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# ADVANCE TOWARD “PEOPLE’S COURT” IN SOUTH KOREA

Yong Chul Park<sup>†</sup>

*Abstract:* Since 2008, criminal jury trials have been implemented in South Korea with the Citizen Participation in Criminal Trials Act. Under the Act, defendants have the option to choose a jury trial over a bench trial, although jury verdicts, as well as sentencing opinions rendered by a jury, are not binding on the court pursuant to Article 46(2) of the Act. While Korea’s adoption of a criminal jury trial was an ambitious move toward judicial reform, it has faced serious obstacles and has had limited influence over the Korean judicial system. In this Article, I use the five stages of planned legal change identified in Malcolm Feeley’s book titled *Court Reform on Trial* (1983) as an analytical framework to explain why the criminal jury trial might not be the best way to regain the public’s confidence in the system and what should be done to better the system.

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## I. INTRODUCTION

Studying the four reforms [diagnosis, initiation, implementation, and routinization] in this manner, we can assess the success of each more realistically than has so far been done. At the same time, we can learn how the process of change operates in the criminal courts and why it often leads to mixed and confusing results.<sup>1</sup>

The Constitution of South Korea was last amended in 1987<sup>2</sup> as a result of the June Struggle,<sup>3</sup> in which people demonstrated against the government to demand direct election of the President.<sup>4</sup> The Constitution has proven

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<sup>1</sup> MALCOLM M. FEELEY, *COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL* 35 (1983).

<sup>2</sup> See DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] (S. Kor.). The 1987 Constitution of South Korea has very “detailed Bill of Rights provisions regarding criminal procedural rights.” For that reason, this phenomenon has been called “constitutionalization of criminal procedure.” However, such “constitutionalization” did not take the people’s factor into account. See generally Kuk Cho, *The Exclusion of Illegally Obtained Confessions, Electronic Communications and Physical Evidence in Korea*, 13 J. KOREAN L. 175 (2014).

<sup>3</sup> Intraman, *The 6.10 Democracy Movement*, KOREA BRIDGE (June 6, 2011, 3:45 PM), <http://koreabridge.net/post/610-democracy-movement-610-%EB%AF%BC%EC%A3%BC%ED%95%AD%EC%9F%81-intraman>. See generally JUSTINE GUICHARD, *REGIME TRANSITION AND THE JUDICIAL POLITICS OF ENMITY: DEMOCRATIC INCLUSION AND EXCLUSION IN SOUTH KOREAN CONSTITUTIONAL JUSTICE* 23–46 (2016).

<sup>4</sup> Kyung-Soo Shim, *A Study on the Problem of Political Power Structure under the Current Constitution*, 62 DONG-A L.J. 23, 36–37 (2014) (S. Kor.).

resilient over thirty years of revolutionary change, including the development of direct presidential elections. Over time, the Constitution and the expansion of policies facilitating public involvement resulted in an increased desire for public participation in the criminal justice system.<sup>5</sup>

This public demand for heightened involvement in the criminal justice system was triggered by the establishment of the Constitutional Court and its subsequent growing legitimacy.<sup>6</sup> With public recognition that, while there is no absolute law, the law profoundly affects people's everyday lives in the real world, the establishment of the Constitutional Court by the 1987 Constitution led to the rejection of the absolutism that existed since the birth of the country.<sup>7</sup> The public's strong desire to engage in legislating, implementing, and changing current laws has created an opportunity for the public's opinion to solidify the existence of Constitutional Court.

In concert with these developments, the public distrusted the existing criminal justice system.<sup>8</sup> In multiple instances, illegitimate political regimes brought fabricated charges against innocent defendants.<sup>9</sup> Many of these charges resulted in the execution of innocent people.<sup>10</sup> This abuse of the judiciary left a permanent stain on the courts and ensured that the public distrusted South Korea's overall criminal justice system.<sup>11</sup> That distrust led the public to demand change to the criminal justice system; this was the most critical driving force behind any attempt for justice reform in twenty-first century South Korea.<sup>12</sup>

The increased engagement of the public, the confidence in the Constitutional Court, and the enormous distrust of the criminal justice system led the people of South Korea to propose changes to the criminal justice system.<sup>13</sup> One suggested approach was for the people to elect judges

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<sup>5</sup> Jaesuk Lee, *The Final Format of the Korean Jury Trial System*, 59 L. Rev. 417, 420–21 (2014) (S. Kor.).

<sup>6</sup> Ki-Choon Song, *An Appraisal of the Rule of Law during the Participatory Government (2003–2008) in Korea*, 35 PUB. L.J. 297, 313–14 (2007) (S. Kor.).

<sup>7</sup> Jeong-In Yun & Seon-Taek Kim, *Constitutional Court as a Guardian of Democracy*, 16 PUB. L.J. 135, 141 (2015) (S. Kor.).

<sup>8</sup> Dong-Hee Lee, *The Achievements and Challenges of the Citizen Participatory Trial in Korea*, 146 JUSTICE 69, 72–73 (2015) (S. Kor.).

<sup>9</sup> Deok-In Lee, *The Justification on the Abolition of Death Penalty: The Judicial Murder and Wrongful Convictions of the Death Penalty*, 12 CHUNG-ANG L. REV. 111, 122–33 (2010) (S. Kor.).

<sup>10</sup> *Id.* at 126.

<sup>11</sup> Yun & Kim, *supra* note 7, at 136.

<sup>12</sup> Tae Hoon Ha, *Public Trust in Justice*, 134 JUSTICE 575, 577 (2013) (S. Kor.).

<sup>13</sup> *Id.* at 587.

who would be attentive to the public’s opinion whenever they had to render important decisions affecting millions of voters’ lives.<sup>14</sup> Another suggestion was to guarantee seats at the Supreme Court of South Korea for non-lawyer candidates, thus ensuring that the justices in the highest court of the Country would consider how the general public would think when making their decisions.<sup>15</sup>

While some of these ideas are still viable, only the use of jury trials received sufficient support from the public to actively develop it.<sup>16</sup> However, the successful launch of the criminal jury trial was not without concern, as many worried that people’s direct involvement in the criminal justice process would aggravate their distrust of the system rather than alleviate it.<sup>17</sup> The public worried that fairness of the jury verdict and sentencing opinion could be tainted.<sup>18</sup> Some were concerned that lay people would not be sufficiently trained to distinguish between the true and false facts produced by both parties at trial.<sup>19</sup> Others expressed discomfort because jury trials forced defendants to reveal details of their private lives to lay people, making defendants more likely to lose face publicly during the trial process.<sup>20</sup>

Yet the National Assembly chose the criminal jury trial because it viewed this approach as the most revolutionary and democratic solution to the public confidence crisis. The year 2008 marked the inception of criminal jury trials in South Korea.<sup>21</sup> An Act titled “Citizen Participation in Criminal Trials” (“the Act”) solidified the jury trial as a part of the South Korean

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<sup>14</sup> A bill regarding direct election of the chief justice and other fellow justices was devised and passed by the National Assembly in 1961. Daebeop-won jangmitdae beopgwan seon-geobeop-an [Chief Justice and Judges Election Bill], Act No. 050164, Jan. 13, 1961 (S. Kor.), <http://likms.assembly.go.kr/bill/billDetail.do?billId=003206>. However, attempts to introduce direct democracy into the judicial branch were subverted by a military regime led by President Jung-Hee Park in the following years.

<sup>15</sup> See generally Younghoon Kim, *Seeking a Judicial Personnel System to Protect Judicial Independence*, 27 YONSEI L. REV. 1 (2017) (detailing the long-debated assertion that enhancing diversity in the Supreme Court would be beneficial in terms of guaranteeing the fairness of court) (S. Kor.).

<sup>16</sup> Dong Eon Cha, *The Effect of the Jury System on Development of Democracy*, 5 SEOUL NAT’L U. L. REV. 166, 168–69 (2015) (S. Kor.).

<sup>17</sup> *Id.* at 168.

<sup>18</sup> *Id.*

<sup>19</sup> Byung-Soo Kim, *The Realization of a Fair Participatory Trial by Division of Fact-Finding and Sentencing*, 27 J. KOREAN L. 109, 113–14 (2015) (S. Kor.).

<sup>20</sup> See generally Ho-Kyum Kim & Kwang-Sub Park, *A Study of the Methods for Activation of Jury Trial System in Korea*, 24 CHUNGNAM L. REV. 301 (2013) (S. Kor.).

<sup>21</sup> Jae-Hyup Lee, *Korean Jury Trial: Has the New System Brought About Changes?*, 12 ASIAN-PAC. L. & POL’Y J. 58, 59 (2010).

criminal justice system.<sup>22</sup> Its title also reinforced the importance of “citizen participation” in the criminal justice system.<sup>23</sup>

South Korea’s inclusion of jury trials in its criminal justice system is perceived by criminal law scholars and the public alike as democratic because it guarantees the public’s involvement in every phase of a criminal trial.<sup>24</sup> Furthermore, the Act was structured to minimize any interference from professional judges in rendering verdicts and giving opinions on sentencing.<sup>25</sup> For example, Article 46(2) limits the role of the judges by providing that “the jury may hear opinions of judges who take part in the trial when a majority of jurors requests to do so.” Additionally, under the Act, defendants have the option to choose a jury trial over a bench trial.<sup>26</sup> However, a jury verdict, as well as a sentencing opinion rendered or recommended by that jury, will not be binding on the court pursuant to Article 46(5) of the Act.<sup>27</sup>

The adoption of the criminal jury trial started with an ambitious move towards the revolution of the criminal justice system as a part of judicial reform. However, this reform had a limited influence over the criminal justice system as a whole.<sup>28</sup> Thus, the groundbreaking solution to

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<sup>22</sup> Gukmin-ui hyongsajaepan chamyeo-e gwanhan beopryul [Act on Citizen Participation in Criminal Trials], Act No. 8495, June 1, 2007, *amended by* Act No. 10258, Apr. 15, 2010, *amended by* Act No. 11155, Jan. 17, 2012, *amended by* Act No. 11690, Mar. 23, 2013, *amended by* Act No. 12844, Nov. 19, 2014, *amended by* Act No. 13762, Jan. 19, 2016, *amended by* Act No. 14184, May 29, 2016 (S. Kor.), *translated in* Korea Legislation Research Institute online database, [https://elaw.klri.re.kr/eng\\_service/main.do](https://elaw.klri.re.kr/eng_service/main.do) (search required) [hereinafter Act on Citizen Participation in Criminal Trials].

<sup>23</sup> Jin-yeon Chung, *Juror as the Representative of the Citizens in the Civil Participation in Criminal Jury Trial*, 21 SOONGSIL L. REV. 201, 203–04 (2009) (S. Kor.).

<sup>24</sup> Cha, *supra* note 16, at 175–76.

<sup>25</sup> Article 46(3) of the Act provides that “if the jury fails to reach an unanimous verdict of guilt or non-guilt, the jury shall hear opinions of judges who take part in the trial before delivering a verdict. In such cases, a verdict of guilt or non-guilt shall be concluded by a majority decision. Judges who take part in the trial shall not participate in the verdict, even in cases where they attend the deliberation and make statements on their opinions.” Act on Citizen Participation in Criminal Trials, art. 46(3). This Article expresses the Act’s intent to minimize the influence from the bench in criminal jury trials. However, there is some counter argument that judge intervention is rather excessive. Oh-Geol Kwon, *Korean Jury Trial System: Present and Future*, 44 L. REV. 225, 239–40 (2011) (S. Kor.).

<sup>26</sup> Kwon, *supra* note 25, at 233–34. Article 8 provides that a court needs to assure a defendant of his/her right to a participatory trial to the maximum. Act on Citizen Participation in Criminal Trials, art. 8.

<sup>27</sup> Article 46(5) of the Act provides that “No verdict and opinions under paragraphs (2) through (4) shall be binding on the court.” Act on Citizen Participation in Criminal Trials, art. 46(5).

<sup>28</sup> Kwon, *supra* note 25, at 229–30.

revolutionize the criminal justice system through criminal jury trials must be re-examined in order to better South Korea’s system.<sup>29</sup>

This Article uses the five stages of planned legal change identified in Malcolm Feeley’s book *Court Reform on Trial* as an analytical framework to explain why the South Korean criminal jury trial might not be the best way to regain the public’s confidence in the system, and what should be done in order to better the system. Feeley identifies the following five stages: 1) *diagnosis or conception*, where, through “the process of identifying problems and considering solutions, . . . different perspectives lead people to identify different problems and suggest different remedies;” 2) *initiation*, where “new functions are added or practices are significantly altered . . . . This stage requires several decisions [regarding] [w]hich of several alternatives will be adopted[;]” 3) *implementation*, “involving staffing, clarifying goals, and adapting to a new environment;” 4) *routinization*, “which involves commitment by an institution to supply funding and a physical base of operations;” and 5) *evaluation*, “in which new programs are usually assessed during their experimental stages rather than their routine periods. . . .”<sup>30</sup> This Article argues that the adoption of the criminal jury trial cannot be the best solution to reform the court because both the audience and influence that the jury may create in the entire criminal justice system are fairly limited.

## II. IMPORTANT STAGES IN THE PROCESS OF CRIMINAL JUSTICE REFORM

### A. *Stage One: Diagnosis of the Problem*

This section provides a historical overview of the criminal justice system in South Korea and describes the perception problem that has impeded the operation of the criminal justice system.

#### 1. A Brief Political and Legal History of South Korea

South Korea is a young democracy.<sup>31</sup> It was established in 1948, three years after World War II.<sup>32</sup> At that time, United States troops marched

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<sup>29</sup> Many scholars, even those with the opinion that the Act does not need constitutional amendment in order to make the Act constitutional, argue that the Act does need some changes. B. Kim, *supra* note 19, at 112–16; Kwon, *supra* note 25, at 229–32.

<sup>30</sup> FEELEY, *supra* note 1, at xiii.

<sup>31</sup> Soon-Won Kang, *Democracy and Human Rights Education in South Korea*, 38 COMP. EDUC. 315–16 (2002).

in the south of the Korean peninsula while Soviet troops occupied the area north of the 38th parallel.<sup>33</sup> The country was sharply divided between the people who led the independence movement and the people loyal to the Imperial Japanese occupational regime.<sup>34</sup> Democracy and socialism were fiercely debated due to the different ideological backgrounds of political leaders.<sup>35</sup> Even after a leader was elected as the President, the country was without any proper governing system, not to mention a legal structure that courts could rely on.<sup>36</sup> Lacking a legal structure of its own, South Korea resorted to using Japanese laws for quite some time.<sup>37</sup> The young country struggled as a place where people could barely make a living, and it could not afford any room for developing its own legal culture.<sup>38</sup> Making matters worse, in 1950, South Korea became engulfed in the Korean War. Active warfare ended with a truce between the United Nations and North Korea in 1953.<sup>39</sup> However, the Korean Peninsula was devastated, with 2.5 million dead and a destroyed socio-economic infrastructure that prevented future development of the country.<sup>40</sup> Immediately after the end of active hostilities, South Korea, one of the poorest countries in the world, found itself engaging in global politics with virtually no means to build or re-build its economy.<sup>41</sup>

Unfortunately, the first three ostensibly democratically-elected Presidents, Syngman Lee (1948-1960), Junghee Park (1961-1979), and Doo-hwan Jun (1979-1988), ruled the country for nearly forty years as dictators.<sup>42</sup> Yet even under these dictatorial rulers, South Korea became a successful industrial economy and quickly broadened and deepened its democratic

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See generally Myounghag Chang, *Post-Liberation Political Situation and Schism in Democratic Republicanism: Left-Right Ideological Confrontation and Korean National Unification*, 8 E. ASIA POL. & IDEOLOGY REV. 239 (2009) (S. Kor.).

<sup>35</sup> See generally Won-mo Kim, *The Establishment of the Republic of Korea by Syngman Rhee-Kim ku-Kwangsoo Lee and the Attempt Unification of Korea by Kim Il-sung's Military Force*, 9 CHUNWON RES. J. 53 (2016) (S. Kor.).

<sup>36</sup> Hojin Choi, *The Judicial System in the End of Chosun Dynasty and Before the Independence*, 16 KOREAN PUB. ADMIN. HIST. REV. 223 (2005) (S. Kor.).

<sup>37</sup> *Id.*

<sup>38</sup> Han-Tae Lee, *Economic Constitution and Constitutional Value of Economic Democratization*, 20 SEOUL L. REV. 1, 15 (2013) (S. Kor.).

<sup>39</sup> The Korean War has never ended officially; instead, a truce agreement was made between the U.N. and North Korea and serves to impede active warfare.

<sup>40</sup> Dong Chun Kim, *Facing 60th Anniversary of the Korean War: The Korean Peninsula and the World*, 91 HIST. CRITICISM 152, 162-64 (2010) (S. Kor.).

<sup>41</sup> *Id.* at 164-70.

<sup>42</sup> See generally Han-Joo Lee, *Dealing with the Past of Authoritarian Rule in South Korea*, 2 J. CONST. L. 32, 49-80 (2015) (S. Kor.).

scope.<sup>43</sup> Despite South Korea being a formal democracy, these authoritarian regimes were more concerned with controlling crimes and paid little attention to criminal procedure, particularly the due process of law.<sup>44</sup> The criminal justice system lacked substantive justice because, ultimately, a dictator controlled the system.<sup>45</sup>

More specifically, the outward fairness of the criminal justice system in South Korea, as seen in the constitution and in criminal procedure, was ultimately tainted by the corrupting influence of the authoritarian regimes.<sup>46</sup> These regimes successfully forced courts to render the regimes’ preferred rulings.<sup>47</sup> In particular, courts responded to pressure from the regimes by fabricating charges against political opponents and sentencing people to lifetime imprisonment or capital punishment. For example, during President Rhee’s lengthy tenure in office, a prominent politician, Mr. Cho, ran against the President. He was arrested on the basis of being part of the “pro-North Korea faction” in 1958.<sup>48</sup> Even though most of his and his colleagues’ charges were fabricated, Mr. Cho was found guilty of espionage and sentenced to execution in 1959.<sup>49</sup> The first chief justice of the Supreme Court, Byong-ro Kim, criticized the government’s actions as perverting the justice of the criminal courts.<sup>50</sup> The Supreme Court later decided to retry Mr. Cho’s case and found him not guilty, admitting the wrongdoing of the Court in rendering a guilty verdict.<sup>51</sup>

The next dictator of South Korea, President Park, was also infamous for his use of the criminal courts as a means for suppressing his political opponents.<sup>52</sup> President Park, following the example from the Meiji

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<sup>43</sup> Tom Ginsburg, *Dismantling the “Developmental State”? Administrative Procedure Reform in Japan and Korea*, 49 AM. J. COMP. L. 585, 587 (2001); Lisa Blomgren Bingham, Sun Woo Lee & Won Kyung Chang, *Participatory Governance in South Korea: Legal Infrastructure, Economic Development, and Dispute Resolution*, 19 PAC. McGEORGE GLOBAL BUS. & DEV. L.J. 375, 376 (2007).

<sup>44</sup> Kuk Cho, *The Unfinished “Criminal Procedure Revolution” of Post-Democratization in South Korea*, 30 DENV. J. INT’L L. & POL’Y 377, 377–78 (2002).

<sup>45</sup> Iltae Hur, *A Study on the History and Thought of ‘Nullum crimen sine lege’ Principles*, 35 KYUNGPOOK NAT’L U. L. J. 142 (2011) (S. Kor.).

<sup>46</sup> H. Lee, *supra* note 42, at 63–71 (S. Kor.).

<sup>47</sup> Sang Hie Han, *How Can the Korean People Have More Independent & More Accountable Judiciary?*, 16 J. CONST. L. 409, 413–15 (2015) (S. Kor.).

<sup>48</sup> See GREGORY HENDERSON, *KOREA: THE POLITICS OF THE VORTEX* 215 (1968).

<sup>49</sup> See WON SOON PARK, *DOCUMENTARY OF THE BARBARIC DAYS* 273–98 (2006) (S. Kor.).

<sup>50</sup> Cho, *supra* note 2, at 178.

<sup>51</sup> Supreme Court [S. Ct.], 2008JaeDo11, Jan. 20, 2011 (S. Kor.).

<sup>52</sup> Kyungkeun Kang, *Returning to the Constitutional Value and Order*, 11 REV. INSTITUTION & ECON. 163, 163–67 (2017) (S. Kor.).



Restoration, declared “the Reformation Regime” in 1972, which established him as a *de facto* permanent President. The regime regularly disregarded the boundary between the executive and the judiciary, and brought fabricated charges against innumerable democratic leaders and students.<sup>53</sup> A particularly important case was that against the People’s Revolution Party Rebuilding Committee (“PRP”).<sup>54</sup> In 1974, the Korean Central Intelligence Agency arrested and tortured some PRP members.<sup>55</sup> They acted on the unfounded suspicion that the PRP had a communist connection with North Korea and was conspiring to foment a communist revolution in South Korea.<sup>56</sup> In 1975, the Supreme Court rendered a final guilty decision against eight members of the PRP.<sup>57</sup> Within twenty-four hours of the decision, the eight individuals were executed.<sup>58</sup> The public called this “judicial murder”<sup>59</sup> because the corrupt criminal justice system led to their deaths.

In the late 1980s and early 1990s, after the dictators’ reins over the country were loosened, democratically-elected civilian presidents had the opportunity to overhaul the criminal justice system.<sup>60</sup> However, these presidents did not make meaningful attempts to do so, nor did they achieve real success at restructuring the system until the late 1990s.<sup>61</sup> This failure of democratically-elected presidents to fix the system further eroded public trust in the “justice” conferred by the criminal justice system.<sup>62</sup>

Between the dictators’ stranglehold on the judiciary and the failure of subsequent presidents to act immediately to reform the criminal justice system, the public felt a need to become directly involved in reformation.<sup>63</sup>

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<sup>53</sup> Cho, *supra* note 2, at 178; H. Lee, *supra* note 42, at 63–66.

<sup>54</sup> See Kuk Cho, *Transitional Justice in Korea: Legally Coping with Past Wrongs After Democratization*, 16 PAC. RIM L. & POL’Y J. 579, 592–93 (2007).

<sup>55</sup> See generally Seung-Yong Oh, *State Violence and the Victimhood of Its Family: The Case of the Committee to Reestablish the People’s Revolutionary Party*, 10 KOREAN SOC’Y FOR THE STUDY OF HIST. 199 (2008) (S. Kor.).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 200; Cho, *supra* note 44, at 178–79.

<sup>58</sup> Cho, *supra* note 2, at 178–79.

<sup>59</sup> CATHOLIC HUMAN RIGHTS COMMITTEE, JUDICIAL MURDER: THE MASSACRE OF APRIL 1975 164–65 (2001) (S. Kor.).

<sup>60</sup> Jin-Ho Chun, *The Criminal Procedure Act Amendments and the Proper Role of Justice*, 23 KYUNGPOOK NAT’L U. L. J. 25, 25–26 (2005) (S. Kor.).

<sup>61</sup> *Id.* at 28; Mi Hwa Chung, *Special Issue: Current Issues on Judicial Reformation Bill: Introduction and Perspective*, 55 L. ASS’N J. 19, 24 (2006) (S. Kor.).

<sup>62</sup> Chung, *supra* note 61, at 25.

<sup>63</sup> *Id.* at 33–35.

## 2. Allowing People to be Involved in the Criminal Justice System

The Presidential Commission on Judicial Reform (“Commission”) and the Presidential Committee on Judicial Reform (“Committee”) were formed in 1999 and 2005, respectively.<sup>64</sup> Together, they functioned as the major players in the judicial reform movement sweeping South Korea in the early twenty-first century.<sup>65</sup> The Commission focused on overall reform, including creating a unitary system of lawyers, eradicating corruption, and training future legal professionals.<sup>66</sup> The Committee prepared complete proposals focused on the reform of legal services and citizen participation in the criminal justice system.<sup>67</sup>

Most of the reformists in South Korea were convinced that the best way to restore the public’s confidence in the system was through a paradigm shift towards public participation in governance, including the judicial process.<sup>68</sup> Some reformists suggested there should be public involvement in the appointment of specific judges.<sup>69</sup> Other reformers thought the best solution was for the public to adopt the role of overseeing court procedures.<sup>70</sup> Ultimately, the reformers decided that incorporating jury trials was the most effective way for the public to participate in the criminal justice system because it allowed lay people to be directly involved.<sup>71</sup> Following the work of the Commission and the Committee, the Act on the Establishment & Management of Professional Law Schools and the Act on Citizen Participation in Criminal Trials were enacted in 2007 and 2008, respectively.<sup>72</sup> Since 2008, jury trials have been a part of South Korea’s criminal justice system.<sup>73</sup>

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<sup>64</sup> Chun, *supra* note 60, at 25–26.

<sup>65</sup> Kyeong Ok Choi, *Judicial Reform and Its Problems in Korea*, 8 YOUNGSAN L. J. 3, 5–6 (2011) (S. Kor.).

<sup>66</sup> See generally Chung, *supra* note 61, at 21–50.

<sup>67</sup> *Id.* at 33–35.

<sup>68</sup> Bingham, Lee & Chang, *supra* note 43, at 376.

<sup>69</sup> See generally Myeong-Sik Kim, *A Study on the Balance between Judicial Independence and Democratic Accountability: Focused on Debates about the State Judge Election System in the United States*, 22 STUDY ON AM. CONST. 1 (2011) (S. Kor.).

<sup>70</sup> Choi, *supra* note 65, at 6–7.

<sup>71</sup> Chun, *supra* note 60, at 28.

<sup>72</sup> Choi, *supra* note 65, at 5–6.

<sup>73</sup> Cha, *supra* note 16, at 168.

Article 1 of the Act on Citizen Participation in Criminal Trials provides: “the purpose of this Act 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.”<sup>74</sup> This was an ambitious textual attempt to connect the criminal jury trial with democracy.<sup>75</sup> Unfortunately, this link is both incomplete and weak because, while unelected judges do not represent the will of the people, official jurors are also not elected, and therefore, do not actually represent the people’s will either.<sup>76</sup>

In addition, the notion of democracy being realized through criminal jury trials can be misguided because “mock” justice often occurs in court due to the participation of lay people. For example, in a famous case brought against a Superintendent of Education in Seoul, Mr. Heeyeon Cho, the jury rendered a guilty verdict, therefore risking Mr. Cho’s seat as the Superintendent.<sup>77</sup> The jury in the first trial decided that Mr. Cho had violated<sup>78</sup> an article from the Local Education Public Official Election Act.<sup>79</sup> However, the sentence was suspended by the appellate court,<sup>80</sup> which was then affirmed by the Supreme Court.<sup>81</sup> The case against Mr. Cho demonstrates the misplaced feeling that criminal jury trials are the most effective way to realize democracy in the judiciary and shows that reflecting the people’s will by institutionalizing the criminal jury does not necessarily bring about democratic and just results.<sup>82</sup>

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<sup>74</sup> Act on Citizen Participation in Criminal Trials, art. 1.

<sup>75</sup> Cha, *supra* note 16, at 169–76.

<sup>76</sup> A majority of legal scholars argues that the advisory nature of juries’ verdicts and sentencing opinions makes the Act constitutional. Jong-Hyun Kim, *A Thought on the Citizen Participation in Criminal Trials from Constitutional Perspective: Focused on Eligible Cases and Debate on Its Reform*, 57 L. REV. 75, 82 (2015) (S. Kor.).

<sup>77</sup> Seoul Central District Court [Dist. Ct.], 2014GoHap1415, Apr. 27, 2015 (S. Kor.).

<sup>78</sup> HoJin Yoon, “Go Seung Deok Heowi Bibang” Cho Hui Yeon, *Gyoyukgamjik Yuji* [“False Slanderer of Seungdeok Go” Heeyeon Cho, Remains Superintendent of Education], JOONGANG DAILY, Dec. 28, 2016, <http://news.joins.com/article/21051318>.

<sup>79</sup> Public Official Election Act, Act. No. 14073, Mar. 3, 2016 (S. Kor.), *translated in* Korea Legislation Research Institute online database, [http://elaw.klri.re.kr/kor\\_service/lawView.do?hseq=38405&lang=ENG](http://elaw.klri.re.kr/kor_service/lawView.do?hseq=38405&lang=ENG).

<sup>80</sup> Seoul High Court [Seoul High Ct.], 2015No1385, Sept. 4, 2015 (S. Kor.).

<sup>81</sup> Supreme Court [S. Ct.], 2015Do14375, Dec. 27, 2016 (S. Kor.).

<sup>82</sup> Jibong Lim, *Casting Doubts on Candidates in Public Official Election and Defining Limits on the Freedom of Expression*, 7 YONSEI J. PUB. GOVERNANCE & L. 111, 119 (2016) (S. Kor.).

### 3. Reform Comes with Constitutional Challenges

There is no provision in South Korea’s Constitution supporting criminal jury trials.<sup>83</sup> Thus, immediately after judicial reform was completed through legislation, the Act on Citizen Participation in Criminal Trials<sup>84</sup> was challenged as unconstitutional.<sup>85</sup> While the Act provides a means for jury trial, it alone is insufficient in providing the right to a jury trial; indeed, true criminal justice reform via participatory justice requires a constitutional amendment providing for the right to a jury trial.<sup>86</sup> The public’s direct involvement in the criminal justice system can never be presumed as reasonable without a clause for direct delegation of authority in the constitution.

A fundamental issue raised in opposition to jury trials is whether the Constitution allows lay people to take on the role of provisional judges.<sup>87</sup> While one of the arguments in favor of lay juries is that jurors’ lack of knowledge of case details before being impaneled may reduce bias, this was not open for discussion when the Constitution was enacted.

#### i. There is No Constitutional Right to a Jury Trial

While criminal jury trials were implemented in Japan in the early twentieth century,<sup>88</sup> the founding fathers of the South Korean Constitution did not consider including them in the Constitution, despite the continued influence of Japanese-style judicial proceedings and the United States military; the Constitution does not provide a right to a jury trial by one’s own peers.<sup>89</sup> Additionally, subsequent amendments to the Constitution never reflected the idea of participatory justice in the criminal justice system.<sup>90</sup> Only the Act provides a legal basis for a jury trial.<sup>91</sup>

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<sup>83</sup> J. Kim, *supra* note 76, at 82.

<sup>84</sup> *See generally* Act on Citizen Participation in Criminal Trials.

<sup>85</sup> Constitutional Court [Const. Ct.], 2008HunBa12, Nov. 26, 2009 (S. Kor.).

<sup>86</sup> Although the Constitutional Court declares the Act constitutional, it does point out that there is no constitutional right to a jury trial. *Id.*

<sup>87</sup> J. Kim, *supra* note 76, at 83.

<sup>88</sup> *See generally* Chang-Kook Kwon, *The Study on the Japanese Jury Law (Bai-Shinn Hou, 1923)*, 26 J. SOC. SCI. 49 (2010) (S. Kor.).

<sup>89</sup> Il Hwan Kim, *A Constitutional Study on the Improvement of the Act on Citizen Participation in Criminal Trials*, 18 CONST. L. J. 309, 313 (2012) (S. Kor.).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 316–17.

Embedded in the Act, however, are the means by which a court may act on its discretion to reject a jury trial.<sup>92</sup> Articles 9 and 11 provide the courts with broad discretion to reject a request for a jury trial.<sup>93</sup> Article 9(1) states that a court may “decide not to proceed to a participatory trial” given particular conditions. These conditions are fairly broad. If the court finds, for example, that “a juror . . . has difficulties in attending a trial” or, even more broadly, “if it is considered inappropriate to proceed to a participatory trial due to any other cause or event,” it can decide not to grant the participatory trial.<sup>94</sup> Similarly, Article 11(1) provides that the court has broad discretion to transfer a case tried by a jury to bench trial.<sup>95</sup> According to Article 11(3), any court decision based on Article 11(1) cannot be challenged.<sup>96</sup>

The Act provides the sole legal means by which the accused can choose a jury trial. Even when the Act provides for a jury trial, the lack of a constitutional protection of jury trials means that wishes of the accused are still subject to the court’s discretion.<sup>97</sup> Thus, the primary way to fully establish criminal jury trials as a part of the justice system is to amend the Constitution to provide for the right to a jury trial.<sup>98</sup> Without this amendment, any request for a jury trial is subject to the discretion of the court and the legitimacy of the criminal jury trial in South Korea is at risk of perpetual criticism.

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<sup>92</sup> J. Kim, *supra* note 76, at 82.

<sup>93</sup> Act on Citizen Participation in Criminal Trials, arts. 9, 11.

<sup>94</sup> Article 9(1) reads: “A court may decide not to proceed to a participatory trial for a period beginning after an indictment is filed and ending on the day after the closing of preparatory proceedings for a trial 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 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 offense 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; (4) If it is considered inappropriate to proceed to a participatory trial due to any other cause or event.” *Id.* art. 9.

<sup>95</sup> Article 11(1) reads: “If proceedings of a trial have been suspended for a long time due to the defendant’s illness or any other cause, if the period of confinement of the defendant expires, if a court is to protect a victim of a sexual crime, or if it is considered inappropriate to continue a participatory trial in view of circumstances of a trial due to any other cause or event, the court may decide to remove the case, at its discretion or at the request of the prosecutor, the defendant, or defense counsel, so that a collegiate panel of the competent district court can make a judgment on the case without a participatory trial.” *Id.* art. 11.

<sup>96</sup> Article 11(3) provides : “No objection may be raised against a decision made pursuant to paragraph (1).” *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> I. Kim, *supra* note 89, at 313.

ii. Juries Are Not Currently Authorized to Adjudicate Criminal Cases

The most fundamental constitutional challenge to the use of criminal jury trials is disagreement about whether jurors are authorized to handle criminal cases. Article 27(1) of the Constitution provides: “[a]ll citizens shall have the right to be tried in conformity with the Act by judges qualified under the Constitution and the Act.”<sup>99</sup> However, the meaning of the term “judges” in this context is subject to fierce debate.<sup>100</sup>

This Article, along with a minority of criminal law and criminal procedure scholars, have suggested that the fact that the Constitution also provides for the qualification, independence, and powers of judges in Articles 101–110 confirms that the term “judges” in Article 27 refers only to professional judges.<sup>101</sup> Accordingly, a jury composed of lay persons is never constitutionally qualified as a “professional judge.”<sup>102</sup>

Conversely, the majority of criminal law, criminal procedure, and constitutional law scholars have expressed the view that the people’s interest trumps the lack of an explicitly enumerated right to a jury trial in the Constitution.<sup>103</sup> According to them, the term “judges” in Article 27 of the Constitution is not limited to professional judges.<sup>104</sup> Since the Constitution defines who the “judges” are, the Constitution grants legislative power to the National Assembly to enact laws interpreting the term “judges.”<sup>105</sup> The Act on Citizen Participation in Criminal Trials is the type of legislative action provided for by the term “the Act” in the Constitution.<sup>106</sup> These scholars also argue that juries engaging in activities such as rendering advisory verdicts and opinions regarding sentencing are not engaging in the type of adjudication limited to professional judges.<sup>107</sup> They further argue that, as long as professional judges are involved in the adjudication process, direct involvement of the people is not unconstitutional.<sup>108</sup>

<sup>99</sup> DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 27 (S. Kor.).

<sup>100</sup> See Ho Hyun Park, *The Constitutional Discourse Related in the Civil Participation in Criminal Jury Trial*, 17 HONGIK L. REV. 423, 423 (2016).

<sup>101</sup> I. Kim, *supra* note 89, at 314.

<sup>102</sup> Park, *supra* note 100, at 434–35.

<sup>103</sup> I. Kim, *supra* note 89, at 314–16.

<sup>104</sup> *Id.* at 315. See also Park, *supra* note 100, at 435; J. Kim, *supra* note 76, at 82.

<sup>105</sup> D. Lee, *supra* note 9, at 91.

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

<sup>107</sup> I. Kim, *supra* note 89, at 315. See also Park, *supra* note 100, at 435; J. Kim, *supra* note 76, at 82.

<sup>108</sup> I. Kim, *supra* note 89, at 315.

This interpretation of the Constitution, however, is undermined by legislation that indicates that, even with a jury trial, judges remain independent in their final decisions. For example, Article 46(5) of the Act states that “[n]o verdict and opinions [delivered by a lay jury] under paragraphs (2) through (4) shall be binding on the court.”<sup>109</sup> By providing for an advisory rather than mandatory effect of a jury verdict and sentencing opinion, the legislature created a work-around that ensured there would be no conflict with the Constitution by giving final authority of deciding any case to professional judges.<sup>110</sup> This advisory effect was challenged by the majority of criminal law, criminal procedure, and constitutional law scholars because without mandatory power, the criminal jury trial might simply be a hollow system that the bench could disregard whenever it wishes.<sup>111</sup> But, even with more than ninety percent of jury decisions matching the judge’s final judgment in criminal cases,<sup>112</sup> constitutional concern will not go away without amending the Constitution itself.<sup>113</sup> For that reason, the current system of providing the jury’s verdict and sentencing opinion as only advisory is unconstitutional. A constitutional amendment that includes lay juries as a kind of judge is the only way to resolve any constitutional concern. Amending the Constitution to include lay people as a kind of judge would give mandatory power to admit their verdict no matter what.

iii. The Court is Not Capable of Handling the Case Influx<sup>114</sup>

Prior to the Act, the expected annual number of criminal jury cases was less than 300 cases nationwide.<sup>115</sup> However, the number of cases referred to criminal jury trial was too small to determine. Therefore, it is difficult to meaningfully consider the huge amount of total criminal cases per year. In 2008, the first year that criminal jury trials were allowed, only sixty-four cases nationwide were referred to a jury trial.<sup>116</sup> This number increased to 345 in 2013, when the Act was amended to extend the range of

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<sup>109</sup> Act on Citizen Participation in Criminal Trials, art. 46(5).

<sup>110</sup> See generally Jae-Jung Kim, *A Study on the Present Condition and Measures of Civil Participation in Criminal Trial in Korea*, 49 CHONBUK L. REV. 191 (2016) (S. Kor.).

<sup>111</sup> D. Lee, *supra* note 8, at 91–93.

<sup>112</sup> *Id.* at 76; Park, *supra* note 100, at 440.

<sup>113</sup> I. Kim, *supra* note 89, at 331–36.

<sup>114</sup> J. Kim, *supra* note 110, at 196–97.

<sup>115</sup> D. Lee, *supra* note 8, at 72.

<sup>116</sup> *Id.* at 74.

eligible cases.<sup>117</sup> Since 2013, the trend of more criminal jury trials has reversed. In 2015, only 203 cases involved criminal jury trials.<sup>118</sup> From 2008 to 2015, less than two percent of eligible cases have been disposed of by a jury.<sup>119</sup> Courts expect the number of jury trials to increase.<sup>120</sup> However, this expectation is not realistic, because criminal jury trials are very different than bench trials and the courts are not prepared to tackle the maximum number of jury trials.<sup>121</sup>

Criminal jury trials are very different from the bench trials typically adjudicated in South Korean courts.<sup>122</sup> For example, jury trials require a court to allocate significantly more time to proceedings and deliberations.<sup>123</sup> Conversely, a court can dispose of more than ten bench trials per day.<sup>124</sup> Indeed, sometimes bench trials are allocated less than ten minutes per trial date.<sup>125</sup> If there is witness testimony or a dispute of fact, the time can be extended.<sup>126</sup> However, there are limits to the availability of an extension because of the other cases that need to be adjudicated the same day.<sup>127</sup> In contrast, a court devotes an entire day to a single criminal jury trial.<sup>128</sup> Even if the issue is very simple, it takes at least a whole court day to finish one case.<sup>129</sup> In addition, prior to the trial date, a court has a preliminary hearing to pinpoint important issues.<sup>130</sup> Furthermore, there is a limited number of courts capable of taking jury trial cases.<sup>131</sup> Although in theory any three-judge panel could adjudicate a jury trial, only certain panels of judges take jury trials because their dockets are already full.<sup>132</sup> Current benches are not

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<sup>117</sup> Subparagraph 1 of Article 5(1) of the Act was amended to include “cases falling under the jurisdiction of a collegiate panel.” Act on Citizen Participation in Criminal Trials, art. 5(1).

<sup>118</sup> D. Lee, *supra* note 8, at 74.

<sup>119</sup> *Id.*; In-Gon Lee, *A Brief Thought on the Revised Act of Korean Jury Trial System*, 17 L. REV. 245, 249 (2017) (S. Kor.).

<sup>120</sup> J. Kim, *supra* note 110, at 197; I. Lee, *supra* note 119, at 249.

<sup>121</sup> Ho-Hyun Park, Myeong-Dae Kim & Jong-Ho Kim, *A Study on the Civil Participation in Criminal Trial: Focused on Precedent Analysis*, 33 J. L. RES. 57 (2017) (S. Kor.).

<sup>122</sup> Cha, *supra* note 16, at 181.

<sup>123</sup> D. Lee, *supra* note 8, at 86–87.

<sup>124</sup> *Id.* at 90.

<sup>125</sup> Jin-Yeon Chung, *Role Comparison of the Parties in Litigation between the Korean Jury System and Criminal Litigation*, 19 SOONGSIL L. REV. 133, 140–41 (2008) (S. Kor.).

<sup>126</sup> See generally In-Young Lee, *Consideration of Ideology and Practical Tasks in Principle of Court-Oriented Trials and Practice Subjects*, 8 THEORIES & PRAC. CRIM. PROC. 27, 28–40 (2016) (S. Kor.).

<sup>127</sup> *Id.*

<sup>128</sup> I. Lee, *supra* note 119, at 259.

<sup>129</sup> *Id.* at 270.

<sup>130</sup> *Id.* at 259–60.

<sup>131</sup> D. Lee, *supra* note 8, at 85.

<sup>132</sup> *Id.*



capable of handling an influx of jury trial cases if the range of eligible cases provided for in the Act becomes too wide.<sup>133</sup> Therefore, it is necessary to have a “reasonable” range of cases or “right number of cases” per year. The “reasonableness” in this context has long been debated,<sup>134</sup> and amendments only appear to exacerbate this division. This is why the Act did not amend subparagraph 4 of Article 9(1), which gives the courts discretionary power to exclude the petitions if “it is considered inappropriate to proceed to a participatory trial due to any other cause or event.”<sup>135</sup>

### B. *Stage Two: Initiation*

The Act on Citizen Participation in Criminal Trials was effectuated in January 2008. By July 2017, the Act had been amended eight times.<sup>136</sup> These amendments added several precautionary measures to avoid granting defendants’ requests for jury trials when judges hope to exercise their discretion to adjudicate as a bench trial.<sup>137</sup> The most vital provision gave only advisory power to a jury verdict and has been challenged because its inconsistent structure undermined the legislative intent of the Act, which gives the control of power in criminal justice to the people.<sup>138</sup> Below, this Article discusses the most crucial issues and provisions in the Act that have been challenged throughout the amendment process.

#### 1. The Act Has Not Been Amended to Allow for Fully Mandatory Power by Juries

A jury verdict and opinion on sentencing are not binding on the court because of the constitutional challenge specified in Stage One. These two elements of jury decisions are only advisory pursuant to Article 46(5) of the Act. Multiple attempts by scholars to create a more authoritative role for juries have not been successful.<sup>139</sup>

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<sup>133</sup> *Id.* at 94.

<sup>134</sup> J. Kim, *supra* note 110, at 197. It has been considered that courts should take any number of cases if all the cases are appropriate or reasonable to adjudicate as jury trials. However, the expectation for the actual number of cases was not noted.

<sup>135</sup> Act on Citizen Participation in Criminal Trials, art. 9.

<sup>136</sup> *See generally* Act on Citizen Participation in Criminal Trials.

<sup>137</sup> D. Lee, *supra* note 8, at 70–72.

<sup>138</sup> I. Kim, *supra* note 89, at 333.

<sup>139</sup> *See generally* Dong-Hee Lee, *The Achievements and Challenges of the Citizen Participatory Trial in Korea*, 146 JUSTICE 69 (2015) (S. Kor.); D. Lee, *supra* note 8, at 91–93.

Both Supreme Court and lower court opinions have held that, while these decisions by juries are not binding, they cannot easily be disregarded by judges.<sup>140</sup> In 2010, the Supreme Court ruled that, although a jury verdict is not binding, it is “near-mandatory;”<sup>141</sup> that is, if the unanimous verdict is in line with the judge’s decision, it cannot be overturned in the appellate court.<sup>142</sup> Lower courts have similarly taken the view that jury verdicts and sentencing opinions must not be disregarded by judges. In a case rendered in Daejun High District Court, the court held that even if a lower court decision against considering the defendant’s argument for his inadequate mental capacity had some merit, the Court would maintain the sentencing opinion accepted by the lower court.<sup>143</sup> The Seoul High District Court even held that if a court decision was made that was not in harmony with a unanimous not guilty jury verdict, the court’s decision of guilt should be overturned.<sup>144</sup> The Supreme Court Committee on People’s Participation ultimately noted that the jury verdict holds *de facto* binding effect, rather than *de jure* binding effect.<sup>145</sup> The attempt to provide mandatory power for jury verdicts and jury sentencing opinions by amending the Act failed due to the constitutional challenges noted in Stage One.

## 2. The Act Does Not Provide the Right to a Jury

In South Korea, the accused has no constitutional right to be tried by a jury and cannot be forced to submit to a trial by their own peers.<sup>146</sup> Article 8 of the Act allows the defendant to apply for a jury trial.<sup>147</sup> Article 9 provides that trial courts ultimately decide whether a trial will be pursued by a jury or by the bench.<sup>148</sup>

The Supreme Court rendered a series of decisions clarifying the process by which a judge decides whether to send a case to a jury trial.<sup>149</sup> It required a lower court to confirm that a defendant wished to proceed with a

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<sup>140</sup> D. Lee, *supra* note 7, at 94.

<sup>141</sup> Supreme Court [S. Ct.], 2009Do14065, Mar. 25, 2010 (S. Kor.).

<sup>142</sup> *Id.*

<sup>143</sup> Daejun High District Court [Dist. Ct.], 2008No123, 2008GamNo18, May 28, 2008 (S. Kor.).

<sup>144</sup> Seoul High District Court [Seoul High Ct.], 2013No2133, May 23, 2014 (S. Kor.).

<sup>145</sup> D. Lee, *supra* note 8, at 83.

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

<sup>147</sup> Act on Citizen Participation in Criminal Trials, art. 8.

<sup>148</sup> *Id.* art. 9.

<sup>149</sup> Supreme Court [S. Ct.], 2012Do13869, Jan. 31, 2013 (S. Kor.); Supreme Court [S. Ct.], 2011Do15484, June 14, 2012 (S. Kor.); Supreme Court [S. Ct.], 2012Do1225, Apr. 26, 2012 (S. Kor.).

jury trial; without this, the whole procedure could be void.<sup>150</sup> The appeals court can cure the flaw if the defendant shows his intent not to take issue with the flaw and clarifies his intent to have a bench trial.<sup>151</sup> This, unfortunately, is a flawed ruling, because it is a principle of criminal justice that serious illegality cannot be fixed in a later proceeding.<sup>152</sup> The only way to explain the holding allowing “rectif[ication] of the wrongs of not properly proceeding with the defendant’s request for jury trial” is that the jury trial is neither a duty nor a right awarded to the accused, and that is why the Court can reinstate already tainted procedure with later validation.<sup>153</sup>

### 3. The Act was Amended to Have More Criminal Jury Trial Cases

Before the Act was enacted, the expected number of cases handled by jury trials was at least 300 cases per year. However, the actual number of cases handled by juries is far smaller than expected. As a result, the influence of the jury trial over the entire criminal justice system is minimized.<sup>154</sup> In 2012, Article 5 of the Act was amended to include most of the cases that would be tried by a panel of three judges to facilitate an increase in the proportion of criminal trials sent to a jury.<sup>155</sup> However, as noted previously, such an amendment gives rise to serious concern about the number of cases courts can adjudicate using a jury given their limited capacity.<sup>156</sup>

Before the 2012 Amendment, only first-degree murder and manslaughter cases were eligible for jury trials.<sup>157</sup> Focusing upon the most serious crimes traces back to the common law tradition of giving the right of jury trials only to defendants accused of felonies.<sup>158</sup> The Amendment is thought to have contributed to the increase in criminal jury trials in 2013.

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<sup>150</sup> Supreme Court [S. Ct.], 2012Do1225, Apr. 26, 2012 (S. Kor.).

<sup>151</sup> Supreme Court [S. Ct.], 2011Do15484, June 14, 2012 (S. Kor.).

<sup>152</sup> For example, Article 308-2 of the Criminal Procedure Act notes that illegally obtained evidence cannot be admissible in court and a later concession for the use of evidence cannot be acknowledged. Hyongsosa sosong beob [Criminal Procedure Act], Act No. 341, Sept. 23, 1954, *amended by* Act No. 8496, June 1, 2007, art. 308-2 (S. Kor.), *translated in* Korean Legislation Research Institute online database, [https://elaw.klri.re.kr/eng\\_service/main.do](https://elaw.klri.re.kr/eng_service/main.do) (search required).

<sup>153</sup> Supreme Court [S. Ct.], 2012Do13869, Jan. 31, 2013 (S. Kor.).

<sup>154</sup> J. Kim, *supra* note 110, at 197.

<sup>155</sup> I. Kim, *supra* note 89, at 322.

<sup>156</sup> D. Lee, *supra* note 8, at 85.

<sup>157</sup> I. Lee, *supra* note 119, at 247.

<sup>158</sup> *Id.*

But, since that year, the number has decreased.<sup>159</sup> The Supreme Court of South Korea is currently considering ways to increase the proportion of criminal jury trials.<sup>160</sup>

#### 4. Victims of Crimes Should be Given the Right to Participate

While a bench trial is painful for any victim because they must testify in court, a criminal jury trial is even harder because of the direct involvement of strangers: the jury.<sup>161</sup> Further, the role of the witness/victim is even more important in a criminal trial. The witness/victim, in testifying in open court, often re-lives the horror of the crime.<sup>162</sup> Victims of sex crimes tend to suffer the most when they have to testify in court.<sup>163</sup> Thus, when Article 5 of the Act was amended to increase the number of jury trial cases, Article 9(1)(3) was amended to provide that “[i]f a victim of any offense 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,” a court may exercise its discretion not to proceed to a participatory trial.<sup>164</sup> This new amendment is meant to address the concern that victims of sex crimes should have a say in a court’s decision to accept a jury trial application made by a defendant.

This amendment giving sex crime victims the right to be involved affirms that a jury trial is not a right, and restricts the strategic moves a defendant might make when choosing a jury trial over a bench trial. However, the Supreme Court recently limited the exclusion decision based on Article 9(1)(3) by holding that the court’s exercise of discretion based solely on the demand made by sex crime victims or lawyers may not be sufficient to legalize the exclusion decision.<sup>165</sup> Instead, the court must consider factors such as (1) the specific reason for moving to exclude, (2) the relationship between the accused and the victims, (3) the mental status of

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<sup>159</sup> D. Lee, *supra* note 8, at 74.

<sup>160</sup> The Supreme Court commissioned a study to increase the number of defendants applying for jury trials. The study, titled “A Study on Facilitating the Number of Defendant’s Application for Criminal Jury Trials,” is expected to be published later this year, and I was honored to be a part of the group for the study.

<sup>161</sup> See generally Choon-Hwa Lee, *A Study on the Issues and the Improvement Plans of Korean Jury Trial for the Sex Offense*, 23 KOREAN J. CRIMINOLOGY 65 (2011) (S. Kor.).

<sup>162</sup> *Id.* at 70–71.

<sup>163</sup> See generally Jessica D. Khan, *He Said, She Said, She Said: Why Pennsylvania Should Adopt Federal Rules of Evidence 413 and 414*, 52 VIL. L. REV. 641 (2007).

<sup>164</sup> Act on Citizen Participation in Criminal Trials, art. 9.

<sup>165</sup> Supreme Court [S. Ct.], 2015Do2898, Mar. 16, 2016 (S. Kor.).

victims and the age of victim, and (4) whether other preventive measures were provided to prevent secondary victimization.<sup>166</sup> These four categories should be considered in deciding whether to deny the defendant's application for jury trials in sex crime cases. In this decision, the Supreme Court indicated that it expects courts to be cautious when denying requests by the accused for a jury trial.<sup>167</sup> The Supreme Court's cautious position that the right to jury trial given to sex crime defendants must be protected shows a confusing state on the status of the right to jury trial.

### C. *Stage Three: Implementation*

The initial goal of including the jury trial was to transform the entire criminal justice system to restore the public's confidence in the judiciary.<sup>168</sup> However, this goal has not been achieved because the proportion of criminal jury trials has been lower than anticipated.<sup>169</sup> The fact that all parties in the system have different views on the purpose of the jury trial also undermines the jury trial's impact on the criminal justice system.

The role an individual plays in the trial affects his or her perspective on the contribution of jury trials in the criminal justice system.<sup>170</sup> For example, judges view jury trials as an opportunity to be involved in the case in a different way.<sup>171</sup> However, each judge approaches jury trials differently.<sup>172</sup> This is likely due in part to the lack of detailed guidelines for jury trial procedure.<sup>173</sup> Defendants may view jury trials as a strategic choice. They may assume that the general public is likely to have harsher views on punishment than judges, in which case they might avoid requesting jury trials.<sup>174</sup> Lawyers generally view requesting jury trials as a risky move because juror decisions are unpredictable. Finally, each party is well aware of the amended provisions of the Act discussed in Stage Two, which allow more cases to be tried by jury thanks to the expansion of eligible cases provided in Article 5 of the Act. However, even though some meaningful changes were made, the outcome has been the same.<sup>175</sup> It has been

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> See generally Yun & Kim, *supra* note 7.

<sup>169</sup> D. Lee, *supra* note 8, at 72–74.

<sup>170</sup> Chung, *supra* note 23, at 218–19.

<sup>171</sup> J. Kim, *supra* note 76, at 83.

<sup>172</sup> *Id.*

<sup>173</sup> D. Lee, *supra* note 8, at 80.

<sup>174</sup> C. Lee, *supra* note 161, at 72.

<sup>175</sup> D. Lee, *supra* note 8, at 74.

suggested that changes in law are not reflected in practice.<sup>176</sup> It remains to be seen whether such legislative overhaul would bring any meaningful outcome changes, such as more judges granting the defendants’ wishes to have jury trials.

#### D. Stage Four: Routinization

While courts have been wrong in predicting the right number of criminal jury cases per year, they have always been publically willing to provide any means necessary to accommodate any number of cases.<sup>177</sup> However, their explicit attempt to hear more cases is not evidenced by the actual number of jury trials granted; the overall percentage of jury trial requests granted is about forty percent, and has been for five years.<sup>178</sup> Furthermore, the fact that courts are working to guarantee the legitimacy of jury verdicts and sentencing opinions does not seem to help the jury trial become a routine procedure in the criminal justice system.<sup>179</sup> But there are many signs that the new system of criminal justice—the criminal jury trial—has gained support from the bench and the public as a routine system, at least for the foreseeable future.<sup>180</sup>

##### 1. Most Jury Verdicts Correlate with Final Judicial Decisions

Although the jury verdict is only advisory, more than ninety percent of jury verdicts since 2008 have been consistent with the holding of the judge.<sup>181</sup> This percentage has remained consistent over time, despite amendments to the Act.<sup>182</sup> Judges appear reluctant to disagree with juries because they respect the decision made by the defendants’ peers.<sup>183</sup> Since any decision made by the jury cannot be easier to make than those made by the bench, this high level of correspondence is quite meaningful.<sup>184</sup> It means that judges agree with juries on findings of fact. This *de facto* mandatory power given to jury decisions has been cited as a sign of success for the

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 78–82.

<sup>178</sup> *Id.* at 74.

<sup>179</sup> Supreme Court [S. Ct.], 2012Do13869, Jan. 31, 2013 (S. Kor.); Supreme Court [S. Ct.], 2011Do15484, June 14, 2012 (S. Kor.); Supreme Court [S. Ct.], 2012Do1225, Apr. 26, 2012 (S. Kor.).

<sup>180</sup> Cha, *supra* note 16, at 187–88.

<sup>181</sup> D. Lee, *supra* note 8, at 82.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 76.

<sup>184</sup> J. Kim, *supra* note 76, at 89.

criminal jury trial;<sup>185</sup> it shows that courts have tried to control the issues settled by juries, ultimately leading juries to find facts and recommend sentences that courts would render by themselves.<sup>186</sup>

## 2. Educating the Public

Part of the original intent of the jury trial was to expose the general public to the criminal justice system.<sup>187</sup> People who have served on juries generally view the experience as positive.<sup>188</sup> However, this represents only a very small fraction of the population. Some scholars even praise this small-scale phenomenon as one which can be understood as an enormous success.<sup>189</sup> However, it cannot be denied that the impact on the people is fairly limited, as few people have yet to serve on juries.<sup>190</sup> The difficulty in routinizing the process of the criminal jury trial has been a driving force behind amendments to expand eligible jury cases under the Act.

## 3. Number of Criminal Jury Trials are Still Negligible

Fewer than two percent of all criminal trials are jury trials.<sup>191</sup> Thus, the original goal of transforming the criminal justice system with the criminal jury trial has not been realized. Furthermore, future attempts to increase the number of criminal jury trials do not look promising, even after amending the Act to include more cases, as the current number of jury trials has not shown any meaningful increase.<sup>192</sup> A constitutional amendment is necessary to make the jury the mandatory fact-finder for every felony case.<sup>193</sup>

### *E. Stage Five: Evaluation*

The 2008 Act was a revolutionary attempt towards a participatory criminal justice system. The willingness to immediately enforce the Act without further deliberation or a waiting period reflects the experimental

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<sup>185</sup> Ha, *supra* note 12, at 585; Lee, *supra* note 8, at 94–95.

<sup>186</sup> J. Kim, *supra* note 76, at 76–77.

<sup>187</sup> D. Lee, *supra* note 8, at 80–81.

<sup>188</sup> *Id.*

<sup>189</sup> Chung, *supra* note 23, at 18–19.

<sup>190</sup> *Id.* at 18.

<sup>191</sup> D. Lee, *supra* note 8, at 74.

<sup>192</sup> *Id.*

<sup>193</sup> I. Kim, *supra* note 89, at 332–33.

period of five years, after which the process was re-evaluated by a newly formed committee under the Supreme Court.<sup>194</sup> Despite many scholars’ grim predictions, public perception of the Act was surprisingly positive, even if its real impact on the overall criminal justice system has been minimal.<sup>195</sup>

The future success of the criminal jury trial hinges on whether both the general public and legal professionals are confident enough in the benefits of jury trials to make them compulsory.<sup>196</sup> Ultimately, the simple measure of amending the Act will be insufficient to silence the concerns about the constitutionality of jury trials.<sup>197</sup> The only way to protect jury trials from these challenges is through a constitutional amendment enumerating the right to a jury trial for at least all cases eligible for a three-judge panel, as provided in the Act. In addition, to ease the minds of legal professionals, enough infrastructure must be in place to accommodate the influx of cases following a constitutional amendment mandating all felony cases be subject to a criminal jury trial. Currently, the process of subjecting all cases eligible for a three-judge panel to criminal jury trials is undergoing a second test period.<sup>198</sup>

This first revolutionary act of letting the public be directly involved in the criminal justice system has been praised as a success by both the public and legal scholars.<sup>199</sup> However, the ambition of realizing democracy in the criminal justice system is not yet near being fulfilled.

The basic premise that the inclusion of criminal jury trials is the best way to realize democracy in the criminal justice system may be based on a false assumption that the jury trial is the symbol of democracy in criminal justice system. Though the premise may be flawed and the execution problematic, the people’s belief that criminal jury trials must be a standard for serious crimes has not changed after eight or nine years. However, educating the public broadly has been less consistent. Initially, courts were very enthusiastic about publicizing criminal jury trials by putting advertisements on television and raising public understanding about this type

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<sup>194</sup> D. Lee, *supra* note 8, at 72.

<sup>195</sup> D. Lee, *supra* note 8, at 81. *See also* J. Kim, *supra* note 110, at 216; Ha, *supra* note 12, at 587.

<sup>196</sup> Ha, *supra* note 12, at 585; Cha, *supra* note 16, at 198–200.

<sup>197</sup> D. Lee, *supra* note 8, at 91–92.

<sup>198</sup> *Id.* at 92–93.

<sup>199</sup> *Id.* at 81. *See also* J. Kim, *supra* note 110, at 216; Ha, *supra* note 12, at 587.



of trial.<sup>200</sup> However, after nearly ten years, visible campaigns or advertisements to publicize criminal jury trials are no longer a part of television.<sup>201</sup>

There is, unfortunately, not enough legal training in general about the difference between facts and law. Sufficient understanding with respect to the legal impact of some factual issues is necessary to ensure that final decisions are not the result of errors. Better training and education of legal minds may be needed “even if this may lead to a reduction in the ‘fresh lay perspective.’”<sup>202</sup> South Korea never had a meaningful opportunity to debate the rationale for instituting criminal jury trials, and therefore lay people need to be provided with some legal understanding to address a case in front of them.<sup>203</sup> By doing this work, public confidence in criminal jury trials would become even stronger, and legal professionals’ uneasiness about the mandatory criminal jury trial would be allayed to a degree. For that purpose, jury instructions must be more guided and transparent, and “legalese” must be translated into laymen’s terms.<sup>204</sup>

### III. CONCLUSION

Moving forward, a fundamental question is whether democracy should be a goal in the criminal justice system in any country.<sup>205</sup> The ultimate goal of a criminal justice system in South Korea should be to realize justice, and there are times when democracy results in the sacrifice of accuracy. Providing an opportunity for lay people might help to restore the peoples’ trust in the judiciary; however, it does not necessarily guarantee fair decisions.

With a new administration taking office after the impeachment of former President Park, the President-elect Moon Jae-in announced that 2017 and 2018 would be a time for contemplation and devising a new

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<sup>200</sup> Young Hun Ham, *Baekjong-won, daebeop-won gong-ikgwanggo churyeon, yori gateun gungmincham-yeojaepan maeryeok hongbo* [Jong-Won Baek, *Appears in Supreme Court Public Service Advertisement, to Promote the Appeal of Cooking-like Public Participation*], HERALD BUSINESS, Nov. 13, 2015, [http://news.heraldcorp.com/view.php?ud=20151112001067&md=20151115003334\\_BL](http://news.heraldcorp.com/view.php?ud=20151112001067&md=20151115003334_BL) (S. Kor.).

<sup>201</sup> *Id.* The Court’s effort to advertise the jury trial has been reduced to radio and newspaper ads.

<sup>202</sup> C. Lee, *supra* note 161, at 78–79.

<sup>203</sup> J. Kim, *supra* note 110, at 214.

<sup>204</sup> Chung, *supra* note 23, at 143–44.

<sup>205</sup> Cha, *supra* note 16, at 169–76.

Constitution.<sup>206</sup> Unfortunately, including the right to jury trial in the Constitution is not predicted to be a priority for the incoming government.<sup>207</sup> The President and his administration side with the majority of scholars who consider it unnecessary to create a constitutional right to a jury trial because its current construction is sufficient for that purpose.<sup>208</sup> Despite this prediction, people should realize that justice is not being served ideally with participation from the general public. Participatory justice should not be a patch to restore the public confidence in the judiciary. Instead, a full-scale attempt to have criminal jury trials for entire felony cases would do tremendous work to overhaul the entire criminal justice system. In order to make this happen, the criminal justice system in South Korea needs more preparation to shore up the legal and practical bases of this procedural change.

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<sup>206</sup> Ju-Young Jang, *Heonbeopgaejeong gungmindaetoronhoe, gwangbeom-wihan gungmin uigyeon suryeong 'jeon-guk 11gae shi gaechoe'* [Citizens' Debate over Constitutional Revision, Gathers Broad Public Opinions in '11 Cities Nationwide'], SEOUL ECONOMIC DAILY (Sept. 25, 2017), <http://www.sedaily.com/NewsView/10L5YS1TH2> (S. Kor.).

<sup>207</sup> See generally J. Kim, *supra* note 76.

<sup>208</sup> *Id.*

