

## Article

# Recently Introduced Measures of Direct and Participatory Democracy and Their Constitutional Ramifications in the Republic of Korea

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### ABSTRACT

*This article analyzes the recently introduced measures of direct democracy at the local government level and criminal jury system in the Republic of Korea, and their constitutional ramifications. The article initially examines such mechanisms as currently in operation and their intended function of activating interest-representation and participation to supplement the representative democracy that the nation's Constitution adopts as principle. The article then discusses the sustainability and further constitutional ramifications of such measures in South Korea's idiosyncratic constitutional and political context, in terms of constitutionalism, democracy and the rule of law.*

*In the main part of the article, the article primarily looks into (1) the voter-initiative system under the Local Autonomy Act, by which the residents of a local administrative unit may request the enactment, revision or abrogation of local ordinances through subsequent involvement of the local parliament; (2) the legislative petition system under the National Assembly Act, the Petition Act and the Local Autonomy Act, and the relevant NGO legislative activities; (3) the recall system under the Recall Act, under which the residents of a local administrative unit may recall their elected officials including the governor and the members of the local legislature; and (4) the criminal jury system under the Civil Participation in Criminal Trials Act. The article analyzes the law and practice pertaining thereto,*

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*and presents relevant statistics. In the last chapter, the article analyzes further constitutional ramifications of such direct and participatory democracy measures. The concepts of constitutionalism, democracy and the rule of law in South Korea's idiosyncratic setting will be revisited as the context for such analysis.*

**Keywords:** *Direct Democracy, Participatory Democracy, Citizen Participation in Criminal Trial, Voter-Initiative, Citizen Recall*

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## I. CONSTITUTIONALISM, REPRESENTATIVE DEMOCRACY AND THE RULE OF LAW IN THE REPUBLIC OF KOREA

The Constitution of the Republic of Korea declares that the Republic of Korea is a democratic republic, and that all its powers and authorities lie in its constituents, or the people.<sup>1</sup> At the same time, South Korea's Constitution adopts an indirect democracy model based upon the representation mechanism.<sup>2</sup> The Constitution, the National Assembly Act, the Public Election Act, and numerous other relevant statutes, together with executive orders and rules, establish the nation's complex constitutional-political mechanism including the election of the representatives and the authorities given to the representatives with the limits thereon, thereby determining the policies, rules and laws that bind the constituents belonging to the nation's constitutional domain, largely by the majority rule.

In terms of democratic legitimacy per se, representative democracy may not outweigh direct democracy, especially in the era of facile communication, where low-cost and almost instantaneous sharing and exchanges of information and opinions are possible. It has conventionally been maintained that aggregation of preferences out of a large number of people would be technically difficult for complex issues and impossible to accomplish every important matter of policy in a large populous political community, the Republic of Korea certainly being one. However, such arguments may be less persuasive now than before. Especially in this age of advanced technologies for instant and low-cost communication, what could be more legitimate than laws initiated and adopted by a popular vote?

From a liberal point of view, legislation by, for example, an initiative measure is the most direct way for individuals to express their preferences, and a majority-wins rule is an appealing way to aggregate political preferences of the members of the community. Next, from a republican point of view, popular initiatives promise to engage the citizenry in lawmaking and stimulate public deliberation over meaningful issues of the time. Then, there must be, especially in this era of facile communication for the expression, aggregation and deliberation of preferences and opinions, deeper objections to direct democracy or further justifications of representative democracy in terms of legitimacy for the adoption of representative

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1. THE CONSTITUTION OF THE SIXTH REPUBLIC OF KOREA [hereinafter CONSTITUTION], art. 1.

2. The Constitutional Court of the Republic of Korea has also consistently stated in its various decisions that the Constitution of the Republic of Korea adopts and embodies the representative system as the basic principle for the realization of democracy, and that the representative democracy is one of the fundamental principles of the Constitution of the Republic of Korea. Refer to, for examples, President's Proposition for National Confidence Referendum Case, Judgment of Nov. 27, 2003, 2003 Hun-Ma 694 (Const. Ct.) and Judgment of May 25, 1995, 91 Hun-Ma 44 (Const. Ct.).

democracy model as the principle.

Here, then, may representative means of legislation and other political processes fulfill the mandate of democratic legitimacy by embracing and integrating direct and participatory measures? At least, changes in the nation's political domain supported both by maturing democratic culture and by the advancement of relevant technologies urge South Korea to deliberate more seriously than before upon the meaning of democratic legitimacy that any political process should meet in implementing democracy and the rule of law. These changes further challenge South Korea as to how it may embody the concept of democratic legitimacy in the institutions and procedures of policymaking and decision-making, and the implementation thereof, both at the national level and the local government level.

Hence, despite its formal and functional tension with the representative form and values, legislation by direct democracy measures and such other measures of direct and participatory democracy in a larger context as the recall system and the jury system, have long been under discussion for adoption in South Korea, primarily as a means to supplement the institution of representative democracy. Currently, as of March 2009, certain measures of direct and participatory democracy measures, albeit in limited forms and to limited extents, are adopted and in operation. Two of such examples are the initiative measure adopted in 1999 for the legislation of local ordinances at the local government level under the Local Autonomy Act (Law No. 6002), and the recall procedure adopted in 2007 applicable to the elected chief executive officer of the local government and the members of the local legislature under the Recall Act (Law No. 8423). Furthermore, as a means to infuse participatory elements into the nation's administration of justice, South Korea introduced a unique model of jury system as part of its criminal procedure in 2008 under the Civil Participation in Criminal Trials Act (Law No. 8495). In the main part of this article, such direct and participatory democracy measures are analyzed to address the appropriate extent of concoction of direct and representative mechanisms of democracy from the perspective of democratic legitimacy, rule of law and constitutionalism in South Korea.

Taking the example of legislative procedure in South Korea at National Assembly, i.e., the national legislature, in order to diagnose the current constitutional-political reality of the representative democracy in Korea, the actual power in law and practice to either facilitate or prevent the enactment of the statute primarily lies in sixteen of the standing committees established within National Assembly, which typically consist of fifteen to thirty members of National Assembly, respectively, out of its 299 members. This means that the target for political lobbying on the part of various interest groups becomes considerably narrow for each of the legislative agenda while

transparently visible at the same time. This aspect becomes intensified rather than mitigated by the fact that South Korean National Assembly is a unicameral, as opposed to bicameral, legislature. These characteristics as combined, notwithstanding respective merits, might from time to time result in illegal lobbying and the lack of deliberation along the legislative procedure within National Assembly. At the same time, not only are citizens ready and willing to participate in the political processes of national and local governments but any information and opinions can be expressed and communicated throughout the community almost instantaneously at a relatively low cost. Such exchanges and communications of information and opinions are the very critical prerequisite for the implementation of direct democracy and the citizen participation in the political processes.

In such contexts, the concept of direct and participatory democracy in South Korea has recently been brought into South Korea's constitutional-political scene to supplement the perceived deficits of its representative system. Such political model of direct and participatory democracy not only presupposes but also enables and further encourages direct participation of the public, or the citizenry, in the nation's public decision-making processes, beyond mere aggregation and inclusion of complex interests and preferences of a pluralistic society. That being said, in the current-day constitutional political soil in South Korea, direct and participatory democracy means enablement and expansion of citizen participation throughout the processes of legislation, administration and adjudication, beyond regularly held public elections. Thus, how to institutionalize, encourage and integrate citizen participation in the overall political processes of legislation, administration and adjudication under the fundamental principles of the nation's democratic constitutional order is the critical question for South Korea in its effort to ultimately enhance constitutional democracy and the rule of law.<sup>3</sup>

This article analyzes the measures of direct and participatory democracy as recently introduced and in place in South Korea. This article is part of an effort to examine such mechanisms, their intended physiology and function of reinforced interest-representation and participation for primarily supplementing the representative democracy, and their actual dynamics and prospective sustainability in South Korea's idiosyncratic setting. This article then aims to discuss further constitutional ramifications of such direct and participatory democracy measures in South Korea's unique constitutional and political context, in terms of constitutionalism, democracy and the rule of law.

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3. The same observation and diagnosis can be found in Kun Yang, *Participatory Democracy, Citizen Activism and Law*, 26(1) KOREAN PUB. L. RES. 33 (1998).

More specifically, this article reviews as the context for discussion the concepts of constitutionalism, democracy and the rule of law in South Korea's unique constitutional and political history and practice and institutions, and diagnoses where the nation stands in those terms. Then this article illustrates some of the recently introduced direct and participatory democracy measures, mechanisms and their functions in the dynamics within the nation's changing constitutional politics. As such, this article primarily looks into (1) the limited voter-initiative legislative system under Article 15 of the Local Autonomy Act (as most recently revised in April 2009),<sup>4</sup> by which the residents of a local administrative unit or local self-government may request, by way of voter-initiative, the enactment, revision or abrogation of local ordinances in entirety or in part, through subsequent involvement of the local legislature; (2) the increasing tendency of South Korea's NGOs to employ legislative movement as one of their primary activities to achieve their intended goals, which has enlarged the forum where the members of the community can present and discuss legislative agendas thereby further activating participation and interest-representation, and ultimately integrating the measures of direct democracy into a healthier representative democracy; (3) the recall system under the Recall Act that came into effect in May 2007, under which the residents of a local administrative unit or local self-government may recall certain of their elected public officials including the governor or chief executive officer and the members of the local legislature; and (4) the recently introduced jury trial system under the Civil Participation in Criminal Trials Act which came into effect in January 2008.

The following parts of this article analyze the relevant laws, practices and statistics pertaining to the above direct and participatory democracy mechanisms and measures. In the final chapter, this article delves into the further constitutional ramifications of such direct and participatory democracy measures as recently introduced in South Korea's constitutional political horizon from the perspectives of constitutionalism, democracy and the rule of law, in the unique South Korean context.

## II. RECENTLY INTRODUCED MEASURES OF DIRECT AND PARTICIPATORY DEMOCRACY IN SOUTH KOREA: AN ANALYSIS FROM THE DEMOCRACY AND RULE OF LAW PERSPECTIVES

### A. *Initiative Measure for the Legislation of Local Ordinances*

The Local Autonomy Act, through a revision in August 1999, introduced

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4. Local Autonomy Act, Law No. 9577 of 2009, art. 15 (Korea).

to the South Korean constitutional-political domain a limited yet significant aspect of direct democracy measure of voter-initiative for the legislation of local ordinances, under its then Article 13-3 (currently Article 15, as of April 2009).<sup>5</sup> Under this voter-initiative system, the residents of a local administrative unit of self-government may initiate the legislative process for the enactment of ordinances by presenting the legislative agenda and triggering the operation of local legislature's ordinance-making procedure. The residents of certain number or more, over nineteen years of age, and residing in the pertinent local self-government unit may request the chief executive officer of that self-government unit to prepare a bill and submit it to the corresponding local legislature for the enactment, revision or repeal of an ordinance. Upon such submission of a bill for the ordinance, the local legislature's ordinance-making procedure is to be triggered, and the local legislature should deliberate thereupon through the ordinary ordinance-making procedure within a certain period of time, although the ultimate authority to pass or discard the bill as an ordinance remains with the local legislature.

Thus, the Local Autonomy Act, under this voter-initiative system, mandates the local legislature to review and deliberate upon the bill for the ordinance initiated by the residents that has satisfied the procedural conditions and requirements, yet the local legislature is free to adopt it or discard it through the ordinary legislative procedure for ordinances as long as it puts it on the legislative calendar for the enactment of ordinances. Such an initiative measure does not limit or replace the local legislature's authority to deliberate or vote on the bill for the ordinances. There is no measure of referendum in place for enacting such a bill as an ordinance by the direct vote of the residents.

Hence, the initiative measure under Article 15 of the Local Autonomy Act conforms to the local self-governance that pursues autonomy through direct democracy, as it permits the introduction to the ordinance-making process of a bill for the ordinance directly by the residents in cases where the local legislature fails to publicly deliberate or sufficiently reflect the preferences and opinions of the residents. Such resident-participation at the stage of legislative agenda-setting enhances the participation of the residents in the legislative procedure as a whole and further protects the rights of the minorities, thereby enriching the democratic nature of the legislative process. The initiative measure, as limited as such, does not contradict the representative legislative system, yet, instead, supplements the representative legislative mechanism and the majority rule.

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5. Local Autonomy Act, Law No. 6002 of 1999, art. 13-3, *amended by* Local Autonomy Act, Law No. 9577 of 2009, art. 15 (Korea).

B. *Legislative Petitions and the NGO Activities in the Form of Legislative Movement*

It is widely observed across the borders as democracy matures that the non-governmental organizations proactively and regularly participate and cooperate in the public decision-making processes and the implementation of public policies, thereby assuming the role as a constant actor in the public sector within the nation's political community. This trend has been stimulated by such factors and ideals in modern mature democracies as citizen participation and global cooperation for the enhancement of human rights, and the new theory of governance that underscores efficiency and responsiveness of the non-public sector and the non-governmental organizations. This is what has been recently and increasingly observed in South Korea as well, especially since the 1990s.<sup>6</sup>

In South Korea, the time has been ripe for such a rise of NGOs and their move towards the public sector,<sup>7</sup> as (1) the democratization movement and the establishment of infrastructure for information technology since the 1980s have enabled and activated the participation of ordinary citizens in the activities of NGOs at various levels, (2) the government support for NGO activities in the institutionalized route and form has been established and expanded since late 1990s,<sup>8</sup> and (3) the global environment and conditions, working as a pressure from outside onto the government, particularly upon the environmental and human rights issues, have played a positive effect for the development of NGOs in South Korea. Currently, NGOs in South Korea have proactively been participating in setting the policy goals and making the public decisions in the constitutional-political domain, both at the national and the local government levels. Now, in South Korea, the opinions presented by the NGOs upon the issues of public concern or public matters

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6. The areas where the decision-making on matters of public concern and the implementation thereof through partnership with and participation of the NGOs have been most active in South Korea include those pertaining to social welfare, education, protection of the minors, environmental protection, and culture. On this point, see Yoo-Hwan Kim, *The Expected Roles and Problems of NGO/NPO in the 21<sup>st</sup> Century's New Governance*, 15 ADMIN. L. REV. 169 (2006).

7. The prerequisite elements for this are particularly addressed and extensively analyzed in Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, in THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 1, 1-47 (Lester M. Salamon ed., 2002).

8. The government support for non-profit NGOs in the form of public fund is established under the Aid to Non-Profit Civil Organizations Act, which was first enacted in 2000 and was most recently revised in February 2008. The Act proclaims that it intends to guarantee autonomous activities and healthy growth of non-profit non-government organizations thereby contributing to the increase of activities in the cause of public interest and the implementation of democracy in the South Korean society. Aid to Non-Profit Civil Organizations Act, Law No. 8852 of 2008, art. 1 (Korea). With respect to the government support through financial aid programs under the Act, there has been a continuously raised criticism in that such government support interferes with the financial independence of the NGOs, eventually undermining the function of such NGOs of monitoring and criticizing the relevant government policies and activities.

serve as the persuasive factors for the major public decision-making. Furthermore, NGOs are now practically leading the citizen participation in public decision-making through various institutionalized and uninstitutionalized procedures both at the national and local government levels. As such, the NGO activities have actually and palpably resulted in changes and improvements in numerous systems, laws and institutions in South Korea in recent years.<sup>9</sup>

The process of democratizing political powers is the process of the establishment and implementation of the separation of powers and the rule of law. In South Korea, especially since 1987, the power and the function of the legislative branch and the judicial branch vis-à-vis the executive branch have been strengthened through the recovery of constitutional authorities vested in the legislative and the judicial branches of government, as the demand therefor on the part of the citizenry has grown. Such democratization in the domain of political powers has both enabled and forced active NGO movements and activities through institutionalized means. That is, where it is possible to solve a problem or to change a system through institutionalized means, it becomes difficult to maintain support from the citizenry for any cause should an actor intending to challenge and change the status quo attempt to achieve such a goal solely through uninstitutionalized means or means lying outside the established political and legal processes. Further, in the context of mature democracy and stabilization in the political domain, for any challenge for changes in political institutions, the citizenry now has a heightened demand for a feasible, viable and sustainable alternative thereto.

Against this background, especially since 1990s, efforts for changes through institutionalized means such as legislative changes on the part of NGOs have been accelerated in South Korea. Various NGOs, including People's Solidarity for Participatory Democracy,<sup>10</sup> have proactively been leading such movements. The legislative movements along with public interest litigations and cause lawyering have become primary and effective strategies for the citizen movement and the NGO activities in South Korea.

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9. As indicated in the text of the article in the following paragraphs, legislative movements led by NGOs including those through legislative petitions have especially been successful in triggering legislation by National Assembly in the areas of political institutional design and political processes. A good example of such legislation triggered by the legislative petition by NGOs is the recent revisions of the Ethics for Public Servants Act, Law No. 9402 of 2009 (Korea).

10. People's Solidarity for Participatory Democracy is one of the representative non-governmental organizations in South Korea with approximately 8,000 members pursuing citizen movements for participatory democracy and the expansion of human rights. Established in September of 1994 by approximately 200 citizens under the name of citizen solidarity for participatory democracy and human rights, PSPD has newly introduced various means of citizen activities such as legislative and judicial watchdog projects, i.e., systemized analysis and scrutiny of legislative and judicial records from diversified perspectives under varied standards, which have enabled disclosure and oversight, thereby publicly stimulating changes through criticism and participation.

The legislative movements in such contexts of NGO activities in maturing democracy in South Korea can be defined as those acts and activities intending to affect the legislative process both at the national and the local government levels, i.e., the legislative process for the statutes and the local ordinances, through such various means and procedures as the legislative petition for a statute or a local ordinance, submission of opinions in various forums on public matters and issues, lobbying for legislation, monitoring upon legislative activities and procedures within the national and local legislatures, initiatives in the legislative procedure for the local ordinance under Article 15 of the Local Autonomy Act, and so forth.

Under the current laws of South Korea, the systems and institutions relevant to such legislative movements include, taking a few examples, the following. First, at the national level, such systems and institutions include the advance notice requirement for the legislation of a statute by National Assembly when the bill therefor is prepared and presented by the executive branch, the legislative petition for the enactment of a statute, the mandatory public hearing under the National Assembly Act for certain types of legislation of the statute, the public recordkeeping and disclosure of certain legislative activities of the members of National Assembly. Second, at the local government level, such systems and institutions include the initiative system for the legislation of the local ordinance under Article 15 of the Local Autonomy Act,<sup>11</sup> the legislative petition for the enactment of local ordinances, the request for audit upon government activities under Article 16 of the Local Autonomy Act,<sup>12</sup> and the public disclosure of certain legislative activities of the members of the local legislatures.

Among these, with respect to the legislative petition, the Constitution of the Republic of Korea provides under Article 26 that all citizens shall have the right to petition in writing to any governmental agency under the conditions as prescribed by the Petition Act, and that the state is obligated to examine and review all such petitions.<sup>13</sup> For the enactment and the repeal of the law, citizens may petition National Assembly for the legislation of a statute,<sup>14</sup> petition the pertinent independent constitutional organs for the

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11. Local Autonomy Act, Law No. 9577 of 2009, art. 15 (Korea).

12. Local Autonomy Act, art. 16.

13. CONSTITUTION, art. 26.

14. For a legislative petition to National Assembly, such a legislative petition should be submitted to National Assembly through a member of National Assembly, National Assembly Act, Law No. 9129 of 2008, art. 123, § 1 (Korea). Upon submission of a legislative petition, the Speaker should distribute to all members of National Assembly a document containing the identity of the petitioner and the member of National Assembly introducing the petition, and the date of petition, and then should designate a standing committee of National Assembly for the review thereupon, National Assembly Act, art. 124. Each of the sixteen standing committees of National Assembly should have a subcommittee that is in charge of examining and reviewing the legislative petition assigned thereto, National Assembly Act, art. 125. Such a subcommittee is also a standing organization that operates

legislation of an executive order or rule, and petition the local legislature for the legislation of a local ordinance.<sup>15</sup>

The legislative authority is ultimately vested in National Assembly, i.e., the nation's legislature, and National Assembly is relatively more sensitive and more responsive towards the public opinions and at the same time more susceptible to the lobbying. For these reasons, there can hardly be found cases of legislative petition to the executive branch, and most of the legislative petitions are filed with National Assembly. Such a legislative bill submitted to National Assembly by way of legislative petition may be deliberated for the enactment through the ordinary legislative procedure within National Assembly, in the form of a bill officially submitted by the members of National Assembly or by the committee of National Assembly, or else it is abolished. Should the bill submitted to National Assembly by way of legislative petition get discarded by a committee decision not to forward it to the plenary session of National Assembly for review, the committee reports such a decision to the Speaker of National Assembly and the Speaker shall thereafter notify the petitioner of the decision. However, in the above case, notwithstanding the committee decision to discard a petitioned bill, thirty or more of the members of National Assembly may forward the bill to the plenary session for review for the enactment thereof.<sup>16</sup> The petitioner is entitled to be notified of the result of review over the petitioned bill at each stage of review, and also of the ground therefor.<sup>17</sup>

Statistics concerning the legislative petition to National Assembly shows that, during the 17<sup>th</sup> National Assembly (in session in 2004-2008), out of 432 legislative petitions, only four were successful.<sup>18</sup> However, these numbers indicate the number of bills enacted as the statutes as unchanged through the ensuing legislative procedure subsequent to the legislative petition. In terms of the substance or the legislative intent of the petitioned bills, a considerable number of bills submitted to National Assembly through the legislative petition process were in fact enacted from a practical point of view during

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whether or not National Assembly is in session, National Assembly Petition Review Rules, National Assembly Rule No. 93 of 1995, art. 8, § 2 (Korea).

15. Petition Act, Law No. 8171 of 2007, art. 4(3) (Korea); National Assembly Act, art. 123; and Local Autonomy Act, arts. 73-76.

16. National Assembly Act, art. 125, § 6.

17. National Assembly Petition Review Rules, art. 113.

18. For the statistics concerning the legislative petitions to the South Korean National Assembly, see Petition Statistics of Petition Processing Period, <http://likms.assembly.go.kr/bill/jsp/PetitionStat.jsp> (last visited July 23, 2009). Taking the examples of legislative petitions prepared and submitted by the People's Solidarity for Participatory Democracy cited *supra* note 10, among approximately 80 legislative petitions that PSPD prepared and submitted to National Assembly since its establishment in 1994, only approximately 10 of such petitions have been reviewed by the standing committees of National Assembly with none submitted to the plenary session of National Assembly, while most others have been aborted prior to the standing committee review process due to the completion of National Assembly's four-year terms.

the 17<sup>th</sup> Session of National Assembly, as the goals and the substances pursued by the petitioned bills were adopted, consolidated and incorporated in whole or in part in other statutes enacted by National Assembly. For example, the statutory revisions of the Civil Act that abrogated the “family head (‘Ho-Ju’)” system,<sup>19</sup> of the Information Disclosure Act,<sup>20</sup> of the Ethics for Public Servants Act<sup>21</sup> and of the Newspaper Act,<sup>22</sup> and the enactment of the statute on the reconciliation and correction of the past wrongs on the part of the government and public authorities were in considerable parts based upon the bills submitted by the NGOs through legislative petition. These examples have constantly been expanding.

Through the 18<sup>th</sup> National Assembly that is currently in session (in session in 2008- 2012), the bills petitioned by the NGOs have primarily dealt with political and policy issues. Although a considerable number of petitioned bills have been consolidated or incorporated into other bills submitted by the government or the members of National Assembly and reviewed as such, the current legislative process under the Constitution and the National Assembly Act does not permit a route for the person submitting a bill to National Assembly through legislative petition to present the original bill to the plenary session of National Assembly for its enactment as a statute. Also, in practice, while most number of the bills petitioned to National Assembly are aborted along the subsequent legislative process, the notice to the petitioners typically contains no more than a statement of the phase of the review process and a brief summary of the result therefrom, without stating the content of the petitioned bill that is consolidated or incorporated in whole or in part into a government bill or National Assembly bill, nor, in case the petitioned bill is discarded, the ground therefor.

Although the NGOs petitioning bills for enactment tend to monitor the subsequent process and result at National Assembly along the legislative process, much effort is called for to establish relevant legal systems in order to activate the legislative petition as a further meaningful means of setting the legislative agendas and reflecting public opinions available to the members of the community. At the same time, for a healthier and more substantiated participation of NGOs and other members of the community through legislative means in South Korea, while respect for the

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19. Civil Act, Law No. 471 of 1960, arts. 778, 980 and others, *repealed by* Civil Act, Law No. 7427 of 2005 (Korea).

20. For example, see the amendment of the Information Disclosure Act, Law No. 7127 of 2004, arts. 6-9, 11-12, 22, 26 (Korea), on the scope of disclosure on the part of information retained by the government entities, etc.

21. For example, the amendment of the Ethics for Public Servants Act, Law No. 7493 of 2005, arts. 1, 2-2, 14-4 to 14-10, 22, 24-2, 25, 28-2 (Korea), on the properties owned by public servants to be disclosed to the public, etc.

22. For example, the amendment of the Newspaper Act, Law No. 7369 of 2005, arts. 10, 15, 17 (Korea), on the prohibition of unfair competition, etc.

representative democratic system on the part of the members of the community as the nation's primary rule of governance is critical on one hand, the NGOs and the government should together make a coordinated effort to enhance the capability of NGOs to motivate discussions and to construct consent over various issues of public concern within the community. The democratization and rationalization of the internal decision-making processes within NGOs, the establishment of a system for NGOs to utilize and retain expert human resources in pertinent specialized fields, the institutionalization of various mechanisms for overcoming factional bias of individual NGOs to sustain fairness, and, further, the enrichment of healthy culture of supporting NGOs in both public and private domains are some examples of the most urgent challenges in this vein in current-day South Korea.

### C. *Recall System in the Republic of Korea*

In the same context of recent addition of direct and participatory means to the representative democracy, South Korea now has the recall system at the local government level as introduced in 2006. The recall system was introduced to South Korea for the first time in May of 2006 by the revision of the Local Autonomy Act, which newly added Article 13-8 that gave the residents of respective local government units the power to recall certain of their elected local government officials.<sup>23</sup> Subsequently, under the mandate of then Article 13-8 (currently Article 20 since the April 2009 revision) of the Local Autonomy Act,<sup>24</sup> a separate statute of the Recall Act was enacted in order to provide the specific requirements and procedures pertaining to recall, which came into effect in May of 2009. Under the Recall Act, the residents of the local government units may recall the chief executive officer and the members of the legislature of their local government except for the proportional representatives.<sup>25</sup>

Under the current recall system in South Korea, the residents of a local government unit registered under the resident registration record or the alien registration record, by collecting the signature of a certain number of people,<sup>26</sup> may request recall of their incumbent chief executive officer or members of the legislature elected at the most recent public elections,<sup>27</sup> in

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23. Local Autonomy Act, Law No. 7957 of 2006, art. 13-8 (current version at Local Autonomy Act, Law No. 9577 of 2009, art. 20) (Korea).

24. *Id.*

25. Recall Act, Law No. 8423 of 2007, art. 7 (Korea).

26. This number varies from 10/100 to 20/100 of the total number of residents with the right to vote for recall, depending upon the type of public office and the type of local government unit, Recall Act, art. 7, § 1.

27. Certain limits exist in deploying this recall system that the residents of the local government

which case a vote follows through which such elected officials are required to step down from their respective public offices prior to the completion of their terms of office should one-third or more of the residents entitled to vote participate in the vote and one-half or more of those who cast the vote consent to the recall.<sup>28</sup> Although limited to the local government level and not actively utilized so far, the recall system as in place in South Korea opened a new chapter for fuller direct democracy measures as means of governance in the public political domain.

*D. Criminal Jury System as a Means of Citizen Participation in the Administration of Justice*

As a means for citizen participation in the nation's judicial process, South Korea adopted its unique system of jury trial in 2008, for a limited type of criminal cases. The Civil Participation in Criminal Trials Act (Law No. 8495) providing the legal ground for South Korea's idiosyncratic jury system, which was enacted in 2007 and came into effect in January of 2008, is South Korea's experiment of yet another form of participatory measure in its constitutional realm.

Participatory democracy in South Korea is defined as the participation of the members of the community in public and community decision-making at the national and local government levels, under the representative democracy as the principal mode of constitutional governance. Such participation may take place at each stage of the nation's constitutional and political life, i.e., from the presentation of agenda for the policies through the implementation and subsequent analysis of the policies. Throughout this process, as long as representative democracy operates as the principle, the ultimate authority to decide the nation's policy matters is endowed to the representatives. However, while decision-making by the representatives works as the principal rule, depending upon the method of institutionalizing participation on the part of the members of the community, the representatives and the ordinary members of the community may substantially make concurrent decisions for the community.

Considering that the concept of participatory democracy evolved as an effort to cure and overcome certain perceived defects under the representative democracy of the exclusion of ordinary members of the community from the political process and of the deviation of decision-making from the preferences of the public, participation within the

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unit may not request the vote to recall against those elected officials whose term of office began to run no less than one year ago, whose remaining term of office is less than one year, or a previous recall vote against whom took place less than one year ago, Recall Act, art. 8.

28. Recall Act, art. 22.

meaning of participatory democracy means the act of participation of the members of the community in order to affect decision-making or policymaking of the community.<sup>29</sup> Such participation signifies constant and ubiquitous participation in the nation's decision-making processes through entire phases thereof, and, as such, may take place in all areas and domains where the power of national government operates. From this perspective, participation of ordinary citizens in the nation's judicial process, which is an integral part of the constitutional domain through which the power of the nation and the government is exercised, becomes convincing as well as the citizen participation in legislative and administrative processes.

In any constitutional democracy, the nation's judicial function should be exercised by and through the principles of rule of law and democratic legitimacy. Rule of law in the realm of justice administration and judicial authority requires adjudication by the previously agreed upon and generally applicable law and the utmost expertise in the pertinent areas of law, while democracy requires the process and the outcome of the operation of the judicial function possess democratic legitimacy.<sup>30</sup> The authority of the nation's judicial power originates from the trust of the citizenry in the judicial branch and the judicial process that is based upon the citizens' belief in their fairness. In this vein, in current-day South Korea, further democratization of the judicial process is critical in order to heighten the authority of the judiciary. While ensuring democratic legitimacy in court administration and the appointment procedure for the members of the judiciary on one hand, the possibility of introducing a type of jury system to South Korea's judicial process as a means of integrating citizen participation into the nation's exercise of judicial power, thereby increasing the democratic legitimacy of judicial process, was intensely discussed.<sup>31</sup> Finally, National Assembly enacted the Civil Participation in Criminal Trials Act (Law No. 8495) in June of 2007 that came into effect in January of 2008, which introduced a jury system in South Korea. The Act prescribes a unique jury system for certain limited categories of criminal cases, through which lay citizens directly participate along with the judges in deciding the issues of both fact and law of the given cases.

The Act declares in its Article 1 that this "citizen participation trial" system, as the law calls this South Korean-style criminal jury trial system, is

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29. For an effort to define participation and participatory democracy in the South Korean context, refer to Seung-Ju Bang, *Partizipation und demokratische Legitimation* [*Participation and Democratic Legitimation*], 32(2) KOREAN PUB. L. RES. 1, 5 (2003).

30. JONG-SUP CHONG, *A STUDY OF CONSTITUTIONAL LAW* 372-89 (1996).

31. For further and extensive discussions on this subject, refer to KYONG-WHAN AHN & IN-SUP HAN, *JURY SYSTEM AND CITIZEN PARTICIPATION IN ADMINISTRATION OF JUSTICE* (2005), and Seung-Ho Lee, *A Study on the Private Participation in Criminal Procedure*, 19 CRIM. L. REV. 85, 85-108 (2003).

to reflect the reason and the common sense of the ordinary members of the community through lay participation in criminal trial, thereby assuring the democratic legitimacy of the nation's judicial process and ultimately deepening the trust of the citizenry in the administration of justice.<sup>32</sup> The current system limits the cases that can be adjudicated by way of jury trial to certain types of cases with relatively severe possible sentences under the Criminal Act and other criminal statutes.<sup>33</sup> One of the idiosyncratic characteristics of the current South Korean system is that the defendant in such cases is given a choice to request a jury trial; otherwise, the case will be adjudicated through ordinary non-jury trial procedure.<sup>34</sup> Also, notwithstanding the request for a jury trial by the defendant, the court may decide not to provide a jury trial should any of the stated grounds under the Act apply.<sup>35</sup>

The number of the jurors range from 5 to 9, depending on the type of particular cases.<sup>36</sup> The jurors are randomly chosen from a list of the potential jurors prepared each year with the individuals of or over twenty years of age residing within the jurisdiction with the South Korean nationality.<sup>37</sup> The qualifications to serve as a juror, the grounds for exclusion and recusal from the jury service and other relevant factors are also prescribed by the Act.<sup>38</sup> During the jury impaneling process, the Act allows challenges for cause based on the answers given by the potential jurors to the questions prepared by the parties, and also peremptory challenges<sup>39</sup> on the part of either the prosecution or the defense.<sup>40</sup> The "citizen participation trial" or the newly introduced jury trial requires that all defendants be represented by defense counsel licensed to practice law under the South Korean law and the Act also prescribes the state-appointed counsel system.<sup>41</sup>

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32. Civil Participation in Criminal Trials Act, Law No. 8495 of 2008, art. 1 (Korea).

33. Civil Participation in Criminal Trials Act, art. 5.

34. Civil Participation in Criminal Trials Act, arts. 3, 5, 8, 10, 11.

35. Civil Participation in Criminal Trials Act, arts. 6, 9, 11. During the one-year period of January 2008 through January 2009 since the inception of the jury system in South Korea, among approximately 2,500 of potential cases (i.e., those cases where the defense could request or could have requested jury trial), the defense requested jury trial in 249 cases or less than 10% of the possible cases. Among 249 cases where the defense requested jury trial during the above period of time, the court decided not to provide a jury trial in 61 cases (24.5% denial rate).

36. The number of the jurors for those cases with possible death sentence or life-term in prison is nine, whereas the number of the jurors is seven for the rest of the cases. Also, it is possible to have a five-juror jury where the defendant confessed as to the primary facts of the case prior to trial, Civil Participation in Criminal Trials Act, art. 13.

37. Civil Participation in Criminal Trials Act, arts. 16, 22, 23.

38. Civil Participation in Criminal Trials Act, arts. 17-20.

39. Each party may request up to five peremptory challenges for a nine-member jury, up to four peremptory challenges for a seven-member jury, and up to three peremptory challenges for a five-member jury, Civil Participation in Criminal Trials Act, art. 30, § 1.

40. Civil Participation in Criminal Trials Act, arts. 28-30.

41. Civil Participation in Criminal Trials Act, art. 7. Since January 2008, in approximately 75% of the jury trials under the Act, the defendants were represented by the state-appointed counsel.

Another unique aspect of the jury system in South Korea under the 2008 Act is that the jury participates in both fact-finding and sentencing phases of the trial, rendering the verdict on the facts of the case and presenting their opinion for sentencing.<sup>42</sup> The jury is required to return a unanimous verdict following deliberation without presence of the judge,<sup>43</sup> however, should the jury fail to reach unanimity for the verdict, then the jury decides upon the facts of the case by way of majority rule following the mandatory hearing of the judge's opinion thereupon.<sup>44</sup> Subsequent to rendering of a guilty verdict, the jury discusses possible sentencing options with the judge and then presents the opinion upon sentencing.<sup>45</sup> Such verdicts and opinions of the jury under the Act have no more than advisory effect or power upon the final decision of the court, thus, neither the verdict upon the facts of the case nor the opinion as to sentencing of the jury binds the court.<sup>46</sup> However, the verdict and the sentencing opinion of the jury construct part of the official trial record,<sup>47</sup> and the presiding judge should notify the defendant of the content of the verdict.<sup>48</sup> The content of the jury verdict may also be stated in the written judgment.<sup>49</sup> If the judgment differs from the verdict of the jury, the presiding judge should explain the ground therefor to the defendant<sup>50</sup> and should also state such ground in the written judgment.<sup>51</sup>

The civil participatory trial or the South Korean-style jury trial was for the first time held on February 12, 2008 in Daegu District Court, and, during the one-year period since the initial jury trial, in 249 cases or slightly less than 10% of the potential cases the defendant requested jury trial.<sup>52</sup> This young system should be analyzed and evaluated from numerous standards and various perspectives, so that the system may live up to the purpose and the goal of integrating participatory elements to the nation's judicial process and administration of justice. Such evaluation should encompass the analyses of, for examples, the rate of request for jury trial and the grounds for not requesting the jury trial where the defendant may, the rate of difference or digression of the court's final judgment from the verdict and sentencing opinion of the jury,<sup>53</sup> the rate of requesting the representation by

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42. Civil Participation in Criminal Trials Act, art. 46.

43. The jury may request to hear the opinion of the judge upon the facts of the case prior to voting for rendering the verdict, should a majority of the jurors intend to do so, Civil Participation in Criminal Trials Act, art. 46, § 2.

44. Civil Participation in Criminal Trials Act, art. 46, §§ 2-3.

45. Civil Participation in Criminal Trials Act, art. 46, § 4.

46. Civil Participation in Criminal Trials Act, art. 46, § 5.

47. Civil Participation in Criminal Trials Act, art. 46, § 6.

48. Civil Participation in Criminal Trials Act, art. 48, § 4.

49. Civil Participation in Criminal Trials Act, art. 49, § 1.

50. Civil Participation in Criminal Trials Act, art. 48, § 4.

51. Civil Participation in Criminal Trials Act, art. 49, § 2.

52. *Supra* note 35.

53. Although further analyses are required, currently, in approximately 88% of the entire jury

the state-appointed counsel in jury trials in comparison with non-jury trials and the grounds therefor, the factors affecting the jury deliberation process for fact-finding and sentencing, and the arguments over the grounds for appellate review of jury trials and the extent of such appellate review. The jury system was for the first time introduced to South Korea in 2008 as a means to supplement the elements of direct and participatory democracy to the nation's indirect representative institution of governance, largely in the same vein as the participation in the legislative and policymaking procedures at the individual and NGO levels and as the recall system. The jury system in South Korea thus should serve to enhance democracy and the rule of law throughout the nation, and should be further monitored and analyzed from such a perspective.

### III. CONSTITUTIONAL RAMIFICATIONS OF SOUTH KOREA'S RECENTLY INTRODUCED MEASURES OF DIRECT DEMOCRACY AND CITIZEN PARTICIPATION OVER THE NATION'S CONSTITUTIONALISM, DEMOCRACY AND RULE OF LAW

As indicated in the above chapters of this article, South Korea has recently introduced certain measures of direct democracy and citizen participation as part of its constitutional-political processes. For example, at the local government level, a limited or partial initiative measure in the legislative process for the local ordinances and a recall system applicable to the elected officials including the chief executive officer and the members of the legislature at the respective levels of local government were introduced within the past fifteen years. Also, an idiosyncratic jury system was introduced in 2008 as applicable to a limited category of criminal cases as a means of lay citizen participation in the nation's administration of justice. The contexts and impetus for these changes are two-folded: while the representative system as the primary rule for the nation's constitutional-political governance has incrementally furthered its representative nature as witnessed in, for example, the legislative process at National Assembly with ever increasing concentration of powers on its standing committees of approximately fifteen to thirty representatives therein as opposed to the plenary session on one hand, on the other hand, as the nation's constitutionalism and democracy mature and its civil sector grows both quantitatively and qualitatively, a demand has grown for a more direct reflection of the opinions and preferences of the citizenry to the nation's constitutional and political processes of agenda-setting through justice-administration at the lowest possible cost thus in an institutionalized

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trials, the verdict and sentencing opinion of the jury and the decision of the court coincide.

means. The newly introduced direct democracy measures and systems as discussed in the previous chapters of this article should be extensively analyzed against the background of such constitutional-political contexts in current-day South Korea, especially from the perspectives of constitutionalism, democracy and rule of law. Some of the observations and analyses toward this direction include the following:

First, considering that direct democracy measures in South Korea have been introduced in South Korea's constitutional-political institutions and processes as a means to redress certain perceived defects of its representative democracy, all such direct democracy measures should be contemplated and evaluated in comparison with the nation's representative mechanisms and institutions as currently in operation. In this regard, it should be noted and underscored that both the representative democracy and the direct democracy commonly face the issue of institutional hurdles or access barriers to the respective political processes against unorganized or loosely organized members of the community with lesser economic means. Economic means and special interests affect the structure of competition between the candidates at public elections as well as the capability of acquiring required numbers of signature for initiative for legislation.

Wealth and organizational cost might at first sight seem to place a higher burden on the political process for direct democracy measures. However, also in representative democracy, wealth and ability to organize affect not only the result of public elections but also the activities of the representatives subsequent to the public elections. Suppose the rate of participation for direct democracy measures were lower than the voting rate at the public elections under representative system, the number of voters affecting the political process by way of economic means would be further limited. Thus, the barriers of money and organizational power to the access to the political processes are common to the measures of direct democracy and representative democracy, although the effect of distortion by such access barriers may have different actual and symbolic effects thereupon. Acknowledging this aspect may liberate the argument for introducing direct democracy measures to supplement the shortcomings of the representative democracy in South Korea, and thus shift the focus of the argument towards the next phase of better designing respective direct democracy measures and mechanisms to lower and overcome such access barriers and combining the merits of both representative and direct democracy measures at various pertinent phases.

Second, it should be noted that, as an important aspect to be considered in contemplating any direct democracy measures and mechanisms to supplement the representative systems and institutions both at the conceptual and the practical levels, the representative political process connotes the

deliberation process and the possibility of improving and fine-tuning policies subsequent to the submission of the policy agenda to the public domain. In comparison, direct democracy measures have been criticized in terms of democratic legitimacy in that they may only reflect the average or median stance of the members of the community by way of posing binary questions, and that, as such, they lack the possibility of improvement for the sake of public good through subsequent deliberation processes. This criticism is particularly to the point when it comes to the legislative or policymaking process, as the representative process of legislation and policymaking does encompass the public hearing and the standing committee review processes, for examples, as well as the support throughout the legislative and policymaking process by human resources with expertise in the specific relevant fields.<sup>54</sup> Such possibility of deliberation does provide the representatives involved in the legislative and policymaking processes with the opportunity to consider various aspects of the given agenda for the community in a prudent, reasoned manner.

However, the institutionalized possibility of deliberation for the representative political processes as stipulated by law does not always guarantee an ideal deliberation in practice. This observation indicates a particularly meaningful concern in South Korea's legislative process, which allocates such heavily concentrated authorities in National Assembly's standing committees with no more than fifteen to thirty members of National Assembly<sup>55</sup> in comparison with its plenary session. While concentration of actual and practical legislative authority in the hand of National Assembly's standing committees as opposed to its plenary session has become rather inevitable in the nation's legislative process due to the increasing demand for expertise and timeliness in legislation, it renders the legislative process short of the virtues of deliberation that is at the core of the representative political process. Furthermore, this aspect of intensely concentrated legislative authority in the hand of the standing committees as a shortcoming has become exacerbated in South Korea as its National Assembly is a unicameral legislature. Further yet, many of the legislators, if not most, notwithstanding

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54. For example, the Korean National Assembly Act mandates a public hearing for the enactment of a statute and the revision of an existing statute in whole (i.e., for all legislation of statutes except for a partial revision of an existing statute), National Assembly Act, Law No. 9129 of 2008, art. 58, § 5 (Korea), and an extensive review over each of the bills by at least one of the standing committees, which have the authority to revise the bill in part or in whole, prior to review thereupon at the plenary session of National Assembly, National Assembly Act, arts. 36, 37, 58 etc.

55. There are sixteen standing committees within National Assembly reviewing each of the bills presented to National Assembly, with exclusive areas of bills subject to their review, National Assembly Act, art. 37. The review process at these standing committees is mandatory and consists of numerous detailed phases, and the standing committees have the authority to revise or amend a bill prior to the plenary session review, to substitute a committee bill for the original bill, and to decide not to submit a bill to the plenary session for its review at all, National Assembly Act, arts. 51, 58, 87.

the provisions of the National Assembly Act,<sup>56</sup> largely follow the stance of the respective political parties to which they belong in voting throughout the legislative process.

In this context, while the representative process as the principle provides a higher probability of producing persuasive outcome by way of deliberation in comparison with direct democracy measures such as initiatives, it is highly difficult, if not impossible, to prove this point in practice. Given this, it is healthier and more realistic to move onto the issue of at which phase of the respective political processes the representative system reveals defects at either institutional or practical level and how and in which means direct democracy measures may cure such defects thereby supplementing the representative system as a whole. South Korea's recently introduced initiative means in the legislative process for the local ordinance and, in a larger context, the year-old jury system may positively serve this end.

Third, and perhaps most significantly from the constitutional law standpoint, we should visit the point that the legislature under a representation model is more sensitive and responsive to the interests of the minorities in the community than the initiative electorate. This conventional point does have a logical appeal. Especially under the pluralist theory, legislators as representatives under the representative system deal with the broad range of issues that come before the government,<sup>57</sup> so that minority groups with differing intensities of preferences on different issues may bargain and logroll with other groups for their votes, which brings minorities into the process and ensures that the resulting compromises will accommodate their interests.<sup>58</sup> Comparing with the above representative process, the direct democracy measure poses certain isolated questions to the voters as a whole.<sup>59</sup> Direct democracy procedures do not provide forum where varying interests within the relevant district or community can be expressed or vote-trading can be negotiated between diverse interest groups from a long-term perspective. Therefore, at least in theory, the representatives under the representative system are in a position to more sensitively respond to the rights and interests of the minorities within the relevant domain than the voters as a whole, or, more accurately, the average

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56. Refer to National Assembly Act, Law No. 9129 of 2008, art. 114-2 (Korea), as most recently revised in August 2008.

57. As of March of 2009, at the 18<sup>th</sup> National Assembly that was composed and began functioning in May of 2008, approximately 3,000 bills are pending, among which approximately 2,700 bills were initiated by the members of National Assembly and approximately 300 bills were presented by the government.

58. Refer to, for example, Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978).

59. For a detailed discussion on this aspect of direct democracy measures, see, for example, Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 175 (1977).

stance across the voters as a whole, in that particular domain.

Yet, the challenge to the means of direct democracy such as the initiative for the lack of sensitivity or responsiveness to minority interests may be misguided for the following reason. The initiative, like other devices of direct democracy, is also designed as a majoritarian tool. The appropriate question here therefore is whether the initiative is more likely than the legislature as the representative to be a source of measures that discriminate against minorities or infringe upon the rights of the politically or socially powerless. Here, we should underscore the function of constitutionality review as an institution that tends to mitigate the anti-minority potential of any legislation including direct legislative measures. That is, voters as a whole as legislature can no more infringe upon constitutionally protected rights than can the representative legislature, under the system of constitutionality review over the statute as implemented in South Korea. Further, there lies no barrier for the South Korean Constitutional Court to call forth a more aggressive judicial control over the initiative process and a judicial scrutiny of initiative proposals for constitutional violations than over the legislation through representative means. The mechanism for the protection of the constitution already in use in South Korea in reviewing the constitutionality of the statute may and will institutionally control the risk of infringement upon the rights and interests of the minorities by direct democracy means as well as by representative means, and the possibility for the direct democracy measures to wield tyranny of the majority in the political process can thus be regulated and deterred by the constitutionality review system that has been in place as a primary part of the nation's constitutional and political domain.<sup>60</sup>

Thus, representative and direct democracy, instead of being starkly different, may suffer from similar defects, albeit in varying degrees, of barriers to access, low levels of popular or community-wide participation, unreasoned decision-making for lack of sufficient deliberation, and potential for anti-majority abuses. The question that South Korea faces now is whether direct and participatory democracy merely compounds the flaws of representative government or, rather, whether recently introduced measures of direct and participatory democracy may function as a corrective to the defects and shortcomings in legislative representation and representation in further dimensions. At least in certain situations, direct legislation or other forms or measures of direct and participatory democracy may be more ameliorative than harmful, but, at the same time, ample caution is due.

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60. However, it should be noted that, in case of infringement upon the rights and interests of the minorities by a direct democracy measure, control thereupon by way of constitutionality review as it currently exists and operates might be more difficult in practice, in that, for example, in such a case, it might be relatively difficult to prove discriminatory intent and so forth.

Representative government, if it is to be worthy as a means of implementing democracy, must be responsive to the governed. This does not require regular submission of all governmental policy choices to the voters for approval: in a large, complex, populous and heterogeneous society, that would be impractical as well as unwise, for many of the reasons. The requirement of periodic public elections may help ensure at large that elected representatives are responsive to the wishes of the governed or the ordinary members of the community. Yet again, at the same time, the imperative of re-election may not prove to be a sufficient guarantee and it might function as a perverse incentive inducing incumbent representatives to erect barriers to entry to the political process. The institutional setting, thus, might divide representatives from their constituents and create incentives for elected representatives to disregard the preferences of popular majorities. Furthermore, although pluralist political theory suggests that the multiplicity of competing interest groups will ensure that no single interest will dominate the legislature because the strength of one cluster of interest groups and lobbyists will be offset by the countervailing demands of organizations with opposite interests, many of these groups may support each other's stances through coalitions, or various interest groups that are already in the mainstream political process may take the same side in a dispute over an issue of government regulation or reform of the existing political process. If that is the case, the pluralists' process of conflict and compromise among interest groups, which is said to result in the virtual representation of the unorganized or loosely organized will not occur and the unorganized will be shut out of the legislative or policymaking process under the representative system.

Thus, here, the best case for direct legislation and other measures of direct democracy in a system of representative government is that it may assume a significant role particularly in those areas in which institutional pressures cause representatives to stray from the interests of popular majorities: government structures, regulation of the representative political process itself, taxation and government spending, to take examples.<sup>61</sup> The initiative, for example, may function as an effective device for getting the legislature's attention and reminding representatives of the public outside the community of political insiders. The difficulties of qualifying the proposed measures<sup>62</sup> and overcoming voter resistance to initiative proposals may well

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61. The actual statistics collected in the United States where twenty-four of the States have the direct legislation measures indicates such a tendency as well. That is, most number of the direct legislation has occurred in the subject area of political process (26%), and the direct legislation in the subject area of taxation and government spending has been the second most (21%). DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITION IN THE UNITED STATES* 74-76 (2001).

62. Refer to Local Government Act, Law No. 9577 of 2009, art. 15 (Korea) and the

function to lead to the result that most laws, even those dealing with subjects normatively prone to initiative activity, will remain the product of legislation by the representatives. Rather, legislative lawmaking occurring with the existence of potential initiative process may become more responsive to popular wishes than a legislature not subject to possible check by direct legislation. Even unsuccessful initiatives will have a role, alerting the elected representatives that public concern on a subject that the legislature has neglected has become significant enough to get a measure on the signature poll, yet giving the representatives a grace period during which to take steps on the matter.

Seen from this perspective, the hurdles blocking passage of direct legislation may have considerable merits. As long as enough initiatives succeed periodically to demonstrate the public's potential lawmaking power, it is probably better that most laws emerge from the representative legislative process, with its greater institutional and systemized capacity for rationality, prudence, compromise and deliberation. The legislature or elected representatives will still write most of the laws, but the existence of the initiative process as a supplement to the legislation by the representatives will influence the pattern of legislative behavior in the direction of greater conformity and responsiveness to popular interests. The susceptibility of the legislative channel to blockage and to deviation from the majority when government structure, the political process, taxing and government spending are at stake will indicate the need for such a mechanism to assure that proposals unappealing to the legislature but meaningful to the people get a fair measure and degree of consideration. In South Korea as well, the most significant function of direct democracy measures may not be to pass initiatives per se, but to get certain subjects on the legislative and policymaking agenda. Especially for those members of the community who do not have ready access to the political process under the representative system including the legislative process, this can be a vital addition to their political resources.

In a democratic state pursuing to implement the ultimate goals of the guarantees of the Constitution and to realize and expand the rule of law, the legitimacy of the law means democratic as well as constitutional legitimacy of the law, which comes from the law's democratic political authority endowed through the process of its legislation established by the Constitution. Such democratic legitimacy is based upon the authority to request those who preferred differing or even opposing alternatives to accept the law on the ground that such law was adopted by the consented means of decision-making. Should a nation's representative political process reveal

certain defects of shunning the members of the community as the bearer of the sovereignty from the decision-making processes by the representatives, such flaws should be repaired so that the sovereign members of the community may control the political process through closer monitoring by making the operation of the political process by the representatives more visible and transparent, and, further, such members of the community may, if they intend to do so, participate in the political process at the lowest possible cost. The measures in the nature of direct and participatory democracy recently introduced to South Korea especially since 1990s can be analyzed as the institutionalization of such demands and possibilities.<sup>63</sup> Discussions for introducing and expanding direct and participatory democracy measures of political process in South Korea whose Constitution adopts the representative system and political process as the principal system of governance should be an integrated part of the effort to remedy the institutional shortcomings of such representative systems ultimately for implementing constitutional democracy and expanding the rule of law throughout the nation.

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63. Relevantly, for discussions and analyses of the democratic legitimacy of the participatory democracy in current-day South Korea at the conceptual level, refer to, for examples, Bang, *supra* note 29, at 5; Young-Hwa Chung, *The Constitutional Evaluation of and Challenges to the Participatory Democracy in Korea*, 32(2) KOREAN PUB. L. RES. 47, 47, 52 (2003); Hyug-Baeg Im, *A New Paradigm of Democracy*, 6(2) J. LEGIS. STUD. 72 (2000); Jong-Sup Chong, *Citizen Organizations and Participatory Democracy*, 26(1) KOREAN PUB. L. RES. 59 (1998).

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