Jury Trials and the Role of the Citizens in the Criminal Court

IN Sup Han

ishan@snu.ac.kr

[June 2014]

This paper is part of the larger National University of Singapore, Faculty of Law Working Paper Series and can also be downloaded without charge at: http://law.nus.edu.sg/wps/.

© Copyright is held by the author or authors of each working paper. No part of this paper may be republished, reprinted, or reproduced in any format without the permission of the paper’s author or authors. Note: The views expressed in each paper are those of the author or authors of the paper. They do not necessarily represent or reflect the views of the National University of Singapore.

JURY TRIALS AND THE ROLE OF CITIZENS IN THE CRIMINAL COURT

The Korean Jury Model and its Comparison to the Japanese Saiban-in Trial

In Sup Han

ABSTRACT:

Korea has used jury trials for serious criminal cases since 2008. The implementation of jury trials was a pivotal experiment in a country where criminal trials had previously been within the realm of professional judges. Criminal jury trials are regarded as one of the most important accomplishments among a set of judicial reform projects, which include the introduction of the law school system. Jury trials have been used successfully during the five years since their implementation. Lawyers are becoming more skilled, and citizens are realizing the value of lay participation in judicial decisions. The Legislature is currently drafting a revision of the Korean Jury Act, which intends to widen the scope of cases in which jury trials are applicable, and strengthen the binding effect of juries’ verdicts.

Within East Asia, citizen participation is not unique to Korea. In 2009, Japan started a Japanese mixed trial called the Saiban-in system. This system is different from the kinds of jury trial which were used in pre-war Japan. It is interesting to compare the Korean model with the Japanese model. Such a comparison may lead to discussion about the value and degree of citizen participation in judicial decisions.

A. Introduction

In Korea, the use of lay judges in criminal trials was historically considered unusual, with jury trials being recognised as a phenomenon found primarily in countries such as England and America. The media occasionally reported scandalous cases from America, such as the notorious O.J. Simpson trial. Although a few reformers issued agendas for judicial reform, these did not include the idea of lay judges in trials. There was little prospect for radical change. A foreign scholar rightly identified the situation, just before the end of the 20th century:

Some countries, such as Japan, South Korea, Saudi Arabia, Bahrain, and the Netherlands, do not feature any lay participation in their respective criminal justice systems (although some of them may have done so in the past).²

---

¹ Professor of Law (Seoul National University) ishan@snu.ac.kr; CALS Fellow (National University of Singapore); President, Korean Association of Criminology; Director, Centre for Public Interest & Human Rights (Seoul National University); Chief, Korean Law School Faculty Association.
In this context, it seems curious that a system involving lay participation was established and implemented in Korea and Japan within the first decade of this century. How and why did those transformations happen?

In 2004, the Korean Judicial Reform Commission\(^3\) debated the introduction of lay judges. Initially, the Commission was not ready for lay judge participation, for which there was no strong drive. However, in the process of hot debate within the Commission, a determined vision emerged. As its member, I strongly argued that it was time to adopt lay participation and that the jury model would be much better than the German-style mixed court model. During the debate, members were divided on the degree of lay participation. The Commission hesitated to choose between the jury model and the mixed court model, mainly because Korea had never experienced either. It was in April 2007, following substantial work during a period of more than two years, that the National Assembly passed the Act on Citizen Participation in Criminal Trials (the Korean Jury Act). The Korean Jury Act clearly leaned towards the jury trial model.

It is especially interesting to compare the Korean jury model with the Japanese lay judge model. In Japan, the Act concerning Criminal Trials (the Saiban-in Act) was passed in May 2004. This introduced a new form of lay judge trial in Japan. In the period before World War II, Japan had used jury trials, modelled on America’s jury trial system. The jury trial system was ‘suspended’ in 1943 during the War. After the War, the U.S. Military Government transplanted some aspects of the American legal system into Japan, but it did not attempt to revive the suspended system of jury trials, to which the Japanese judiciary was averse. Judicial officials wanted to retain control over judicial decisions, despite some opposition from the Japanese Bar Association and legal academics. It was only at the turn of the 21st century that the system of lay judges emerged as part of the national agenda for judicial reform.\(^4\)

The Japanese lay judge model adopted in 2004 is called the Saiban-in system. Literally, Saiban-in [裁判員] means the use of ‘lay persons’ in trials, in contrast to the use of official trial judges [裁判官]. In cases involving certain serious crimes, six Saiban-in work together with three official judges\(^5\) to determine guilt and sentencing. The Saiban-in trial is mandatory for crimes which attract the death penalty or life imprisonment, and for offences which

---


\(^3\) The Korean Judicial Reform Commission was established by the Supreme Court. It was mandated by the President who had publically promised to promote judicial reform. The Commission worked from October 2003, and was concluded in December 2004. Although its working period was not very long, it determined to adopt a package of reforms, including the graduate law school system, overall reform of criminal procedure, and the jury trial system. Its conclusion was announced two years later by the Presidential Commission for the Implementation of Judicial Reform, and the relevant legislation was finally passed by the National Assembly in 2007.

\(^4\) In addition to the law school system, reform of criminal procedure was another key agenda for judicial reform.

\(^5\) Many references translate the word 裁判官 (Japanese) or 判事 (Korean) as the ‘professional’ judge, but I think the more suitable phrase under the lay judge system is the ‘official’ judge. This highlights the contrast between lay persons and those who have official positions.
require that the accused possessed a specific criminal intent when he caused his victim’s death.

The Japanese model is different from the typical jury model. First, lay persons do not work without the assistance of official judges. Second, the verdict of guilty or not guilty is arrived at through lay judges and official judges working together. Third, lay persons are involved in sentencing as well as in assessing guilt or innocence. In these respects, the Japanese model is similar to the German mixed court model. However, the Japanese model diverges from the German model in other respects: such as the fact that lay persons are randomly chosen, and serve at one trial only.

During the five years starting from 2004, Japan prepared for the new trial model. The Japanese government and courts encouraged trained professionals and educated citizens to experiment through moot courts a variety of other methods.

Korea started jury trials in February 2008, just 10 months after the Korean Jury Act had been passed. The Korean model is consciously framed to resemble the jury system which Japan started with the Saiban-in trials in May 2009. So now Korea and Japan belong to the group of countries where lay participation exists for serious criminal cases.6

Lay participation in trials is common throughout the World. Many of the relevant systems have their origins in the jury trial system, which originated in England and is widely practiced in America. The jury system can now be found in over 50 countries.7 A different model of lay participation is the mixed tribunal, which exists in many European countries, including Germany, although Spain and Russia revived jury trials in the 1990s, and those revivals are now regarded as a significant development for substantial democracy. Recent changes to the trial system are particularly interesting for Asian countries, where criminal trials have always been exclusively conducted by official judges. Jury trials ceased in Singapore in the 20th century.8 On the other hand, Hong Kong chose to maintain the jury system after it became a special administrative region of China.9 China has tried to vitalize (健全化) the element of civil participation under the title of “people’s jury system” (人民陪審員制度) since 2005. Although in China, lay persons are called the “jury”, the Chinese system seems to function as

---


9 Basic Law of Hong Kong, Cap 2101, Article 86 stipulates that "The principle of trial by jury previously practised in Hong Kong shall be maintained."
a kind of advisory lay assessor system.\textsuperscript{10} There are a few other countries in which an attenuated form of lay participation has also been attempted.\textsuperscript{11}

It thus comes as no surprise that there has been increasingly lively discussion of issues on juries or other forms of lay participation in criminal trials both within Asia and in the international arena.\textsuperscript{12} Korea’s model may offer a unique talking point in the discussion because Korea created its own model from nothing. If any country tries to “innovate” a model from the monopolized career-judge system, it may draw on the Korean experience.\textsuperscript{13}

B. Framing lay judge participation in Korea and Japan

(1) Mandatory v. non-mandatory

Under the Japanese model, a certain number of serious cases are mandatorily tried at the \textit{Saiban-in} trial. The \textit{Saiban-in} trial is mandatory for crimes which attract the death penalty or life imprisonment, or offences which require that the accused possessed a specific criminal intent when he caused his victim’s death.

This is in contrast with the Korean jury trial, which is only available upon the defendant’s application and the judge’s acceptance of the application. It is obligatory to ask the defendant whether he or she will apply for a jury trial. The judge retains the authority to exclude the case from jury trial. Such a discretionary power by the judge is understandable, considering that Korea has only taken its first steps towards lay participation. As the country accumulates more experience in jury trials, the judge’s discretion is expected to be narrowed.

(2) Number of lay participants

Deciding the number of lay participants drew intense interest. The greater the number of lay judges, the more the system would resemble the jury trial. England and America bear a long


\textsuperscript{11} Taiwan also tries to adopt a kind of civil participation trial under the title of “the observer jury”. This is a kind of lay assessor system, in which five laymen will sit with and advise three judges in serious criminal trials. Jerome A. Cohen & Yu-Jie Chen, “Taiwan’s Proposed Experiment With Citizen Assessors In Criminal Trials (SCMP)”, \textit{South China Morning Post} (3 September, 2011), online: <http://usali.org>. For recent developments, see Rich Chang, “Bill aims for public participation in criminal trials,” \textit{Taipei Times} (19 February 2013) online: <http://www.taipeitimes.com>. The draft of the Provisional Act governing Lay Participation in Criminal Trials, which calls for the creation of an “observer jury”, is currently under review in the Legislative Yuan, after approval by the Executive Yuan.


\textsuperscript{13} A writer summarizes her paper on the Korean jury trial by commenting that “the Korean system endeavours to alleviate tensions inherent in existing iteration of lay adjudication. In so doing, it serves as a potential model for nations allured by the democratic promise of vesting ordinary citizens with judicial authority, but reticent to adopt either of the two most-prevalent, yet widely-discredited, institutional mechanisms thereof.” See Park, Ryan Y., “The Globalization of the Jury Trial: Lessons and Insights from Korea” (Summer 2010) Am. J. Comp. L. at 525-582. Taiwanese civilian group for judicial reform commented on the impact the developments in Korea had on the Taiwanese society, stating that “these developments (in South Korea and Japan) have renewed interest in and serious contemplation of public participation in trials within Taiwanese society.” See Judicial Reform Foundation, \textit{Projects}, online: <http://www.jrf.org.tw>.
tradition of having 12 jurors. Under the German mixed court system, one or two lay persons co-operate with three official judges. In Japan, the Judiciary and the Prosecutor’s Office were reluctant to introduce the lay judge trial, and expressed preference for a minimal number of lay judges even during its introduction, while the Japanese Bar Association argued for 12 lay judges. The compromise between zero to twelve was finally made—a *Saiban-in* trial is composed of six lay judges and three professional judges.

In contrast, the Korean Judicial Reform Commission did not originally decide on a fixed number in 2004; the Commission only determined a range from five to nine lay judges. However, the Korean Jury Law of 2007 finally stipulated that the number should correspond with the seriousness of the offence and whether the accused confessed to or denied the charge. The most serious cases would be presided by nine jurors, and the least serious by seven jurors. Where the accused made a confession, his case might be tried by five jurors. The numbers suggest that the Korean model is more similar than the Japanese model to the jury trial.

(3) Separate decision v. co-operative decision

Under the jury system, only the jurors deliberate over and arrive at a verdict in the jury room. Korea’s system is similar to this as jurors reach a verdict of guilty or not guilty by their own deliberation, whereas in a Japanese *Saiban-in* trial, the lay judges deliberate and decide the case together with official judges.

Korean reformers were seriously concerned about the potentially undesirable results of lay persons discussing matters with professionals. They were concerned that the lay persons would be overwhelmed by the professionals’ judicial rhetoric, and defer to the professionals’ findings. They were also concerned that the parties would focus on persuading the official judges instead of the citizens. Under mixed trial systems like that in Germany, lay persons play a subsidiary role in decision-making. That is why Koreans preferred the jury system. At the outset, the jury would be informed that they are to serve as an independent verdict maker. Koreans expect citizens to take on a more active role under the jury trial model. It may be symbolic that the participating citizens are designated as the Baesimwon [陪審員], which literally means “jury.”

(4) Lay person’s decision: binding v. non-binding

Under the Japanese model, the final decision is made with the combined effort of lay judges and officials. Therefore, there is only one conclusion. Under the Korean model, however, two different kinds of fact-finding can be made: by jury verdict and by judge’s determination. When the former corresponds with the latter, no problem arises as there is a single final verdict. However, when they do not agree, the problem is whose verdict should have final authority. In Korea, it is stipulated that the “jury verdict shall not bind the judge’s decision” (The Korean Jury Act, Art. 46). Thus it is said that the jury verdict has an “advisory effect” or “recommendatory effect” on the judges. However, such an expression might be misleading as a jury verdict is a separate, independent decision that cannot be changed even if the official judges reach a contrary decision. The jury verdict is recorded at the time the decision is made,
and any disagreement between the jury verdict and judges’ decision is a matter of public record. Whenever there is a disagreement, the judges face great pressure from the parties and/or the public. Hence judges are often under indirect but intense pressure to agree with the jury verdict.\textsuperscript{14} In reality, judges tend to respect the jury verdict, in part because the verdicts often do not differ much from the judges’ opinions. After the first five years of evaluating jury trials, the draft revision on jury law, which provides that the “jury verdict shall be respected by judges”, is on the table of the National Assembly. With such a draft, Koreans expect that jury verdicts will have a \textit{de facto} binding effect, rather than a mere recommendatory effect, although it is still not legally binding. If the Legislature passes such a draft, that would represent a further advancement for the Korean jury system.

\textbf{(5) Decision rule: majority or unanimity?}

In the American jury system, unanimous votes are required in most states to reach a verdict of guilty or not guilty. In England, the rule of unanimity has been slightly changed into the rule of absolute majority, if a verdict cannot be reached unanimously after two hours of jury deliberation have passed. Under the German mixed court system, majority rule prevails on condition that at least one lay person decides on a guilty verdict. Japan adopted the majority rule, but the majority must include at least one judge’s vote. This means that every guilty verdict requires the agreement of an official judge.

In Korea, the jury verdict is arrived at in two steps, the second step preconditioned on the failure of the first. The first step requires that the jury arrives at a unanimous decision. However, if after deliberation a unanimous decision cannot be reached, jurors have to listen to the judges’ explanation of the issues at hand. Only after a second stage of deliberation can the jury then reach a verdict with majority vote. A significant requirement in the Korean system is that the jury must first attempt to arrive at a unanimous verdict.

The principle of unanimity in the jury system needs to be preserved. It pushes jurors to debate vigorously and deliberate sincerely before reaching a conclusion. Differing opinions on the facts should be carefully considered and communicated among the jurors. The diversity of experiences and backgrounds of the jurors can be an impetus for understanding between them. Korea is now attempting to strengthen the simple majority rule by making it an absolute majority rule, which would require the agreement of at least three out of four jurors. The new draft proposes as follows:\textsuperscript{15}

1. The jury deliberates and seeks to reach a unanimous verdict.
2. If the jury cannot reach an agreement unanimously, it has to hear the judge’s explanation.
3. After hearing from the judge, the jury arrives at a verdict under the rule of absolute majority amounting to three out of four jurors. Judges cannot participate in the jury verdict at any time.

\textsuperscript{14} See further Lee, “Getting Citizens Involved”, \textit{supra} note 6 at 196.
\textsuperscript{15} Beopmubu gong-go, no. 2013-288. Proposed by the Minister of Justice.
4. Judges shall respect the jury verdict.

Such an attempt to change the simple majority rule to an absolute majority rule reflects the desire to strengthen the recommendatory force of the jury verdict to a *de facto* binding force.

(6) The extent of jury involvement: guilty or not guilty verdict and sentencing

While an American jury’s prime duty is to reach a verdict of guilty or not guilty, lay participants in the German mixed court are also involved in sentencing. Japanese *Saiban-in* also co-operate with official judges in determining sentencing.

Even though the Korean jury trial resembles the American model in some respects, Korean jurors participate in sentencing. If the accused is found guilty, jurors discuss sentencing with judges and give their respective opinions. The typical process is: first, the presiding judge explains the upper and lower limits of the sentence and the sentencing guidelines. Second, jurors express their own opinions on the suitable sentence. Third, judges decide the specific sentence for the convicted person.

Why did Korea determine that jurors should be also involved in sentencing? One of the most important reasons was that people had a great distrust of the sentencing practices. Sentencing practices had been widely criticized as often being swayed by the influence of power, money, and professional ties, tending to be harsh towards the poor and disadvantaged. Another point of criticism lies in sentencing being arbitrary or susceptible to judge’s biases or prejudices. Thus the new sentencing guidelines aim for more rational, proportional and victim-sensitive sentencing. The sentencing guidelines have some recommendatory effect upon a judge’s sentencing decision. With the implementation of the sentencing guidelines, it is anticipated that lay persons will relay their own opinions on sentencing to judges.

In reality, jurors deliver their own opinions. While their opinions do not usually greatly diverge from the official judge’s, where they do, the difference lies in that jurors tend to recommend a more lenient penalty. The involvement of lay persons in sentencing may thus alleviate popular distrust.

(7) The possibility of appeal

Under the American jury trial, it is usually not possible to appeal against the jury’s verdict, particularly if the verdict is that the accused is not guilty. It is a legal principle that an appeal to a higher court violates the prohibition of double jeopardy. Unlike America, Japan and Korea have widely allowed appeals against the first instance decision. A lot of cases are appealed to higher courts, and even to the Supreme Court. The opportunity to appeal is not blocked even in a trial which involves lay judges.

---

16 As part of the judicial reform project, it was stipulated in 2007 that the Sentencing Commission would provide the sentencing guidelines for certain serious offences. These guidelines have a recommendatory effect upon the judge’s sentencing. The first phase of sentencing guidelines was enforced starting from July 2009. Offences such as Homicide, bribery, robbery, sexual assault, embezzlement, and perjury were included. Major offenses are now subject to the sentencing guidelines. I was a member of the first Sentencing Commission (2007-2009). All the sentencing guidelines are available for public viewing. See Sentencing Commission, *Sentencing Guidelines*, online: <http://www.scourt.go.kr>. 
In Japan, the number of appeals by defendants is high, but the number of appeals by the prosecutor is comparatively small. The prosecutor’s office tends to accept the decision reached through the Saiban-in trial.

On the other hand, in Korea, prosecutors who are not satisfied with the decision of the jury trial readily appeal to the higher court. The ratio of appeals by prosecutors in jury trials to appeals in non-jury trials is very high. It appears that some prosecutors feel embarrassed by the not guilty verdict given by lay citizens. Another reason is the relatively higher number of not guilty verdicts in jury trials than in non-jury trials. The number of appeals by defendants in jury trials is also higher. Such a high ratio of appeal from both sides becomes burdensome for the higher court.

In both countries, however, the incidence of reversal of the first instance decision at the appellate court is not high. The higher court is especially reluctant to reverse decisions made by juries.

(8) The Supreme Court’s Attitude to Lay Judge Trials

In seeking to understand the Supreme Court’s attitude towards jury trials, it is interesting to observe the recent leading decisions of the Supreme Courts of both Japan and Korea.

The Supreme Court of Japan dealt with a case in which the appellate court reversed a first instance decision. The Saiban-in trial found the accused not guilty, but the appellate court reversed this, and declared him guilty. However, on 13 February 2012, the Supreme Court of Japan decided that the appellate court should respect the lay judge’s decision at first instance.17 The mandate of an appellate court is just to review whether the first instance trial was or was not correct. While the principle of directness is upheld at first instance, this is not the case in the appellate court. In order to reverse the first instance decision, the appellate court must demonstrate in concrete terms that the fact-finding at first instance was unreasonable according to the rule of logic and experience. The Supreme Court’s reaffirmation of the intrinsic value of lay judge trials will make the prosecutor’s appeal against a not guilty decision more difficult.

In Korea, the Supreme Court shows strong support for the development of jury trials. The Supreme Court stated:

“When the jury reached the verdict of innocence unanimously, and the official judges agreed to the jury verdict, such a verdict should be respected much more, unless newly presented evidence at the higher court shows an error of fact by the jury decision in a convincing way.”18

---

17 See judgment of the First Petty Bench of the Supreme Court of February 13, 2012, Keishu Vol. 66, No. 4, at 482.
18 See decision of the Supreme Court of Korea of March 25, 2010, Seongo 2009 Do 14605.
Through this statement, the Supreme Court declared that a jury verdict should be strongly respected under two conditions: that of a unanimous vote, and agreement between verdict and judgment. Although the Korean Jury Act stipulates that a jury verdict should not bind the judge’s decision, the Supreme Court went one step further. It implied that a jury verdict might have de facto binding force if the jury’s unanimous decision was supported by the judge’s decision.

Thus, the Supreme Courts in both countries guarantee the more stable development of lay judge trials.

C. Why is the Lay Judge System Differently Framed?

(1) Why does Korea have a jury system while Japan has a lay judge system?

During the initial debate, the degree of reception towards lay judges was sharply divided in Korea. The public prosecutor’s office did not want to adopt the idea of lay judges. The Supreme Court hesitated to adopt it, because of the idea that a court’s decision cannot be reached with the participation of lay persons who are easily swayed by populist sentiment or lawyers’ tactics. However, even decisions by professional judges can give rise to criticism and doubt, and eventually it became impossible completely to ignore populist pressure. The judiciary took the view that “the less change, the better.” If any model were to be implemented, they preferred the German model to the American one.

The reform groups had a contrasting view to that of the legal profession. They argued that judicial monopoly on decision-making had brought about a lot of abuse—from the judges’ attitude of elitism, to friendly relationships between judges and lawyers who had just departed from the judge’s office, to some vulnerability in political cases. Henceforth, the judiciary must be responsive to the common sense and the experience of lay persons. The distrust between the judiciary and the people would be solved by lay participation. In addition, lay participation would contribute to judicial democracy and more transparent justice.

The reform groups preferred the jury system to the mixed court system, and the American model to the German model. They suspected that should the mixed court trial be adopted, lay persons would be influenced by official judges and play a subsidiary role in decision-making. At the very least, lay persons should be able to serve as a check against any abuse by official judges. Overall, judicial reform called for a more active role by citizens in decision-making, and the jury trial would be a better answer. In their minds, it was a case of “the more, the better.”

As explained above, a compromise was made between the jury system and lay judge system. However, at its core, the Korean system inherently resembles the jury system. There has been no genuine experiment of mixed court trials. Korean reformers are proud that they succeeded in creating an essentially jury model, even if the actual working scheme weakened key elements of the jury system.
Japan went in a slightly different direction. The Supreme Court was reluctant to adopt any form of lay judges. It suggested an idea similar to the mixed court system, in which three official judges work with two to three lay judges. The Ministry of Justice, which represents the position of Prosecutor’s Office, agreed to the Supreme Court’s proposal. On the other hand, the Japanese Bar Association, which wished to revive the suspended jury trial, proposed dramatically to increase the number of lay judges from nine to eleven, with one or two official judges. NGO groups proposed a more radical number—eleven lay judges with one official judge. The debate on the composition of the court clearly demonstrates who really decides or controls the court’s decision. The incumbent legal professionals did not want to yield the substantial power of judicial decision-making to citizens, but lawyers and civic groups wanted to put the power within the hands of citizens. The Japanese compromised with three official judges and six lay assessors. The number of lay assessors reflects a more jury-like system than the German model, in which the number of lay assessors is limited to two in any case. However, the Japanese model still resembles the German model more than the American one. Thus, the ratio of official judges to lay assessors may be a measure for evaluating the degree of civil influence on the judiciary.

(2) How has the issue of a constitutional barrier influenced the institutional framework?

England has a long history of the jury system and the jury system was firmly written in the U.S. Constitution from its birth. Written law in Japan and Korea seemed to suppose that the justice system should be run only by official judges. When the issue of juries or lay judges is in the centre of legal debate, questioning its constitutionality becomes unavoidable. Is there any constitutional barrier to lay participation in Japan and Korea?

Before World War II, Japanese constitutional law stipulated the “individual’s right to trial by a judge qualified by law.” This provision could be interpreted to prohibit lay persons from issuing a separate verdict with binding force. That is why the law during the pre-War period awarded the official judge the authority to reject a jury verdict. After the war, Japan adopted a radically different, and democratic, Constitution. Among the revisions, there was a provision of the “individual’s right to trial in court” (Art 32). This provision may be interpreted as admitting a jury equipped with full powers. However, those who were reluctant to adopt any lay participation continued to argue that the lay judge system might be unconstitutional, and that the layperson’s role, even if it were to be legislated, should be weakened. Finally, the Supreme Court of Japan decided on 16 November 2011 that the Saiban-in Act is constitutional, and does not violate “the individual’s right to trial in court” under the Constitution. The debate is now over.

On the other hand, Korea faces a more serious constitutional barrier, because Korean Constitutional Law provides that “all citizens shall have the right to trial in court presided over by a judge qualified by this Constitution and the law” (Art 27). Here, “the judge qualified by this Constitution and the law” is normally interpreted as “a judge whose material

---

and personal independence is legally ensured, and is appointed by the process and qualifications provided by this Constitution and the law.” This provision contemplates only a professional official judge.

Does such a constitutional provision then not automatically exclude the possibility of the participation of any lay judges? If it does so, however, this is strange in a country where democracy and popular sovereignty constitutes an institutional-legal bulwark. It may reasonably be within constitutional limits to state the following: first, it cannot be said that any form of lay participation is inadmissible under the Constitution, because the essential spirit of lay participation is harmonious with the Constitution. Second, it is possible to make a pro-constitutional framework for lay participation. Third, the Korean model of lay judge trials should be framed cautiously to prevent potential legal attacks by opponents.

The chosen model was explained in this way: first, the verdict and sentencing opinion of jurors shall not bind the court’s decision. Final authority shall be reserved for the professional-official judge. Second, jury trials shall be initiated by the defendant’s application, and by the recognition of the judge. Thus it would be unreasonable for the defendant, who had applied for trial by jury, to appeal to the Constitutional Court to question the jury trial’s constitutional status. Third, all defendants are guaranteed the chance to appeal to a higher court. Judges in the higher courts are composed of professional-official judges only, hence all defendants are guaranteed trial by professional-official judges only. While these compromises weaken the full-fledged jury trial, they are understandable, as Korea is only in the initial stages of its implementation.

D. Progress during the initial phase of the experiment

Below is outlined the progress made in jury trials during the initial phase, focusing on developments in Korea based on statistics across five years, from 2008 to 2012. To provide a contrast, I will introduce statistics from Japan for three years from May 2009 to May 2012. A careful analysis is required when comparing these statistics, in order to avoid reaching a reckless conclusion.

(1) Statistics on jury trial cases

After a very short preparation period, the first jury trial was initiated in Korea in February 2008. The results during the first five years (2008-2012) are as follows:

---

Korea: A total of 2,100 cases were submitted, and in 848 cases, jury verdicts were made in jury trials.

Japan: A total of 3,801 cases were decided during the first full three years (May 2009-May 2012). The number of cases in Japan is naturally much higher than in Korea, considering that Japan has a mandatory Saiban-in system, while Korea’s jury system is premised upon the defendant’s application and the judge’s screening.21

Korea: About 40 percent of the cases were homicide or injury causing death, 30 percent were robbery cases, and 16 percent were sexual assault cases.

Japan: About 45 percent of the cases were homicide, and robbery causing injury cases. Arson, drug-related offenses, and injury causing death cases each amounted to about 8 percent of the total cases. Sexual assault (and aggravated robbery or death) cases amounted to 20 percent.

Korea: Cases in which a defendant denied the alleged offence amounted to 70 percent, and applications for a reduced sentence after confession constituted 30 percent. (Those who denied their alleged offence tended to be tried more conservatively.

Japan: Confession cases amounted to 60.8 percent, while denial cases amounted to about 39.2 percent.

Korea: Trials mostly lasted for one full day (92.6 percent), and less than 10 percent of cases lasted for two days or more (7.4 percent). The time taken to reach a jury verdict was on average 81 minutes in cases where the defendant confessed, and 106 minutes in cases where the defendant denied committing the offence.22 The time taken for the verdict depended on the complexity of the case rather than whether or not the defendant confessed. In order to finish the trial within a day, deliberation and verdict often took place until late at night. A one-day trial was often implemented at the strong request of jurors, who wished to take as little time as possible away from work.

Japan: Time in court amounted to an average of 650.9 minutes, time for deliberations amounted to an average of 536.4 minutes. Trials involving not guilty pleas understandably took longer – the former 1549.2 minutes, and the latter 945.5 minutes. In cases where the accused claimed he had not committed the offence, deliberations took up to 677.3 minutes, and the time in court amounted to 871.9 minutes.23 That means that in cases where the accused denied his guilt, it took more than 11 hours to reach a verdict. In Japan, whether the defendant confessed or denied his guilt was thus one of the key elements affecting the time taken to reach a verdict.

(2) Statistics on jury selection procedure

22 Analysis Report 2013, supra note 20 at 142-143.
1. Pre-trial procedure is a necessary component of jury trials, although it is discretionary in non-jury trials.

2. When 9 jurors are needed, about 130 citizens are notified. When 7 jurors are needed, about 100 citizens are notified. Among those who are notified as jury candidates, 27.6 percent attend the jury selection process held in the courtroom.\(^\text{24}\)

3. Challenging the selection of the jury is possible either for cause or by peremptory challenge. Challenge for cause is used on average twice per case, and peremptory challenge five times per case. Prosecutors and defence lawyers do not make extensive use of challenges, partly because there is not much time available for jury selection and, more importantly, because Korean Law does not require a unanimous vote.

4. The average time for jury selection is 80 minutes, which means that a jury panel can be selected in a morning.

5. Race, gender, and age are not considered a significant consideration when choosing jurors.

\textit{Japan:} Among the citizens called, 79.1 percent turn up in court. The high ratio of attendance (115,695/146,258) shows an astonishing phenomenon, considering that policy makers were very concerned about the possibility of a low ratio of attendance. It is also astonishing, considering that it was originally predicted that jury trials would take up to 11 days.\(^\text{25}\)

Due to the mandatory Saiban-in system, Japan requires the participation of many more citizens. Prosecutors and defence lawyers may apply both for challenge for cause and peremptory challenge. In each type of challenge, up to four citizens may be excluded. In practice, the number of applications for challenge is very low.\(^\text{26}\) This may be attributed to the Saiban-in trial’s requirement that official judges work together with lay persons, thus preventing the likelihood of any deviant behaviour.

\textbf{(3) Statistics on defence lawyers}

Jury trials demand active participation by defence lawyers. Most cases are taken on by state-sponsored lawyers who have the duty of representing the defendant at a jury trial. State-sponsored lawyers are used in 82 percent of jury trials, whereas private lawyers are used in 51 percent of all trials.

Why is the ratio of private lawyers comparatively low in jury trials? First, criminals who have committed serious offences often come from less well-off backgrounds, and cannot afford a private lawyer’s fees. The lawyer’s work in a jury trial is very intensive and stressful. Even experienced lawyers may be novices when it comes to the new form of jury trial. They cannot effectively apply the skills and experience that they have acquired during their professional career. As a result, most jury trials involve lawyers who are state-sponsored. State-sponsored

\(^{24}\) Analysis Report 2013, supra note 20 at 133.

\(^{25}\) Review Report 2012, supra note 21 at 52.

\(^{26}\) Challenge for cause was used 0.1 times per case, and peremptory challenge was used 3.8 times per case: see Review Report 2012, supra note 21 at 48.
lawyers are comparatively young and have little experience. A jury trial can be a huge challenge for them.

At jury trials, one or two lawyers are usually in court. Where the issue is whether the defendant is or is not guilty, two lawyers usually argue for the defendant, and there are usually one or two prosecutors.

(4) Jury’s verdict v. judge’s decision

Under the present law, a jury verdict can be made by majority vote, instead of a unanimous vote. Under the majority rule, every case results in a decision, and there is no ‘hung jury’.

In practice, a unanimous decision is arrived at in 85.7 percent of cases where the verdict is guilty. This number is 70.6 percent where the verdict is not guilty. It is more difficult to reach unanimity in cases where the verdict is not guilty.

Disagreement between jurors happens often in cases of sexual offences, whether the verdict is guilty or not guilty. Sexual offences are characterized by the invisibility of the offence, and the extremely contrasting testimonies of the accused and the victim, which often leads to different interpretations of the evidence by jurors.

It is interesting to observe the degree of agreement or disagreement between the jury’s verdict and the official judge’s decision. Astonishingly, the jury verdict frequently corresponds with the judge’s decision in cases decided by absolute majority. The rate of agreement amounts to 90.6 percent, while the rate of disagreement amounts to 9.4 percent. In cases of disagreement, the ratio of the jury’s not guilty verdict to the judge’s guilty verdict is much higher than the other way around, 8.7 percent as opposed to 0.7 percent.

It is also very interesting to note the higher ratio of not guilty verdicts by juries. It is assumed that jurors have higher respect for the principle of presumption of innocence, and adhere more strictly to the standard of “proof beyond reasonable doubt”. For example, juries are reluctant to recognise “uncertain mens rea” (Eventualvorsatz) as a form of “mens rea” (Vorsatz). Such a difference often occurs in cases where a robber has caused bodily injury by a violent deed while trying to escape arrest. Juries suspect that the penalty of seven years imprisonment or more is too heavy for such an offence, because this case can be differentiated from intentional injury by a robber. On the other hand, professional judges have been trained to classify this case as being a type of aggravated robbery. Thus the natural instincts of citizens may conflict with the trained skills of professionals.

Summary: 1) Most cases show a very high rate of agreement between the jury’s verdict and the judge’s decision (about 90 percent). 2) The jury has a higher respect for the basic principle of criminal evidence. 3) The jury is more cautious of the danger that a defendant might be found guilty without sufficient evidence. 4) The jury evinces an approach based on daily experience, whereas professionals are used to a legalistic-dogmatic approach.

(5) Sentencing process
In the sentencing process, the jurors sit with the judges. Each juror makes a statement on the appropriate sentencing. The opinions of jurors do not differ greatly from those of judges. Statistics show that jurors and judges assess the appropriate period of imprisonment very similarly – on average differing by no more than a year. The final word on sentencing belongs to the judge, but judges listen carefully to the jurors’ opinions.

In may cases: first, the presiding judge explains the sentencing guidelines and the upper and lower limits to the jurors. Second, the presiding judge allows the jurors to talk freely among themselves to reach an agreement on the penalty. Finally, the judge accepts the jury’s opinions. Even though judges have legal authority on sentencing, each juror’s opinion is also recorded in the written decision.

Even though in most cases there are similar sentencing boundaries, on average juries recommend slightly lighter sentences. In both reaching a verdict and sentencing, professional judges tend to find guilt and impose a slightly higher sentence, even if the difference is not great.

(6) Appeals to higher courts and to the Supreme Court

It is possible to appeal against a trial court’s decision under Korean law. In practice, an astonishing number of jury trial cases are appealed to higher courts (85.5 percent), as compared to judge trials, for which the ratio of appeals to non-appeals is 68.0 percent.27 Another interesting point is the higher courts’ lower ratio of reversals (23.1 percent) of decisions made by jury trial, compared to cases decided only by a judge (40.6 percent).28 These statistics convey a simple message. First, prosecutors are less ready to accept decisions arrived at with the contribution of the jury. Second, higher courts are more ready to accept trial decisions made by a jury.

The decision of the higher courts may be appealed to the Supreme Court, but the Supreme Court rarely overturns the higher court’s decision. The Supreme Court especially shows respect for decisions made by jury trial, as shown above. Even though the Supreme Court receives more appeals against jury trial decisions (42.8 percent) than non-jury trial decisions (36.1 percent), to date it has only reversed one case.29

The Supreme Court considers that a jury verdict might have de facto binding force if it is a unanimous decision and supported by the judge’s decision.

Japan: the ratio of appeals to the higher court against the Saiban-in trial’s decision is similar to that against that of official trials (34.5 percent v. 34.3 percent).30 However, decisions in the higher court record a very low ratio of reversal (6.6 percent), compared to official trial cases (17.6 percent). The proportion of cases in which appeals against mistakes of fact are accepted is 0.5 percent, compared to official trial cases, which amount to 2.6

27 Summary Report 2013, supra note 20 at, p. 78.
28 Ibid at, p. 80.
29 Ibid.
30 Review Report 2012, supra note 21 at 112.
percent. In reviewing inappropriate sentencing, the higher court accepts 0.6 percent of the cases, compared to 5.3 percent in the old official-judge cases. These statistics show that the higher court has a clear respect for decisions made in the Saiban-in trial.

(7) Changes in criminal procedure and pre-trial procedure

It is, of course, essential to have a reliable system of pre-trial procedure. Its role is to screen evidence in order to exclude inadmissible evidence, and to facilitate the exchange of evidence to be presented according to the rules of discovery. The discovery of evidence was substantiated after the introduction of jury trials.

In jury trials, the court has a very different atmosphere. The court sits daily until the case is closed, instead of sitting on a (bi)weekly basis. Many citizens attend the court for jury selection in the morning. The confrontation between the prosecutor and the defence lawyer is intensified. Instead of reading a pre-prepared legal document, evidence is submitted and rigorously cross-examined. New modes of persuasion using high-technology tools are applied. Lawyers use PowerPoint presentations, videos, and projectors.

The most significant change is in the evidential value of an investigatory document written by a prosecutor. Before jury trials were introduced, the written dossier [interrogation paper] by the investigating prosecutor was prime evidence. Now, however, the evidential power of such a written document is weakened. Jurors concentrate on the evidence of witnesses who might be subject to cross-examination. Jurors do not read papers, but listen to the witness, and observe his attitude carefully. A vivid oral confrontation is much more valuable than a written document. The courtroom really becomes the centre for fact-finding and sentencing. Therefore, jury trials challenge old-fashioned procedural practices.

E. Conclusion

Since Korea is still in the initial stages of implementation of jury trials, the legal profession is busy adjusting itself to the new environment. General trends point towards strengthening the element of jury trials and increasing the number of cases involving lay participation. Such a trend is based on positive evaluation of the jury trials which have taken place to date, with initial concerns having conspicuously diminished. There is no longer any organized opposition to jury trials and no appeal has been made to the Constitutional Court.

Currently, a new draft for strengthening the role of the jury is on the table of the National Assembly.

The proposals for revision are as follows:

---

31 Ibid at 115.
32 A Japanese scholar commented that “Concerns at the time of initiation that there would be big problems or confusion have not materialized. The tone that the media has used in its reporting shows that its implementation has been smooth.” See 稲田伸夫，裁判員制度実施から3年余りが経過して (2013) 50:2 Crime & Punishment, Japanese Association of Criminology 2. In Korea, there is also no serious opposition to the jury trial.
The number of cases which are subject to jury trial should be widened. Jury trials should take place not only where the defendant applies for a jury trial, but where the court itself decides to try by jury. In the latter case, the court should consider whether the referral to jury trial is appropriate for enhancing judicial democracy and transparency.

New draft comments on the effect of jury verdicts state that “although jury verdicts do not bind the decisions of courts, they should be respected by the official judges.” This suggests that the present recommendatory effect of the jury verdict will be strengthened into a de facto binding effect.

As the jury verdict will have greater power, the verdict of guilty or not guilty will require more votes – an absolute majority, instead of simple majority. By absolute majority is meant the ratio of three-quarters of the jurors. A trial with nine jurors requires seven or more votes, and a trial with seven jurors requires six or more.

Even if a verdict cannot be made because the required majority is not reached, the official judges should be advised by the contents of the jury’s deliberation.

In a court’s written decision, the following points should be clearly described, namely, the number of participating jurors, the contents of the jury verdict (guilty or not guilty), and the jury’s statements on sentencing. When there is a discrepancy between the official judges’ decision and the jury’s verdict, the official judges should clearly provide their reasons for such discrepancy.

The introduction of Korean jury trials has had some impact. Two recent cases attracted a great deal of attention. In the first case, protestors who issued political attacks against the president were investigated by the prosecutor. Among them, two popular podcast makers called Nakkomsu were accused, and they applied for jury trial. After a heated confrontation in the courtroom, the jury found them not guilty, and the court accepted this verdict. Another case involved a poet, An Do Hyun, who was prosecuted for violation of the Election Law, by spreading via Twitter suspicion that the real holder of a valuable object might be Park Geun Hye, the presidential candidate. He also applied for jury trial. Although the jury found him not guilty, the court did not accept it, and found him guilty. However, the jury’s verdict meant that the court imposed only a suspended sentence.

These two cases suggest a few things. First, jury trials can function as a bulwark of civil liberty against the political abuse of prosecutorial power. Second, even if the official judges do not accept the jury’s verdict, it is difficult for them completely to reject its implications. Third, the governing political party might have some motive to limit the scope for jury trials. Such a situation is inescapable when any country chooses the road to jury trials. On the path to jury trials, we have encountered famous cases such as those of William Penn, Peter Jenger and Vera Zasulich. The cases of Nakkomsu and Ahn Do Hyun may be a symbol for the future of a full-fledged jury trial in Korea.
One of the most important motives that reformers had for pushing for the jury system was the aspiration to move from prosecutorial justice to civilian justice. The existence of lay citizens in the courtroom changes the court environment. The prosecutor has to persuade lay persons who have no association with the legal profession, and who do not read the prosecutor’s documents. The old-fashioned authoritarian attitude of judicial officials is unhelpful, and technical terms have to be translated into easy explanations.

Thus, the judicial process is steadily being transformed into a more citizen-friendly process. It is really important to change the judiciary’s attitude from a bureaucratic one to one that is accessible to civilians, and to change from prosecutorial justice to citizen-centred justice. The jury system might be a useful incentive for changing the judicial culture with respect to criminal justice in general. The principle of popular sovereignty can be reinforced by a more sophisticated and advanced the jury system – at least that is what I, as an advocate of judicial reform – firmly believe.

<Table 1> Lay Participation: Major Difference between Korea & Japan

<table>
<thead>
<tr>
<th></th>
<th>Korea</th>
<th>Japan</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basic information</td>
<td>Jury trial model</td>
<td>Lay judge model</td>
</tr>
<tr>
<td>Title of citizen</td>
<td>Jury (Baesim-won)</td>
<td>Lay assessor (saiban-in)</td>
</tr>
<tr>
<td>Composition (lay/judge)</td>
<td>Jury (9,7) / Judge (3)</td>
<td>Lay person (6) / Judge (3)</td>
</tr>
<tr>
<td>Constitutional barrier</td>
<td>Disputable, depending on how the constitutional framework is defined</td>
<td>Less dispute, but its constitutionality is now confirmed</td>
</tr>
<tr>
<td>Prior experience</td>
<td>None</td>
<td>Jury (1928-1943)</td>
</tr>
<tr>
<td>Passing law</td>
<td>April 2007</td>
<td>2004</td>
</tr>
<tr>
<td>Period of enforcement</td>
<td>February 2008</td>
<td>May 2009</td>
</tr>
<tr>
<td>How the process is started</td>
<td>Upon defendant’s application</td>
<td>Mandatory for severe offenses</td>
</tr>
<tr>
<td>Deliberation for guilty or not guilty</td>
<td>Jury only; judges deliberates at the separate room</td>
<td>Together with judges</td>
</tr>
<tr>
<td>Number of votes required</td>
<td>Majority vote, but jury to first try to reach unanimity</td>
<td>Majority vote, but at least one judge’s agreement is required for a guilty decision</td>
</tr>
<tr>
<td>Lay persons’ verdict</td>
<td>Separate decision</td>
<td>Together with judges</td>
</tr>
<tr>
<td>Sentencing</td>
<td>Lay persons to state opinions to judges</td>
<td>Lay persons to decide together with judges</td>
</tr>
<tr>
<td>Effect of lay persons’ verdict</td>
<td>Not binding on the court</td>
<td>Co-operative decision</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>--------------------------</td>
<td>----------------------</td>
</tr>
<tr>
<td>Letter of Decision</td>
<td>Jury verdict and their opinion on sentencing separately written on the decision paper</td>
<td>No distinction between lay persons and judge</td>
</tr>
<tr>
<td>Appeal</td>
<td>Available</td>
<td>Available</td>
</tr>
<tr>
<td>Country</td>
<td>Number of Country</td>
<td>Number of Official Judge[O]</td>
</tr>
<tr>
<td>-------------</td>
<td>-------------------</td>
<td>-----------------------------</td>
</tr>
<tr>
<td>England</td>
<td>1</td>
<td>12</td>
</tr>
<tr>
<td>U.S. A.</td>
<td>1</td>
<td>12</td>
</tr>
<tr>
<td>France</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>Germany</td>
<td>1(3)</td>
<td>2</td>
</tr>
<tr>
<td>Austria</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Spain</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>Russia</td>
<td>1</td>
<td>12</td>
</tr>
<tr>
<td>Japan</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>Korea</td>
<td>2</td>
<td>9/7/5</td>
</tr>
</tbody>
</table>