consol.), Jan. 26, 2009, (2009 DKCC) (S. Kor.).

29. SUPREME COURT OF KOREA, AN UNDERSTANDING OF CITIZEN PARTICIPATION IN CRIMINAL TRIALS 127 (2007).

30. DAETONGLYUNG JAMOON JUNGCHOK KIHOK WIWONHOE [PRESIDENTIAL COMM’N ON POLICY PLANNING], SABUPJEDO KAEHYUK [JUDICIAL REFORM], CHAMYEO JUNGBOO JUNGCHOK BOGOSEO [POLICY REPORT OF PARTICIPATORY GOVERNMENT] 3 (2008).

31. The survey was conducted, over the phone by KBS, on 1,038 men and women in seven major cities of Korea in 2003. KBS, http://shop.kbs.co.kr/dvd/dvd02_1.html?page=4&category=DVD&category1=SISA&category2=&sub (last visited Oct. 25, 2016).

judges were influenced by money, power, alumni connections or regionalism. In particular, more than seventy percent of the respondents answered that the practice of litigants retaining former high-ranking judges or prosecutors-turned attorneys in order to gain influence in pending cases and sentencing prevailed in and around the judicial system.³² The survey clearly showed that the people did not trust professional judges and criminal justice, thereby casting considerable doubt on the legitimacy of trial justice in Korea.

Further mistrust of the fairness of the criminal trial procedure in Korea came from the practice of courts adopting handwritten notes of prosecutors, as well as other investigative findings. These often included notes of alleged confessions by an accused, which were submitted as evidence to the court. Courts trusted such records more than the statement of the accused denying the alleged confession and handed down guilty verdicts based upon them.³³ Hence, once a suspect was alleged to have made a confession during investigation, the accused had little choice but to refrain from denying the confession in hope of more favorable sentencing rather than arguing his/her innocence to the judge.³⁴ These judicial practices infringe on the right of the accused to be tried fairly, and disrupt the principle of checks and balances between the public prosecutor and the court. Most significantly, this practice encourages, if not rewards, illegal investigative practices in order to elicit coerced confessions.³⁵

Legal scholars and lawyers began to suggest in the 2000s that the principle of democracy be enhanced in criminal justice in order to deal with these serious issues. The Presidential Committee on Judicial Reform (“PCJR”), staffed with judges, prosecutors, professors and jurists, consolidated various discussions on citizen participation in judicial procedure and drafted a bill focused on the participation of lay citizens in criminal trials as jurors. With some revisions, the bill passed the National Assembly on April 30, 2007,³⁶

32. Such a practice is referred to as “Jeon Gwan Ye Woo” in Korea, which is equivalent to the metaphor of “revolving door.” Koreans thought that because attorneys with influence require significantly higher fees, only the rich could afford to engage such attorneys and thereby receive favorable treatment at trial, thus, rendering the trial process unfair due to the advantage gained by persons of means. Nine out of ten lawyers in Korea also believe that such a practice still prevails in the criminal justice of Korea. See *9 out of 10 Lawyers Named “Chamberlain Still Honored”*, JOONGANG ILBO [JOONGANG DAILY] (June 12, 2013) <http://news.joins.com/article/11775826>.

33. See *Korean Department of Justice in 2004*, DONGA ILBO [DONGA DAILY], <http://news.donga.com/3/all/20040802/8090363/1> (last modified Oct. 4, 2009).

34. Bloom, *supra* note 16, at 37-38.

35. See Kim. H.C., Col. KOREA CHOSUN DAILY, Apr. 29, 2005 (arguing it is time to put an end to the practice of “trial based on interrogation record written by prosecutor”). The Supreme Court of Korea also tried to overcome these judicial practices by overturning its judicial precedent. See Supreme Court [S. Ct.], 2005Do1849, June 10, 2005 (S. Kor.).

36. SUPREME COURT OF KOREA, *supra* note 29, at 12-13.

resulting in the promulgation of the Korean ACPCT on June 1, 2007. It became effective on January 1, 2008.³⁷

As a result, lay citizens were allowed to participate in the fact-finding and sentencing of criminal trials for the first time in the history of Korea. Previously, from the time of the inauguration of the first government in the Republic of Korea, criminal trials had been operated only by professional judges, and Korea had no institution for allowing lay citizens to participate in criminal trials. During this time, the concept of citizen participation in criminal justice was frequently discussed in the academic community and among legal practitioners. But it was difficult to bring about the needed legislative change. President Roh Moo-hyun's administration (2003-2008), which was inaugurated in 2004, defined "Democracy Shared with the People" as one of its key national policy initiatives and attempted to incorporate the ideology of democracy in the criminal justice. This strong commitment helped bring about the needed revisions adopted subsequently in the ACPCT.

III. ACPCT AS AN ATTEMPT TO BOLSTER UP DEMOCRACY IN CRIMINAL JUSTICE

Until recently, juries were not a part of criminal justice in East Asia, but for two exceptions. Hong Kong, as a British colony, inherited the legal traditions of the U.K., including the use of juries.³⁸ In the Japanese judicial system, juries were not used and criminal trials were the exclusive domain of legal professionals for seventy years, except for a brief time at the end of World War II when Japan operated a jury system temporarily under the U.S. military rule.³⁹ In the mid-2000s, Japan and the Republic of Korea saw legislative reforms that allowed ordinary citizens to participate in criminal justice.⁴⁰

The inclusion of citizen participation came about because criminal justice should be governed by the principles of democracy, and no other method

37. SUPREME COURT OF KOREA, *supra* note 29, at 12-13.

38. Kiss, *supra* note 3.

39. Matthew J. Wilson, *Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time*, 33 FORDHAM INT'L L.J. 487, 488-89 (2010).

40. See Saiban'in no sanku suru keiji saiban ni kansuru horitsu [Act Concerning Participation of Lay Assessors in Criminal Trials], Law No. 63 of 2004, art. 3 (Japan) (Japan revived citizen participation in criminal trials pursuant to the Act Concerning Participation of Lay Assessors in Criminal Trials (Saiban-in Ho or Japanese Lay Assessors Trial) in 2009); Rosa Kim, *A Benchmark in Asian Judicial Reform: The New Korean Jury System*, 38:2 SUFFOLK TRANSNAT'L L. REV. 297-301 (2015).

could better ensure democratic legitimacy than direct participation of lay citizens. In Japan, the ACPCT clearly states that this institution is intended to bolster democratic legitimacy and confidence in judicial process.⁴¹

A. HIGHLIGHTS OF THE ACPCT

The following section briefly describes the key features of the ACPCT of Korea, with a focus on differences from the U.S. jury system.

1. *Condition for ACPCT: Application of Defendant & Court Decision for Exclusion*

Citizen Participation (“CP”) in criminal trials is limited in application to cases involving the most serious crimes.⁴² It may be initiated only by a written application of the defendant. The court or prosecutor cannot initiate CP pursuant to the current provisions. Corruption cases of *chaebol* owners, family owned business conglomerates, or political figures have long been criticized because of favorable treatment given the defendants by professional judges. The use of citizen juries could inject fairness into these prosecutions. At present that will not happen, because these defendants are unlikely to apply for CP, and a case cannot be referred to CP unless the defendant makes the request. These are cases in which civil participation in criminal trials is essential for fairness in trial. Nevertheless, because they are effectively rendered ineligible for CP, the purpose of the institution, improvement of democratic legitimacy in criminal justice, is compromised.

In situations where a prosecution is eligible for CP and the defendant applies for it, Article 9 of the ACPCT allows the court to decide to exclude the case from CP.⁴³ As a result, for seven years and six months from January 2008 to June 2015 during which the ACPCT was in effect, applications for CP were submitted for 3,796 cases, or 4.1% of all eligible cases, and only

41. Saiban'in no sanku suru keiji saiban ni kansuru horitsu [Act Concerning Participation of Lay Assessors in Criminal Trials], Law No. 63 of 2004, art. 1. The purpose of ACPCT is to clarify the power and responsibilities of citizens who take part in criminal trials under the participatory trial system that is hereby adopted to raise democratic legitimacy and confidence in judicial process and to provide for special cases for trial procedure and other necessary matters. *Id.* at art. 1.

42. See Gukminui hyeongsajaepan chamyoe gwanhwan beopryul [Act for Citizen Participation in Criminal Trials], Act No. 8495, June 1, 2007, amended by Act No. 11155, Jan. 17, 2012, art. 5 (S. Kor.). The Act only applies to cases in which a defendant is charged with a crime punishable by a possible sentence of more than one year of imprisonment. Lesser crimes are not eligible cases for participatory trial. *Id.*

43. See *id.* at art. 9.

1,556 cases were referred to CP.⁴⁴ An overwhelming number of defendants did not apply for CP. When defendants requested CP, the court excluded the cases in spite of a defendant's application on the assumption that CP was not appropriate, or a defendant withdrew his/her application.⁴⁵

2. *The Scope and Effect of Jury's Verdict under the ACPCT*

The ACPCT gives jurors the power to find facts and present opinions on the application of law, as well as gives opinions on punishment.⁴⁶ Jurors deliberate the guilt or innocence of the accused after hearing the evidence and arguments of counsel and deliver a verdict if they reach a unanimous decision. The verdict of the jury on guilt and opinion on sentencing is not binding on the court.⁴⁷ The presiding judge notifies the defendant of the results of the jury verdict at the time of sentencing and explains to the defendant the reasons why the sentence pronounced by the judge differs from the jury's verdict, if such is the case.⁴⁸ A jury verdict in Korea carries nothing but advisory effects.

In addition to the limited times that CP is invoked by defendants or allowed by judges, some have also argued recently that cases of election law violations should be excluded from the scope of the ACPCT. Their argument is that jurors would render biased decisions because of their political propensity or regionalism.⁴⁹ These arguments are intended to reduce the scope of eligibility for CP as much as possible.⁵⁰

In the face of these vulnerabilities of the jury system in Korea, a revision bill was proposed in 2013 by the Ministry of Justice (MJ) of Korea and the

44. *Jury Verdict Graded 'A' with Concordance Rate of 93% with Bench Decisions*, JOONGANG ILBO [JOONGANG DAILY] (Sept. 12, 2015), <http://news.joins.com/article/18648603>.

45. *Id.*; see ACPCT, *supra* note 40, at art. 8-9.

46. See ACPCT, *supra* note 40, at art. 12, ¶ 1.

47. See ACPCT, *supra* note 40, at art. 46, ¶ 5.

48. See ACPCT, *supra* note 40, at art. 48, ¶ 4; ACPCT, *supra* note 40, at art. 49 ¶ 2.

49. See [Editorial] *Torn Between the Innocent and the Verdict, 'Andohyeon Conviction'*, DONGA ILBO [DONGA DAILY] (Nov. 8, 2013), <http://news.donga.com/3/all/20131108/58758332/1>. This criticism is ironic given that the public outrage against lenient verdicts of the court, for election law cases or other criminal cases involving highly influential politicians was one of the enablers of the ACPCT.

50. Revision bill of the Ministry of Justice 2013 actually excludes violating case of the Public Election Act from the coverage of ACPCT case. See Article 5 paragraphs 1 of this revision bill. MINISTRY OF JUSTICE OF KOREA, http://www.moj.go.kr/HP/COM/bbs_04/ShowData.do (last visited Oct. 25, 2016).

Committee on Civil Participation in Judiciary (CCPJ), affiliated with the Supreme Court of Korea. It grants *de facto* binding power to the jury verdict.⁵¹ It creates a duty on the bench to respect a jury's verdict unless it constitutes a violation of the constitution, again allowing the court to not be bound by the jury's decision.⁵²

3. *Appeal Against Jury Decision*

The ACPCT does not address whether jury decisions are appealable or not. The Supreme Court of Korea has sent mixed signals in a case where the appellate court delivered a not guilty verdict. At trial, the jurors handed down a unanimous not guilty verdict, and the judge accepted the verdict. The Supreme Court stated:

In a case where the jury participated in the entire process of witness questioning and a unanimous verdict of acquittal was reached by the jury, with the findings of fact, adoption of evidence and credibility of witness statements corresponds to the trial bench's belief, and is adopted as it is, the first instance court's determination as to the adoption of evidence such as credibility of witness statement and fact-finding should be respected all the more in light of the purport and spirit of the direct and open trial priority unless sufficient, convincing and clearly opposite evidences appear through evidence questioning of the appellate court.⁵³

This means that the appellate court should not overturn the original decision that coincided with the jury's verdict unless there is clear evidence. However, the Korean Supreme Court decision implies at the same time that even after jurors delivered a unanimous not guilty verdict in favor of the defendant, it is not unlawful for the appellate court to deliver a guilty verdict as long as sufficient and compelling circumstances that clearly refute the previous not guilty verdict are found in evidence examination of the appellate trial.

51. See Press Release, Nat'l Participation Decision Final Format Decision, COURT OF KOREA (Jan. 25, 2013), <http://www.scourt.go.kr/portal/news/NewsViewAction.work?seqnum=821&gubun=6&searchOption=&searchWord=%C0%CE%BB%E7> (explaining the *de facto* binding power of a jury verdict).

52. The 2013 revision bills of ACPCT are still pending.

53. See Supreme Court [S. Ct.], 2009Do14065, Mar. 25, 2010 (S. Kor.).

B. CHARACTERISTICS OF CITIZEN PARTICIPATION

The Korean CP system is similar to the Anglo-American jury system in that lay citizens participate as fact finders. The CP system also has characteristics of the mixed tribunal system, in that jurors not only render verdicts of guilty or not guilty, but they also participate in sentencing. However, the Korean system is also highly unique when compared with any other comparable systems in other countries because the jury's guilty or not guilty decision does not bind the decision of judges.

1. *Is it a Jury System or Mixed Tribunal System?*

Lay citizen participation as jurors in criminal trials exists in both the Anglo-American jury system and the European mixed tribunal system in Germany.⁵⁴ The main differences between the jury system and the mixed tribunal system are whether the jurors only participate in fact-finding, or whether jurors participate in sentencing as well. Additionally, the systems differ in whether jurors make decisions independently or in discussion with professional judges. In a jury system, juries deliver guilty or not guilty verdicts independently of judges, whereas in a mixed tribunal, lay jurors have the same authorities as those of professional judges.⁵⁵ They deliver guilty or not guilty decisions and perform sentencing in collaboration with the professional judges.⁵⁶ The ACPCT of Korea has allowed citizen participation in criminal trials as jurors, but it does not have exclusive traits of either system. Instead, it shares the characteristics of both a jury system and a mixed tribunal system.⁵⁷ The characteristics of the various systems are set forth in the following table:

TABLE 1. COMPARATIVE ANALYSIS OF CITIZEN PARTICIPATION CHARACTERISTICS

| Jury System-Analogous Characteristics | Mixed Tribunal-Analogous Characteristics | Characteristics Found in Neither Systems |
|--|---|---|
| ① The system seeks unanimous verdict by jurors | ① If jurors fail to reach a unanimous decision, judge's opinion is heard and verdict is delivered by majority decision. | ① Jury's decision carry only advisory effects. |

54. Leib, *supra* note 4, at 633.

55. REICHEL, *supra* note 22, at 256.

56. In this mixed tribunal, private citizens and professional judges combine into a single body responsible for deciding questions of fact and law. See REICHEL, *supra* note 22, at 256-57.

57. SUPREME COURT OF KOREA, *supra* note 29, at 14.

| Jury System-Analogous Characteristics | Mixed Tribunal-Analogous Characteristics | Characteristics Found in Neither Systems |
|--|---|--|
| ② Judges do not intervene in guilty-or-not-guilty verdict of the jury. | ② The jury is allowed to present opinion to judges concerning sentencing. | ② Jury's decision is changeable in an appellate trial. |
| ③ Civil representatives are referred to as jurors. ④ As far as sentencing is concerned, the jury is allowed only to present their opinion, but are barred from participating in sentencing decisions. | ③ The jury may hear opinions of judges who take part in the trial when a majority of jurors request to do so. | N/A |

2. *The Court's Intervention in Jury's Deliberation & Verdict*

CP jurors are very limited in their authority and role when compared with U.S. jurors. As described above, judges are not bound by jury's verdicts in CP trials. The U.S. jury system generally requires unanimous verdicts; jury verdicts have binding power, guilty verdicts by the jury are not limited on appeal, and not guilty verdicts are not appealable.⁵⁸ In mixed tribunal systems, where lay jurors and professional judges deliberate together and reach

58. See Bloom, *supra* note 16, at 40 (explaining that the jury verdict is not subject to appeal by the state in criminal prosecution because of double jeopardy protection in the Fifth Amendment to the United States Constitution). The Fifth Amendment states, in part:

No person shall be held to answer for any capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

decisions on guilt and sentencing by a majority vote, it is not possible to ascertain the extent to which a lay juror's decision was influenced or changed by a professional judge or overturned on appeal. The Japanese Lay Assessors Trial Act, which introduced civil participation in criminal trials at the same time as Korea, allows a prosecutor or defendant to appeal a majority decision delivered by lay jurors and professional judges as does the ACPCT in Korea.⁵⁹ But the Japanese system is different from its Korean counterpart in that majority decisions delivered by lay assessors/jurors outside of involvement of professional judges have binding power.⁶⁰

In a Japanese Lay Assessors Trial, professional judges and lay judges participate in discussion for verdict with equal authority. The lay assessors/jurors outnumber the professional judges, and the binding power of their verdict is recognized. Some in Japan have argued that the binding power was unconstitutional, but the Japanese Supreme Court ruled in favor of its constitutionality.⁶¹ Korea and Japan represent the sole cases where the constitutionality of ordinary citizens' participation in criminal justice as jurors has been challenged, and only Korea does not recognize the binding power of the jury's verdict.

Unlike other countries, the Korean ACPCT allows professional judges to reassess the lay jury's verdict. It is believed this is attributable to low confidence of Korean legislators and legal professionals in the jury, and they mistrust the lay jury's ability to make proper findings of fact. Data suggests otherwise. Looking at 1,556 jury verdicts and bench verdicts where CP was applied from January 2008 and June 2015, the concordance rate was 92.8% (1,446 cases).⁶² The concordance rate between jury and bench in sentencing decisions, where the difference between the jury's sentencing opinion and final sentencing decision was one year or less, was 89.3%.⁶³ This concordance rate is higher than those of other countries.

Allowing professional judges to change a lay jury's verdict may be a compromise necessary to avoid conflict with the right to be tried by judges as guaranteed in the Constitution of Korea,⁶⁴ but as a result, CP has become a system in which professional judges educate and assess lay jurors. But, in

U.S. CONST. amend. V (emphasis added).

59. Ryo Ogiso, *Comparative Study of Korea and Japanese Trial by Jury*, 26 SUNGKYUNKWAN L. REV. 98 (2014).

60. On May 21, 2009, Japan adopted the Act Concerning Participation of Lay Assessors in Criminal Trials, providing for citizen participation in criminal trials. In this system, professional judges collaborate with ordinary citizens in determining innocence or guilt, and also in determining a convicted defendant's sentence. See Wilson, *supra* note 39, at 566.

61. Ogiso, *supra* note 59, at 102.

62. See JOONGANG DAILY, *supra* note 44.

63. JOONGANG DAILY, *supra* note 44.

64. See DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] art. 27, para. 1 (S. Kor.).

its truest sense, a criminal justice system that utilizes lay juries should operate in the opposite fashion, with juries providing a check on the power of professional judges. Furthermore, CP allows judges to interject their opinions in the jury deliberation process when a majority of jurors so request. If the jury fails to reach a unanimous verdict, guilty or not guilty, the jury then hears the opinions of judges who take part in the trial before delivering a verdict.⁶⁵ Although it is not a mixed tribunal system, CP accords judges a broad window of opportunities to present opinions and intervene in the jury's deliberation process.

3. *Entitlement of a Defendant to Citizen Participation and Restrictions Thereto*

CP is initiated upon application of a defendant. Without such an application, CP cannot be commenced. Yet, even with a defendant's application, the court may decide not to agree to initiate CP.⁶⁶ The ACPCT provides reasons to not apply CP procedure and allows the court the discretion to determine whether any of the reasons not to initiate CP are satisfied.⁶⁷

C. COMPARISON & ANALYSIS

How truly CP conforms to principles of democracy can be better understood if it is compared with the jury system of the United States, where the jury system is most actively operated, and to the lay assessor's trial system of Japan, one of the Asian countries that implemented a system analogous to the Korean CP system at a similar time.

TABLE 2: COMPARISON OF CITIZEN PARTICIPATION IN CRIMINAL TRIALS IN USA, JAPAN, AND KOREA

| | USA (Federal Law) | Japan | Korea |
|---------------------|------------------------------|--|-------------------------|
| Option of defendant | Can choose to apply for | Cannot choose to apply for Cannot choose to give up | Can choose to apply for |

65. See ACPCT, *supra* note 42, at art. 13.

66. See ACPCT, *supra* note 42, at art. 9.

67. ACPCT, *supra* note 42, at art. 9.

| | USA (Federal Law) | Japan | Korea |
|--|-------------------------------------|---|---|
| Condition for initiation | All cases except for petty offenses | Eligible cases \wedge Reasons for inapplicability not existing | Eligible cases ⁶⁸ \wedge Defendant's application \wedge Reasons for inapplicability not existing |
| Deliberations with Professional judges | None | Full-scale | Limited |
| Scope of verdict | Fact-finding (verdict) | Fact-finding (verdict) + Sentencing (verdict) | Fact-finding (verdict) + Sentencing (presentation of opinion) |
| Verdict delivered by | Unanimity | Majority among lay assessors and professional judges | Unanimity for the first discussion and majority for the second discussion |

68. According to Article 5 of ACPCT:

[A] case enumerated in any of the following subparagraphs shall be eligible for a participatory trial:

1. Cases falling under the jurisdiction of a collegiate panel under Article 32 (1) (excluding sub-paragraphs 2 and 5) of the Court Organization Act;
2. Cases of an attempt of, abetment, aiding, preparation, or conspiracy to commit an offense among cases falling under subparagraph 1;
3. Cases falling under subparagraph 1 or 2, and those falling under Article 11 of the Criminal Procedure Act, which are consolidated for a trial as a single case.

ACPCT, *supra* note 42, at art. 5.

| | USA (Federal Law) | Japan | Korea |
|--------------------|------------------------------|-----------------|-----------------|
| Effect of verdict | Binding power | Binding power | Advisory effect |
| Appeal for verdict | Cannot be appealed | Can be appealed | Can be appealed |

1. Coverage: Application, Renunciation & Exclusion

The United States recognizes the right to be tried by jury not only in criminal cases but also in civil cases.⁶⁹ Such a right is constitutionally mandated in federal cases and required by constitution or statute in all of the states.⁷⁰ Except for very minor offenses, defendants in all criminal cases are entitled to jury trials.⁷¹ In Korea, charges constituting serious crimes over a certain threshold are covered by the ACPCT, although certain specified cases are deemed ineligible for CP and exclude lay citizen participation as jurors.⁷²

69. See U.S. CONST. art. III, § 2 (“The trial of all crimes, except in cases of impeachment, shall be by jury . . .”). Additionally, the Sixth Amendment of the U.S. Constitution states,

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI, art. III, § 2 (emphasis added).

70. See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

71. See WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* 1034-37 (West ed., 4th ed. 2004) (after the *Duncan* case, most U.S. states recognize the entitlement to jury trial in cases where imprisonment of six months or longer can be sentenced).

72. According to Article 9 of ACPCT,

A court may decide not to proceed . . . in any of the following cases:

1. If a juror, an alternate juror, or a prospective juror has difficulties in attending a trial or is unlikely to be able to duly perform his/her duties under this Act because of a violation or

The statutory language describing the reasons for exclusion states, “If it is considered inappropriate to proceed towards CP due to any other cause or event.” This language is overly far-reaching and ambiguous, and thus it makes it likely that there will be excessive infringement upon the defendant’s entitlement to CP. Japan, which has a judicial tradition similar to that of Korea, also provides reasons for exclusion of citizen juries in certain trials, but the exclusions are not as broad nor as ambiguous.⁷³

The U.S. jury system provides defendants not only the right to be tried by jury, but also, an option to renounce the right to a jury trial.⁷⁴ However, in most state and federal cases, defendants need the prosecutor’s consent and court’s approval to renounce their right to a jury trial.⁷⁵ In Korea, defendants are entitled to apply for a jury trial and renounce the right as well. In such event, a CP trial is not held. In the case of Japan, if a case is eligible for lay assessors trial, a lay assessors trial is held irrespective of the intention of defendant.⁷⁶ A defendant is not entitled to renounce their right to such a trial.

likely violation of the life, body, or property of the juror, alternate juror, prospective juror, or any of his/her family members;

2. If some of the accomplices do not want a participatory trial and it is considered difficult to proceed to a participatory trial;
3. If a victim of any offence prescribed in Article 2 of the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes is committed, or his/her legal representative does not want a participatory trial; or
4. If it is considered inappropriate to proceed to a participatory trial due to any other cause or event.

ACPCT, *supra* note 42, at art. 9.

73. For example, Japan expressly stipulates reasons for exclusion of lay assessor trial by stating, “If it is difficult for lay judges to attend trials out of concern for harm or impossible to perform their duties in a fair manner, or it is difficult to recruit lay judges, etc.” See ACPCT, *supra* note 40. Kwon S.M., *A Study on Application and Exclusion of Citizen Participation in Criminal Trials*, 38 DANKOOK L. REV. 177 (2014).

74. *Patton v. United States*, 281 U.S. 276, 300-01 (1930), *abrogated by Williams v. Florida*, 399 U.S. 78 (1970).

75. See *e.g.*, *Singer v. United States*, 380 U.S. 24 (1965); *Allredge v. Indiana*, 156 N.E.2d 888 (Ind. 1959); *Palmer v. State*, 25 S.E.2d 295 (Ga. 1943); see also FED. R. CRIM. P. 23(a).

76. The Japanese lay person serves as a lay assessor in:
- [C]riminal trials involving serious crimes, such as homicide, robbery resulting in bodily injury or death, bodily injury resulting in death, unsafe driving resulting in death, arson of an inhabited building, kidnapping for ransom, abandonment of parental responsibilities resulting in the death of a child, as well as certain rape, drug, and counterfeiting offenses.

See Wilson, *supra* note 39.

The CP system is the only system that prevents initiation of civil participation trial unconditionally when a defendant does not want it.

2. *Intervention by Professional Judges*

The U.S. jury system does not permit judges to participate in jury deliberation, and judges may not even comment on the determination of guilt or innocence. CP allows professional judges engaged in the case to state their opinions to the lay jury, both before and after the verdict is delivered. Hence, Korean judges are allowed to intervene more freely than judges in the U.S. jury system. In a Japanese trial with lay assessors, the law requires lay assessors and professional judges to collaborate and together deliver a verdict of guilty or innocence and sentencing decisions by majority vote.⁷⁷ The collaboration between lay assessors and professional judges is mandatory, and the Japanese system allows for the broadest room for intervention by professional judges among the three countries. Yet, the system is designed to allow lay assessors to outnumber professional judges in deliberation in order to prevent the professional judges from dominating the lay assessors.

3. *Coverage & Effect of Verdict*

In the U.S. jury system, the jury delivers a verdict only on the question of guilty or not guilty. In Japan, lay assessors make decisions that include both findings of fact and sentencing.⁷⁸ Korean jurors have the right to deliver a verdict only in connection with findings of fact. They may express only opinions concerning sentencing. The participation of lay persons in criminal trials in these three countries is broadest in Japan. In addition, both the U.S. and Japan recognize the binding power of decisions delivered by lay jurors, whereas Korea recognizes only an advisory effect for the verdicts of lay juries. The presiding judge in Korea may deliver a different judgment from the verdict of the lay jury. When compared with the jury systems in the U.S. and Japan, Korean CP features the narrowest scope of jury's verdict and the least authority thereof.

4. *Whether Appealable or Not*

In the United States, a prosecutor may not appeal a not guilty verdict of the jury whereas unanimous verdicts delivered by lay judges or the jury can

77. The lay assessors will determine facts, reach verdicts, and decide sentences with authority theoretically equivalent to that of the professional judges in Japanese Lay Assessors Trial. See ACPCT, *supra* note 40, at art. 2.

78. The Japanese Lay Assessors Trial consists of three professional judges and six lay jurors (ordinary citizens). They work together to determine culpability and sentencing. Bloom, *supra* note 16, at 41.

be appealed in Japan and Korea. It is questionable whether the ACPCT of Korea can improve democracy and confidence in criminal justice as even a unanimous verdict by the jury does not have binding power and can be overturned in an appellate trial.

5. *Conclusion*

In the case of CP, the limited effect of a jury's verdict does not obligate the presiding judge to deliver a ruling in conformance to the jury's verdict. Even Japan, which legislated lay citizen participation in criminal trials at a time similar to Korea, accords binding authority to a decision by lay assessors. Therefore, when compared with the United States and Japan, Korea recognizes the lowest level of jury authority and keeps open the widest window of opportunities for intervention by professional judges. The likelihood a jury's verdict will be changed or disregarded by a professional judge is the highest in Korea.

IV. IMPROVING CITIZEN PARTICIPATION BY BOLSTERING UP DEMOCRACY

Criminal justice in Korea was under criticism for being authoritarian and exclusive at the time of the adoption of the ACPCT. CP was institutionalized in a bid to bolster up democratic legitimacy and citizen confidence. That begs the question – to what extent has CP in its current form accomplished its objective?

A. HOW MUCH HAS THE JUDICIAL CIRCLE OF KOREA CHANGED?

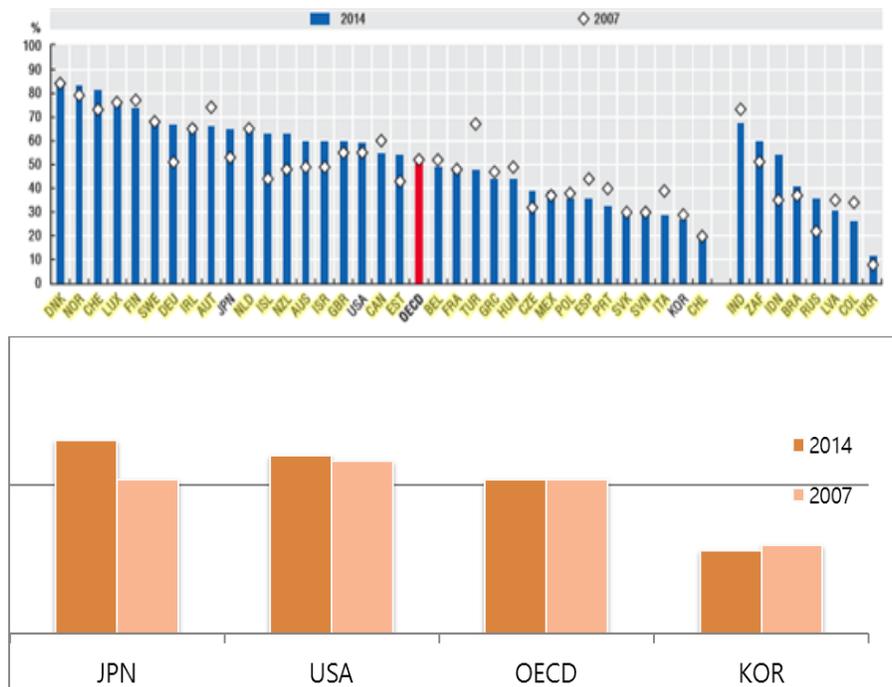
Accomplishing democracy necessarily requires checks on the power of the state through citizen participation. Limitations on power are required not only in connection with the executive and legislative branches, but also in the judicial branch. Judges in Korea are neither elected nor subject to retention in an election.⁷⁹ From the district court (low-level court) to the supreme court and the constitutional court, it is not possible for lay citizens who are not legal professionals to be members thereof. There is no mechanism for citizens to participate in the appointment of legal professionals. Such an environment can only render judicial process exclusive and authoritarian. This judicial structure compromises the rationality of fact-finding and the perception of fairness. The fact that an authoritarian and exclusive judicial system

79. This is in drastic contrast to the United States where judges are elected by voting in some occasions. See Bubwojjojikbeob [Court Organization Act], Act No. 13522, Dec. 1, 2015, art. 42 (S. Kor.).

cannot earn the confidence of the general public rings true for criminal justice in Korea.

Having been in force for seven years, how much has the ACPCT changed citizen perception of the judicial system of Korea? Citizen confidence with the judicial system was surveyed as a part of *Government at a Glance 2015* of OECD, and it shows how discontent the citizens of Korea continue to be with their judicial system.⁸⁰

TABLE 3. CITIZEN CONFIDENCE WITH THE JUDICIAL SYSTEM, 2007 AND 2014⁸¹



Citizen confidence with the judicial system of Korea is probably the lowest among the OECD member countries and fails to reach the OECD average.⁸² It showed no improvement in comparison with the year 2007, whereas the United States and Japan show confidence levels above the OECD average.⁸³ In addition, Japan, which enforced lay person participation

80. See OECD, *GOVERNMENT AT A GLANCE 2015*, at 170-71 (2015), http://www.oecd-ilibrary.org/governance/government-at-a-glance-2015_gov_glance-2015-en.

81. *Id.* at 171.

82. As shown in the table 3 above, only Columbia, Chile, and Ukraine showed lower confidence levels with judicial system than Korea.

83. OECD, *supra* note 80, at 23.

in criminal justice at a similar time as Korea, saw the confidence level of its citizens with the judicial system improving significantly in comparison with the 2007 level.

These figures are similar to the outcomes found in the *Public's Understanding of the Judicial Procedure and Perception of the Trial* survey conducted recently by the Judicial Policy Research Institute of Korea. In the survey of 1,100 Koreans, only 30% of the respondents answered that they had a level of confidence in the court.⁸⁴ The majority of those who indicated that the criminal justice system is problematic also indicated beliefs that criminal trials were operated in favor of socially influential people or those who could take advantage of judicial procedures, and the trial process was too difficult for ordinary citizens to understand.⁸⁵

As the statistics gleaned from the survey are not focused on the satisfaction level with CP itself, it may not be fair to impute the weak satisfaction with the judicial system in Korea solely to the ACPCT. However, Koreans continue to distrust their judicial system and find trial procedures unfair and difficult to understand seven or eight years after the enforcement of the ACPCT. The strong implication is that the ACPCT has not had any positive influence on the public perception of criminal justice in Korea.

B. HOW SHALL ACPCT BE IMPROVED?

As discussed, CP in Korea has many shortcomings. The ACPCT allows the court to broadly restrict the right to a jury trial at its discretion. A unanimous jury decision does not necessarily result in a corresponding final verdict at trial, and a jury's verdict can be overturned in an appellate court even if it had been accepted by the trial court. In addition, financial scandals of *chaebols*, or corruption cases of the powerful, cannot effectively proceed to CP, even though such cases are most in need of participation of a jury staffed with lay citizens if confidence in the judicial system is to be bolstered.⁸⁶ Nevertheless, it should not be concluded that lay person participation is not suitable for criminal justice in Korea. Neither should it follow from the fact that Korea has not yet implemented CP as properly as other countries, or that CP is not likely to be as effective in Korea as it has been in analogous systems.

One is hard pressed to find a country in the world that utilizes a jury system or mixed tribunal system that renders the authority of participating citizens so limited and vulnerable at the same time. In no other countries are judges awarded so wide a window of opportunity for intervention in jury de-

84. S.Y. JANG, JUDICIAL POLICY RESEARCH INST., ANALYSIS OF THE PUBLIC'S UNDERSTANDING OF THE JUDICIAL PROCEDURE AND PERCEPTION OF THE TRIAL 214 (2015).

85. *Id.* at 211-12.

86. *See supra* Section III herein for the requirement of CP for defendant applications.

cision making. With that said, we can only expect a positive educational effect resulting from lay persons participating as jurors and having first-hand experience with criminal procedure. Citizens will develop better insight and understanding of Korean laws and criminal justice.

Korea enacted the ACPCT with the intent that democracy should be incorporated in criminal justice in order to build up public confidence. For the ACPCT to accomplish this objective of beefing up democratic legitimacy and confidence in the judicial system of Korea beyond the realm of educational contribution, democratic principles must be applied on a broader and stricter scale. Direction and guidance for such an initiative can be found in respect for citizens, procedural rationality, and universality from the perspective of comparative legal studies. Criminal justice must respect citizens and enable them to participate in effective terms. Judges should not interfere with and control jurors. Instead, jurors must be able to control criminal justice. In more specific terms: 1) political and financial cases, where the perception of fairness of trial is essential, should proceed to CP even in the absence of defendant's application; 2) the basis for discretion of judges to exclude the application of CP against defendant's application should be rendered more specific and restrictive; and 3) the presiding judge should not be allowed to deliver a judgment different from a unanimous verdict by the jury. These are minimum requirements for the ACPCT to fulfill its stated goals and bolster democratic legitimacy and confidence in the judicial procedure.

V. CONCLUSION

Nearly two hundred and fifty years ago, when the colonial United States declared its independence and freed itself from an absolute monarchy and arbitrary justice, the kind of which was often experienced in the U.K. and other countries in Europe, the most effective way to guarantee the liberty and freedom of its citizens was to take fact-finding authority from professional judges and hand it over to lay citizens. But today, when the concept of a democratic society governed by law is not open to question, concerns about the abuse of power in an absolutist state are far less relevant. Instead, citizen participation in criminal justice today should not only promote democracy, but it should also improve rationality in decision making by preventing professional judges from finding facts exclusively. The public consensus of civil society should not be disregarded in criminal trials. By ensuring meaningful and binding citizen participation in criminal trials, citizen satisfaction with and confidence in judicial procedure will be enhanced. This critical objective should continue to be pursued.