

Legal and Institutional Measures to Reform Participatory Trials for Sex Crime Cases

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Abstract

The five-year experimental period of the “Citizen Participatory Trial System,” implemented in 2008, has come to an end. Currently, the people are waiting for the final form of the participatory trial system to be established. Based on the analysis of operation results of the participatory trial system, the Committee for Citizens’ Participation in the Judicial System under the Supreme Court of Korea has resolved an amendment direction of the Act on Citizen Participation in Criminal Trials (the “Act”) in March 2013. According to the direction, the Ministry of Justice worked out a partially revised bill of the Act. However, the aforementioned bill has been evaluated as being insufficient in properly reflecting public interest, i.e., the protection of sex crime victims.

This study specifically focuses on sex crime cases among the actual operation data of the participatory trial system published by the Committee for Citizens’ Participation in the Judicial System, and reanalyzes the results of and issues with the implementation of participatory trials. Furthermore, through applying the contents of legislation and legislative arguments aimed at protecting sex crime victims in participatory sex crime trials, the authors suggest improvement measures that can not only prevent possible secondary victimization such as the disclosure of sex crime victims’ identities and the violation of their privacy in the participatory trial procedure, but also ease their psychological burdens.

The authors propose three legal and institutional measures of improvement. First, in regard to the eligible cases for participatory trials and the decision for exclusion prescribed in the Act, the defendant’s request for a participatory trial and the sex crime victim’s right of objection to such a trial should be considered properly on equal footing to prevent secondary victimization, and consequently, the aforementioned victim’s right of objection should be further strengthened. Second, as

for the argument that at least a certain number of female jurors should mandatorily take part in a participatory trial, the authors believe that a careful approach should be taken based on the analysis of the five-year operation results and performance, while recognizing the necessity to secure fairness in jury composition. Lastly, with respect to the matter of victims/witnesses and their interrogation in the participatory trial procedure for sex crimes, it is necessary to implement a legislative measure that can resolve the sex crime victims' mental distress deriving from concerns about their identities being disclosed and their privacy being violated in front of jurors.

Key words

Participatory trial, sex crimes, protection of victims, jury selection, prohibit depositions of child victims of sex crimes

Introduction

Korea first introduced citizen participatory trials¹ (hereinafter “participatory trials”) in 2008, with the aim of promoting democratic legitimacy and public confidence in the judiciary and criminal justice system. With the initially planned five-year experimental phase coming to an end, the results of implementation that have been witnessed so far will be analyzed, after which the lay participation system will be finalized in a form deemed suitable to the country's circumstances.²

Some evaluate the new participatory trials as having improved the general public's confidence in criminal trials and safeguarding the basic

¹ The citizen participatory trial (jury trial) system was introduced to South Korea in 2008 by the *Gukmin-eui Hyongsa Jaepan Chamyeo-e Gwanban Beobryul* [Act on Citizen Participation in Criminal Trials] (hereinafter “the Act”), Act No. 8495, to enhance public confidence in the judicial system. The Act was partially amended by Act No. 11155 in 2012, after which the Ministry of Justice came up with a partially revised bill in 2013, reflecting the five-year operation results of the participatory system.

² See Article 55 of the Act. Established on July 12, 2012 pursuant to this provision, the Committee for Citizens' Participation in the Judicial System analyzed the data on the enforcement of participatory trials, collected opinions from all levels of society at the public hearing held on February 18, 2013, and decided a final form of citizen participation in criminal trials in its 8th meeting on March 6, 2013. Accordingly, the government has prepared a partially revised bill of the Act to complete a final form of participatory trial and inquired opinions.

rights of defendants (Chang, 2009, p. 408 et ss); others criticize the system for disregarding the characteristics of different types of crime and revealing serious problems when it comes to protecting victims (B. S. Kim, 2008, p. 291; C. H. Lee, 2011, p. 66). According to the latter position, participatory trials for sex crime cases, in particular, give rise to issues not witnessed in other types of offenses, such as infringement of juror candidates' privacy during jury selection procedures and secondary victimization of victims during the participatory trial process. Despite such concerns, the currently proposed amendments to the Act on Citizen Participation in Criminal Trials (hereinafter the "Act"), as resolved by the Committee for Citizens' Participation in the Judicial System on March 6, 2013, include no legal or institutional improvement measures reflecting these distinct features of sexual crimes.³

This article analyzes and reviews the current status of the implementation of participatory trials and the problems occurring during the process, as well as legal and institutional measures to improve the participatory trial system. Based on this, the authors will propose measures to prevent secondary damages stemming from sexual offenses and to protect female, child, and juvenile victims of sex crimes within the current participatory trial procedure. Prior to establishing such protection measures, however, we must consider whether the protection of sex crime victims in participatory trials overly restricts or infringes on the defendant's right to trial guaranteed in the traditional criminal procedure.⁴

Launch of the Act

Significance of the Act in the Constitutional History of Korea

The constitutional history of Korea can be divided into before and after 1987; the major difference between these periods would be that,

³ However, victims or their legal representatives may suggest an opinion on whether to proceed to a participatory trial prior to the court's decision to exclude (Article 9 (1) Subparagraph 3 of the Act amended by Act No. 11155 on January 17, 2012).

⁴ The title of this study may raise feminist issues which require an analysis from a feminist perspective. In the article, however, the authors discuss participatory trials for sex crime cases from a general viewpoint, without such gender-based perspectives, although a majority of sex crime victims are indeed women.

from a nation in which the Constitution had no secure position as the supreme norm, the country has now advanced into a society in which the Constitution's supreme normative power and its function to control the state are in place. The judiciary first faced demands for independence from external powers, and has recognized, since 1987, the need to secure independence from powers inside the judiciary itself. Finally, following 1987, there was a call to enhance the democratic legitimacy of judicial practices (details, *see* Kim, 2001, p. 710 et ss). From a constitutional standpoint, the focus of recent debates on judicial reform can be seen as shifting from the formal aspect of judicial independence to the substantive issue of promoting democratic legitimacy in judicial practices.⁵

As a part of such judicial reform, starting January 1, 2008, participatory trials were introduced and implemented by the Act (Act No. 8495), which was promulgated on June 1, 2007.⁶ The system allowed ordinary citizens, regardless of their legal knowledge, to participate in criminal trials “as a juror”⁷ to determine the guilt or non-guilt of a party and express their opinions on sentencing.⁸ The participatory trial⁹ system is evaluated as having finally secured the democratic legitimacy of judicial practices, giving the general public, as the holder of sovereignty, a chance to participate directly in the judicial decision-making process.

Features of the Citizen Participatory Trial

The first-phase of the citizen participatory trial system, initiated in

⁵ Such debates on judicial reform are, of course, related to various subjects including constitutional theory-based approaches and institutional improvement, the necessity for constitutional reform, etc.

⁶ For an overview of citizen participation in criminal trials, such as the introduction process and main content of participatory trials, surveys on the Koreans' awareness of the system, the legal institution and policy advice, see Tak & Choi, 2011.

⁷ The term “juror” means a person who is selected to participate in a criminal trial (Article 2 Subparagraph 1 of the Act).

⁸ In Germany, a civil law country like Korea, a court pronounces a sentence in the name of people, who are the citizens like the defendant, by specifying “on behalf of people” (Im Namen des Volkes) at the beginning of a written judgment in criminal trials.

⁹ The term “participatory trial” means a criminal trial in which jurors are participating (Article 2 Subparagraph 2 of the Act).

January 2008, and which incorporates both the lay assessor system of Continental law and the jury system of Anglo-American law, remains in a provisional form until its final format is determined. In accordance with Article 3 of the Act, every citizen has a right to a participatory trial as well as a right and duty to participate in a participatory trial. After pleadings and arguments are closed, the presiding judge should explain to the jurors in court the main points of prosecuted facts, applicable law, main arguments made by the defendant and defense counsel, admissibility of evidence, and other necessary or legal matters. After this explanation, jurors should deliberate on whether the accused party is guilty or not guilty, and may deliver a verdict if all members of the jury reach a unanimous verdict. However, the jury may opt to hear the judges' opinion when a majority of jurors make a request to do so. If the jury fails to reach a unanimous verdict on guilt or non-guilt, they must hear the opinions of the judges participating in the trial before delivering their verdict, in which case, the jury's verdict of guilt or non-guilt is decided by a majority vote. Should the jury render a verdict of guilt, the jurors go on to discuss sentencing issues with the judge(s) in charge of the trial, after which they submit their opinion on sentencing (Article 46 of the Act).

Under current provisions, the jury in a participatory trial, by general rule, discusses the guilt of the defendant without input from a judge and then renders a unanimous verdict, after which it submits its opinion on sentencing, rather than deciding sentencing through voting. On the other hand, a feature of the lay assessor system is also included in the participatory trial in that if jurors cannot reach a unanimous verdict on guilt or non-guilt, they should hear the judges' opinion and discuss sentencing with the judges who participate in the trial.

However, some point out the problematic nature of Article 46 (5), which does not acknowledge the verdict and opinions of the jury as binding the court. The final form of participatory trial confirmed and resolved in the 8th meeting (March 6, 2013) of the Committee for Citizens' Participation in the Judicial System adopts a "qualified majority voting," by which a verdict is reached only when three-fourths of the jurors make an agreement, providing the jury's verdict with the "actual binding force" beyond an advisory effect.

The Significance and Current Status of Sex Crimes Eligible for a Participatory Trial

Overview of Provisions related to Sex Crimes

A sexual crime refers to any crime infringing on a person's right of sexual self-determination through the means of force, such as assault and threat (Lee, 2013, pp. 155, 157). Article 2 of the "Act on Special Cases Concerning the Punishment, Etc. of Sexual Crimes" (hereinafter the "Sexual Crime Punishment Act"), in particular, expressly lists the types of "sexual crimes" applicable under this law. All cases included in the following provisions of the Criminal Act become eligible for a participatory trial: Article 301 (bodily injury by or resulting from rape); Article 301-2 (murder or homicide by committing rape); the parts referring to Articles 301 and 301-2 in Article 305 (bodily injury by or resulting from sexual intercourse with, or sexual abuse to, a minor or murder or homicide by commission of sexual intercourse with, or sexual abuse to, a minor); Article 339 (robbery and rape); and Article 340 (3) (murder, homicide, and rape by committing piracy). In addition, a crime prescribed in the following under the Sexual Crime Punishment Act is eligible for a civil participation trial: Article 3 (aggravated robbery and rape, etc.); Article 4 (aggravated rape, etc.); Article 8 (bodily injury by or resulting from rape, etc.); Article 9 (murder or homicide by committing rape, etc.); Article 5 (rape, etc. through abuse of consanguineous or marital relationship); Article 6 (rape of, or indecent acts by compulsion against, persons with disability); and Article 7 (rape of, or commission of indecent act by force on, minor under age of 13).¹⁰ Furthermore, cases of an attempt of, abetment, aiding, preparation, or conspiracy to commit an offense enumerated above, as well as all the aforementioned cases and those falling under Article 11 of the Criminal Procedure Act, in which related cases are joined together for

¹⁰ Before the Act was amended by Act No. 11155 on January 17, 2012, crimes prescribed under Articles 3, 4, 8, and 9 of the "Act on Special Cases Concerning the Punishment, Etc. of Sexual Crimes" (hereinafter the "Sexual Crime Punishment Act") were cases eligible for a participatory trial. However, under the current Act of 2012, the scope of eligible cases has been extended to include Articles 5, 6, and 7 of the Sexual Crime Punishment Act.

trial as a single case, are eligible for a participatory trial (Subparagraphs 2 and 3 of Article 5 (1) of the Act). However, if a sex crime victim does not want a participatory trial, or if there is a need to protect the victim, the court may decide not to proceed to a participatory trial (Article 9 (1) of the Act). When a citizen participatory trial is held for such sexual crime cases, Article 5 (Eligible Cases), Article 9 (Decision to Exclude), and Article 28 (Questioning of and Challenges against Prospective Jurors) of the Act are the provisions requiring the most attention.

Statistics on Participatory Trials for Sex Crime Cases

This study analyzes the five years of data accumulated on participatory trials for sex crimes, based on official statistics released in *Gukmin Chamyeojaepan Seonggwa Bunseok* [Analysis of Participatory Trial Results] (January 1, 2008 – December 31, 2012), included within the sourcebook for the *Gukmin Chamyeojaepan Jedoeni Chojjong Hyungtae Gyeoljeongeul Wiban Gongcheonghoe* [Public Hearing to Determine the Final Form of a Participatory Trial] (February 18, 2013) held by the Committee for Citizens' Participation in the Judicial System of the Supreme Court of Korea.

1) The Implementation of Participatory Trials

A defendant may request a participatory trial in accordance with Article 5¹¹ (Eligible Cases) of the Act, and the court may decide to ex-

¹¹ Article 5 (Eligible Cases)

- (1) A case enumerated in any of the following subparagraphs shall be eligible for a participatory trial (hereinafter referred to as "eligible cases"): <Amended on January 17, 2012>
 1. Cases under jurisdiction of a collegiate panel under Article 32 (1) (excluding subparagraphs 2 and 5) of the Court Organization Act;
 2. Cases of an attempt of, abetment, aiding, preparation, or conspiracy to commit an offense under subparagraph 1
 3. Cases falling under subparagraph 1 or 2 and Article 11 of the Criminal Procedure Act, in which related cases are joined together for trial as a single case.
- (2) If a defendant does not want a participatory trial or if a decision to exclude is made pursuant to Article 9 (1), no participatory trial shall proceed.

clude or withdraw such a request pursuant to Article 9¹² of the Act.

In the statistical data on requested, excluded, and withdrawn cases among eligible cases, it is observed that 2,232 out of 41,691 eligible cases were filed for as participatory trials (5.4%). Table 1 illustrates the number of requested, excluded, and withdrawn cases by crime type.¹³

Table 1.
Number of eligible, requested, excluded, and withdrawn cases by offense type

Category	Total	Offense Type					
		Murder-attempted murder	Bodily injury-death or injury resulting from violence	Murder by robbery-bodily injury resulting from robbery	Bodily injury by or resulting from rape	Violation of the Sexual Crime Punishment Act	Other
Eligible	41,691	3,965	1,043	7,858	4,929	5,343	18,553
Requested	2,232	454	107	449	240	212	720
Excluded	398	46	15	91	115		131
Withdrawn	855	126	32	189	192		316

If the combined number of excluded and withdrawn cases are sub-

¹² Article 9 (Decision to Exclude)

- (1) A court may decide not to proceed to a participatory trial for a period beginning after indictment is filed and ending on the day after the closing of preparatory proceedings for a trial in any of the following cases: <Amended on Jan. 17, 2012>
1. If a juror, an alternate juror, or a prospective juror has difficulties in attending a trial or is unlikely to be able to duly perform his/her duties under this Act because of a violation or likely violation of the life, body, or property of the juror, alternate juror, prospective juror, or any of his/her family members;
 2. If some of the accomplices do not want a participatory trial and it is considered difficult to proceed to a participatory trial;
 3. A victim of any crime falling under Article 2 of the Act on Special Cases Concerning the Punishment Etc. of Sexual Crimes (hereinafter “sex crime victim”) or his/her legal representative does not want a participatory trial;
 4. If it is considered inappropriate to proceed to a participatory trial due to any other cause or event.
- (2) A court shall hear opinions of the public prosecutor and the defendant or defense counsel before making a decision pursuant to paragraph (1)
- (3) An immediate appeal may be filed against a decision made pursuant to paragraph (1).

¹³ The Committee for Citizens’ Participation in the Judicial System of the Supreme Court of Korea, Sourcebook for the Public Hearing to Determine the Final Form of a Participatory Trial, February 18, 2013, see tables at pp. 126, 127, 130, and 131.

tracted from all requested cases, a total of 979 cases remains. According to the data, among the 2,232 requested cases, 848 cases (38.0%) were tried with a jury (despite some minor discrepancies, these figures illustrate the trends of participatory trials for sex crimes).¹⁴

Among the total of 10,272 sexual crime cases (bodily injury by or resulting from rape, in addition to violation of the Sexual Crime Punishment Act), defendants requested a participatory trial in 452 cases (4.4%), which is 1% lower than the average request rate of 5.4%. In sexual offense cases, the rate of exclusion against requests was 25.4% (115 out of 452), exceeding the overall average (17.8%). The statistical analysis shows that not only defendants but also victims in sex crimes tend to avoid a participatory trial.¹⁵

Thus, the cases related to bodily injury resulting from robbery, homicide, etc., account for a relatively high share in the total participatory trials, while sexual crimes hold a low share. The numbers of cases tried with a jury are categorized by offense type as shown in Table 2 below.¹⁶

Table 2.
Number of participatory trials by offense type

Offense Type		Participatory Trials	
		Number (B)	Percentage (B/A; %)
Murder· attempted murder		268	31.6
Bodily injury· death or injury resulting from violence		54	6.4
Robbery, etc.	Murder by robbery · bodily injury resulting from robbery	202	23.8
	Robbery and rape	8	0.9
Sex Crime	Bodily injury by or resulting from rape	75	8.8
	Violation of the Sexual Crime Punishment Act	61	7.2
	Subtotal	136	16.0
Other		180	21.2
Total (A)		848	100.0

¹⁴ Ibid., p. 127.

¹⁵ Such a trend is shown in the withdrawal of participatory trials. In the case of sex crimes, the rate of withdrawal was 42.9% (192 out of 452 cases), higher than 38.3%, the average rate of withdrawal.

¹⁶ The Committee for Citizens' Participation in the Judicial System of the Supreme Court of Korea, 2013, p. 137.

Out of all cases tried by jury, sexual crimes numbered only 144 cases or 16.9%. This also means that a mere 1.4% of the entire 10,272 sexual crime cases eligible for a participatory trial were actually tried before a jury.

2) Results of Participatory Trials

Table 3 shows that the actual prison sentences were pronounced for 644 out of 848 persons, meaning that 75.9% of the defendants in participatory trials received actual prison sentences. The distribution of sentences by offense type is illustrated in Table 3 below.¹⁷

Table 3.
Determination of sentences by offense type

Category	Number of persons (A)	Death penalty	Imprisonment for life (B)	Imprisonment for a limited time (C)	Rate of actual prison sentence (B+C / A)	Suspended sentence	Pecuniary punishment	Not guilty	Other
Homicide, etc.	268		1	220	82.5	42	0	5	0
Robbery, etc.	210		5	130	64.3	54	6	13	2
Bodily injury resulting death, etc.	54		0	36	66.7	11	1	5	1
Sex crime, etc.	136		1	96	71.3	14	4	19	2
Other	180		0	155	86.1	12	6	6	1
Total	848		7	637	644	133	17	48	5
	100%		0.8	75.1	75.9	15.7	2.0	5.7	0.6

In the case of sex crimes, the rate of actual prison sentences was 71.3%, second only to homicide cases (82.5%). In particular, among the entire 48 cases that received non-guilty verdicts (5.7% of the total participatory trial cases), 19 cases were sex crimes, accounting for 39.6% of the total acquittals in participatory trials. This figure of 39.6% was a lot higher than 3.2%, the rate of not guilty rulings delivered by collegiate panels in criminal courts of the first instance across

¹⁷ Ibid., p. 141.

the nation during the same period.¹⁸ The reason for such a discrepancy in sex crime trial results is that it is difficult to collect evidence or offer proof beyond a reasonable doubt due to the distinct nature of sexual crime cases (Heo & Jo, 2012, p. 381; C. H. Lee, 2011, p. 68; Ryu, 2008, p. 366).

In addition, there may be an explanation for the phenomenon in which the defendants of sex crimes in participatory trials actively claim their innocence to the jurors who give a guilty or non-guilty verdict on the crimes, unlike bench trials in which defendants of sexual crimes tend to admit to their crimes and challenge for sentencing. However, we believe that there are few criminal defendants who would adopt such a trial strategy in a situation in which the trial procedures for the verdict and for sentencing are not separate (Moon, 2013, pp. 193-194; H. J. Lee, 2011, p. 225).

The judges' rulings matched the jury's verdicts in 782 out of 848 cases (92.3%). In most of the 66 cases in which the verdicts and rulings did not match, the jury rendered a not guilty verdict, whereas the judge found defendants guilty (62 cases in total).¹⁹ Jury verdicts by offense type are shown in Table 4 below.²⁰

¹⁸ Since a jury's verdict is not binding on the court but advisory to help the decision of the judge(s) in fact-finding proceedings, the court's decision precedes the jury's verdict. In regard to this, the Supreme Court of Korea emphasized that when the first instance court adopts the jury's verdict as it is, the appellate court should respect it all the more unless sufficient, convincing, and clearly opposite evidences appear through evidence questioning of the appellate court (Supreme Court Decision 2009Do14065 delivered on March 25, 2010).

¹⁹ Among the cases in which the jury's verdicts and the judge's rulings were inconsistent, the decision of guilt or non-guilt was overturned in two cases in appeals trials.

Case No.	Jury's verdict	Court's ruling	Decision in appeals trial	Note
Incheon District Court 2008GoHap706	Not guilty	Guilty	not guilty	Seoul High Court 2009No387
Ulsan District Court 2009Go-Hap5	Guilty	Not guilty	guilty	Busan High Court 2009No311

²⁰ The Committee for Citizens' Participation in the Judicial System of the Supreme Court of Korea, 2013, p. 144.

Table 4.
Jury verdicts by offense type

Category	Number of persons	Guilty			Not Guilty			Guilty + Not Guilty			
		Subtotal	Unanimous	Majority vote * ¹	Subtotal	Unanimous	Majority vote	Subtotal	Multiple offenses	Primary/secondary	Abridged fact
Homicide	268 (%)	226 84.3	198 73.9	28 10.5	13 4.9	8 3.0	5 1.9	29 10.8	11	3	15
Robbery	210 (%)	127 60.5	109 51.9	18 8.6	16 7.6	15 7.1	1 0.5	67 31.9	37	6	24
Bodily injury resulting death	54 (%)	39 72.2	36 66.7	3 5.6	7 13.0	5 9.3	2 3.7	8 14.8	3		5
Sex crime	136 (%)	81 59.6	58 42.7	23 16.9	31 22.8	18 13.2	13 9.6	24 17.7	15	1	8
Other	180 (%)	151 83.9	135 75.0	16 8.9	8 4.4	6 3.3	2 1.1	21 11.7	17		4
Total	848 (%)	624 73.6	536 63.2	88 10.3	75 8.8	52 6.1	23 2.7	149 17.6	83	10	56

* Article 46 (3) of the Act: If the jury fails to reach a unanimous verdict of guilty or non-guilty, the jury shall hear opinions of judges who take part in the trial before delivering a verdict. In such cases, a verdict of guilty or non-guilty shall be concluded by a majority decision. Judges who take part in the trial shall not participate in the verdict, even in cases where they attend the deliberation and make statements on their opinions.

When the jury fails to reach a unanimous verdict, they reach a decision through majority vote. In sex crime trials, the rate of verdicts based on a majority vote is relatively higher than that of other criminal cases. For example, the rate is 28.4% (23 out of 81 cases) in guilty verdicts while it reaches 41.9% (13 out of 31 cases) in not guilty verdicts. The reason for a relatively low rate of unanimous verdicts in sex crime cases can be attributed to differing personal views regarding sex crimes (C. H. Lee, 2011, p. 69).

3) Appeals against Decisions by Participatory Trials

The appeal rate of the cases in civil participatory trials was 82.0%, higher than that of collegiate panels in criminal courts of the first instance (58.1%) during the same period.²¹

²¹ Ibid, p. 142.

Table 5.
Comparison of appeal rates

Category	Number of cases	Appeals			No appeal
		Prosecutors	Defendants	Subtotal	
Participatory trial	848 (%)	386 45.5	542 63.9	695 82.0	153 18.0
Collegiate panel criminal cases (first instance)	98,876 (%)	24,445 24.7	48,038 48.6	57,463 58.1	41,413 41.9

In addition, appeals by prosecutors (45.5%) were almost twice as frequent as those for ordinary bench trials (24.7%). The rate of appeals by defendants (63.9%) also exceeded that of ordinary trials (48.6%). Furthermore, as illustrated in Table 6, 476 out of 628 cases²² (75.8%) processed in the appellate courts were dismissed, while the rate of reversal was 23.6% (148 out of 628 cases) as shown in Table 7. The fact that this figure was lower than the rate of reversal at a High Court (40.4%) during the same period was analyzed to mean that appellate courts tend to respect rulings by a court of first instance in which citizens participated.²³

Table 6.
Results in appeals trials

Requested (Number of persons)	Processed (Number of persons)									Unresolved
	Subtotal	Reversal						Dismissal	Withdrawal	
		Death penalty	Imprisonment			Pecuniary punishment	Not guilty			
			Actual prison sentence		Suspended sentence					
	For life	Limited term								
683	628	-	1	115	27	3	2	476	4	39
	100%		0.2	18.3	4.5	0.5	0.3	75.8	0.6	

²² This is based on 628 cases processed among the 683 cases filed for appeals trials from Jan. 1, 2008 to December 31, 2012.

²³ The Committee for Citizens' Participation in the Judicial System of the Supreme Court of Korea, 2013, p. 165.

Table 7.
Reversal in appeals trials

Category	Statistics on appeal of the participatory trial cases				Reversal rate at High Court
	Processed	Ruled	Reversed	Reversal rate	
Number of cases/rate	628	624	148	23.6%	40.4%

The relatively high rate of appeal against the rulings by participatory trials, both by prosecutors or defendants, reveals that both sides tend not to accept the rulings of a first instance court with jury. Along with this, the visible trend in which the appellate courts tend to respect the decision of the first instance courts with jury actually leads to the suspicion that this judicial reform, i.e., the introduction of participatory trials, yet remains enclosed in a so-called “league of their own,” instead of enhancing the public’s trust in judicial practices and promoting the democratic legitimacy of the judiciary.

Issues of Civil Participatory Trials for Sex Crimes and Measures to Improve the System

Eligible Cases and the Decision to Exclude

1) Current Status

Before the Act was amended by Act No. 11155 on January 17, 2012, it had taken a dual approach, expressly prescribing criminal cases eligible for a participatory trial while delegating some crimes to the Rules of the Supreme Court within a certain scope.²⁴ However, the Act, which came into effect on July 1, 2012, has extended the scope of eligible cases to those under jurisdiction of a collegiate panel under Article 32 (1) (excluding Subparagraphs 2 and 5) of the Court Organization Act in order to improve public confidence in the judiciary. When the purport of

²⁴ Before it was amended on January 17, 2012, Article 5 (1) of the former Act had enumerated crimes eligible for a participatory trial one by one, citing each relevant provision of the Criminal Act. In addition, when it comes to some crimes under special law, the former Act had listed each relevant provision by adding those crimes to Article 2 of the Regulation on Citizen Participation in Trials that is one of the Rules of the Supreme Court.

amending the Act is considered along with the interpretation of the structure of relevant provisions, sexual crime cases that are eligible for a participatory trial are the cases that fall under jurisdiction of a collegiate panel under Article 32 (1) of the Court Organization Act (cases falling under the capital punishment or imprisonment with or without prison labor for life or for not less than one year) among “sexual crimes prescribed under Article 2 of the Sexual Crime Punishment Act” that may be subject to a decision to exclude.²⁵

2) Issues

However, when applying the above interpretation, a logical error occurs in that cases of murder, homicide, and rape by committing piracy²⁶ (Article 340 (3) of the Criminal Act) — which logically should be eligible for a trial with jury — become ineligible for a participatory trial. The problem does not lie in the scope of eligible cases; rather, it lies in fact that the victims of murder, homicide, and rape by committing piracy or their legal representatives cannot apply for the court’s decision to exclude the case since such a crime does not fall under the category of “sexual crimes” under Article 2 of the “Sexual Crime Punishment Act.”

In the amendment²⁷ of the Act, Subparagraph 3 was added under Article 9 (Decision to Exclude) (1) to prevent secondary victimization, as victims’ personal information and crime details are disclosed in the participatory trial procedure. In the same context, the court should also be allowed to exclude the case when the victims or their legal representatives of the murder, homicide, and rape by piracy case do not desire a participatory trial.²⁸

²⁵ See Article 9 (Decision to Exclude) (1) Subparagraph 3 and Article 5 (Eligible Cases) (1) Subparagraph 1 of the Act as described in footnotes 33 and 34.

²⁶ Murder, homicide, and rape by committing piracy was expressly prescribed in Article 5 (1) Subparagraph 1 of the Act before amendment, and since a person who commits the crime is punished by death or by imprisonment for life, it is a case under jurisdiction of a collegiate panel under Article 32 (1) of the Court Organization Act.

²⁷ Refers to the amendment made by Act No. 11155 on January 17, 2012 and put into effect on July 1, 2012.

²⁸ Even under current law, a case can be excluded from a participatory trial “if it is considered inappropriate to proceed to a participatory trial due to any other cause or event (Article 9 (1) Subparagraph 4).

3) Improvement Measures

a) To correct the matter above, a revised bill (Bill No. 1904043) of the Act was recently submitted to the National Assembly and referred to the 1st Subcommittee of Legislative Proposal Review in the Legislation and Judiciary Committee.²⁹ According to evaluation reports on the bill or discussions conducted by the Legislation and Judiciary Committee, Bill No. 1904043, which aims to add murder, homicide, and rape by committing piracy to the category of crimes subject to a decision to exclude, is being viewed as “appropriate to protect victims” and a “reasonable legislation” (Lim, 2013, p. 4).³⁰ Although the authors of this article completely agree with the purpose of Bill No. 1904043, certain issues need to be pointed out in regard to the form or technique of legislation.

The current Act adopts a legislative format that extends the scope of eligible cases from expressly enumerated crimes to cases under jurisdiction of a collegiate panel pursuant to Article 32 (1) of the Court Organization Act and adds sexual crimes prescribed under Article 2 of the “Sexual Crime Punishment Act” to the cases subject to the decision to exclude in order to prevent secondary victimization of sex crime victims. When this format is considered, Bill No. 1904043 should instead be revised in a way that murder, homicide, and rape by committing piracy is inserted into Article 2 (Definition) of the Sexual Crime Punishment Act; this is because Bill No. 1904043 was proposed since murder, homicide, and rape by committing piracy is not expressly prescribed as “sexual crimes” under Article 2 of the Sexual Crime Punishment Act.

b) Furthermore, the Partially Revised Bill of the Ministry of Justice,³¹ which is based on the final form confirmed and resolved in the 8th

²⁹ The meeting minutes for the 3rd entire meeting (June 20, 2013) of the 316th National Assembly session (extraordinary), p. 13 and p. 32.

³⁰ The meeting minutes for the 3rd Legislation and Judiciary Committee meeting (June 20, 2013) of the 316th National Assembly session, p. 13.

³¹ Appendix to Criminal Legislation Division of the Ministry of Justice-2237 Action Copy (July 4, 2013): the Partially Revised Bill on the Act on Citizen Participation in Criminal Trials (hereinafter the “Partially Revised Bill of the Ministry of Justice”).

meeting (March 6, 2013) of the Committee for Citizens' Participation in the Judicial System of the Supreme Court, revises the requirement for a participatory trial, which is currently proceeded only upon the defendant's request. In other words, it allows a criminal case to be tried with jury either by the court *ex officio* or at the request of the prosecutor, even without the defendant's request.³² Such a "partially forced" mechanism, however, raised concerns about a possible infringement of the defendant's constitutional rights (i.e., the defendant's right not to be tried in a participatory trial) at the public hearing held on February 18, 2013. Accordingly, a proviso was added to mandatorily grant the defendant an opportunity to state his/her opinion before the court decides to transfer the case to a participatory trial, aiming to dispel the worries about the infringement of the constitutional rights.³³

In accordance with the Partially Revised Bill of the Ministry of Justice revised and proposed as above, a participatory trial must be held when the court makes a decision³⁴ to transfer the case either by *ex officio* or by the prosecutor's request, or when the defendant applies for a participatory trial, and the foregoing shall not apply if the court makes a decision to exclude the case. As such, whether by the court's decision to transfer or by the defendant's application, a participatory trial is held when the defendant desires to be tried with jury in an eligible case. When it comes to exclusion, however, a court may decide on its own discretion to not exclude the case even when victims, and sex crime victims in particular, do not wish for a participatory trial (a reverse interpretation of Article 9 (1) of the Act), and an immediate appeal may be filed against a decision to exclude (Article 9 (3) of the Act). In other words, by law, when it comes to the participatory trial procedure, protecting a criminal defendant's request for a participatory trial eventually

³² Under the revised bill (Bill No. 1903657, *see* the reason for the proposal made by lawmaker Ki Ho Seo (February 7, 2013)), an example of "cases where a participatory trial is necessary to enhance the democratic legitimacy and transparency of the Judiciary" is when the defendant or the victim was a judge or a prosecutor at the time of the crime, and in such a case, the decision to exclude a participatory trial or the decision to transfer to ordinary proceedings is prohibited.

³³ *See* Article 5 (3) of the Partially Revised Bill of the Ministry of Justice

³⁴ The defendant shall not raise objection to such a decision (refer to Article 5 (4) of the Partially Revised Bill of the Ministry of Justice).

precedes the respect for a sex crime victim's objection to a participatory trial. To dispel worries over the secondary and even tertiary victimization of sex crime victims in a participatory trial, considerations should be taken to equally deal with both the defendant's right to request and the victim's right to object to a participatory trial.³⁵

Jury Selection

1) Current Status

It is essential to select jurors for a participatory trial proceeding. Under the current law, jurors are selected "among citizens of the Republic of Korea who shall be not less than 20 years of age" (Article 16 of the Act). Nine jurors shall participate in a participatory trial for an eligible case the statutory punishment for which shall be death penalty or life imprisonment with or without prison labor; seven jurors shall take part in a participatory trial for the remainder of criminal cases; and five jurors are allowed if the defendant admits the charges (Article 13 of the Act).

Given that the percentage of cases tried with five jurors was less than 10% of all participatory cases³⁶, the Committee for Citizens' Participation in the Judicial System has decided to abolish juries made

³⁵ Refer to the argument for changing the current system, which allows the court to arbitrarily overturn a victim's request for exclusion, into a system in which such a request by the victim is treated as mandatory grounds for exclusion, to protect sex crime victims and prevent secondary victimization, made in Kim, B. S., 2013, pp. 119-120.

³⁶ Most of the cases were tried by the jury consisting of 7 jurors, accounting for 57.8%, while the rate of the jury composed of 5 jurors was only 9.8%. Also, among the cases in which the defendant admitted guilt (280 cases), 181 cases (64.6%) were tried by the jury consisting of 7 jurors. (The Committee for Citizens' Participation in the Judicial System of the Supreme Court of Korea, 2013, p. 133).

Table 8.
Number of cases by jury size

Jury Size	Case Statistics	
	Number of cases	Percentage (%)
5	83	9.8
7	490	57.8
9	275	32.4
Total	848	100.0

up of five jurors. On the other hand, the committee has resolved to maintain the current jury of nine jurors in principle in regard to crimes for which the statutory punishment includes the death penalty or life imprisonment with or without prison labor, while allowing a choice of seven or nine jurors regardless of statutory punishment, if agreed by the parties.³⁷ Thus, the partially revised bill of July 4, 2013, drafted by the Ministry of Justice has deleted the proviso of Article 13 (1), making a participatory trial by nine jurors the basic form.

2) Issues

Neither the current Act nor the finally drafted Partially Revised Bill of the Ministry of Justice contains a “composition of jurors” intended to protect sex crime victims and prevent their secondary victimization. The revised bill (Bill No. 1904043) recently submitted to the National Assembly makes the participation of female jurors mandatory in certain criminal cases like sex crimes, aiming to implement an institutional mechanism through which to reflect a sound gender-sensitive perspective in the composition of jurors. Pursuant to the revised bill, a certain number of female jurors must take part in a participatory trial for sex crimes or domestic violence cases. Since distorted notions including paternalism, Confucian sense of ethics, and gender-based different point of view on sex, can influence a participatory trial for such crime cases, the bill prescribes the participation of at least four females out of nine jurors, three out of seven jurors, and two out of five jurors.³⁸

3) Improvement Measures

Following the proposal of the revised bill mentioned above, the Criminal Act was partially amended (by Act No. 11731 on April 5, 2013) and came into force on June 19, 2013. Under the amended Criminal Act, the scope of a potential victim of sex crime has been expanded from a “woman” to a “person,” signifying that a man can also

³⁷ Press Release by the Supreme Court of Korea (March 6, 2013): The Committee for Citizens’ Participation in the Judicial System determined the final form of a participatory trial, p. 4.

³⁸ It is a newly established provision under Article 13 (3) of the Partially Revised Bill on the Act (Bill No. 1904043) proposed by lawmaker Young Kyo Seo (March 12, 2013).

become a victim of a sex crime. In addition, after reviewing statistics for the experimental period, the Committee for Citizens' Participation in the Judicial System agreed upon a recommendation to eliminate five-member juries in the final form of the Korean citizen participatory trial system.

The data on participatory trials held over the last five years show an even distribution of gender in juries. To be more specific, 6,803 (28.6%) persons were selected as jurors or alternate jurors among 23,778 juror candidates.³⁹ In addition, as in Table 9, women accounted for 49.3% of juror candidates and 49.7% of jurors and alternate jurors, indicating no significant imbalance in gender composition.⁴⁰

Table 9.
Jurors' gender composition

Category	Ratio (%)	
	Male	Female
Juror candidates (23,778)	50.7	49.3
Jurors · Alternate jurors (6,803)	50.3	49.7

Also, no significant difference between male and female jurors has been reported in their perception of the judge's opinion and the impact of the judge's opinion on their decisions.⁴¹ Under the current law, the jury may hear opinions of judges who take part in the trial when a majority of jurors requests to do so during deliberation (the proviso of Article 46 (2)); if the jury fails to reach a unanimous verdict of guilt or non-guilt, the jury must hear opinions of judges who take part in

³⁹ The Committee for Citizens' Participation in the Judicial System of the Supreme Court of Korea, 2013, pp. 172-173.

⁴⁰ Pursuant to the Act, the court, prosecutor, defendant or defense counsel may interview prospective jurors by asking questions, and if the court finds that the prospective juror is likely to make an unfair and biased judgment, the court shall dismiss the prospective juror at its discretion or upon a challenge made by the public prosecutor, the defendant, or defense counsel (Article 28 of the Act and Article 20 of the Regulations on Citizen Participation in Criminal Trials). However, the more fundamental problem is that there is no restriction or mention of the scope and contents of such questions. (Moon, 2013, p. 181)

⁴¹ The Committee for Citizens' Participation in the Judicial System of the Supreme Court of Korea, 2013, pp. 58-59.

the trial before delivering a verdict (the first sentence of Article 46 (3)). As for the impact of the judge's opinion on jurors' decision on guilt or non-guilt, it was surveyed as illustrated in Table 10 that female jurors are influenced by it slightly, while male jurors are impacted only a little.^{42, 43}

Table 10.
Impact of judge's opinion on jurors

Category	Ratio (%)	
	Male	Female
Decision on guilt or non-guilt	2.76 (194: 0.93)	3.04 (213: 0.92)
Decision on sentencing	3.00 (189: 0.81)	3.19 (216: 0.72)

* Each cell of the table displays the average rating value, along with the number of respondents: standard deviation in parenthesis. The rating scale for the impact of the judge's opinion on jurors is as follows: 1= Not at all; 2= Only a little; 3= Slightly; and 4= Strongly.

Therefore, although mandating a certain number of female jurors in a participatory trial for specific crime cases may be necessary to ensure a fair composition of jurors, such a decision should first thoroughly re-

⁴² The statistics are the result of analyses on the following sources: Kim, Jong Ho (Chief Judge of the Seoul Western District Court and Senior Expert at the Committee for Citizens' Participation in the Judicial System), who gave a presentation at the public hearing held by the Committee for Citizens' Participation in the Judicial System of the Supreme Court of Korea on February 18, 2013, entitled "Final Form of a Participatory Trial"; The Committee for Citizens' Participation in the Judicial System of the Supreme Court of Korea, 2013, p. 58; Korea Criminal Policy Institute, Tak & Choi (2011). Studies on the Criminal Justice Policies and Judicial Systems (V) - Focused on Evaluation Research on Civil Participation in Criminal Trials, Seoul: Korean Institute of Criminology.

⁴³ Tak & Choi (2011), A survey was conducted on ① the general public ② defendants tried in participatory trials and defendants tried in ordinary trials ③ candidate jurors and jurors for participatory trials and ④ legal professionals including judges, prosecutors, lawyers, etc. for the purpose of understanding the level of awareness of the participatory trial system and its implementation status. In particular, the survey on group ③ was conducted via return-by-mail in which surveyors distributed questionnaires in person to juror candidates who were leaving the courts after not being selected as jurors and to jurors who were leaving the courts after trials, with those two juror groups answering the questionnaires and sending them back to the surveyors in the return envelopes. Among the returned questionnaires, 58 from juror candidates and 90 from jurors were finally adopted, based on which our statistical data was created.

view the facts stated above and the accumulated data on the operation of participatory trials up to now.

Sex Crime Victims as Witnesses and the Interrogation of the Witnesses

1) Current Status

The nature of sexual crimes means they are usually committed in circumstances, which often leads to a lack of evidence or the victim being the only witness to the crime (Chung, 1999, p. 310 et ss). In addition, alleged sex offenders often aim at a favorable ruling by undermining the credibility of the victim/witness's statement. Therefore, a crucial aspect of protection for the victim of a sex crime is to prevent secondary victimization during the trial and investigation procedures (Chung, 2000, p. 192 et ss).

The danger of secondary victimization during trial proceedings for a sex crime case can first be reduced by conducting closed-door sessions.⁴⁴ That is, the judge panel can decide to conduct a participatory trial for sex crime cases without disclosing the proceedings to the public; this does not mean, of course, that the trial is closed to the jury as well. In a participatory trial, the victim's identity and other private matters are inevitably revealed to the jurors. For this reason, the Act imposes upon all jurors the duty to not divulge confidential information gained while performing their duties (Article 12 (3) of the Act), prescribing that any juror violating this duty shall be punished by imprisonment with prison labor for not more than six months or by a fine not exceeding three million won (Article 58 of the Act).

As is well known, while the right to be tried in an open-door trial is guaranteed for a criminal defendant, the request for a closed-door trial is prescribed in law as a victim protection measure to prevent secondary victimization of a sex crime victim.⁴⁵ Even if a sex crime victim

⁴⁴ Article 27 of the Sexual Crime Punishment Act. Pursuant to Article 27 (2), a victim may request not to open the examination of a witness to the public.

⁴⁵ Refer to Article 31 (1) and (2) amended on April 5, 2013: ① A court may decide not to open a trial on a sexual crime to the public to protect the privacy of the victim. ② A victim of a sexual crime or his/her family member, who is summoned as a witness, may request not to open the examination of a witness to the public, on grounds of protection, etc. of privacy.

requests a closed-door session for a participatory trial, the trial proceedings are open to jurors. If the purpose of a closed-door session is to prevent secondary victimization in the procedure of an investigation or a trial, the victim should be granted the right to object to the defendant's request for a participatory trial for the case in which such a victim is involved.⁴⁶

The provision on the victim's right of objection was newly established in the Amendment of the Act on January 17, 2012. The victim's objection accounts for 27 (21.8%) out of 124 cases excluded in 2012, and 27 (6.8%) out of a total of 398 cases excluded during the five-year experimental period.⁴⁷ In addition, out of a total of 327 cases during the five-year pilot period for participatory trials, there were 28 cases (8.6%) in which a court excluded the case as "it was considered inappropriate to proceed to a participatory trial" (Article 9 (1) 4 of the Act) despite the defendant's request for such a trial.⁴⁸

These institutional guarantees⁴⁹ to prevent secondary victimization

⁴⁶ The legal and institutional issue regarding the conflict between the defendant's right to request a participatory trial for a sex crime and the victim's right to object to such is discussed in Item a) under Part 1 of Section IV.

⁴⁷ The Committee for Citizens' Participation in the Judicial System of the Supreme Court of Korea, 2013, p. 128.

⁴⁸ The Committee for Citizens' Participation in the Judicial System of the Supreme Court of Korea, 2013, p. 129.

⁴⁹ To prevent secondary victimization in the sex crime investigation procedure, the Public Prosecutors' Office designed the "Guideline on the Protection of Victims in the Sex Crime Investigation and the Participation in Trials" (Established Regulation of the Supreme Prosecutors' Office No. 290, Felonious Crime 61100-413) in February 1999. Furthermore, the Sexual Crime Punishment Act (Act No. 10258, April 15, 2010) reflected research results over the past few years and prescribes prohibition against divulgence of identity and privacy of victims (Article 22), introduction of exclusive investigation with respect to victims of sexual crimes and a trial division in exclusive charge of sexual crimes (Articles 23 and 24), taking and keeping of videos as well as interrogation of witnesses by means of video and other relay devices (Articles 26 and 30), and presence of persons having reliable relations in the interrogation of the victim as a witness (Article 29). Another systems to protect witnesses of special crimes in criminal proceedings, such as victims of sexual crimes, include the defendant's withdrawal from court (Article 297 of the Criminal Procedure Act) and non-disclosure of victim's statements (Article 294-3) as well as examination of witnesses through video or other transmission devices (Article 165-2 of the Criminal Procedure Act) and installment of shielding facilities (Article 84-9 of the Regulations on Criminal Procedure).

during criminal procedures, however, have not been sufficient to wholly negate the psychological burden felt by the victims in regard to their identity and the facts of the crime being disclosed. This is because even the limited disclosure of their information remains a psychological burden for the victims/witnesses of sex crimes.⁵⁰

As mentioned above, witness protection programs, introduced mainly to safeguard victims as witnesses in the existing ordinary proceedings, have been insufficient to prevent secondary victimization of sex crime victims or eliminate psychological stress on the part of victims/witnesses (T. K. Kim, 2008, p. 140 et ss; C. H. Lee, 2011, p. 77 et ss).

Thus, even though some argued that preparing stronger and more detailed measures is necessary to protect sex crime victims and their families in cases tried by jurors (who are selected from among a large number of unspecified candidates) (In particular, *see* C. H. Lee, 2011, p. 78 et ss),⁵¹ this opinion was not reflected in the Partially Revised Bill of the Ministry of Justice.

2) Review of Improvement Measures

a) A view holds that, in order to reduce the psychological burden experienced by sexual crime victims, a limit should be placed on using the sexual behavior or predisposition of a sex crime victim as evidence in a criminal trial (Cho, 2002, p. 178 et ss; Cho, 2004, p. 97 et ss). This is because the defendant in a sex crime case will generally opt to present the victim's sexual history or sexual predisposition as evidence to weaken the reliability of his/her statement and cast responsibility on the victim, infringing the victim's personal rights and leading to secondary vic-

⁵⁰ News article in M. K. Kim and N. I. Kim (2010, July 28): "It is painful to testify about rape in the presence of jurors" available at http://www.hani.co.kr/arti/society/society_general/43246_4.html (last visited Jan. 21, 2014). Even if a trial is held behind closed doors and minor rape victims are allowed to make video testimonies, the victim is inevitably disclosed to the jury. Thus, while the risk remains low, sex crime victims are worried that a juror they know in person might be present at the trial or they might encounter a juror later by chance.

⁵¹ For such detailed measures to protect sex crime victims, some argue for the prohibition on the use of such victims' sexual history or sexual predisposition as evidence and the introduction of an attorney system for the victims so that they can get legal information in the investigation or inquiry stage or receive legal assistance in lawsuit.

timization (Ryu, 2008, p. 373).

The aforesaid issue requires appropriate action since a sexual crime victim's right to object to a participatory trial is not acknowledged currently. Under the current law, infringement of a sex offense victim's personal rights can be prevented to a certain degree through the presiding judge's restriction of unnecessary oral proceedings (Article 299 of the Criminal Procedure Act) (C. H. Lee, 2011, p. 79). Such restriction is, however, allowed only "when a statement or inquiry of the parties is repetitious or is a matter irrelevant to the trial," to the "extent that it does not harm the substantial rights of the parties connected with the lawsuit." Thus, it is more likely to remain as a theoretical possibility, since the presiding judge's restriction of irrelevant oral proceedings should not limit the exercise of the defendant's actual right to defend. In addition, even such a theoretical possibility is insufficient to prevent the victims completely from stress. In effect, the only appropriate solution becomes a legislative measure.⁵² In coming up with such a legislative measure, the rape shield law of the U.S. can serve as a reference.

In order to guarantee the defendant's rights, prevent infringement of the victim's personal dignity and secondary victimization, and have trial proceedings be concentrated on discovering substantive matters of truth such as the defendant's guilt or innocence, not on the victim's morality in the criminal procedure of a sex offense case, a newly established provision on prohibited use of a sexual crime victim's previous records of sexual relationship as evidence should include the following: a victim's history of sexual behavior and predisposition shall not be offered as evidence except ① when the evidence is to prove that the source of semen or injury is someone other than the defendant; ② when the evidence is to prove the victim's consent to sexual behavior with the defendant; and ③ when the evidence is to prove that the victim's accusation of rape is false. However, ④ evidence may be admissible if the

⁵² With regard to an argument for the amendment to the Regulations on Criminal Procedure, see Cho, 2004, p. 109; and in regard to a position for an amendment to establish prohibition of use of evidence in order to secure the system's efficiency, see Ryu, 2008, p. 385. The latter author views that an extra provision on prohibition of use of evidence can be newly established under Section II (Evidence) of Chapter III of Part II of the Criminal Procedure Act, or under the Crime Victim Protection Act or the Sexual Crime Punishment Act.

judge determines that such prohibited use of evidence seriously violates the defendant's constitutional rights (Cho, 2004, p. 109).⁵³

When the 2013 amendment to the Sexual Crime Punishment Act is taken into account, some might argue that the opinion above is hardly in harmony with the criminal procedure system of Korea. However, it is still necessary to make a legislative and policy-wise decision on whether to delegate the protection of sex crime victims from secondary victimization in the trial proceedings, an important issue in the participatory trials for sex crimes and even in the relation with the jury, only to the judge panel's discretion or whether to prescribe in law that the use of evidence in such a hearing that may lead to secondary victimization in the trial procedure shall be prohibited.

b) There is an argument to implement a measure that prohibits depositions by child or juvenile victims of sex crimes (C. H. Lee, 2011, p. 79). Supporters of this view find their model in the Act Relating to Improving Vermont's Sexual Abuse Response System of the U.S. The Vermont legislature revised Vermont's Rules of Criminal Procedure (V.R.Cr.P.) in 2009 to prohibit depositions of child victims of sex crimes without agreement of the parties or an order of a court (Mongeon, 2011, p. 4).⁵⁴

V.R.Cr.P. prohibits depositions of victims under the age of 16 in a criminal prosecution involving lewd and lascivious conduct, lewd and lascivious conduct with a child, sexual assault, aggravated sexual assault, or aggravated sexual assault of a child, except by agreement of the parties or by order of the court.⁵⁵ In order for the court to order the deposition of a child victim, the court must find: ① that the testimony of the child is necessary to assist the trial; ② that the evidence sought is not reasonably available by any other means; and, ③ that the probative

⁵³ Such contents are included in Rule 412 of Federal Rules of Evidence.

⁵⁴ This rule on criminal procedure considers child victims of sex crimes "sensitive witnesses" and permits the court to issue an order regulating the deposition and to require that it be taken in the presence of a judge or special master. And the court may also issue a protective order which sets forth certain conditions to protect a child from "emotional harm." (V.R.Cr.P. 15(f))

⁵⁵ V.R.Cr.P.15(e)(5)(A).

value of the testimony outweighs the potential detriment to the child of being deposed (Mongeon, 2011, p. 8). It provides that in making these findings, the court must consider both the availability of recorded statements of the victim and the complexity of the issues involved.⁵⁶

Furthermore, V.R.Cr.P. 15(e)(5)(C)(i) prescribes that whenever a deposition of a child victim of sex crimes occurs, the court must issue a protective order “to protect the deponent from emotional harm, unnecessary annoyance, embarrassment, oppression, invasion of privacy, or undue burden of expense or waste of time.”⁵⁷ In addition, in accordance with V.R.Cr.P. 15(e)(5)(C)(ii), an attorney must be appointed for such a victim whenever a deposition occurs.

The amendment of V.R.Cr.P. by the Vermont legislature received strong support from the Vermont Department of State’s Attorney and Sheriffs. Before the amendment, meritorious cases had been often dismissed because children could not endure the painful experience of a deposition. The revision prevented such cases from happening, and consequently, the 2009 amendment to the deposition rule is regarded as being highly successful (*See* Mongeon, 2011, p. 4).

c) The authors of this article, however, believe that those who argue for introducing the prohibition of depositions by child victims of sex crimes fail to understand the legislative purport of V.R.Cr.P. or abandon the prosecution of sex offenders, as well as the pursuit of substantive truth, solely for the sake of protecting child victims of sex crimes. As mentioned previously, in most sex crime cases, the victim serves as the only evidence available. Thus, the argument for the establishment of a provision prohibiting depositions of child victims without consent of the parties or a court’s order can lead to an unexpected result which can nearly amount to giving up on punishing sex crimes against children.

⁵⁶ V.R.Cr.P.15(e)(5)(B).

⁵⁷ Any protective order issued by a court may include: ① that the deposition may be taken only on specified terms and conditions, including a designation of the time, place, and manner of taking the deposition; ② that the deposition may be taken only by written questions; ③ that certain matters not be inquired into, or that the scope of the deposition be limited to certain matters; ④ that the deposition be conducted with only such persons present as the court may designate; or ⑤ that after the deposition has been taken, the tape or transcription be sealed until further order of the court (Mongeon, 2011, p. 8).

In addition, Korea has already prescribed special cases in the “Act on the Protection of Children and Juveniles from Sexual Abuse (hereinafter the “Children and Juveniles Act”)” (wholly amended by Act No. 11572 on December 18, 2012) to prevent infringement of privacy of child and juvenile victims and their secondary victimization.⁵⁸ In particular, the law includes provisions on recording or preservation, etc. of video (Article 26), special cases concerning preservation of evidence (Article 27), obtainment of the president judge’s approval for reading or printing documents or evidence (Article 29), and special cases pertaining to appointment of lawyers for child and juvenile victims (Article 30), striking a good balance between protection of child and juvenile victims of sex crimes and finding of substantive truth.

For instance, the Constitutional Court of Korea ruled that Article 18-2 (5) (currently Article 26 (6)) of the Children and Juveniles Act — under which the video recording of eight- and nine-year-old child victims in a sex crime case is acknowledged as evidence without statement in court made by the child victims — does not violate the defendant’s right to a fair trial, pronouncing the provision to be constitutional.⁵⁹ After a comprehensive consideration of the gravity of the public interest to protect child victims of sex crimes, the level of limitation on the right to cross-examination, and the actual impact of the video recording on the exercise of the defendant’s right to defend, the Court ruled that the provision may limit the defendant’s rights to a certain extent but does not breach the principle of proportionality, although the Court recognized the importance of defendants’ constitutional rights. Therefore, given the legislative purport and tenor of the Children and Juveniles Act, a more considerate approach will be necessary in regard to improvement measures aiming to prohibit depositions of child or juvenile victims of sex crimes in the manner of V.R.Cr.P.

Conclusion

It has been five years since participatory trials were introduced in

⁵⁸ See Articles 25 to 31 of Children and Juveniles Act.

⁵⁹ The Constitutional Court of Korea, Decision 2011Hun-Ba108 delivered on December 26, 2013.

Korea with the aim of promoting democracy in the judiciary and civil participation in criminal justice. The year 2013 marks the beginning of Korea finalizing its own system of participatory trials, based on the data accumulated during the experimental phase. Accordingly, the Committee for Citizens' Participation in the Judicial System has drafted a partially revised bill for the Act based on an analysis of the implementation results. However, the revised bill fails to provide for the special characteristics of eligible cases by offense type, raising concerns over a possible infringement of the personal rights of child and female victims of sex crimes and their secondary victimization during the trial proceedings.

This article has reviewed the revised bills and legislative arguments based on issues that may arise during the procedures of a participatory trial for sex crime cases. It has also attempted to present measures to enhance the legal system based on an analysis of the actual operation of participatory trials. These measures comprehensively consider the guaranteeing of a defendant's right to a fair trial, the protection of a victim's personal rights and prevention against secondary victimization, and the pursuit of actual truth being carried out by the people through civil participation in criminal trials.

In summary, the article suggests measures to improve the relevant legal system. First, as for eligible criminal cases and the decision for exclusion, it will be necessary to properly consider the defendant's right to request a participatory trial and the victim's right to object to a trial by jury on equal footing, aiming to dispel concerns about secondary or tertiary victimization of sex crime victims. That is, the current system in which the victim's intention is reflected indirectly at the judge's discretion should be amended so that it is mandatorily reflected at least in sex crime cases. Second, in regard to jury selection, while mandatory participation of female jurors in a participatory trial for specific crimes may be necessary for fair composition of jurors, the five-year statistical data on the operation of participatory trial suggests caution regarding this matter. Additionally, the authors believe that the issue should be determined prudently, by considering the recent amendment to the Criminal Act regarding sex crimes. Last but not least, in regard to the issue of victims as witnesses and witness examination (which can be seen as the most serious issue of all) during participatory trial procedures for sex crime cases, it will be important to implement a legislative

measure that is sufficient to alleviate sex crime victims' mental distress concerning the disclosure of their identities and other private information to the jury. For this measure of legislative improvement, the rape shield law of the U.S. can serve as a good example.

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