

A CRITICAL REVIEW ON COMPOSITION OF THE CONSTITUTIONAL COURT OF KOREA

Sang-Hyeon Jeon*

Seoul National University (SNU), Seoul, Korea
jeonshine@snu.ac.kr

Received: 4 April 2023 | Last Revised: 7 December 2023 | Accepted: 10 March 2024

Abstract

The composition of the Constitutional Court is a crucial aspect for the realization of constitutionalism. While the Constitutional Court has been praised for its significant contributions to the establishment of constitutional democracy in Korea, there have been criticisms regarding the composition of the Court in both its institutional structure and operational practices. The Constitutional Court of Korea consists of nine justices. Although these nine justices are formally appointed by the President of Korea, three are elected by the National Assembly, and three are designated by the Chief of the Supreme Court. This means that the President, the majority of the National Assembly, and even the Chief Justice of the Supreme Court can each choose three justices on their own without any consent or approval from other branches. This raises concerns about the lack of democratic legitimacy, judicial independence and the expertise of the Constitutional Court. Additionally, there are constitutional issues such as the relatively short term of office, the reappointment, the absence of a specified term for the Chief Justice, and the potential for prolonged vacancies of seats.

Keywords: Appointment of Justices; Constitutional Court Composition; Constitutional Court of Korea; Democratic Legitimacy; Judicial Independence; Term of Office

* B.A.(SNU) LL.M.(Fordam University) Ph.D. in Law (SNU), Law Professor at Seoul National University School of Law. This Article is based on the author's presentation at the 6th Indonesian Constitutional Court International Symposium on August 10, 2023. This article was funded by the 2024 Research Fund of the Seoul National University Asia-Pacific Law Institute, donated by the Seoul National University Foundation.

I. INTRODUCTION

The Constitutional Democracy in Korea began with the current Constitution, which established the Constitutional Court of Korea in 1988. Although the Korean had Constitutions even before 1988, those Constitutions were nominal. At the inception of the current Constitution, the primary objective was to establish constitutionalism, wherein the Constitution is regarded and enforced as the supreme legal norm, binding all state actions. Over the past thirty-five years since the establishment, the Constitution has exercised normative power as the highest norm both in name and reality through constitutional adjudication by the Constitutional Court, which has invalidated a number of statutes repugnant to the Constitution, remedied infringements of constitutional rights of individuals. The Constitutional Court has played a pivotal role in establishing constitutional democracy in Korea and the Constitution has been perceived as the paramount norm, binding all branches of the state - legislative, executive, and judicial.

Simultaneously, the Constitutional Court of Korea has risen as a powerful institution, wielding significant influence. Notably, the Court nullified the Capital Relocation Plan, which was a pivotal policy announced by the then-President, citing the customary constitution that designates Seoul as the capital of Korea.¹ Additionally, in a case involving the dissolution of a political party, the Court dissolved the party and deprived its five members of their positions as members of the National Assembly.² Above all, the Court has presided over impeachment trials of the President of Korea twice,³ resulting in the removal of the President from office in one instance.⁴ These events have captured immense public attention, prompting a shift in focus from the mere realization of constitutionalism

¹ 2004 Hun-Ma 554, October 21, 2004, 16-2(2) KCCR 1. Hereinafter, "KCCR" is abbreviation of "Korean Constitutional Court's Report" which is the official report book of the Court's decisions. "2004 Hun-Ma 554" denotes the case number, with "October 21, 2004" indicating the date of the decision. "16-2(2) KCCR 1" signifies that the case begins on page 1 of volume number 16-2(2) of the official report.

² 2013 Hun-Da 1, December 19, 2014, 26-2(2) KCCR 1.

³ 2004 Hun-Na 1, May 14, 2004, 16-1 KCCR 609(case against President Moo-Hyun Roh); 2016 Hun-Na 1, March 10, 2017, 29-1 KCCR 1 (case against President Geun-Hye Park).

⁴ 2016 Hun-Na 1, March 10, 2017, 29-1 KCCR 2016 Hun-Na 1. The Court ruled that the President Geun-Hye Park should be removed from her office of the President of Republic of Korea.

through constitutional adjudication to the justification of such adjudication and ensuring democratic oversight over the Court itself. Consequently, organizing the Constitutional Court from a perspective of democracy has become a pressing issue. Given the political implications and ramifications of the cases handled by the Court, the political stances of the Justices are also significant, as they may impact the outcomes of individual cases. Thus, the appointment of Justices to the Constitutional Court holds political significance.

The composition of the Constitutional Court, like other constitutional institutions, should adhere to constitutional principles such as popular sovereignty, democracy, and the rule of law.⁵ Given that the authority wielded by the Constitutional Court is derived from the people, its organization must reflect the will of the people. Moreover, to safeguard the Court's effective operation, it is imperative to ensure its independence and professionalism.⁶ The Constitution of Korea assigns the task of composing the Constitutional Court to the President, the National Assembly, and the Chief Justice of the Supreme Court. However, questions arise regarding whether this method of composition aligns with principle of democracy or ensures the independence of the Constitutional Court. In other words, there are concerns about whether those institutions - the President, the National Assembly, and the Chief Justice of the Supreme Court - appropriately wield their authority for this purpose. Despite the Constitutional Court's decisive role in establishing constitutional democracy in Korea, criticisms have been raised regarding the composition of the Court both in terms of institutional structure and practices surrounding the appointments of Justice.

This paper seeks to delve into the experience of composing the Constitutional Court in Korea and explore the related issues. After briefly looking over the history of the constitutional adjudication in Korea (Section II), it examines the problems concerning the composition of the Court, particularly appointment of Justices, covering both the provisions of the Constitution and their practical

⁵ Nak-In Sung, *Heonbeonhak* [Constitutional Law] (Paju Bookcity: Bobmun Sa, 2023), 765; Jong-Sup Chong, *Heonbeobsosongbeob* [Constitutional Litigation] 5th ed (Seoul: Parkyoung Publishing & Company, 2008) 38.

⁶ Ha-Yurl Kim, *Heonbeonsosongbeob* [Constitutional Litigation] (Seoul: Parkyong Publishing & Company, 2021) 77.

application (Section III). Subsequently, it explores matters concerning the terms of office, reappointment and vacancies of seats (Section IV).

II. BRIEF HISTORY OF THE CONSTITUTIONAL ADJUDICATION IN KOREA

During the drafting of the Constitution of 1948, often referred as “the Founding Constitution”, there were debates about which type of constitutional adjudication system should be adopted, between the centralized (or concentrated) model and the decentralized (or diffuse) model.⁷ The centralized model refers to constitutional review system where a separate independent institution, distinct from the ordinary courts exercises the power of constitutional review. In contrast, the decentralized model confers the power of judicial review to ordinary courts, as seen in U.S.

The drafters of the Constitution adopted the centralized system and established the Constitutional Committee. According to the memoirs of a late Professor *Jin-Oh Yoo*,⁸ who is considered to have influenced significantly the constitution-drafting process, he believed that granting the power for constitutional review to the ordinary courts would be improper. This was partly due to absence of experienced judges in terms of constitutional review at the time and considerable doubts about the ability of ordinary court’s judges to engage in constitutional adjudication.⁹ Additionally, there might have been distrust of the judges from their history of cooperating with the Japanese ruling during the colonial era before 1945. The Constitutional Committee was composed of five Members of National Assembly and five Justices of the Supreme Court, with the Vice President assuming the chairmanship of the Committee.¹⁰ Concurrently, the Founding Constitution established the Impeachment Tribunal which would take

⁷ For distinction of judicial review into two models, see Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis, Kansas City, New York: The Bobbs-Merrill Company, 1971), 46-51.

⁸ He was a prominent professor of public law at that time and participated the drafting of the Constitution of 1948 as an expert member of the Constitution-Drafting Committee.

⁹ Jin-Oh Yoo, *Heonbeob-Gicho-Hoegorok* [The Memoirs of Drafting the Constitution] (Seoul: Iljogak, 1980), 41-42.

¹⁰ The Constitution of 1948, Art.81.

charge of impeachment cases.¹¹ The composition of the Impeachment Tribunal was in the same way as the Constitutional Committee.

The Constitution of 1960, known as the Constitution of the Second Republic, introduced the Constitutional Court for the first time in Korea, replacing the Constitutional Committee with the Constitutional Court. In 1961, the National Assembly enacted the Constitutional Court Act. However, the establishment of the Constitutional Court was thwarted as the constitutional system collapsed by a military coup in the same year.¹² The Constitutional Court adopted in the 1960 Constitution, while not realized in practice, serves as a precursor of the current Constitutional Court of Korea. The Constitution of 1960 provided that the Constitutional Court should be composed of nine Justices, with three appointed by the Senate of National Assembly, three by the President, and three by the Supreme Court.¹³ The Constitutional Court Act stipulated that the three Justices appointed by the Supreme Court should be elected at the Council of Supreme Court's Justices with the votes of majority of the sitting Justices.¹⁴

The Constitution of 1962,¹⁵ regarded as having most similarities to the U.S. Constitution in terms of structure of government, granted the Supreme Court the authority of constitutional review, including the power to decide constitutionality of statutes and dissolution of political parties.¹⁶ The Constitution established the Committee for Impeachment as a separate institution to handle impeachment cases.¹⁷ Less than 10 years after the introduction of constitutional review by the Supreme Court, the constitutional review system underwent another change. The Constitution of 1972, as known as *Yushin* Constitution,¹⁸ revoked the Supreme Court's authority for constitutional review and reinstated the Constitutional Committee system, previously adopted in the Constitution of 1948. Prior to

¹¹ The Constitution of 1948, Art.47.

¹² The military coup broke out on May 16th, 1961 approximately one month after the enactment of the Constitutional Court Act on April 17th of the same year.

¹³ The Constitution of 1960, Art.83-4.

¹⁴ The Constitutional Court Act of 1961, Art. 3(1).

¹⁵ The Constitution of 1962 was enacted by the military government that launched the coup in the previous year and approved by national referendum of people.

¹⁶ The Constitution of 1962, Art.7(3), 102(1).

¹⁷ The Constitution of 1962, Art.62.

¹⁸ *Yushin* means reformation or revitalizing reform.

this change, the Supreme Court had ruled that the State Compensation Act, which restricted state compensation to military soldiers or policemen injured while performing their official duties, was unconstitutional.¹⁹ The Constitution of 1972 was enacted for the establishment of an authoritarian regime, conferring absolute power to the President of the Republic and eliminating the limitation on the President's reelection.²⁰

Although the Constitution of 1972 went back to the Constitutional Committee system, the jurisdiction and composition of the Committee differed from those of the Founding Constitution. The Constitutional Committee's jurisdiction included the impeachment and dissolution of political party,²¹ and the Committee consisted of nine members appointed by the President.²² Among these nine members, three were elected by the National Assembly, and three were designated by the Chief Justice of the Supreme Court.²³ The President also had power to appoint the chairperson among the Committee members.²⁴ The Constitutional Committee Act under the Constitution of 1972 included provisions that significantly restricted the opportunity for the Committee's review. According to the Act, if a court sought the Committee's review of a statute's constitutionality, the request had to be submitted via the Supreme Court, and the panel of the Supreme Court, comprised of Justices of the Supreme Court, held the authority to determine whether the request was necessary and decide not to forward it to the Committee.²⁵ The Constitutional Committee system persisted under the Constitution of 1980, and continued until the end of 1987 when the current Constitution was enacted. However, during this period, the constitutional adjudication did not function effectively and remained nominal. It is notable that there was not a single

¹⁹ The Supreme Court, June 22th, 1971, 70 Da 1010 (Plenary Session).

²⁰ For example, under the *Yushin* Constitution, the President could actually appoint one third members of the National Assembly, and had the power to promulgate Presidential Emergency Decree to suspend the constitutional rights and to intervene the judicial power. The Constitution of 1972, Art.40, Art.53.

²¹ The Constitution of 1972, Art.109(1).

²² The Constitution of 1972, Art.109(2).

²³ The Constitution of 1972, Art.109(3).

²⁴ The Constitution of 1972, Art.109(4).

²⁵ The Constitutional Committee Act, Art.15.

decision of the Constitutional Committee throughout the duration of both the Constitution of 1972 and the Constitution of 1980.²⁶

The current Constitution was the result of Democratization Movements, which culminated in the June Uprising of 1987, bringing an end to the authoritarian regime that had lasted since 1972. The most important aim of the drafters of the current Constitution was realization of democratic constitutionalism. The Constitutional Court was regarded as the guarantor of this aim. Finally, the current Constitution adopted the Constitutional Court and the Constitutional Court was established through the Constitutional Court Act in September 1988.²⁷

III. APPOINTMENT OF JUSTICES

3.1. Overview

The Constitutional Court is composed of nine Justices,²⁸ a composition method similar to that of the Constitutional Committee under the Constitutions of 1972 and 1980. While all nine Justices are appointed by the President, among the nine, the President appoints three who are elected by the National Assembly and three designated by the Chief Justice of the Supreme Court(hereinafter, “Chief of SC”).²⁹ The President cannot refuse to appoint those elected by the National Assembly or designated by the Chief of SC. In other words, the President has authority to select only three Justices of his own choice. It is noteworthy that the Constitution of 1960, which first adopted the Constitutional Court system, outlined the method of composition for the Court slightly different from the current Constitution. Under the 1960 Constitution, the President was granted the authority to appoint only three Justices, not all nine, and the authority to designate three Justices was vested in the Supreme Court itself, not specifically in the Chief of SC.³⁰

²⁶ The Constitutional Court of Korea, *The Twenty Years Of The Constitutional Court* (Seoul, The Constitutional Court of Korea: 2008), 84-86.

²⁷ The Constitutional Court Act was enacted on August 5, 1988 and came into effect on September 1 of the same year. On September 12, six Justices were appointed by the President including three designated by the Chief of SC of the Supreme Court, and the remaining three were elected by the National Assembly on September 15.

²⁸ CONST. Art.111(2).

²⁹ CONST. Art.111(3). The National Election Commission is organized through the same way as the Constitutional Court under the current Constitution of Korea. CONST. Art.114(2).

³⁰ The Constitution of 1960 Art.83-4.

There are several countries that have adopted similar composition for the Constitutional Courts.³¹ For example, the Mongolian Constitutional Court is composed of nine Justices who are all appointed by the National Parliament, upon the nomination of three of them by the National Parliament, three by the President, and the remaining three by the Supreme Court.³² In Indonesia, the Constitutional Court consists of nine Justices, three of whom are nominated by the House of Representatives (DPR), three by the President, and three by the Supreme Court. All nine nominees shall be confirmed by the President.³³ The Bulgarian Constitutional Court consists of 12 Justices, with one-third elected by the National Assembly, one-third appointed by the President, and one-third elected by a joint meeting of the judges of the Supreme Court of Cassation and the Supreme Administrative Court.³⁴ The Constitutional Court of Italy is composed of fifteen Justice. One third of them are nominated by the President of the Republic, one third by Parliament in joint session, and one third by the ordinary and administrative supreme courts.³⁵ In Spain, the Constitutional Court consists of twelve Justices, appointed by the King. Among the twelve, four are nominated by the Congress, four by the Senate, two by the Government, and the remaining two by the General Council of the Judiciary.³⁶

The way of composing the Constitution Courts, as observed in the examples above, may be perceived as a cooperation among three branches, each contributing equally to the composition of the Constitutional Court. However, it is more accurate to say that each department independently exercise the power of appointment regardless of other branch's opinion. The President can appoint three Justices without consent of the National Assembly, and the National Assembly can select

³¹ For brief introduction to the Constitutional Court's composition of those countries, Dong Hoon Han et al, *Heonbeobjaepanso Jepangwanuie Jagyeok, Guseongbangsik Mit Imgi* [The Composition of Constitutional Court, Qualifications and Term of Office of a Justice] (Seoul, Constitutional Research Institute, 2011), 38.

³² The Constitution of Mongolia, Art.65(1)

³³ The Constitution of Indonesia, Art.24C(3). For brief introduction to Indonesian constitutional review system, see Hae-Cheol Byun, "Indonesia Heonbeobjaepanjedo-e Gwanhan Sogo"[A Study on The Indonesian Constitutional Review System], *HUFS Law Review* 41, no.1 (2017): 103-119

³⁴ The Constitution of the Republic of Bulgaria, Art. 147(1).

³⁵ The Constitution of Italy Art.135(1). For constitutional adjudication system of Italy, see, Hakseon Jeon, "Italia-ui Heonbeobjeapanjado [The Justice constitutionnelle in Italy]," *World Constitutional Law Review* 16, no.3 (2010): 543-560.

³⁶ The Constitution of Spain Art.159(1).

Justice-candidates for election by itself without any nomination or designation from other departments. There is neither prior procedural intervention, such as recommendations from other institutions, nor post-control, such as confirmation processes by other branches, in the designation of Justices by the Chief of SC. No branch holds veto power against the selection made by another branch. In essence, the composition of the Constitutional Court is not the product of cooperation among three branches, but rather the result of the separate and independent exercise of authority by each branch.

This raises several constitutional issues from the perspective of democratic legitimacy, judicial independence and neutrality of the Constitutional Court. Especially noteworthy is the unique characteristic of the Korean system, where the Chief of SC, rather than the Supreme Court itself or an institution consisting of courts, holds the sole power to appoint Justices without any checks or controls.

3.2. The President's Appointment

3.2.1. Unilateral Appointment without Parliament Consent

Among the nine Justices who the President appoints, three are selected directly by the President himself. As the President's appointment does not require consent from the National Assembly, the selection of candidates essentially equates to their appointment as Justices. This raises some problems.

Firstly, the President's appointing Justices without parliament's consent lacks democratic legitimacy compared to those appointed with parliamentary consent. One of the most challenging questions in constitutional review by the Constitutional Court is the justification for Justices, who are not elected by the people, to invalidate laws enacted by parliament, the representatives elected by the people. This raises the vexing question of whether constitutional review is consistent with the principles of democracy or popular sovereignty.³⁷ In the United States, where judicial review has been firmly established since the Marbury Case in 1803, arguments persist for the abolition of judicial review even today.³⁸ The

³⁷ It was famously formulated as "counter-majoritarian difficulty" by Alexander Bickel. Alexander Bickel, *The Least Dangerous Branch* (New York: The Bobbs-Merrill Co., Inc., 1962).

³⁸ For example Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999).

ongoing debates over the legitimacy of judicial review in the U.S. may stem from the absence of an explicit provision for judicial review in the Constitution. However, even in Korea, where the Constitution expressly provides for the Constitutional Court's authority for constitutional review, questions about the legitimacy of constitutional review can still arise in relation to the constitutional principles of democracy or popular sovereignty. Requiring parliamentary consent for appointment of the Justices would undoubtedly supplement the democratic legitimacy of the Constitutional Court's Justices. However, achieving this seems very challenging as it would require constitutional amendment with very difficult process.³⁹

Cases and controversies handled by the Constitutional Court are often more closely linked to issues of democracy and popular sovereignty compared to those within the jurisdiction of ordinary courts, including the Supreme Court. Therefore, ensuring democratic legitimacy is of greater importance in the composition of the Constitutional Court than the Supreme Court. The same holds true for the judicial independence of the Constitutional Court. Considering this, it is somewhat paradoxical that Constitutional Court's Justices can be appointed without the consent of the National Assembly, while Supreme Court's Justices require such consent.

Secondly, there is no effective procedure to check and control the President's selection. Neither Constitution nor the Constitutional Court Act provides an institution or process to actually verify the competence and qualification of the candidates whom the President appoints. Although a parliamentary hearing before the President's official appointment was introduced by the Constitutional Court Act in 2005,⁴⁰ the President is not bound by the result of the hearing. The Legislation and Judiciary Committee, which takes charge of hearing process, submits the report on the hearing to the Speaker of the National Assembly after hearing is finished, and the Speaker forwards the report

³⁹ The draft proposed by the President or a majority of the total member of the National Assembly shall require approval by two thirds of the total member of the National Assembly. Subsequently, it must be approved by a majority of all votes cast by more than half of the voters eligible for national referendum. CONST. Art.130(1),(2).

⁴⁰ The National Assembly Act, Art.65-2(2). The operation and procedure of personnel hearing is regulated by the Personnel Hearing Act.

to the President.⁴¹ However, the report has no binding effect on the President's appointment. In other words, the President can appoint a Justice nominee to the position regardless of the result of the hearing. When public criticism against the candidate is particularly intense, the President may choose to withdraw the appointment, accepting the public opinion. Even then, it is still possible for the President to push ahead with appointment. There was a notable instance in 2017 when the President withdrew a nomination following intense criticism of the candidate's morality after a parliamentary hearing.⁴² The nominee faced accusations of engaging in suspicious lucrative stock trading, which led to her decision to step down from the nomination. Typically, a nominee's stepping down is interpreted as the President withdrawing the nomination. However, the President's withdrawal of a Justice nominee is exceptionally rare in Korea because the President can proceed with the appointment despite objections of the opposition party or public opinion. Nevertheless, the President would not insist on the appointment if it costs substantial loss of political support. Therefore, the pressure from external institutions such as interest groups, news media, and public opinion should be considered to play comparatively more significant role, especially in the Korean context.⁴³

3.2.2. Criterion of Selection

What is the most important factor for the President to select Justices? It is difficult to pinpoint one or two factors that have played a prominent role in the President's selection of candidates for the Constitutional Court's Justices. However, it is so important issue that on what criteria the President should choose a candidate.

In the context of the United States, the criteria for presidential selection of Justices have been identified as merit, ideology, personal friendship and

⁴¹ The Personnel Hearing Act, Art.9(2), 11(2).

⁴² Kim Hyo-jin, "Constitutional Court's Justice nominee Accused of Illegally Trading," *The Korea Times*, August 31, 2017.

⁴³ Even in United States, where the Justices of the Supreme Court are appointed by the President with the consent of the Senate, the role of external actor such as interest groups, the news media, and public opinion is regarded as important. See Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* (Oxford: Oxford University Press, 2005), 24-30.

representativeness.⁴⁴ Because the Justiceship of the Supreme Court demands a high level of professional ability as a lawyer, the objective merit can be considered a crucial factor for the selection. However, defining what constitutes merit for the Justiceship and how to evaluate it fairly and objectively is not easy question.⁴⁵ It is understandable that the Presidents would seek to appoint someone who shares political position, given that the nature and impact of the Supreme Court's decisions. While appointing personal friends to high-ranking offices may be tempting for Presidents, such appointments are likely to face backlash,⁴⁶ especially when the office requires a high degree of independence from external institutions. Even though the judicial branch is not an institution representing the people directly and the composition of courts need not mirror the composition of the population, the balancing of representation of the people has been regarded as one of the criteria selecting Supreme Court's Justices.⁴⁷ This balancing aims to promote diversity within the judiciary, which is generally perceived as legitimate. The specific categories to be considered depend on the demographic dynamics of each country, particularly identifying which categories constitute minorities.⁴⁸

It is safe to say that these selections have been based on various factors including the candidate's merit, ideology, personal relationship with the President, and representativeness. These factors may vary depending on the circumstances and priorities of each President. For example, during President Moon Jae-In's

⁴⁴ Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (Oxford: Oxford University Press, 1992), 5. Similarly, Epstein and Posner identify four models depending on what factors the President mainly considers when appointing the Supreme Court's Justices. They are merits model (who is most qualified for the position), patronage model (to whom he owes a favor or whom he trusts to carry out his agenda), ideology model (who can be trusted to vote in an ideologically consistent way) and constituency model (characteristics that are in political demand, such as a regional pedigree or a specific racial, ethnic, or religious identity). Epstein and Posner, "Supreme Court's Justices' Loyalty to the President," *The Journal of Legal Studies* 45, no.2, (June 2016): 407.

⁴⁵ Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* (Oxford: Oxford University Press, 2005), 43-44.

⁴⁶ Davis, *Electing Justice*, 45-46.

⁴⁷ Davis, *Electing Justice*, 46.

⁴⁸ For example, in the early days of the United States, the region of origin was considered as a factor for selecting Justices. However, today, categories such as race, ethnicity, gender are perceived as important factors in the selection process. Davis, *Electing Justice*, 47-51.

tenure (2017-2022), there appeared to be a consideration for representation in his appointments. He appointed one relatively young female judge and one local judge who had been serving in a specific region. Prior to this, President Roh Moo-Hyun (2003-2008) attempted to appoint a female Justice as the Chief Justice of the Constitutional Court, marking the first such appointment in Korea's history. More Recently, the incumbent President *Yoon Suk-Yeol* appointed his college classmate to the Chief Justice of the Constitutional Court with consent of the National Assembly.

In the Korean system, where the President is able to appoint Justices without anyone's consent, the President may prioritize personal relationships or political alignment of the candidate over their professional qualifications or integrity. While not always the case, Justices often tend to align their decisions with the President who appointed them.⁴⁹ The Presidents may expect that the Constitutional Court's Justices, whom they appointed, will refrain from opposing the President's major policies. Conversely, the Justices may feel a psychological obligation not to challenge the policies of the President who appointed them.

In Korea, particularly, the Constitutional Court handled impeachment trials against the President twice,⁵⁰ with the Court deciding to remove the President from office in the second case.⁵¹ Out of this historical experience, the Presidents may prioritize personal friendship or loyalty over anything else as those appointees may take charge of an impeachment trial against the President himself in the future.⁵²

⁴⁹ For the study about voting behavior of the Justices of the Supreme Court of U.S., see Lee Epstein & Eric A. Posner, "Supreme Court's Justices' Loyalty to the President," *The Journal of Legal Studies* 45, no.2 (June 2016): 401. According to Epstein & Posner, the Justices in the U.S. Supreme Court vote in a way that favors the Presidents who appointed them.

⁵⁰ 2004 Hun-Na1, May 14, 2004, 16-1 KCCR 609 (Case against President Moo-Hyun Roh); 2016Hun-Na1, March 10, 2017, 29-1 KCCR 1(case against President Geun-Hye Park).

⁵¹ 2016Hun-Na1, March 10, 2017, KCCR 29-1, 1.

⁵² However, there is no guarantee that Justices will make judgment in favor of the President who appointed them. In fact, in the impeachment case against President Park, the two Justices whom Park had appointed participated the opinion of the Court ruling to remove her from the office of President. 2016Hun-Na1, March 10, 2017, 29-1 KCCR 1.

3.3. Election by the National Assembly

3.3.1. The Political Parties' Selection

The three Justices of the Constitutional Court are elected by the National Assembly through voting during plenary session. Since the formation of the Court in 1988, the National Assembly has established a practice for distributing the power to recommend candidates among major parties. According to this practice, out of three seats for Justices elected by the National Assembly, one is recommended by the ruling party, one by the largest opposite party, and the third either by agreement between the ruling party and the largest opposition party or by the recommendation of the second largest opposition party, provided it holds considerable seats in the National Assembly. This practice originated as a political compromise between political parties.

Following the first general election under the current Constitution in April 1988, where no single party held a majority in the National Assembly and three opposition parties shared the majority,⁵³ the election of Justices of the Court was delayed due to the inability of political parties to agree on candidates. After prolonged debates, the three major parties reached a consensus, with each of them recommending one candidate respectively. The fourth largest party, holding 35 seats at that time, was excluded from this agreement. The National Assembly elected three Justices on September 15, 1988, two weeks after the Constitutional Court Act was went into effect on September 1.

After six years, when the term of office for Justices expired, the election process once again became a subject of debate due to the merger of the ruling party and two opposition parties, the third and fourth largest ones.⁵⁴ This merger led to the emergence of a dominant ruling party holding more than two-thirds of the total seats. The second largest party before the merger became a lone opposition party holding less than one-third of the total seat. The opposition

⁵³ Of the total 299 seats of the National Assembly, the Democratic Justice Party, a ruling party, won 125, the Peace Democratic Party 70, the Reunification Democratic Party 59, the New Democratic Republican Party 35, and the remaining seats, including independent members, accounted for 10.

⁵⁴ In January 1990, The Democratic Justice Party, the Reunification Democratic Party, the New Democratic Republican Party 35 announced to consolidate into a newly formed the Democratic Liberal Party.

party proposed that each of the ruling party and the opposition party nominate one Justice, while the remaining nominee would be recommended jointly by both parties. However, the ruling party insisted on its right to recommend two Justices in proportion to its number of seats. In the end, acceding the ruling party's insistence, among the three Justices elected, two were recommended by the ruling party, while one was recommended by the opposition party.

After that, no party managed to secure a two-thirds majority of the seats in the National Assembly. Consequently, the ruling party and the largest opposition party each recommended one candidate, while the remaining candidate was jointly recommended by these two parties. In 2018, with no political party holding a majority, the third largest party, wielding a casting vote, strongly asserted its right to recommend a candidate for the Constitutional Court's Justice. As a result, each of the three major party recommended a candidate respectively.

These practices illustrate that the authority to elect three Justices of the Constitutional Court, bestowed upon the National Assembly, is actually partitioned among major political parties through political negotiations. In reality, the selection of Justices is determined by the decisions of these major political parties, rather than through consensus among National Assembly members. In the process, appointment of a Justice requires a majority vote at a plenary session of the National Assembly, followed by the President's formal appointment.

However, it is exceedingly rare to be rejected by voting at the plenary session because political parties generally approve the candidates recommended by other parties in order to gain support for their own recommendations.⁵⁵ Additionally, the President's role in the appointment is purely ceremonial, lacking presidential veto power. Consequently, the election within the National Assembly effectively amounts to the appointment of the Justice. Put differently, the selection of a candidate by political party results in the appointment of a Justice without encountering significant difficulty. Consequently, there is a likelihood of political

⁵⁵ As seen below, there has been a case where a nominee recommended by an opposition party was rejected through voting during a plenary session.

and partisan lawyers being selected as Justices because political parties often consider political ideology as crucial factor for choice of the candidates.

3.3.2. Simple Majority for Election

The Constitution and the Constitutional Court Act do not stipulate the quorum for the election of a Justice of the Court. The Constitution of Korea provides that the quorum required for decision-making in the National Assembly is a simple majority, except as otherwise provided for in the Constitution or in Act.⁵⁶ Consequently, the quorum for election of Justices is a simple majority, allowing a political party with even a narrow majority to unilaterally select a Justice. There have been criticisms of this simple majority requirement, with some advocating for a supermajority such as three-fifths or two-thirds.⁵⁷

The requirement for a supermajority of two-thirds votes often necessitates compromise between political parties, unless one political party holds more than two-thirds of the seats in the Parliament. Requiring a supermajority for the election of Justices could be expected to prevent the election of partisan candidates and ensure that more qualified people are appointed as Justices. In Germany, where requires the quorum for electing Justices requires a two-thirds majority,⁵⁸ it appears that politically moderate Justices are more likely to be elected.⁵⁹ In Spain, the quorum for the election of Justices is a three-fifths votes of either the House or the Senate.⁶⁰

It is true that even the supermajority cannot always guarantee the qualification of Justice-elected. Even under requirement of supermajority, major parties sharing two-thirds of the parliamentary seats can circumvent the supermajority

⁵⁶ CONST. Art.49.

⁵⁷ Soo-Woong Han, *Heonbeobhak* [Constitutional Law] (Seoul: Bobmun Sa, 2021), 1411. In the case of Germany, as shown below, a two-thirds majority vote is required for the election of a Justice.

⁵⁸ The Bundestag elects Justices with a two-thirds majority of the votes cast and at least the majority of the votes of the Members of the Bundestag. The election shall be based upon proposals by the Selection Committee responsible for selecting the Justices. The Committee is composed of twelve Members of the Bundestag, in accordance with the principles of proportional representation. The Bundesrat elects Justices by two thirds of the votes of the Bundesrat. Bundesverfassungsgesetz [Act on the Federal Constitutional Court] Part 1, Section.6(1), Section.7.

⁵⁹ Christoph Möllers, "Legality, Legitimacy, and Legitimation of the Federal Constitutional Court," in *The German Federal Constitutional Court: The Court Without Limit*, ed. Justin Collings (Oxford: Oxford University Press, 2020), 169.

⁶⁰ The Constitution of Spain, Art.159(1). The Spanish Constitutional Court's Justices are twelve. four of them are elected by the House of Representatives and four by the Senate.

requirement by agreeing on the distribution of opportunities for selecting Justices between each party.⁶¹ More crucial than the quorum are stances of political parties regarding candidate selection and the political ethos emphasizing inter-party collaboration and compromise. Nonetheless, a supermajority can be a factor in shaping such attitudes and culture.

3.3.3. Hearing and Voting

Until the year 2000, there was no formal procedure for assessing the suitability of candidates before voting during plenary sessions in the National Assembly. In 2000, the National Assembly implemented a compulsory hearing process preceding voting during plenary sessions.⁶² These hearings, often broadcasted either on air or online, aim not only to scrutinize candidate eligibility but also to influence public opinion about them. Nevertheless, these hearings often fall short of expectations. They frequently degenerate into arenas for political battles, devoid of substantive discussion on the candidates' qualifications for the position and their professional expertise.

Most candidates have been elected without difficulty because the recommendation powers were distributed and mutually recognized between major parties. There has been only one instance in which a candidate recommended by a political party was rejected during plenary session. In 2011, the ruling party-dominated National Assembly voted down a candidate recommended by the opposition party. The candidate, *Cho Yong-hwan*, was a well-known human rights lawyer who had led several decisions of the Constitutional Court declaring statutes and state actions unconstitutional, and his qualification and eligibility as a lawyer was not disputed. However, the ruling party criticized the candidate's statement regarding military submarine explosion, purportedly caused by a North Korean attack. During the hearing, the candidate said that he respected the government's announcement about the accident, but he also mentioned that

⁶¹ In fact, the power of election of Justices has long been divided between two major parties, the Christian Democratic Union (CDU) and the Social Democratic Party (SPD) in Germany. Christoph Schönberger, "Karlsruhe", in *The German Federal Constitutional Court: The Court Without Limit*, ed. Justin Collings (Oxford: Oxford University Press, 2020), 6.

⁶² The National Assembly Act, Art.46-3(1).

he could not be certain due to a lack of access to the documents relating the accident. This case can be seen as an example that political attacks against a candidate outweighed any considerations of a candidate's merit or qualification.⁶³

3.4. Designation of the Chief of SC

3.4.1. Unusual Method of Appointment and Its Origin

In Korea, the Chief of SC holds the power to designate three Justices of the Constitutional Court.⁶⁴ Although it is the President who ultimately appoints them to Justices, the President's appointment is just formal and ceremonial without authority to refuse to appoint. Moreover, there is no additional process such as consent of the National Assembly. While parliamentary hearing is required by the National Assembly Act,⁶⁵ the opinion of the hearing committee of the National Assembly has no binding effect. In essence, the Chief of SC has actually the power to appoint three Justices.

There are the Constitutions, as seen above, in which the judiciary has the power to appoint or nominate the Constitutional Court's Justices. However, even in those cases, the power to appoint or nominate is vested in the judiciary itself as an institution or in joint meetings such as the General Council of the Judiciary, not in the Chief of SC individual. In Korea, judges other than Supreme Court's Justices are appointed by the Chief of SC, however, their appointments require the consent of the Council of Supreme Court's Justices.⁶⁶ Although, the Chief of SC can appoint three Justices of the Constitutional Court unilaterally without anyone's consent.

This method of appointment, granting the substantial power of appointment to the Chief of SC individually, originated from the Constitution of 1972.⁶⁷ As

⁶³ For an attempt to analyze the behavior of the members of the National Assembly at the confirmation hearing, based on this case, SeaYoung Sung & Joon Hyung Hong, "The Legislative-Judiciary Relationship Reflected in the Confirmation Hearings of the Constitutional Court's Justice of Korea: A Content Analysis of the Confirmation Committee Sessions of the Justice Nominee Cho Yong-hwan," *Korean Society and Public Administration*, 23(3) (2012): 349.

⁶⁴ CONST. Art.111(3).

⁶⁵ The National Assembly Act, Art.65-2(2).

⁶⁶ CONST. Art.104(3).

⁶⁷ Jong-Sup Chong, *Heonbeobhak-wonlon [Constitutional Law]* (Seoul: Parkyoung Publishing & Company, 2018), 1482.

explained above, the Constitution of 1960 had stipulated that the Constitutional Court would be composed by the nine Justices, appointed by the Senate of National Assembly, the President, and the Supreme Court, with three appointments each.⁶⁸ Importantly, it was “the Supreme Court” that had the authority to appoint, not “the Chief of SC”. Subsequently, the Constitutional Court Act of 1961 provided that the authority to appoint the three Justices of the Constitutional Court belonged to the Council of Supreme Court’s Justices, comprised of the Justices of the Supreme Court.⁶⁹ However, due to the military coup in 1961, the Constitutional Court could not be realized and the regime of the Constitution of 1960 fell down. Following the Constitution of 1962, which granted the judicial review to the Supreme Court, The Constitution of 1972 established the Constitutional Committee as an institution for constitutional adjudication.

The Constitution of 1972, as previously explained, was a nominal and decorative constitution, of which primary aim was not to guarantee individual’s freedom and rights, but rather to strengthen the state power, particularly that of the President. Consequently, it was hardly expected for the Constitutional Committee to function effectively.⁷⁰

The decision to confer the power to designate three members of the Constitutional Committee on the Chief of SC, rather than on the Council of the Supreme Court consisting of all Justices, may have been intended to facilitate the President’s influence on the appointment of Constitutional Court’s Justices. This approach makes it much easier to exert influence over a single Chief of SC rather than over all the Justices who comprise the Council of Supreme Court’s Justices. Put differently, when the authority to select the three members of the Committee belongs solely to the Chief of SC rather than to an institution composed of many Justices, the intervention of the President in the Judiciary’s selection process becomes much more feasible.

⁶⁸ The Constitution of 1960, Art.83-4.

⁶⁹ The Constitutional Court Act, Art.3(1).

⁷⁰ As mentioned above, there was not even a single decision by the Constitutional Committee.

3.4.2. Lack of Democratic Legitimacy

The Constitutional Court wields enormous power, including the authority to nullify laws passed by the legislature, dissolve political parties, and even remove high-level public officials, including the President, from office. In making these decisions, the Constitutional Court may act against the preferences of the majority of the population, raising questions about the principles of popular sovereignty and democracy. Constitutional adjudication inherently creates tension with democratic principles.

In order for the people to accept decisions that may contradict the will of the majority, it's crucial for people to have a stake in the selection process of decision-makers. While direct election of Constitutional Court's Justices might be impractical, people should have a means to influence or oversee the composition of the Court, at least through their representatives. From a standpoint of democratic legitimacy, granting the Chief of SC authority to designate three Justices is hardly to be justified, given the Chief of SC is neither elected by nor accountable to the people. The provision that confer on the Chief of SC the power to compose the Constitutional Court is the result of reception of the provision stipulated by the previous Constitution, which was enacted for authoritarian regime. Currently, most constitutional law scholars in Korea criticize the Chief of SC's power to designate three of the Constitutional Court's Justices, pointing out its lack of democratic legitimacy.⁷¹

In response to criticisms of the Chief of SC's authority to designate the Constitutional Court's Justices, the Supreme Court enacted a bylaw in 2018 (The Bylaw for the Committee of Recommendation Candidates for the Constitutional Court). The bylaw requires the Chief of SC to designate a Justice among those recommended by the Committee of Recommendation of Candidates for the Constitutional Court's Justice.⁷² According to the bylaw, the Supreme Court

⁷¹ For example, Nak-In Sung, *Heonbeonhak[Constitutional Law]* (Paju Bookcity: Bobmun Sa, 2023), 765; Jong-Sup Chong, *Heonbeobhak-wonlon [Constitutional Law]* (Seoul: Parkyoung Publishing & Company, 2018) 1482; Ha-Yuri Kim, *Heonbeonsosongbeob[Constitutional Litigation]* (Seoul: Parkyong Publishing & Company, 2021), 78; Hyo-Won Lee, *Heonbeobjaepangangui[Lecture On Constitutinal Litigation]* (Seoul: Parkyoung Publishing & Company, 2022), 59.

⁷² The Bylaw for the Committee of Recommendation of Candidates for the Constitutional Court's Justice (enacted and enforced in April 18, 2018).

shall establish the Committee of Recommendation of the Constitutional Court's Justice candidates, composed of nine members including two Supreme Court's Justices, an ordinary court judge, the President of the Korean Bar Association, law professors and non-lawyers.⁷³ The Committee recommends candidates at least three times the number of the nominees be designated by the Chief of SC,⁷⁴ and the Chief of SC should respect the recommendation.⁷⁵

The bylaw is not a regulation or court-rule, a kind of statutory norms that the Constitution explicitly authorizes,⁷⁶ but rather an internal rule that the Supreme Court can make and amend at its discretion. In addition, while the Chief of SC has to respect the recommendation, there is no legal obligation for the Chief of SC to comply it. Given the criticisms against the Chief of SC's designation of the Constitutional Court's Justices, it seems to be difficult for the Chief of SC to ignore the recommendations of the Committee. However, the recommendation by the Committee falls by far short of redeeming the lack of democratic legitimacy. Many of the members of the Committee are legal professionals, including two Supreme Court's Justices, and even the three non-lawyer members cannot represent the people. Although the Committee's recommendation by the Committee may help limit the abuse of the Chief of SC's designation power, it could not be considered a comprehensive solution. The legitimate solution lies in repealing the provision that grants the Chief of SC authority to compose the Constitutional Court through constitutional amendment.

3.5. Neutrality and Expertise

One of the justifications for granting the Chief of SC the power of designation is to enhance the political neutrality and expertise of the Constitutional Court.

⁷³ The members consist of senior Justices of the Supreme Court, the Minister of Court Administration who holds the post of Justice of the Supreme Court, the President of the Korean Bar Association, the President of the Korea Law Professors Association, the President of the Korean Association of Law Schools, a judge who is not a Justice of the Supreme Court, and three esteemed individuals with profound expertise in their respective fields, including at least one female member. The Bylaw for the Committee of Recommendation of Constitutional Court's Justice Candidates, Art.2.

⁷⁴ The Bylaw for the Committee of Recommendation of Constitutional Court's Justice Candidates, Art.8(2).

⁷⁵ The Bylaw for the Committee of Recommendation of Constitutional Court's Justice Candidates, Art.8(4).

⁷⁶ CONST. Art.108 "The Supreme Court may establish, within the scope of Act, regulations pertaining to judicial proceedings and internal discipline and regulations on administrative matters of the court."

Political neutrality is indeed a fundamental requirement for Justices. However, it's important to acknowledge that the Chief of SC also holds a political position personally. Moreover, the President may seek to appoint politically credible individuals to both the Supreme Court and the Constitutional Court. In this context, it may be advantageous for the President to nominate individuals who align politically and exhibit loyalty to the Chief of SC, who holds authority over the designation of three Constitutional Court's Justices and the recommendation of Supreme Court's Justice candidates for presidential appointment.⁷⁷ Essentially, the Chief of SC himself could have been chosen based on his political stance.

Therefore, relying solely on the Chief of SC to enhance the political neutrality of the Constitutional Court is a vague expectation. To ensure political neutrality, it would be preferable to grant the power of designation to the Conference of the Supreme Court's Justices rather than to the Chief of SC alone. In a draft of constitutional amendment proposed by the President in 2018, the Chief of SC's authority to designate Constitutional Court's Justices was indeed proposed to be transferred to the Conference of the Supreme Court's Justices.⁷⁸

Another justification for the Chief of SC's designation of the Constitutional Court's Justices is to enhance professionalism and expertise. The constitutional adjudication is basically judicial action while it is different from traditional judicial action of ordinary courts in terms of jurisdiction and the impact of its decisions.⁷⁹ This is the reason why the Constitution requires qualification as judge for the Constitutional Court's Justices.⁸⁰ Therefore, expertise is a crucial factor in selecting candidates for Justices.⁸¹ The Chief of SC's authority to designate

⁷⁷ In Korea, the Supreme Court's Justices shall be appointed by the President on the recommendation of the Chief of SC and with the consent of the National Assembly. CONST. Art.104(2).

⁷⁸ The President's Proposition for Amendment of the Constitution, Art.111(3). The Proposition was proposed by the then President Jae-In Moon, but rejected and discarded in the National Assembly.

⁷⁹ Some Constitutions explicitly state that the Constitutional Court's actions belong to the judicial power. For example, the German Basic Law provides "The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law and by the courts of the Länder." in Article 92. Similarly, the Indonesian Constitution makes it clear that the Constitutional Court implements the judicial power in Art.24(2).

⁸⁰ CONST. Art.111(2).

⁸¹ For explanation of the principles of the composition of the Constitutional Court as democracy, professionalism, and independence, Jongcheol Kim, "Heonbeobjaepanso Guseongbangbeob-ui Gaehyeoglon [A Proposal for Reform in the Composition of the Constitutional Court]," *Constitutional Law* 11, no.2 (June 2005): 18-24.

presupposes that the Chief of SC would prioritize merit or qualifications as a lawyer than the National Assembly or the President when selecting candidates for Justices. It might be expected that the Chief of SC, as the head of the judiciary, would be able to find and designate the most suitable persons for Justices, considering their expertise.

However, the reality in Korea differs from this ideal. Firstly, it is difficult to assert that the expertise has been always the primary criterion in selecting Justices. Among the Justices designated by the Chief of SC since establishment of the Constitutional Court, all but one have been incumbent or former judges of the ordinary courts.⁸² However, experience as a judge in ordinary court does not necessarily guarantee the expertise in constitutional adjudication. Interpreting the Constitution, which provides highly abstract provisions and implies fundamental values, is different from interpreting other statutory provisions.⁸³ As explained above, when the Korean Constitution was first enacted in 1948, one of the reasons for establishing the Constitutional Committee for constitutional adjudication separate from was due to doubts about the capability of ordinary court judges for constitutional adjudication.⁸⁴ Even today, under the dualized system of the Judiciary, which consists of ordinary courts and the Constitutional Court, it can be generally said that the ordinary court's judges are not familiar with constitutional adjudication.

More problematic is the situation where the Supreme Court of Korea competes with the Constitutional Court for the position of the highest body in judicial power. In this context, the Chief of SC has often utilized the power to designate the Constitutional Court Justices in a manner that diminishes the status of the Constitutional Court. This is achieved by appointing comparatively lower-profile or lower-ranked judges, in the name of promoting diversity. These designations may foster a sense of gratitude and loyalty to the Chief of SC among the

⁸² Out of twenty-one Justices the Chief of SCs designated since the establishment of the Constitutional Court, seventeen were incumbent judges and three were former judge.

⁸³ He-Su Choi, "Heonbeobjaepanso Gusung Immyoung Deonggwa Gwanleohan Gaejongbanghyang [Directions for Amending the Constitutional Law and Constitutional Court Law for the Appointment, Personnel Structure, etc. of Constitutional Judges in the Korean Constitutional Court]," *Constitutional Law* 17, no.2 (June 2011): 172-173.

⁸⁴ See Jin-Oh Yoo, *Heonbeob-Gicho-Hoegorok* [The Memoirs of Drafting the Constitution] (Seoul: Iljogak, 1980), 41-42.

designated Justices. The revelation that the authority to designate Constitutional Court Justices could be intentionally used to weaken the Constitutional Court's status by the Chief of SC came as a significant shock, particularly when it was confirmed in internal reports of the Supreme Court revealed during the criminal prosecution of a former Chief of SC.⁸⁵

IV. TERM OF OFFICE, REAPPOINTMENT AND VACANCIES

4.1. Term of Office

4.1.1. Short Term of Office

The Constitution provides that the term of the office of the Constitutional Court's Justice is six years.⁸⁶ The Constitutional Court's Justice's term of office varies among countries, many constitutions establish terms from nine to twelve years.⁸⁷ Six-year term may be considered comparatively short for the Constitutional Court's Justice. While long terms, such as those of the U.S. Supreme Court's Justices with life tenure raises concerns about legal stagnation, short term of Justiceship is also problematic.

Primarily, frequent replacement of Justices may threaten the stability of constitutional interpretation. Changes in the composition of the Constitutional Court can lead to shifts in the interpretation of the Constitution. Even though the change of interpretation of the Constitution is unavoidable and even necessary, excessive fluctuation in constitutional meaning is undesirable. The Constitution, being the highest norm, ought to maintain stability in its textual content and meaning. The frequent Justice's replacement is detrimental to the coherence of the case law of the Court. The relatively frequent overruling of precedents of the Korean Constitutional Court may be attributed to the short terms of its Justices.

Additionally, the relatively short term of the office presents concerns about expertise. In Korea, where the ordinary courts and the Constitutional Court are separated, the newly appointed Justices lack expertise in constitutional

⁸⁵ Hangyooreh newspaper, "The Chief of SC Yang's Supreme Court Plans to Weaken the Constitutional Court Through Designating Low-profile Judges," August 8, 2018.

⁸⁶ CONST. Art.112(1).

⁸⁷ There are countries of which Constitutional Court's Justice's term is nine years, such as France, Italy, Spain and Portugal, and 12 years such as Germany, South Africa and Hungary.

adjudication. It may be exacerbated when most Justices are appointed from among former judges of the ordinary courts. While the expertise can be partly supplemented by the assistance of rapporteur judges, who are the judicial assistants employed by the Court,⁸⁸ it is undeniable that the expertise of Justices holds significantly more weight for proper constitutional adjudications. The short tenure of office compels Justices to retire before they can develop thorough expertise in constitutional adjudication.

Furthermore, the Constitutional Court Act stipulates a retirement age of seventy,⁸⁹ which poses a problem as it shortens the term of office guaranteed by the Constitution through legislative means. This is particularly concerning because it further diminishes the already brief tenure of Justices.

4.1.2. The Chief Justice's Term

The Chief Justice of the Constitutional Court (hereinafter, "the Chief Justice") represents the Constitutional Court, oversees the affairs of the Constitutional Court, and directs and supervises the public officials under his or her authority.⁹⁰ The Constitution provides that the Chief Justice shall be appointed by the President from among the Justices with the consent of the National Assembly.⁹¹

The Constitution does not specify the term of the Chief Justice, and the Constitutional Court Act also remains silent on this matter. In the past, the President had appointed an individual who was not an incumbent Justice as the Chief Justice. When the President appoints someone who is not currently a Justice to the Chief Justice, the appointee serves for six years, the term of a Justice. Since 1988, four consecutive Chief Justices had served six-year terms. However, a shift occurred after the appointment of the fifth Chief Justice in 2013, where Presidents began appointing incumbent Justices to the role of the Chief Justice. Since then, the four subsequent Chief Justices were appointed

⁸⁸ The Rapporteur Judges are public officials in special service for investigation and research concerning the review and adjudication of cases under the order of the President of the Constitutional Court. The Constitutional Court Act, Art.19. For discussion of various model of the judicial assistant of the constitutional courts, see Hwanghee Lee, "Heonbeob-Yeongugwan-Jedo-ui Model [Models of Judicial Assistants at Constitutional Courts]," *Public Law* 49, no.4 (June 2021): 81.

⁸⁹ The Constitutional Court Act, Art.7(2).

⁹⁰ The Constitutional Court Act, Art.12(3).

⁹¹ CONST. Art.111(4).

while they were serving as Justices. This practice raises concerns regarding the independence of the Constitutional Court.

Firstly, the President can appoint Chief Justices more than twice and to make the influence on the Court last longer. Given the absence of provisions regarding the term of office for the Chief Justice in both the Constitution and the Constitutional Court Act, when an incumbent Justice is appointed as Chief Justice, the length of the Chief Justice's term depends on the remaining term of the incumbent. If the President appoints an incumbent whose remaining term is shorter than the President's own remaining term in office, the President will have another opportunity to appoint a Chief Justice after the term of the newly appointed Chief Justice ends. Since Constitutional Court Justices serve a six-year term, longer than the President's five-year term, the President cannot appoint the same seats of Justices during their own presidential term. A similar consideration should be applied to the appointment of the Chief Justice. Therefore, it is undesirable for the President to appoint an incumbent Justice as Chief Justice if the incumbent's term is shorter than the President's term.

Secondly, appointing an incumbent Justice as Chief Justice gives the President more influence in shaping the composition of the Court. According to the Constitution, the President can select only three Justices while appointing all nine Justices. When the President appoints a non-incumbent as Chief Justice, the President can choose two Justices and one Chief Justice who concurrently holds the position of Justice. However, if the President appoints an incumbent Justice as Chief Justice, then the President can choose three Justices and additionally pick another person as Chief Justice from among the incumbent Justices.

4.2. Reappointment

Under the Constitution of Korea, Justices are allowed to be reappointed.⁹² There were two Justices reappointed in the early days of the Constitutional Court. Justices can be appointed as the Chief Justice when being reappointed.⁹³ As there

⁹² CONST. Art.112(1). Before 2014, there was difference between the associate Justice and the Chief of SC in retirement age, the former was sixty-five and the latter seventy.

⁹³ In 2013, a former Constitutional Court's Justice was nominated as Chief of SC of the Court, but he resigned from the position of nominee after big controversies over various allegations raised at the personnel hearing.

is no regulation about the reappointment of the Chief Justice, the Chief Justice also can be reappointed theoretically. It is worth to note that the Constitution prohibits reappointment of the Chief of SC.⁹⁴

The reappointment of Justices threatens the judicial independence of the Constitutional Court, especially when Justice terms are short. Justices seeking to be reappointed may be inclined to align their decisions with the political position of the appointing authority. It is desirable to lengthen the term of office for Justices for enhancing their expertise and to prohibit reappointment for reinforcing judicial independence of the Court. However, these changes would require an amendment to the Constitution.

4.3. Prolonged Vacancies

The Constitution stipulates that Constitutional Court consists of nine Justices. Therefore, the filling the vacancy of Justice seats is not just an authority, but also a constitutional obligation of those state agencies which have authority to comprise the Court. The Constitutional Court Act provides that the successor should be appointed by no later than on the date the vacancy occurs when the term of office of the Justices expires and the Justices reaches retirement age.⁹⁵ In case that the vacancy occurs unexpectedly on which during the term, the successor should be appointed by within 30 days from the date.⁹⁶ Notwithstanding these provisions, Justice vacancies often extend the 30-day period.

Occasional delays in the Justice appointment process may be understandable due to the time required to identify potential candidates and assess their qualifications and abilities. Although the Constitutional Court has interpreted the aforementioned provisions of the Constitutional Court Act as non-binding, the Court has ruled that failure by the National Assembly to elect a successor within a reasonable period amounts to unconstitutional nonfeasance.⁹⁷ This decision was about the case where a Justice's vacancy lasted for a year and two

⁹⁴ CONST. Art.105(1).

⁹⁵ The Constitutional Court Act Art.6(3).

⁹⁶ The Constitutional Court Act Art.6(4).

⁹⁷ 2012Hun-Ma2, April 24, 2014, 26-1(2) KCCR 209, 214-217. The vacancy began on July 8, 2011 and finished on September 20, 2012 when successor took the office.

months. The prolonged vacancies have occurred with even Chief Justice seats, lasting from three months to nine months.

The prolonged vacancy of the Justice may pose obstacles to the proper functioning of the Constitutional Court and could potentially distort the outcomes of specific cases. The Constitution mandates a super-majority quorum for many decisions, such as those concerning the unconstitutionality of laws, impeachment, dissolution of political parties, or infringements of constitutional rights, which require six or more votes, rather than a simple majority of the Justices.⁹⁸ Additionally, the Constitutional Court Act stipulates that overruling precedents also requires a super-majority of six or more votes.⁹⁹ Furthermore, under the Constitutional Court Act, a case can be reviewed and decided upon with the presence of seven or more Justices.¹⁰⁰ Therefore, even the absence of one Justice can significantly impact the conclusions of decisions. On the other hand, individuals have the right to a fair trial, including the right to a fair trial in constitutional adjudication. Trial by the Constitutional Court with a vacancy in the Justice seat may infringe upon the petitioner's right to a fair trial in a constitutional complaint.¹⁰¹

Although the substitute justices may be considered, the introduction of a substitute justice system raises constitutional concerns under the current Constitution, which explicitly stipulates the number of Justices of the Constitutional Court and the process of their appointment.

V. CONCLUSION

The composition of the Constitutional Court is a crucial aspect for the realization of constitutionalism. While the founder of the current Constitution may have prioritized the establishment of constitutional democracy through the Constitutional Court, less attention may have been paid to how the Court should be organized. Despite the Constitutional Court's significant contributions

⁹⁸ CONST. Art.113(1).

⁹⁹ The Constitutional Court Act, Art.23(2).

¹⁰⁰ The Constitutional Court Act, Art.23(1).

¹⁰¹ 2012Hun-Ma2, April 24, 2014, 26-1(2) KCCR 209, 214.

to the establishment of constitutional democracy in Korea, criticisms have been raised regarding the composition of the Court in both its institutional structure and operational practices.

The Constitution of Korea entrusts the composition of the Constitutional Court to the President, the National Assembly, and the Chief of the Supreme Court. While this method of composition may be perceived as a cooperative effort among the three branches of government, it also allows each department to independently exercise their composing power without considering the opinions of the other branches.

Under the current system of composition of the Constitutional Court, several issues have been highlighted, including the process of appointment, the relatively short term of office, the allowance for reappointment, the absence of a specified term for the Chief Justice, and the potential for prolonged vacancies of seats. These issues are examined in light of democratic legitimation, judicial independence, and the professionalism of the Constitutional Court, and ultimately could be resolved only through amending the Constitution.

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