

# The Challenges and Outlook of Trial by Jury in Korea

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## Abstract

*As of January 1, 2008, a system for civil participation in criminal trials was introduced and enforced in Korea. This system is of particular importance as it is the first jury system in the history of Korean criminal justice. The jury system of Korea shares, prima facie, certain similarities with the prewar jury system of Japan: it exclusively deals with felony cases, allows majority verdicts, and does not recognize the binding effect of the verdict. Based on such a simple comparison one might predict for the jury system of Korea to fail to gain the support of the people, as the Japanese jury system did before.*

*This article, however, takes a different outlook. The fate of the Korean jury system might prove to be brighter than that of the Japanese jury system for several reasons. Firstly, the circumstances surrounding Korean criminal justice today are fairly different from pre-war Japan, where militarism was on the rise. Secondly, the simple majority vote produces no theoretical issues, as it honors the self-determinations of the largest number of people. Thirdly, a sense of equality and a refusal to recognize privileged classes are deeply ingrained among the Korean public. Fourthly, the introduction of the jury system in Korea was a bottom-up reformation implementing the wishes of the public toward the democratization of justice. Lastly, Korea's introduction of the jury system was implemented concurrently with the reform of the Criminal Procedure Code, which enhances the principle of oral proceedings.*

*Now the challenge at hand is to build an extensive consensus and respect among the people for jury verdicts. The decisions and choices of the jury deserve respect just as much as those of the judges. To this end, the judiciary must make efforts to enhance its democratic legitimacy as well.*

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## I. Introduction

The jury is before everything a political institution;  
one ought to consider it as a mode of the sovereignty of the people.

- Alexis de Tocqueville, *Democracy in America* -

Despite the fairly measurable progress of Korean democracy well beyond the wall of authoritarianism, the public's thirst for democracy in its full-blooded form has not yet been quenched. The increase in the level of democracy achieved in Korea has been limited when it comes to legislation and administration, but now the Korean public aspires to make the legal system more democratic as well. It has often been pointed out that Korean judicature has problems in terms of democratic legitimacy, as its power is not directly authorized by the public, but indirectly by way of the National Assembly and the President.<sup>1)</sup>

The demand that not only legislative and executive but also judicial power obey the will of the public, however, is in essence an absolute bedrock of democracy. Even without mentioning Article 1 (2) of the Constitution of the Republic of Korea that reads, "The sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people," the premise that judicial power must derive from the people is self-evident. In this respect, the last few years have seen heated debate in the country about the institutionalization of the public's participation in justice, resulting in the Civil participation in Criminal Trial Act of 2007.<sup>2)</sup>

The French political theorist Alexis de Tocqueville (1805-1859) argued in his work *Democracy in America* that universal suffrage and trial by jury were like the two wheels of a cart called democracy. Assuming that his intuitive insight was right, it would also be safe to state that Korea has now broken away from half-baked democracy and established a moderately unimpaired foundation of democracy.<sup>3)</sup> The increasing number of countries implementing

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1) Korean judges are appointed by the Chief Justice, who is nominated by the President with the consent of the National Assembly. To summarize, the President, the National Assembly and the Chief Justice intervene in the process of the appointment of judges in Korea.

2) Law No. 8495 of 2007.

3) It cannot be said that the cart of democracy in Korea is fully equipped with its two

democracy indicate that citizen's participation in justice has positioned itself as an irresistible current of the times. Only a tiny minority of countries refuse to allow for civil participation in criminal trials in any form.<sup>4)</sup> The above Act is of substantial historical significance as it is a sign that Korea has taken the first step in jury trial, in line with this global trend.

As mentioned before, the current jury system of Korea shares certain similarities with the prewar system of Japan. As the implementation of the jury system is the first to be seen in the history of Korean criminal justice, the outlook for its success or failure draws significant attention. This in turn calls for a comparative study of the prewar Japanese jury trial system in order to assess where the Korean jury system stands now. In this connection, this article reviews the prewar Japanese jury system. It then examines the discussions concerning the introduction of jury trial in Korea since the end of the Japanese colonial era up to this point, before moving on to a comparative analysis of the current jury systems. Then, based on these examinations, it intends to provide a careful outlook of the future of the Korean jury system.

## II. The Jury System in Prewar Japan

The jury trial system of Japan differs in its creation.  
This institution was not produced by the effort of the people,  
but established by the government  
to pursue the enhancement of the judicial system.

- Yুক্তoki Takigawa, *The Jury Act* -

### 1. *The Backdrop for the Introduction of the Jury System*

Jury system refers to the institution of a legal proceeding where a jury of selected members of the public makes findings of fact and a professional judge interprets and applies law. In a nutshell, the jury system may be referred to as a collaborative trial system involving the public and judicial officers. Japan once had a jury system in place in this sense: the Jury Act of

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wheels, because Korea has not yet introduced a jury system in civil trials.

4) See NEIL VIDMAR, *WORLD JURY SYSTEMS* 3 (2000).

1923<sup>5)</sup> governed jury trials for fifteen years from 1928 until 1943.

The history of the jury system in Japan may be chronologically divided into the following three stages: (i) the Meiji Constitution establishment period, (ii) the Taisho Democracy period, and (iii) the period of lay participation in trials.<sup>6)</sup>

Perfunctorily based on this chronological demarcation, the jury system that was in force in prewar Japan may appear, at a glance, as a product of Taisho Democracy. 1923, or Taisho 12, the year in which the Jury Act was established, technically fell within the Taisho Democracy period. Moreover, the jury trial system was consistent with the goals of Taisho democracy, which may be roughly broken down into two: (i) universal suffrage and (ii) the implementation of the jury system.<sup>7)</sup> It is therefore not entirely farfetched that the Jury Act appeared as a product of Taisho democracy, as it were. However, the Jury Act was not a product of Taisho democracy alone. On the contrary, it is this paper's view that it was far more of a product of political ploys spanning nearly a half decade<sup>8)</sup> since the Meiji era.

It was during the Meiji Constitution establishment period, starting around Meiji 10 (1877), when the discussion of the legislation of the jury system was initiated for the first time in Japan.<sup>9)</sup> The draft bill of the Penal Code, prepared by the Ministry of Justice of Japan from July of Meiji 10 to June of Meiji 12, already contained the provisions for the jury system.<sup>10)</sup> The incorporation of these provisions in the draft was largely done by Gustave Emile Boissonade (1825-1910), the then legal advisor from France.<sup>11)</sup> It was his idea that the revision of unequal treaties would require the enhancement of the Japanese legal system to a level on a par with those of Western Europe, which in turn would make it necessary to introduce a jury trial system.<sup>12)</sup> As such, the first

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5) Law No. 50 of 1923.

6) As for the chronological classification of the development of the Japanese jury system, this article is based on TAICHIRO MITANI, *THE JURY SYSTEM AS A POLITICAL INSTITUTION* 3-7 (2001) (available only in Japanese).

7) *Id.* at 137.

8) To be more exact, it took 46 years from the preparation of draft Penal Code in Meiji 10 (1877) to the establishment of the Jury Act of Taisho 12 (1923).

9) MITANI, *supra* note 6, at 3, 97.

10) *Id.*

11) *Id.* at 97-98.

12) *Id.* at 98. It is paradoxical that, contrary to Boissonade's idea, Hirobumi Ito, the most

step of the Japanese jury system stemmed from political considerations.

Following the drafting of the Penal Code, the Penal Code Review Board, established in October of Meiji 12 (1879), conducted an article-by-article review of the draft and applied certain modifications before submitting a proposed revision of the bill to the Chancellor of the Realm (*Daijōdaishin*), which revision preserved the jury system provisions nearly intact.<sup>13)</sup> The proposed revision submitted to the Chamber of Elders (*Genrōin*) in March of Meiji 13 (1880), merely one month after the filing of the bill to the Chancellor, however, had no trace of the jury system provisions.<sup>14)</sup> In the end, the Penal Code was promulgated in July of Meiji 13 (1880) with these provisions completely deleted.<sup>15)</sup>

Although the attempt to incorporate a jury system in the Penal Code was thus thwarted, this did not mean that the cry for the introduction of the jury system faded away. On the contrary, the camp arguing for its introduction was winning an increasing number of supporters outside of the government. A series of events was triggered by the Satsuma Rebellion. In order to ensure fairness in the trials of those involved in the Rebellion, Yukichi Fukuzawa (1835-1901) argued that jury trials be held.<sup>16)</sup> The Meiji government, however, went on to execute these people without even going through judicial formalities, which Fukuzawa strongly criticized.<sup>17)</sup> This criticism was then propagated to the entire rank and file of the Freedom and People's Rights Movement that was then on the rise, and served to cause this movement to make the establishment of the jury system one of its objectives.<sup>18)</sup> The newspapers in the civil rights camp unanimously ran editorials advocating the merits of the jury system,<sup>19)</sup> and a large number of constitutional drafts proposed by the private sector contained provisions for it.<sup>20)</sup>

Despite these efforts, however, the Meiji Constitution as promulgated in

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influential figure then, considered the jury system as an obstacle to the revision of the unequal treaties.

13) *Id.* at 99.

14) *Id.* at 100.

15) *Id.* at 101.

16) *Id.* at 4, 104.

17) *Id.*

18) *Id.* at 4, 108.

19) *Id.* at 4, 109.

20) *Id.* at 4.

Meiji 23 (1890) did not incorporate trial by jury. Although the Constitution of the Kingdom of Prussia, which the Meiji Constitution was modeled after, did provide for jury trial,<sup>21)</sup> those who drafted the Meiji Constitution deliberately rejected it.<sup>22)</sup> Most decisively, the jury system failed to persuade Toshimichi Okubo (1830-1878), the most influential figure in the Meiji government, and his successor Hirobumi Ito (1841-1909).<sup>23)</sup> Having placed the revision of unequal treaties at the top of the state agenda, Ito concentrated his efforts on maximizing the wealth and military might of Japan, even at the expense of the jury system, if necessary.<sup>24)</sup> The attempts made in the Meiji Constitution era towards the introduction of the jury system, in the end, were repeatedly thwarted.

Following the Meiji Constitution era, it was during the so-called Taisho Democracy period, spanning the Russo-Japanese War in 1905 and the Manchurian Incident in 1931, when the second wave toward the jury system arose. A proposal for the establishment of a jury system was submitted by the *Seiyukai*, the opposing party, to the Diet in February of Meiji 43 (1910) and unanimously passed by the House of Representatives in February of Meiji 43 (1910).<sup>25)</sup> Taking the lead in this passage was Takashi Hara,<sup>26)</sup> the then *de-facto* leader of the party and a disciple of Boissonade,<sup>27)</sup> which gives rise to the presumption that Boissonade had a major influence on Hara spearheading the proposal.

An aspect that deserves more attention, however, is that political rationales served as a basis for the passage of the proposition. One of these rationales is as follows:<sup>28)</sup> the Meiji Constitution dictates that trials be held in the name of *Tenno*, the Japanese Emperor. What was at issue was that if findings of fact were to be made in his name as well, it would inevitably give rise to issues of Emperor's liability. This led to the reasoning that the maintenance of the

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21) The Constitution of the Kingdom of Prussia § 94 provided that felony cases should be dealt with by jury trials.

22) MITANI, *supra* note 6, at 117.

23) *Id.* at 3, 117. It is said, however, that Ito had deliberately examined the introduction of the jury system as a premise of the establishment of the Meiji Constitution.

24) *Id.* at 106-7.

25) *Id.* at 125.

26) *Id.*

27) *Id.* at 5.

28) *See id.* at 126.

inviolability of Emperor would require the establishment of a jury system so that liability might be spread among the public.

At any rate, the proposal passed in Meiji 43 (1910) was the beginning of a renewed round of legislative efforts for the jury system in the Taisho Democracy period. When Takashi Hara came to head the cabinet in September of Taisho 7 (1918), he immediately set out to have the jury system incorporated in the legal framework.<sup>29)</sup> The *Seiyukai*, which was an opposing party when it made the Meiji 43 proposal, had already become the dominant ruling party by December of Taisho 9 (1920), when the Jury Act was drafted.<sup>30)</sup> Although Hara was assassinated in November of Taisho 10 (1921) and his cabinet soon dissolved, he left behind the Jury Act bill, which was inherited by the Takahashi cabinet.<sup>31)</sup> After being discarded by the Takahashi cabinet and then once more revived by the Tomosaburo Kato cabinet,<sup>32)</sup> the bill finally passed the Imperial Diet and resulted in the Jury Act in April of Taisho 12 (1923).<sup>33)</sup>

There is a paper explaining the genuine motive behind the enactment of the Jury Act that is worthy of mentioning. Naomichi Toyoshima (1871-1930), who took part in the drafting of the bill in the Ministry of Justice of the Hara cabinet and introduced the bill to the Privy Council Review Committee as a government committeeman, presents in his paper, *On the Occasion of the First Anniversary of the Jury Act*, the following statement:

The [Japanese] jury system never originated from a democratic idea of, say, the people being entitled to participate in judicial procedures. It may rather be ascribed to a notion of the people protecting the judicial power exercised in the name of the Emperor. The Jury Act has made it clear that this duty to vindicate judicial power lies with the public.<sup>34)</sup>

As discussed above, the jury system in prewar Japan was a political institution conceived and created by political considerations such as the

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29) *Id.* at 129.

30) *Id.* at 173, 179.

31) *Id.* at 211.

32) *Id.* at 240-41.

33) *Id.* at 244.

34) *See id.* at 250.

revision of unequal treaties and the vindication of the Imperial power. Although the jury system had consistently been advocated by the Freedom and People's Rights Movement and the atmosphere of Taisho democracy was in general favorable to its introduction, it went through several ups and downs, being at times thwarted, at other times hailed due to political considerations. While the jury systems in Western Europe were trophies of the political struggles of the masses as pointed out by Yukitoki Takigawa,<sup>35)</sup> that of Japan was a byproduct of the government's political agenda. These inherent limitations of the jury system of prewar Japan would have adverse impact on its substance and operation as discussed below.

## *2. The Substance of the Jury System*

The jury trial system as provided for in the Jury Act of 1923 was what may be specifically referred to as a Japanese version in that it had substantial differences from those of the UK or the US in the following aspects: Firstly, jury trials were exclusively limited to felony cases. Jury trials may have been granted only (i) where the maximum statutory penalty was a capital punishment or a life sentence,<sup>36)</sup> or (ii) where the maximum statutory term of imprisonment was no less than three years and the minimum no less than one year.<sup>37)</sup> In the former case, a jury trial was available unless waived by the defendant (statutory jury trial),<sup>38)</sup> whereas in the latter, it was available only when specifically requested by the defendant (requested jury trial).<sup>39)</sup> Secondly, the jury was not permitted to reach a verdict of 'guilty' or 'not guilty.' The duty of the jury was to give answers to the questions asked by the judge relating to the existence or nonexistence of facts.<sup>40)</sup> These verdicts were determined by majority voting of twelve jurors.<sup>41)</sup> Lastly, the answer of the jury was not binding.<sup>42)</sup> If the court deemed the verdict of the previous jury

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35) YUKITOKI TAKIGAWA, THE JURY ACT 42 (1938) (available only in Japanese).

36) The Jury Act § 2.

37) The Jury Act § 3.

38) The Jury Act § 2, 6.

39) The Jury Act § 3.

40) The Jury Act § 88.

41) The Jury Act § 91.

42) The Jury Act § 95.



unwarranted, it was possible to organize a new jury to deliberate on the case.<sup>43)</sup>

The shaping of the prewar Japanese jury system in the above form was heavily influenced by political intentions. Article 24 of the Meiji Constitution stipulated, "No Japanese subject shall be deprived of his right of being tried by the judges determined by law," while Article 57 (1) prescribed, "The judicature shall be exercised by the courts according to law, in the name of the Emperor." Article 58 (1) also provided that "The judges shall be appointed from among those, who possess proper qualifications according to law." At any rate, according to the explicit provisions of the Meiji Constitution, trials were required to be conducted by judges and judicature exercised by courts. This gave rise to criticism that having jurors who did not possess the necessary qualifications to be a judge take part in trial procedures infringed on the authority of the judges and courts and was thus unconstitutional.

It was for no other reason than to evade this criticism why the Jury Act limited the duty of the jury to findings of fact, refused to recognize the binding effect of the verdict, and allowed for the replacement of the jury. The reasoning was, in other words, that the trial-by-jury system did not infringe on the authority of the judge or the court since the verdict returned by the jury was not binding the judge and the judge was allowed to replace the jury. As such, not only the introduction of the jury system but also its substance was not free from the influence of political agendas.

### 3. *The Development of the Jury System*

The prewar Japanese jury system was in place for a total of fifteen years from 1928 until 1943. The following is a tabular analysis of the annual statistics for the jury system: the number of jury trial cases and the number of cases where the defendants were found not guilty.

**Table 1.**

Year	1928	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940	1941	1942	Total
Jury cases	31	143	66	60	55	36	26	18	19	15	4	4	4	1	2	484
Not-guilty cases	5	14	3	17	14	6	5	8	4	3	0	0	1	1	0	81

43) The Jury Act § 95.

As indicated in the above table, although the jury system was made relatively active use of in the earlier years of its implementation, the number of the users declined over the years, with the annual number of the jury cases reaching a single-digit figure by 1938, which indicates that the jury trial system somehow failed to draw the attention of the Japanese public. In the end, the jury system of prewar Japan was abrogated by the Act on the Abolition of the Jury System of 1943<sup>44)</sup> and has been regarded as an institutional failure.<sup>45)</sup>

Such being the case, what could have been the cause of the failure? A number of analyses have been presented on this matter as follows. Firstly, military actors were rapidly increasing their power on the Japanese political scene when the jury system was put in place.<sup>46)</sup> The peace preservation law regime started by the enactment of the Peace Preservation Act of 1925 (*Chian ijihō*), was further reinforced by the 1928 revision of the same Act.<sup>47)</sup> In addition, although a significant number of communists were arrested in 1928, they were entirely denied the right to jury trial,<sup>48)</sup> as the Jury Act excluded any and all violations of the Peace Preservation Act from jury trials.<sup>49)</sup>

Secondly, an inherent flaw of the jury system also contributed to its demise.<sup>50)</sup> As judges were allowed to disregard verdicts and replace juries, defendants were hardly motivated to insist on jury trials.<sup>51)</sup> Besides, it has

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44) Law No. 88 of 1943.

45) However, it is remarkable that the average rate of not-guilty cases during the 15 years even reaches 16.7%, whereas the Japanese criminal justice is famous for its high guilty rate of 99.9%. The prewar Japanese jury system might as well be considered to have contributed to the democratization of the Japanese criminal procedure.

46) See Mamoru Urabe, *A Study on Trial by Jury in Japan*, in *THE JAPANESE LEGAL SYSTEM* 487 (Hideo Takana ed., 1976); VIDMAR, *supra* note 4 at 361.

47) After the revision of the Peace Preservation Act in 1928, the statutory maximum punishment was reinforced to capital punishment from no more than 10 years imprisonment with or without forced labor.

48) Urabe, *supra* note 46 at 487; VIDMAR, *supra* note 4 at 361.

49) The Jury Act § 4; Urabe, *id.* at 484.

50) In this respect, noteworthy is the following assertion of Professor Nobuyosi Toshitani: "The miserable state of affairs which developed in the actual operation of the Jury Act had been expected at the time of its enactment. One should feel surprised not at this point [*i.e.*, the failure of the jury system] but at the remarkable success of various devices which were built into the system in order to prevent the smooth working of trial by jury in Japan." (Urabe, *id.* at 487.)

51) Urabe, *id.* at 490; VIDMAR, *supra* note 4 at 362.

been reported that as a finding produced in a jury trial could not be appealed against,<sup>52)</sup> a significant number of defendants waived jury trials with the sole purpose of preserving the right to appeal.<sup>53)</sup> The Jury Act did not permit objections against the jury instructions given by the judge, either.<sup>54)</sup> This led to the criticism among defending counsels that the judges' instructions encouraged verdicts unfavorable to the defendants.

Lastly, the failure of the jury system is often ascribed to the vertical nature of Japanese society. In the cultural soil of Japan stressing hierarchical relationships, the Japanese reportedly prefer to be tried by *those in superior positions* than by their *peers*.<sup>55)</sup> It is also reported that the Japanese tend to believe that the judges would give fair trials with high moral standards as they preside over trials *in the name of the Emperor*.<sup>56)</sup>

As discussed above, the failure of the Japanese jury system is attributed to a number of factors. This article, however, intends to present a few additional factors based on the author's own analysis and intuition. Firstly, it is noteworthy that the introduction of the jury system in Japan was not a reformation achieved by the people but by the government.<sup>57)</sup> Put another way, the prewar jury trial system of Japan was not a trophy of the struggles of the Japanese people, but a byproduct of the aspirations of the ruling class. This was why its substance conformed to the political agenda of the government, instead of encouraging the participation by the people in judicial affairs. It is probably not surprising at all that a jury system in this form failed to gain the

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52) The Jury Act § 101; § 102.

53) TAKIGAWA, *supra* note 35 at 37. More importantly, there was a general tendency to mitigate the sentence on the appellate trial, and therefore the Japanese people preferred to preserve the right to appeal rather than go on the jury trial.

54) The Jury Act § 78.

55) Urabe, *supra* note 46 at 485; VIDMAR, *supra* note 4 at 63.

56) Urabe, *id.*; VIDMAR, *id.* at 363. The high guilty rate of 99.9% of Japanese Criminal Justice explicitly shows the Japanese people's deep confidence in the bureaucrat. As for the detailed research on this, see Noah Stuart Stephens, 99.9: The Japanese Conviction Rate (2008) (unpublished Master thesis, Seoul National University).

57) Yukioki Takigawa points out sharply as follows: "The jury trial systems of the Western Europe are all the products of the political revolutions. That is, they are institutions acquired by the strife of the people to the tyrannies. However, the jury trial system of Japan differs in its creation. This institution was not produced by the effort of the people, but established by the government to pursue the enhancement of the judicial system." TAKIGAWA, *supra* note 35 at 41.

support of the people.

Lastly, it was not very feasible to implement the purpose of the jury system when oral proceedings were not properly held. The jurors, who are not legal experts, merely hear the statements of the witnesses present in court and observe evidence submitted to the court before bringing in verdicts. The principle of oral proceedings, the absolute precept of the modern criminal procedure code, is essential to jury trials. It is out of the question that a jury system could have been successful when this principle was neglected and the so-called trial by dossier rampant. Accordingly, the following argument made by Mamoru Urabe well illustrates the atmosphere prevalent in the courtrooms back then:

The law of criminal procedure at that time was [basically inquisitorial] following the pattern of Continental law. The Jury Act was engrafted upon this [inquisitorial] system . . . . If it had been true, as it often said, that jurors were inclined to see the case as if they had been attorneys for the accused, and thereby returned answers negating the existence of those facts necessary to constitute a crime, I guess the reason might have been the inquisitorial attitude to the conduct of the trial taken by most judges, which might have had the effect of creating an antagonistic attitude to the court among jurors, which in turn might have made them [unduly] sympathetic to the accused.

. . . [If such an observation is correct] the present framework of criminal procedure, which has adopted various adversary principles from Anglo-American law, seems to fit much better a system in which criminal cases are tried by jury.<sup>58)</sup>

This article does not wish to promote the overly simplified view that the adversary system is compatible with the jury system while the inquisitorial system is not. In both systems the implementation of a jury system would require the adherence to the principle of oral proceedings. The jury system proved to be unsuccessful in prewar Japan because this principle was neglected.

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58) Urabe, *supra* note 46 at 490.

### III. The Current Jury System of Korea

Trial by jury is more than an instrument of justice  
and more than one wheel of the constitution:  
it is the lamp that shows that freedom lives.

- Patrick Devlin, *Trial by Jury* -

#### 1. *The Backdrop for the Introduction of the Jury System*

The Jury Act that was in place in prewar Japan was never enforced in its colony, Joseon. It was difficult for the members of the Korean public to qualify as jurors under the Jury Act,<sup>59)</sup> while the essential objectives of the Act were not related to Joseon, either. The political reasoning of vindicating the judicial power exercised in the name of the Emperor, was of no concern to the Korean public.

The discussion of the introduction of the jury system to Korea was first initiated in the period of the U.S. Military Government in Korea after the country was liberated. In May 1947, the U.S.-Soviet Joint Commission required the parties and organizations in both halves of Korea to file responses regarding the organization and platform of a provisional government. A proposal jointly filed in response by the Supreme Public Prosecutor's Office, the Seoul High Prosecutor's Office, and the Seoul District Prosecutor's Office in June 1947 contained details regarding the introduction of a jury system.<sup>60)</sup>

Subsequently in June 1948, its introduction was briefly discussed during the course of the review of the draft of the first Constitution. In response to a written question of the assemblyman Byeong-hoe Kim as to whether to introduce a jury system, Expert Member of the Committee Seung-ryeol Gwon

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59) Jurors were chosen by lot from those (i) who were Japanese male citizens over thirty years of age, (ii) who had resided in the same city, town or village for two years or longer, (iii) who paid not less than three yen in national direct tax for the preceding two consecutive years, and (iv) who were literate (The Jury Act § 12, 23 & 27).

60) As for details, see Joon Young Moon, *The Failure in Attempts toward Democratic Justice in South Korea from 1945 to 1949: debates upon the introduction of the jury system and the selection of judges by legal professions*, 21 DEMOCRATIC LEGAL STUDIES 141, 155 (2002) (available only in Korean).

replied as follows:

Trial by jury is a judicial component. It is therefore conventional to incorporate jury trial in the judicial system. Article 75 stipulates, "Judicial power is exercised by courts consisting of judges. The organization of the Supreme Court and lower courts shall be determined by Act." This "determined by Act" phrase may imply that a jury system is either incorporated or not. The National Assembly could insert certain provisions in the Court Organization Act and the Criminal Procedure Code. This is why the constitutional bill does not deal with trial by jury.

In actuality, however, neither the Court Organization Act of 1949<sup>61)</sup> nor the Criminal Procedure Code of 1954<sup>62)</sup> contained any provisions for jury trial. Afterwards, the jury system became a matter of little concern to the Koreans, and for nearly a half century, no official discussions were initiated to introduce it.

Although a number of analyses may be produced as to why the institution failed to garner attention among the Korean judicial community over the course of establishing the Constitution, the Court Organization Act, and the Criminal Procedure Code following the end of the Colonial Era, this article wishes to stress the importance of certain circumstances that were in many ways similar to those surrounding the prewar Japanese jury system. As noted earlier, the prewar jury system of Japan was realized in courtrooms where oral proceedings were neglected and thus failed to find a way of effective operation. Under the authoritarian, bureaucratic judicial system that lacked criminal procedures protecting human rights, the Japanese public did not find it compelling to go out of their way to make use of the jury system. More fundamentally, this is because the jury system of that time was introduced to further political agendas, not to implement civil participation in judicial affairs.

In this sense, the criminal justice of post-liberation Korea was not very

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61) Law No. 51 of 1949.

62) Law No. 341 of 1954.

different from that of prewar Japan. The criminal justice of post-liberation Korea inherited the criminal justice system of the Colonial Era nearly intact. As the trial by dossier was practically unquestioned, the members of the judicial community must have found the introduction of a trial-by-jury system less than compelling. There were no political motives for its introduction as a political institution, either. The following analysis made by Professor Joon Young Moon is straightforward testimony of the situations surrounding post-liberation Korea.

It is obvious that with respect to the discussions of civil participation in the judicial system engaged in after the liberation, the key to its success was how its political implications might be newly reorganized. As discussed below, however, the public awareness of the political implications was, counting out those on the left wing, very limited at best. Most judicial officers grew up within the bureaucratic and precise judicial framework of the Colonial Era and thus required strong political intervention from the outside if they were to break out of such framework, which intervention, however, was not permitted by the circumstances of the time.<sup>63)</sup>

Another round of official discussions of the introduction of the jury system in Korea began when a series of Presidential Committees on Judicial Reform were successively organized since the 1990s. The first Committee organized in May 1999 concluded its May 2000 proposal stating that civil participation in the judicial system was “a project to be studied and reviewed over a long haul in an affirmative manner.” Thereafter, the second Committee established in October 2003 presented their opinion in its December 2004 proposal: “It is appropriate to have in place an institution of civil participation in the judicial system.” Then, the last Committee launched in January 2005 submitted to the National Assembly a bill of the Civil participation in Criminal Trial Act in December 2005, which passed the Assembly on April 30, 2007, resulting in its enactment.

Korea now took a step closer to the democratization of justice by

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63) Moon, *supra* note 60 at 151.

implementing civil participation. The collective competence of the Korean public that achieved democracy in legislation and administration, finally demonstrated itself in justice as well. The jury trial system of Korea was not created as a byproduct of political considerations as in Japan. Rather, it would be correct to say that the Korean jury system was a product of this collective competence that has been accumulated to date. The specific basis for this argument is presented below.

## *2. The Substance of the Jury System*

The substance of the Korean jury trial system may be summarized as follows, with a focus on a comparison with that of prewar Japan. Firstly, in a similar manner with its Japanese counterpart, the jury trials of Korea deal with felony cases only. This is a makeshift measure to minimize the adverse effects in the early stages of the implementation, and the aim is to gradually expand the applicability over its course.

Secondly, the Korean juries are expected to deliver verdicts of guilty and not guilty. The verdicts are to be reached by unanimous voting.<sup>64)</sup> If no unanimous decision is made, the jurors are required to hear the opinions of the judge before reaching a verdict by a majority vote.<sup>65)</sup> If a guilty verdict has been delivered, the jurors are to present their opinions on sentencing after engaging in a discussion with the judge.<sup>66)</sup>

Lastly, the verdict and sentencing opinions given by the jury do not bind the court.<sup>67)</sup> The judge, however, is required to explain to the defendant in the courtroom and state in the court decision the reason for a ruling inconsistent with the jury's verdict.<sup>68)</sup>

As shown above, although the jury trial of Korea differs from that of Japan in that it produces verdicts of guilty and not guilty, it also shares certain similarities with it: it exclusively deals with felony cases, allows for a verdict

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64) Civil Participation in Criminal Trials Act (hereinafter referred to as the CPCT Act) § 46 Sec. 2.

65) The CPCT Act § 46 Sec. 3.

66) The CPCT Act § 46 Sec. 4.

67) The CPCT Act § 46 Sec. 5.

68) The CPCT Act § 48 Sec. 4, § 49 Sec. 2.



by a majority vote, and does not recognize the binding effect of the verdict. It is therefore necessary for the Korean lawmakers to take precautions against the kind of failures that were experienced in Japan in the past.

The following Chapter reviews where the criminal justice of Korea stands today and analyzes it in comparison to the situation surrounding the criminal justice of prewar Japan. Based on this analysis, it argues that the outlook for the Korean jury trial is promising, and that the Korean jury system most likely will not share the faith of its Japanese counterpart. It then intends to explore some of the challenges to be faced by the Korean jury trial on the road to a better future.

#### **IV. The Outlook of Civil Participation in Criminal Trials in Korea**

Kings, marquises, generals, and chancellors are made, not born.

- Sima Qian, *The Records of the Grand Historian* -

The Civil participation in Criminal Trial Act has been in force for one year since January 1, 2008. A current overview of civil participation in criminal trials is as follows:<sup>69)</sup> As of January 1, 2009, a total of 223 cases of trial by jury have been filed for, resulting in 60 holdings and 30 cases still pending. In the remaining 133 cases, either the defendants withdrew the application, or the courts precluded jury trials. As it has only been one year since the jury system started, it would be premature to evaluate the performance of this system. It is necessary to observe how it fares over a longer term. This article, however, presents a careful forecast of the future of civil participation in proceedings, based on a comparative analysis of the reality in which Korean criminal justice is rooted.

Firstly, the circumstances surrounding Korean criminal justice of today are fairly different from the fascist regime of Japan in the past. South Korea is cited as one of the very few examples where economic development and

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69) For the detailed statistics of the Korean jury trial over the last one year, see THE CHOSUN ILBO, December 26, 2008, at A27.

democracy were concurrently accomplished. Given its moderately adequate levels of economic conditions and democratic values, the failure of the jury system seems unlikely.

Secondly, this article finds the civil participation system in its current form fairly well organized in substance. Some may note that it does not require unanimous verdicts, unlike the Anglo-American jury system. It stands, however, to good reason that a legal institution reflects the society that it is rooted in. The differences of the Korean jury system from those of other countries alone do not warrant belittlement. Moreover, there are no grounds to presume that unanimous decision-making is superior to a majority vote. People often resort to majority voting when it comes to collective decision making, and there are several theories that argue for the legitimacy of majority voting.<sup>70</sup> If unanimity is required for group decision-making, an objection raised by a single person reverses the decisions made by everyone else. To put it another way, only the decision of a single person is honored.<sup>71</sup> If a group decision-making process requires two thirds of the decision makers to cast favorable votes, the opposing votes cast by only one third are enough to reverse the self-determinations made by the remaining two thirds. Expressed in other terms, only the self-determinations of the one third are honored. This leads to the conclusion that a simple majority vote would honor the self-determinations of the largest number of people.<sup>72</sup> Besides, the American economist Kenneth Arrow (1921- ) once produced mathematical proof that it was impossible to determine a collective preference of a group by aggregating the preferences of its members, no matter what methods are employed, including simple majority voting, weighted majority voting, or unanimous voting.<sup>73</sup> Conclusively, the fact that the Korean jury system has elected to use

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70) As for the theories which justify the majority rule, see generally ROBERT ALAN DAHL, DEMOCRACY AND ITS CRITICS 138-44 (1989); YASUO HASEBE, THE LABYRINTH OF INCOMMENSURABLE VALUES: STUDIES IN CONSTITUTIONAL LAW AND LIBERAL DEMOCRACY 89-98 (2000) (available only in Japanese).

71) In the well-known classical film *Twelve Angry Men* (1957), which is often said to illustrate the virtues of the jury system, the stubborn objection of only one person finally resulted in the justice. However, a fictitious case of the movie should not be generalized to advocate the unanimous voting.

72) DAHL, *supra* note 70, at 138-39.

73) This is called the *Arrow's Impossibility Theorem*. Kenneth Arrow was awarded a Nobel

simple majority votes for verdicts, produces no particular issues in theoretical terms. It is also permitted to file an appeal against a holding produced in a jury trial of Korea,<sup>74)</sup> which precludes the likelihood of defendants waiving jury trials, as was the case with Japan in the past, so that they could later appeal.

Thirdly, the level of the sense of equality in Korea is virtually unparalleled in any other countries. Korea has no royal families or aristocracy. A sense of equality and a refusal to recognize privileged classes are deeply ingrained among the Korean public. Furthermore, the seemingly unending vine of distrust of the judiciary system among the public since the foundation of the republic, has reached an alarming level. These factors rule out any remote likelihood of the Korean people preferring trials by professional judges over trials by jury.

Fourthly, the introduction of the civil participation in criminal proceedings was a bottom-up reformation implementing the wishes of the public toward the democratization of justice. This stands in stark contrast to the Japanese experience in that it was a top-down reformation stemming from political agendas.

Lastly, Korea's introduction of the jury trial system was implemented concurrently with the reform of the Criminal Procedure Code. This descended from the recognition of the lawmakers that the successful implementation of the jury system would be unfeasible without the reform. The reform of the Criminal Procedure Code of 2007 is regarded as the most extensive and most desirable revision since its establishment in 1954. Enhancing the principle of oral proceedings as well as the principle of adjudication based on evidence, the revised Criminal Procedure Code laid solid foundations on which the jury system could take root.

Based on these grounds, this article maintains that the future of the civil participation system is not bleak at all, and considers it necessary to observe how it fares for some time to come. Just as it is unwarranted to have an

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Prize in 1972 for this theorem. For the theoretical attempt to repute the *Arrow's Impossibility Theorem* and re-evaluate democracy, see HONG SIK CHO, *DEMOCRACY AND MARKET ECONOMY* Ch. IV (2007) (available only in Korean).

74) For a discussion of the egalitarian spirit of the Korean, see HO-KEUN SONG, *WHAT EGALITARIANISM MEANS TO KOREA* (2006) (available only in Korean).

entirely rosy view of the future, it is equally unnecessary to be overly pessimistic. The task the Korean public has at hand is to explore the future challenges on the road in order to ensure the successful operation of the system.

## V. Conclusion

Never mind that the jury was not, nor could it be realistically expected to be, a perfect institution. It was viewed as better than the alternatives.

- Neil Vidmar, *World Jury Systems* -

Like it or not, the system of civil participation in trials has been implemented into the legal program and will stay operational in this country for a substantial period. The challenge we have on hand is to successfully operate this institution. To this end, this article deems it necessary to build an extensive consensus and respect among the public for jury verdicts. Empirical studies indicate that the percentage of verdicts consistent with judge decisions is approximately 75%. The remaining 25% inconsistency reportedly eventuates from differences in values, where judges also agree that different values share the same weight and it would be unreasonable to put some above others. Such being the case, the respect for jury verdicts boils down to the issue of the respect for different values.

Man does not entirely depend on reason in a decision-making process. Intuition is sometimes relied upon. Human beings make reasonable decisions but they also make subjective choices. Subjective choices involved in decision making, therefore, deserves respect just as much as reasonable judgments do. So do the subjective choices of the jury as well as those of the judges. Any seemingly undesirable and subjective values incorporated in the 25% of dissenting opinions, do not justify the claim that the civil participation system is unreasonable.

To be sure, the public support for the system requires efforts within the judicature as well. The implementation of the system does not translate into the complete achievement of judicial democracy. Insofar as the Korean jury trial does not recognize the binding effect of the jury verdict and leaves the final decisive power to the judge, the judiciary must make efforts to enhance

its democratic legitimacy. It could be a practical option to consider introducing a system of electing judges, which was attempted in the early 1960s.

KEY WORDS: democracy, jury system, trial by jury, Meiji Constitution, Taisho Democracy, Jury Act, Judicial Reform, civil participation in criminal trials, majority rule