

The Role of Rapporteur Judges in the Korean Constitutional Adjudication System*

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Abstract

The Constitutional Court of Korea, endowed with extensive authority and enjoying substantial support from the public, handles a wide range of cases. Since it is nearly impossible for the small group of nine Justices to conduct in-depth investigations and research for each case, the Constitutional Court of Korea employs judicial assistants known as "Rapporteur Judges".

Rapporteur Judges are public officials who are specially appointed to conduct investigations and legal research related to case deliberations and judgments under the direction of the Court's president. Although the Rapporteur Judge system was established when the Court was founded, initially only a few individuals served as Rapporteur Judges. However, the Constitutional Court Act and internal regulations have undergone several reforms to increase the number of employed Rapporteur Judges and provide long-term career prospects. As a result, the current Rapporteur Judge system of the Constitutional Court of Korea operates in a unique manner, granting individual Rapporteur Judges a certain level of independence in their tasks. Rapporteur Judges have become more permanent positions, and their recruitment is decided collaboratively with the involvement of all the Justices and Senior Rapporteur Judges. Furthermore, Rapporteur Judges are not exclusively assigned to a specific Justice and have the obligation and authority to present their independent conclusions on cases to the Justices, even if they differ from the Justice's perspective.

While it is difficult to determine the ideal judicial assistant system, the current Korean Rapporteur Judge system offers distinct advantages that contribute to the Court's performance, as well as challenges. The job security, the collaborative reporting process, and the guarantee of independence allow the Rapporteur Judges to develop their expertise, which contributes greatly to the constitutional adjudication progress. Yet the inherent limitation of the position prevents them from taking a more proactive role and the bureaucratic nature of the organization discourages Justices from conveying their own views on the decisions.

The case of the Korean experience exemplifies that the Justices and the president of the Constitutional Court shall count, in particular, on the collaboration with their assistants to carry out their institutional duties, and more extensive research must be carried out on the role

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** Rapporteur Judge, Korean Constitutional Court.

of the Rapporteur Judges, as they play a crucial part in constitutional adjudication and fundamental right protection.

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I. Introduction

Since its establishment in 1988, the Korean Constitutional Court has been the primary institution for constitutional adjudication, protecting the fundamental rights of the people by ensuring that the constitution is upheld as the supreme law in practice. The Korean Constitutional Court is empowered to adjudicate the constitutionality of statutes upon request from ordinary courts on impeachment motions, on the dissolution of political parties, on competence disputes between state agencies, between a state agency and a local government, between local governments, and on constitutional complaints as provided by law (The Korean Constitution, art. 117). With its extensive authority and the significant support it receives from the public, the Korean Constitutional Court had handled a total of 46,854 cases as of May 31, 2023.¹⁾ Although the Justices are responsible for the Court's decisions, it is nearly impossible for the small group of nine Justices to conduct the in-depth investigation and research each case requires.²⁾ For this reason, like many other countries with constitutional courts, the Korean Constitutional Court employs judicial assistants known as "Rapporteur

1) *Jurisdiction Statistics As of Jan. 31, 2024*, CONSTITUTIONAL COURT OF KOREA, <https://english.court.go.kr/site/eng/jurisdiction/caseLoadStatic.do> (last visited Feb. 19, 2024).

2) Almost all constitutional courts around the world comprise a relatively small number of judges, and therefore require professional judicial assistance: 9 (Korean Constitutional Court, Armenia, Lithuania, Romania, Slovenia, Indonesia, Mongolia); 10 (Slovakia); 11 (Republic of South Africa); 12 (Spain and Belgium); 13 (Portugal and Croatia); 14 (Austria); 15 (Italy, Poland, Serbia, Czech Republic, Türkiye); 16 (Germany); 18 (Ukraine); 19 (Russia). See Hwanghee Lee, *Heonbebyeongugwanjedoui model [Models of Judicial Assistants at Constitutional Courts]*, 49(4) PUB. L. 81, 82 (2021) (In Korean).

Judges.”³⁾

Rapporteur Judges are public officials in special service, who are engaged in investigation and legal research to assist in the deliberation and adjudication of cases under the orders of the president of the Court.⁴⁾ While it is not uncommon for the highest courts to employ judicial assistants for case investigation and legal research, the Rapporteur Judge system of the Korean Constitutional Court operates uniquely, allowing individual Rapporteur Judges a certain level of independence in their tasks. Such independence not only enables them to play key roles in the decision-making process but also ensures the continuity of the Court’s decisions.

Given the nature of the judicial assistant system globally, it is usually difficult to discern its original role as independent from the Justices. Judicial assistants were often considered “ghost writers,”⁵⁾ and in numerous countries with constitutional court systems, there is no legal foundation for the status of judicial assistants.⁶⁾ For this reason, only a few research studies have been conducted on the exact status and scope of authority of judicial assistants. However, it is imperative to acknowledge the importance of judicial assistants in the process of constitutional adjudication.

This article aims to assess the Rapporteur Judge system of the Korean Constitutional Court, particularly in terms of appointment, status, tasks, and how these aspects secure the independence of the Rapporteur Judges. In this context, this study will analyze the advantages and challenges of the

3) Assistant-Magistrates in the jurisdiction of constitutional courts go by different name and title: adviser (Albania, Czech Republic, Latvia, Serbia, Slovenia), law clerks (Austria, Croatia, Georgia, Hungary, Slovakia, Germany, Portugal, Moldova, Israel), référendaires (Belgium, CJEU), assistants (Czech Republic, Poland, Ukraine), legal officers (Cyprus), judicial assistants (Italy, Lithuania), Assistant-Magistrates (Latvia, Romania, Russia, Spain), research consultants (Ukraine), rapporteurs (Türkiye), Rapporteur Judges or research judge (Korea), state adviser (Macedonia). For the different names of judicial assistants of constitutional courts, see THE CONSTITUTIONAL COURT OF ROMANIA, THE ROLE OF ASSISTANT-MAGISTRATES IN THE JURISDICTION OF CONSTITUTIONAL COURTS 9 (Augustine Zegrean et al. eds., 2016). The Korean Constitutional Court has adopted “Rapporteur Judge” as the official English title for the judicial assistants.

4) KOREAN CONSTITUTIONAL COURT, THIRTY YEARS OF THE KOREAN CONSTITUTIONAL COURT 115 (2018).

5) Tudorel Toader & Marieta Safta, *Judges and Assistant-Magistrates within Constitutional Courts*, 3 CONST. L. REV. 93, 99 (2016).

6) Lee, *supra* note 2, at 84.

current Rapporteur Judge system in relation to the performance of the Korean Constitutional Court.

II. The History of Rapporteur Judge System

A. The Korean Constitutional Court and Rapporteur Judges in Early Times

The Korean Constitutional Court was established when the ninth constitutional amendment went into effect in 1987. This revision resulted from the Korean people's consistent pleas for the reformation of the institution and the democratization of the country. During the revision process, the ruling and opposition parties agreed on adopting constitutional adjudication and establishing an independent constitutional court for adjudicating constitutional complaints. The revised Constitution granted the organization the authority to decide on all constitutional matters, including the review of the constitutionality of statutes, which led to the birth of the Constitutional Court in its current form.

On September 19, 1988, the Korean Constitutional Court was formally established, and its first president, Cho Kyu Kwang, took office. The Constitutional Court initially launched with six standing and three non-standing Justices. On January 25, 1989, the Court delivered its first unconstitutionality ruling, striking down the provision of Article 6 Section 1 of the Act on Special Cases concerning the Expedition, etc., of Legal Proceedings, which granted the state immunity from provisional execution (88Hun-Ka7).

Article 113 Section 3 of the Korean Constitution states that the organization, function, and other necessary matters of the Constitutional Court shall be determined by Act. Article 19 of the enacted Constitutional Court Act of 1988 stipulated that the Court may employ Rapporteur Judges, with the number to be determined by its internal regulations. Rapporteur Judges were to be appointed as public officials in extraordinary civil service, a title usually given to officials with short-term contracts, with rankings from grade 1 to 3.^{7), 8)}

7) Guggagongmuwonbeob [State Public Officials Act] art. 4 para. 1 (S. Kor.). In Korea, public officials in general service are classified from Grade 1 to 9.

Although the Rapporteur Judge system was established from the very beginning of the Court, only a few Rapporteur Judges were employed in the early stages. Some of the first who are publicly known today are Jong Seop Jung, who later served as the Dean at the Seoul National University Law School and the Minister of Government Administration and Home Affairs, and Seok Yeon Lee, a former public official of the Ministry of Government Legislation, who later served as the Head of the Ministry after resigning from the judgeship.⁹ As of 1991, there were only 11 Rapporteur Judges, almost all of whom were dispatched from ordinary courts, along with three part-time and full-time researchers.¹⁰

B. Development of the Rapporteur Judge System

On November 11, 1991, the Constitutional Court Act was revised to accommodate the increasing demands on the Court. According to the revised Act of 1991, all nine Justices of the Court became standing Justices. The Rapporteur Judge system was also revised by introducing the position of “Assistant Rapporteur Judge.” Assistant Rapporteur Judges were appointed as grade 4 public officials in extraordinary civil service, and after five years of service, they were eligible for appointment as Rapporteur Judges by the President of the Korean Constitutional Court through a resolution of the Council of Justices.¹¹

8) The position was appointed by desirable candidates falling under any of the following categories: (1) a person who is qualified as a judge, public prosecutor or attorney-at-law; (2) a person who has been in a position equal to or higher than an assistant professor of law in an accredited college or university; (3) a person who has been engaged in legal affairs for five or more years as a public official of Grade 4 or higher in the state agencies, such as the National Assembly, the Executive, or courts.

9) Jihoon Han, *Heonjae mudae dwi 'sumeun ilkkun' heonbeobyongugwandeul* [Rapporteur Judges: The Shadow Writers of the Korean Constitutional Court], YEONHAP NEWS AGENCY (Dec. 18, 2014, 11:36 AM), <https://www.yna.co.kr/view/AKR20141218085400004> (In Korean).

10) Jongseo Kim, *Heonbeopjaepanui silsange daehan tonggyejeok bunseok* [A Statistical Analysis on the Activities of the Korean Constitutional Court], in *COMMEMORATIVE PROCEEDINGS FOR PROF. CHEOLSOO KIM* 609, 614 (1993) (In Korean).

11) Desirable candidates falling under any of the following categories could be appointed to the position: (1) a person who is qualified as a judge, public prosecutor or attorney-at-law; (2) a person who has been in a position equal to or higher than an lecturer of law in an accredited college or university; (3) a person who has obtained a doctorate in law; (4) a person

However, the majority of Rapporteur Judges, especially those in management positions, were still judges dispatched from ordinary courts. Additionally, there were skeptical perspectives about the viability of a research unit primarily staffed with employed Rapporteur Judges. In the early 1990s, some scholars argued that it was unrealistic to employ desirable candidates within the system that was in place at that time, as the Court did not provide promotion opportunities or sufficient practical experience to train them as legal experts.¹²⁾

Taking such criticism into account, the Constitutional Court Act underwent several reforms throughout the 2000s and 2010s. On March 12, 2003, the legal status of Rapporteur Judges was changed from public officials in extraordinary civil service to public officials in special service, thus providing them with better job security. On April 21, 2010, the Constitutional Research Institute was established to conduct long-term research on constitutional law and constitutional adjudication from a more academic perspective. The Constitutional Court Act now states that Rapporteur Judges shall be appointed as the head of the institute, the heads of subsidiary divisions, or research officers, allowing them to dedicate a part of their career to in-depth academic research.¹³⁾ On April 5, 2011, Article 19 of the Constitutional Court Act was revised again to allow the President of the Court to appoint Rapporteur Judges or assign them to hold concurrent positions with duties other than investigation and research related to the review and adjudication of cases, thus providing the possibility of being appointed as the Registrar or to other high-ranking positions within the Court. The number of Rapporteur Judges assigned to such positions is determined by the Constitutional Court Rules, and their remuneration is set at the higher of the scales of Rapporteur Judge and the scales of other positions.¹⁴⁾

Meanwhile, internal regulations were gradually revised to create a more

who has been engaged in legal affairs for four or more years as a public official of Grade 5 or higher in the state agencies, such as the National Assembly, the Executive, or courts.

12) Sam Seung Yang, *Heonbeobyeongugwanjedoui gaeseonbangan [Improving the Rapporteur judge System]*, 3 HEONBEOBNONCHONG 229, 242 (1992) (In Korean).

13) Heonbeobjaepansobeob [Constitutional Court Act] art. 19-4 (S. Kor.).

14) Heonbeobjaepansobeob [Constitutional Court Act] art. 19 para. 11 (S. Kor.).

efficient work environment and to encourage Rapporteur Judges to develop their professional skills. Initially, a Rapporteur Judge was exclusively assigned to a specific Justice, but the Court later established the “Research Department” and set up a separate division where Rapporteur Judges worked for all Justices. Furthermore, Rapporteur Judges with 10 or more years of professional legal experience and three or more years of Rapporteur judgeship could be appointed as “Senior” Rapporteur Judges. This promotion system was designed to encourage them to set long-term career goals. Additionally, the Court currently provides Rapporteur Judges with the opportunity to study abroad. Rapporteur Judges can study in an English-speaking country for up to a year or in a non-English speaking country for a year and a half. Senior Rapporteur Judges have an additional opportunity to study abroad as visiting scholars at the institution of their choice for six months.

III. Current Operation of The Rapporteur Judge System¹⁵⁾

A. Appointment of Rapporteur Judges

Rapporteur Judges are appointed by the President of the Korean Constitutional Court through a resolution of the Council of Justices. The position can be filled by candidates meeting any of the following criteria: (1) a person who is qualified as a judge, public prosecutor, or attorney-at-law; (2) a person who has held a position equal to or higher than an assistant professor of law in an accredited college or university; (3) a person who has been engaged in legal affairs for five or more years as a public official of grade 4 or higher in state agencies, such as the National Assembly, the executives, or courts; (4) a person who has obtained a doctorate in law and has been engaged in legal affairs for five or more years in an accredited research institute, as stipulated by the Constitutional Court Rules.¹⁶⁾

15) For prior research on the appointment, role, and status of the Korean Rapporteur Judges, see Sunhong Min, *Research Judges of the Korean Constitutional Court*, noted in Toader & Safta, *supra* note 3, at 102-109.

16) Heonbeobjaepansobeob [Constitutional Court Act] art. 19 para. 4 (S. Kor.).

Due to the limited number of positions available (approximately 3–10 each year), the recruitment process for Rapporteur Judges is highly competitive, and candidates are carefully selected. The process involves the screening of applications and group discussions, in which the performances of each candidates are evaluated by the Chief Rapporteur Judge, the Heads of Research Divisions, and the Deputy Secretary General of the Department of Administration, as well as individual interviews with three Justices and the Secretary General of the Department of Administration. Reference checks may also be conducted, typically by former colleagues and supervisors of the candidates. The appointment of Rapporteur Judges is a collective decision made by the Justices and Rapporteur Judges.

In the event that a desirable candidate meets the qualification criteria but lacks sufficient professional experience, he or she may be appointed as an “Assistant Rapporteur Judge” for a specific period. This appointment allows the candidate to gain the necessary experience and eventually become eligible for the position of Rapporteur Judge. Assistant Rapporteur Judges hold the status of public officials in extraordinary civil service. Although their legal status and terms of appointment differ from those of Rapporteur Judges, they are appointed in the same way by the President of the Court through a resolution of the Council of Justices, and they perform similar tasks. In most cases, Assistant Rapporteur Judges are re-appointed as Rapporteur Judges upon completion of their term. The general term of office for an Assistant Rapporteur Judge is three years, but it may be adjusted based on the individual’s career and performance.¹⁷⁾

Currently, the Korean Constitutional Court employs 75 Rapporteur Judges, including two Assistant Rapporteur Judges. All of them are qualified lawyers, except for two Rapporteur Judges who hold doctorates in law and possess the legal experience that meets the qualifications mentioned in category (4) above.

B. Legal Status of Rapporteur Judges

The term of office for Rapporteur Judges is 10 years, but consecutive

17) Heonbeobjaepansobeob [Constitutional Court Act] art. 19-2 para. 1 (S. Kor.).

reappointments are permitted, with the age limit set at 60 years old.¹⁸⁾ There is no limit to the number of consecutive reappointments, and in practice, permission for such reappointments is rarely denied. Consequently, Rapporteur Judges effectively hold permanent positions, and the 10-year term functions as a mechanism for assessing and dismissing highly unqualified employees.¹⁹⁾ As public officials, Rapporteur Judges have general duties that include maintaining confidentiality, demonstrating integrity, refraining from engaging in pecuniary business or political activities, and annually registering their properties and those of their spouses with the competent agency.

Rapporteur Judges hold a rank equivalent to public officials of grade 3, which is comparable to the rank and remuneration of judges in ordinary courts and prosecutors. Since September 1, 2017, the President of the Court has had the authority to appoint Senior Rapporteur Judges from among the Rapporteur Judges who have at least 10 years of professional legal experience, including a minimum of three years as a Rapporteur Judge. Senior Rapporteur Judges are eligible for management positions within the Research Department of the Court, such as Registrar, Deputy Registrar, Chief Rapporteur Judge, Deputy Chief Rapporteur Judge, and heads of subsidiary divisions. Individuals among the Senior Rapporteur Judges are appointed as heads of each subsidiary division within the Preliminary Review, Designated Research, and Specialized Research Division. Their primary responsibilities include reviewing reports for each case and providing necessary comments. The most senior judges are appointed as the Chief and Deputy Chief Rapporteur Judges, and they are responsible for managing the entire Research Department. Since 2017, a rotating system has been implemented, which requires the appointed Senior Rapporteur Judges to serve in each position for a period of two years.

18) Heonbeobjaepansobeob [Constitutional Court Act] art. 19 para. 7 (S. Kor.). Judges at the ordinary courts have the same term of office.

19) CONSTITUTIONAL RESEARCH INSTITUTE, JUSEOG HEONBEOBJAEPANSOBEOB [COMMENTARY ON CONSTITUTIONAL COURT ACT] 197 (2015) (In Korean).

C. Research Department of the Korean Constitutional Court

As mentioned above, the organization of the Research Department is largely divided into two groups: a division of Rapporteur Judges assigned exclusively to a Justice (the “Designated Research Division”) and a division of Rapporteur Judges working for all Justices (the “Specialized Research Division”). As of 2024, a newly appointed Rapporteur Judge is usually assigned to the Designated Research Division and then may be assigned to the Specialized Research Division as they become trained for more difficult cases.

The Constitutional Court has implemented a system of three Designated Panels, each consisting of three Justices, which are responsible for conducting preliminary reviews. In February 2024, the Preliminary Review Division, a unit of Rapporteur Judges responsible for the preliminary review of constitutional complaints and the constitutionality review of statutes, has been launched. This division consists of one Senior Rapporteur Judge and five Rapporteur Judges with 5–7 years of experience.

The President of the Court has the authority to request the dispatch of public officials from other judiciary institutions and state agencies, primarily the ordinary courts and prosecutors’ offices, to serve as Rapporteur Judges in the Court. Typically, these dispatched Rapporteur Judges serve for a period of two years. To be eligible for the position, these Dispatched Rapporteur Judges must have extensive work experience of at least 10 years in their respective offices. Currently, there are 12 Dispatched Rapporteur Judges at the Korean Constitutional Court: 8 are judges from ordinary courts, while the remainder are from prosecutors’ offices. With the exception of the President of the Constitutional Court, each Justice is usually assigned one senior Rapporteur Judge, two or three Rapporteur Judges directly employed by the Court, and one Rapporteur Judge dispatched from the ordinary courts. Additionally, every two Justices are assigned one Rapporteur Judge from the Prosecutor’s office.

Rapporteur Judges of the Designated Research Division conduct research and investigation primarily on cases with accumulated precedents or simple issues that require prompt decision-making. They are assigned only to the cases allocated to the Justice to whom they are assigned. It is

crucial to note that the allocation of Rapporteur Judges to specific Justices does not reflect their legal or political viewpoints. The power to allocate personnel, including Rapporteur Judges, solely rests with the President of the Court and the board of Justices. The allocation is based on the individuals' professional experience and history of assignments within the court rather than their political orientations or beliefs in judicial interpretations.

The Specialized Research Division consists of three subsidiary divisions: the Freedom Rights Division, the Property Rights Division, and the Social Rights Division. These divisions handle cases primarily related to specific fundamental rights. The Freedom Rights Division focuses on civil and political rights cases, the Property Rights Division mainly deals with real estate and tax cases, and the Social Rights Division is in charge of labor, education, environment, and social welfare cases. Justices can assign cases to the Specialized Research Divisions when they deem it necessary for in-depth research.

In special cases, an ad hoc research team or "task force," consisting of five or more Rapporteur Judges, may be formed to conduct intensive research for impeachment cases or cases that attract media attention. This is generally uncommon and typically only occurred for one or two cases a year, although the creation of a task force has become relatively common, as the number of impeachment cases has significantly increased.

On another note, the Research Department employs Constitutional Researchers who hold doctoral degrees in law. Their role is to conduct research on legal theories and practices in other countries regarding case deliberation and adjudication. This research is carried out upon request by the Justices and Rapporteur Judges. Given the nature of their tasks, which requires in-depth knowledge of foreign legal practices, these researchers generally have academic backgrounds from foreign countries, namely, Germany, the United States, or Japan. Currently, there are three Constitutional Researchers specializing in English-speaking jurisdictions, two in German-speaking jurisdictions, and one specializing in Japanese jurisdiction.

The Court also has the authority to appoint university professors as academic advisors, a public official from the Ministry of Government Legislation as a legislation researcher, and a public official from the National Tax Service as a taxation researcher. These appointments aim to provide necessary advice for constitutional adjudication, with terms

typically ranging from one to two years.

D. Responsibilities of Rapporteur Judges

1. Research and Investigation

The primary task of Rapporteur Judges is to conduct research and investigations related to the deliberation and adjudication of cases under the direction of the President of the Court. They work on their assigned cases by examining relevant precedents, academic papers, domestic and foreign laws, and other necessary materials. Rapporteur Judges may also seek information from other state agencies or institutions regarding factual circumstances relevant to the cases. When the Court holds an oral argument, Rapporteur Judges are responsible for preparing the argument by drafting a plan that includes sample questions for the Justices and a list of parties and other participants who may be summoned. After the oral argument, they report a summary of the argument to the Justices.

Upon completing the investigation and research, the assigned Rapporteur Judge prepares an initial report that includes their opinion on the case's conclusion. This report generally undergoes a discussion and review process within the subsidiary division to which the reporting Rapporteur Judge belongs. Specialized Research Division cases are required to go through discussions, while Designated Research Division cases may be exempted from this requirement if the assigned Rapporteur Judge and the head of the subsidiary division think it is unnecessary. During the discussion, other Rapporteur Judges, constitutional researchers, and advisors provide their advice and opinions, which are documented and reported to the Justices. After the discussion, the report may be revised based on the reporting Rapporteur Judge's findings and ideas proposed by colleagues. The revised report is then reviewed by the head of the subsidiary division and the Chief and Deputy Chief Rapporteur Judges.

The revised report, along with the final opinion of the reporting Rapporteur Judge, the head of the subsidiary division, and the Chief or Deputy Chief Rapporteur Judge, is then presented to the presiding Justice. The presiding Justice and the assigned Rapporteur Judge discuss the case based on the report to form the Justice's opinion, which is then presented to the Justices' Conference. Often, additional reports are requested by the

Justices, generally for a more in-depth analysis of the issues in dispute or for complementary research on constitutional theories that are relatively new to the Justices.

Once the Justices' Conference is concluded, the reporting Rapporteur Judge drafts the Court's decision. The Justice may assign a Rapporteur Judge other than the reporting Rapporteur Judge to draft the minority opinion. Rapporteur Judges strive to produce persuasive and coherent decisions aligned with constitutional precedents by drawing on diverse constitutional theories and comparative legal perspectives. They also prepare decision summaries for announcements and press releases.

2. Commentary on Major Decisions

The names and works of the Rapporteur Judges concerning the Court's cases are generally unknown to the public. However, if a case assigned to a Rapporteur Judge is deemed significant, they are required to write a commentary on the decision. In this commentary, the assigned Rapporteur Judge has an opportunity to explain the research and investigation results, the theological or social background of the issue, and the significance of the Court's decision under their own name. These commentaries are published annually for the public, following the year in which the decision was made.

3. Other Tasks

Some Rapporteur Judges serve as lecturers at the Constitutional Research Institute, providing constitutional education to law school students, public officials, teachers, police officers, and the general public. The head of the Constitutional Research Institute, as well as the heads of subsidiary divisions, may be appointed from among the Senior Rapporteur Judges.

As reputable experts in constitutional adjudication, Rapporteur Judges engage in various international affairs, including attending conferences and providing support to the Justices in diplomatic meetings. Additionally, there are Rapporteur Judges who hold concurrent positions outside the Court. Two Rapporteur Judges are dispatched to the Supreme Court and the National Assembly to provide consultations on disputes involving constitutional matters.

IV. Analysis: The Benefits and Limitations of the Rapporteur Judge System

A. Permanent Office

From a global perspective, the judicial assistant system does not always provide officials with permanent contracts. Often, judicial assistants are employed for a fixed term. In this case, judicial assistants, who are selected by the justices, usually based on “mutual trust”, are offered the position on condition that the offices of the assistant/equivalent are temporary, usually corresponding to the Justice’s term of office or less.²⁰⁾ Notable examples are Germany, Italy, Austria, Portugal.²¹⁾

Initially, the Rapporteur Judges in the Korean Constitutional Court were mainly dispatched judges from ordinary courts and prosecutors, resulting in a significant number of temporary employments. However, since 2003, the job security of employed Rapporteur Judges has been greatly enhanced due to the reconstruction of their legal status. Currently, the Korean Rapporteur Judge system utilizes both long-term and short-term recruitment, employing assistants with indefinite terms as well as external collaborators or employees for fixed periods, both of whom are involved in the judicial activity and provide support to supporting.²²⁾ However, in practice, the Korean model leans more towards a long-term or permanent office arrangement. Although the Rapporteur Judge position is temporary for a term of 10 years, contracts are generally renewed or new appointments made unless there are serious disqualifications.

The permanency of the position suggests that the Rapporteur Judge system is not an outgrowth of the apprentice model of legal education, as,

20) Toader & Safta, *supra* note 5, at 99; Lee, *supra* note 4, at 85.

21) Fabian Scheffczyk, *The Role of the Judicial Clerks at the German Federal Constitutional Court*, noted in Toader & Safta, *supra* note 3, at 75; Teresa Grieco, *The Role of Judicial Assistants within the Italian Constitutional Court*, noted in Toader & Safta, *Id.* at 91, 95; Stefan L. Frank, *The Role of Law Clerk in the Jurisdiction of the Constitutional Court of the Republic of Austria*, noted in Toader & Safta, *Id.* at 36, 39-40; Mariana Canotilho, *The Role of Judicial Clerks at the Portuguese Constitutional Court*, noted in Toader & Safta, *Id.* at 137, 138-139.

22) Toader & Safta, *supra* note 5, at 100.

for instance, law clerkships in the United States²³⁾ or even the law clerkships of Korean ordinary courts²⁴⁾ strive to be. The Rapporteur Judge system is not considered as a training program for lawyers who have just started practicing. Rather, Rapporteur Judges are viewed as trained experts and the most reliable advisors for the Justices. This is evidenced by the fact that most Rapporteur Judges in the Korean Constitutional Courts are lawyers with at least three years of experience, and only a few candidates with less experience are hired as Assistant Rapporteur Judges.

The nature of the position allows Rapporteur Judges to develop and maintain expertise, contributing to the stability of decisions. Constitutional adjudication requires theoretical, comparative, and empirical knowledge as well as investigative research skills. Under the current system, the Court is able to employ Rapporteur Judges with accumulated work experience in the field of constitutional adjudication. This is particularly valuable for the Justices of the Korean Constitutional Court, as they are usually appointed based on their general expertise as legal professionals rather than their specific knowledge on constitutional adjudication. Furthermore, Justices serve six-year terms, and customary practice does not involve renewal of those terms.²⁵⁾ This limited time frame restricts their opportunity to gain

23) In the U.S. Supreme Court, each Justice may hire up to four law clerks, while the Chief Justice may employ five law clerks, plus two administrative assistants. As established practice, law clerks work for a single term of Court, although some Justices prefer to have a senior clerk who serves a second term and brings continuity to the chambers. Almost all modern law clerks are recent law school graduates. The history of the Supreme Court law clerk begins in 1882, when Justice Horace Gray selected Harvard Law School graduate Thomas Russell to work as his legal secretary. A clerkship on the Supreme Court has become a highly sought prize for graduating law students. This ultimate brass ring, however, is available to only a select few. See Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 55 (2008).

24) Beobwonjojigbeob [Court Organization Act] art. 53-2 para. 1-2. (S. Kor.) (“Ordinary courts may appoint its law clerks from among those persons admitted to the bar as public officials in a fixed and non-renewable term of up to three years. A law clerk shall conduct research and study and do other necessary affairs on hearing and trial of cases, pursuant to the order of the chief judge of the court to which he/she belongs.”) As of 2023, ordinary courts have begun to hire lawyers with previous work experience, yet the majority of law clerks are law school graduates.

25) Heonbeobjaepansobeob [Constitutional Court Act] art. 7 (S. Kor.) (“Justices may serve renewable terms of six years and shall retire at 70.”) However, in practice, Justices do not usually renew their terms.

sufficient knowledge regarding precedents in the Court's cases. However, with the assistance of Rapporteur Judges, especially senior members, newly appointed Justices can bridge this knowledge gap. Permanent or long-serving judicial assistants act as a "memory device," ensuring continuity in the Court's decisions.²⁶⁾

However, the permanent nature of the position suggests that Rapporteur Judges are stuck in supporting roles, possibly for the rest of their careers. The short-term model for the judicial assistant system could allow young lawyers to gain experience in the field of constitutional adjudication, which they could draw on to perform more proactive roles in later stages of their careers. Whereas Korean Rapporteur Judges are given relatively less opportunity to take the lead in their work, which may lead to discouragement and dissatisfaction in their career. Moreover, the terms of Justices are only six years, and so new Justices come into office after a certain period of time. Consequently, the expertise and work experiences of long-serving Rapporteur Judges can be overlooked if they fail to work cohesively with new Justices. Indeed, this aspect of the position has been pointed as the main reason why there has been only one Rapporteur Judge who served until retirement age in the history of Rapporteur Judges.²⁷⁾

Yet, the Korean Constitutional Court has acknowledged that Rapporteur Judges are indispensable experts and that their early resignation has taken a toll on the constitutional adjudication process. For this reason, the Court has provided them with various opportunities to further their careers within the Court. The promotion to Senior Rapporteur Judges allows them to move into a management role, and they are also given opportunities to work in different legislative or judicial bodies. Thus, Rapporteur Judges have a path for long-term service without needing to look at other career options outside the Court, thus preventing them from losing interest or focus.

26) VENICE COMMISSION, *Study on Individual Access to Constitutional Justice*, 59, adopted at its 85th Plenary Session, Venice, 17-18 December 2010, CDL-AD(2010)039, as cited in Lee, *supra* note 2, at 89.

27) Jimin Shin, *Heonjae heonbeobyongugwan 25si* [The 25th Hour of Rapporteur Judges of the Korean Constitutional Court], *BEOLYULSINMUN* (Apr. 24, 2017, 17:57), <https://www.lawtimes.co.kr/news/109549?serial=109549> (In Korean).

B. Recruitment through Competition

Recruitment policies for judicial assistants in the jurisdiction of constitutional courts may vary, from Justices having full freedom regarding the appointment/election of judicial assistants occupying the office, to a thorough regulation aimed at ensuring a rigorous selection by applying the same criteria to all candidates.²⁸⁾

A notable example of the former type of recruitment process is the Constitutional Court of Germany. The employment of “law clerks” at the Constitutional Court of Germany is entirely at the Justices’ discretion, and they often choose legal practitioners with whom they are familiar, generally from their previous work experience. The main recruitment method is for the Justices to contact presidents of the state superior courts, human resource departments, or the heads of personnel from these institutions. They can recommend one or more persons they deem suitable for the office. Then, the selection is made based on an interview with the Justice.²⁹⁾ Similarly, in Italy, appointments are made directly by the constitutional Justices without a formal selection procedure. This is followed by a meeting with the President’s Office to verify the qualifications and competences of the appointed person and to obtain official acceptance of the appointment.³⁰⁾

Korea is a country in which a competition-based recruitment process is utilized. Qualifications for the position are established by law, and individuals who do not meet the listed criteria are disqualified regardless of their merit. Desirable candidates are then subject to stages of open competition. Although the final appointment is based on the decision of the President of the Court, the recruitment process involves collaboration among all the Justices and Senior Rapporteur Judges.

Such test-based recruitment guarantees the fairness of the process. It also contributes to ensuring the excellence of the selected candidates, as

28) Toader & Safta, *supra* note 5, at 99.

29) Fabian Scheffczyk, *The Role of the Judicial Clerks at the German Federal Constitutional Court*, noted in Toader & Safta, *supra* note 21 at 74-75.

30) Teresa Grieco, *The Role of Judicial Assistants within the Italian Constitutional Court*, noted in Toader & Safta, *supra* note 21, at 95-96.

their qualifications are thoroughly examined. The newly appointed Rapporteur Judges are usually graduates of some of the nation's top universities and law schools, with significant academic and professional achievements. However, this also contributes to the standardization of Rapporteur Judges, which may have a negative effect on diversity. In fact, according to the 2016 parliamentary audit report, 85% of Rapporteur Judges were graduates of the so-called "sky" or "holy trinity": Seoul National University, Yonsei University, and Korea University.³¹⁾ Additionally, 2022 parliamentary audit reports pointed out that 97% of the Rapporteur Judges were lawyers, although it is possible for the Court to hire non-lawyers, including a person who has been in a position equal to or higher than a law lecturer in an accredited college or university, a person who has obtained a doctorate in law, or a person who has been engaged in legal affairs for four or more years as a public official of grade 5 or higher in a state agency.³²⁾ This phenomenon is not limited to Korea, as most judicial assistants in the highest courts around the globe are the nations' finest lawyers as well as top school graduates.³³⁾ For instance, in the U.S., a clerkship on the Supreme Court has become a highly sought prize for graduating law students. This ultimate brass ring, however, is available to only a select few. From 1953 to 2004, the percentage of clerks serving in each term that were drawn from the "top-five" law schools from which clerks have historically graduated (Harvard University, Yale University, Columbia University, the University of Chicago, and Stanford University) has been relatively stable over the past five decades, from 60 to 80% on average, and never below 40%. It is also worth mentioning that quite a few Rapporteur Judges are lawyers with doctoral degrees, thus qualified in multiple categories. Yet, the test-based recruitment process clearly suggests that a certain standard exists for what

31) Janghee Han, "Heonjae heonbebyeongugwan, SKYchulsin dogsig. Jibangdae jeonmu" [Rapporteur Judges are dominated by SKY graduates], KUKMINILBO (Sept. 20, 2016, 09:39 AM), <https://www.kmib.co.kr/article/view.asp?arcid=0010939166&code=61111111&cp=nv> (In Korean).

32) Seulgi Jang, *Heonbebyeongugwan 97% beobjoine "Sahoejeog galdeung haegyool wihae dayangseong pilyo"* [97% of Rapporteur Judges are Lawyers: Diversity in Need for Resolving Social Conflict], MEDIA TODAY (Sept. 23, 2022, 10:47 AM), <https://www.mediatoday.co.kr/news/articleView.html?idxno=305956> (In Korean).

33) Peppers & Zorn, *supra* note 23, at 61-62.

constitutes an ideal Rapporteur Judge, which may negatively affect the opinions of the Justices due to reduced diversity.

C. Weak Subordination to a Particular Justice

Rapporteur Judges in the Korean Constitutional Court are not exclusively assigned to a specific Justice. Rapporteur Judges in the Specialized Research Division are assigned to cases based on the relevant fundamental rights involved. The Justice presiding over a case does not have the authority to designate a Rapporteur Judge in the initial reporting stage. Indeed, the only possibility for designating a Rapporteur Judge for a particular case in this initial stage occurs when the case is allocated to an ad hoc research team. However, even in such cases, the team members are selected based on a collective decision of the Research Department and the Justices, not based on the sole preference of the Presiding Justice. Moreover, as previously mentioned, Rapporteur Judges in the Designated Research Division are appointed to support specific Justices, but the appointment is made by the President, and other Justices do not get to choose who they work with.

The limited subordination of Rapporteur Judges to Justices is evident in the reporting process. Although the Rapporteur Judge in charge of a case directly reports to the presiding Justice, the case report reflects the collective opinion of the Research Department, as the report goes through several stages of discussion and review within the department.

The fact that the Justices of the Korean Constitutional Court do not get to choose their own staff members under the current system could be a disadvantage on some level, as the current system requires some time for a Justice and an assigned Rapporteur Judge to build trust between each other. At the same time, the bureaucratic nature of the current Research Department inevitably leads to the risk that Justices may be prevented from conveying their own points of view during the adjudication process.

Nonetheless, the current system has merit, as it allows the Justices to receive various opinions from different Rapporteur Judges. There are usually 10 to 15 members per division, which means the Justices have the opportunity to consider the opinions of 10 to 15 experts for each case through the discussion result report. This process minimizes the possibility of errors and prevents the risk of uneven support. In other words, the

Justices collectively benefit from the systematic assistance provided by the Rapporteur Judges as a whole.

This system also gives Rapporteur Judges access to different perspectives from different Justices. It is not uncommon for countries in which each Justice can hire their own judicial assistant to suffer from political polarization. In the case of the U.S. Supreme Court, the more conservative justices are much more likely than their predecessors to hire clerks who worked for judges appointed by Republicans, while the more liberal justices are more likely to hire clerks who worked for judges appointed by Democrats. For example, Justice Clarence Thomas has chosen 84 clerks over two decades on the court, all of whom were first trained by an appeals court judge appointed by a Republican president.³⁴⁾ This problem is highly unlikely in Korea, where Rapporteur Judges can develop unbiased viewpoints through their work, allowing them to become constitutional adjudication experts rather than ideological advocates.

D. Authority to Form an Independent Conclusion

While judicial assistants in most countries are not allowed to express their own conclusions or opinions, it is worth mentioning a few countries where judicial assistants have more proactive roles. A notable example is the Constitutional Court of Türkiye, which does not assign a presiding Justice in the constitutional adjudication process. When a case is filed, the President of the Constitutional Court of Türkiye allocates the case to a Rapporteur. The assigned Rapporteur prepares a non-binding initial and merit examination reports of the cases. Then, the Rapporteur presents the report and draft directly to the Plenary or to the sections or the Commissions.³⁵⁾

Another example of an independent judicial assistant is the Constitutional Court of Croatia. The legal advisors of the Constitutional Court of Croatia

34) Adam Liptak, *A Sign of the Court's Polarization: Choice of Clerks*, THE NEW YORK TIMES (Sept. 6, 2010), <https://www.nytimes.com/2010/09/07/us/politics/07clerks.html>.

35) Recep Kaplan, *The Role of Rapporteurs at the Constitutional Court of the Republic of Turkey*, noted in Toader & Safta, *supra* note 3, at 200; VENICE COMMISSION, *supra* note 26, at 98, as cited in Lee, *supra* note 2, at 89.

are allowed to attend the sessions of the Constitutional Court, expert meetings, and sessions of the Chambers, unless the Justices decide otherwise. At the invitation of the presiding Justice, they make introductory presentations of cases or orally explain draft decisions, rulings, reports, and if needed, provide supplementary statements of reasons and participate in deliberation. They may also provide opinions and proposals on the matters being deliberated. Moreover, they are authorized to co-sign the original texts of decisions, rulings, and reports when they participate in their preparation and drafting.³⁶⁾

Although Rapporteur Judges of the Korean Constitutional Court cannot attend the deliberation of Justices or co-sign the original decision, they do have an obligation and authority to present cases to the Justices along with their independent conclusions. It is not uncommon for a Rapporteur Judge's conclusion to be opposed to that of the presiding Justice or other Justices on the bench. In such cases, the presiding Justice cannot compel the Rapporteur Judge to change his or her conclusion of the case report. The Justices may request revisions to the case, but if the Rapporteur Judge does not change his or her conclusion, the report is filed as is, regardless of the decision of the Justices. When there are significant differences of opinion, the presiding Justice or other Justices may request that other Rapporteur Judges, particularly those who expressed opposing ideas during the discussion, write a separate report or draft the final opinion.

The stability of the practices of constitutional courts can only be guaranteed by those who know and accept their standards and procedures. Rapporteur Judges, with a wealth of experience and superior knowledge regarding the Court's cases, help to maintain the continuity of the precedents. At the same time, although it is important to maintain the stability of the Court's decisions, the duty of constitutional courts is to protect the freedom and rights of the people by declaring provisions or executive actions unconstitutional, if necessary. The authority of Rapporteur Judges to make their own decisions and stand by them is important in this regard, as the ideas of Rapporteur Judges that go against precedent or the scholarly works of the time can contribute greatly when the Justices try to

36) Dubravko Ljubić, *The Role of Legal Advisers in the Jurisdiction of the Constitutional Court of the Republic of Croatia*, noted in Toader & Safta, *supra* note 3, at 60.

make more progressive decisions.

However, the influence of the separate conclusion of Rapporteur Judges on the final decision is clearly limited, as they are not the final decision-makers. Rapporteur Judges' analyses and conclusions are not reflected in the decision when they do not coincide with those of the Justices, so this information would only be available in internal reports. However, it may be used as a reference for subsequent decisions on similar matters, and it could ultimately be reflected in other decisions or opinions if a Justice chooses to do so.

E. Looking Forward: Overcoming the Shortcomings

Currently, the Rapporteur Judge system of the Korean Constitutional Court operates in a unique way, providing individual Rapporteur Judges with a certain level of independence in their tasks. Specifically, (1) the term of office for Rapporteur Judges is 10 years, but consecutive appointments may be permitted, with the age limit set at 60 years old; (2) desirable candidates are required to undergo stages of open competition; (3) Rapporteur Judges are not solely assigned to a particular Justice; and (4) Rapporteur Judges have an obligation and authority to report cases to the Justices with their independent conclusions, even if their conclusions oppose those of the Justices. As this article has discussed, these characteristics have clear advantages that have enabled the Court to effectively fulfill its role as the institution responsible for interpreting the Constitution, yet there are inevitable challenges caused by them.

A few solutions can be suggested for improving the Korean Rapporteur Judge system. First and foremost, it is crucial to develop more ways to keep the Rapporteur Judges motivated in their duties. In particular, the responsibilities of senior members need to be diversified so that their experiences can be utilized. As discussed above, the Court has offered some opportunities, such as study-abroad programs or dispatch to other institutions. While this can contribute to work motivation to some degree, a more fundamental solution is necessary. On February 14th, 2024, Rapporteur Judge Jeongwon Kim, who previously served as a Deputy Secretary General, took office as a new Secretary General of the Korean Constitutional Court for the first time in the history of the Rapporteur Judge System. This could be a

positive signal on the possibilities for the Rapporteur Judges to expand their roles.

Improvements can also be made to the recruitment process. As discussed, test-based recruitment has clear benefits, but it also results in the standardization of staff members. While merit-based recruitment of judicial assistants for the highest courts is natural, diversity considerations are also important, as the role of the Korean Constitutional Court is to resolve social conflicts and protect minorities.

It is obvious that the independence of the Rapporteur Judges is guaranteed by their weak subordination to Justices and their authority to write their own conclusions. However, the influence of Rapporteur Judges' independent ideas on decisions must be balanced. If they carry too much weight, the very idea that decisions are made by democratically selected Justices is threatened, and if they are belittled, both the stability and progressiveness of the Court's decisions can be threatened. Therefore, there is a need for various methods to ensure a collaborative environment between Justices and Rapporteur Judges.

V. Conclusion

It is difficult to say what kind of judicial assistant system is best suited for constitutional courts. There are only models that are more or less suitable, depending on the laws, institutions, political situation, social conditions, and cultural backgrounds of the country in which the court is established.³⁷⁾ Moreover, a crucial question can be raised: As Rapporteur Judges are not democratically selected as Justices, how much independence or influence is "appropriate"?

Clearly, there is no easy answer to this question. For one, the activity of Justices of constitutional courts is subordinated to the mandate to ensure the supremacy of the Constitution, and their status is configured to achieve this goal. However, to carry out their institutional duties, the Justices and the President of the Constitutional Court must rely on collaboration with

37) Lee, *supra* note 2, at 104.

their assistants.³⁸⁾ Therefore, it is safe to say that the expertise of judicial assistants in constitutional courts plays a crucial role in the performance of those courts. Indeed, the Germans refer to the judicial assistant unit as the “Third Senate” of the court.³⁹⁾

The initial organization of the Rapporteur Judge system of the Korean Constitutional Court was rather underwhelming. However, continuous efforts to improve the system through revisions of laws and internal regulations have transformed it from a small research unit into a sizable department with several subsidiary divisions. Although there are challenges that still need to be addressed, the Korean experience of the Rapporteur Judge system proves that by granting a certain level of authority and independence to judicial assistants, the Court can benefit from the expertise of Rapporteur Judges.

38) Toader & Safta, *supra* note 5, at 107.

39) Lee, *supra* note 2, at 83. The Constitutional Court of Germany has two Senates. Still, the clerks as a group are often called the “third Senate” both internally as well as in scientific publication. The word often conveys a negative connotation, illustrating the elitism of its members. See Fabian Scheffczyk, *The Role of the Judicial Clerks at the German Federal Constitutional Court*, noted in Toader & Safta, *supra* note 21, at 78.