Global Constitutionalism, Transnational Human Rights Law, and the Constitutional Rights Practice of South Korea

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This research project aims to further the emerging scholarship of global constitutionalism and transnational human rights law by bringing the constitutional rights practice of South Korea into global dialogues. Despite the country’s remarkable achievements in democracy, human rights, and the rule of law over the last few decades, which have been facilitated by effective rights practice through the Constitutional Court of Korea, the rich global implications of this rights practice have received scant scholarly attention. The Constitutional Court of Korea began its work in September 1988, following the historic democratic reform of the Korean Constitution in 1987, as a response to a nation-wide popular movement demanding the end of military dictatorship that had ruled the country since 1961. As of August 2015, the Court has received 28,082 petitions and decided 10,228 cases on the merits. Among the 826 cases requesting adjudication on the constitutionality of specific legislation, the Court has found 325 laws (39.3%) unconstitutional, either in entirety or in part. Most of the Court cases have been initiated by individuals who were affected by the relevant laws and government actions, often inspired by international human rights norms and constitutional rights practices in other parts of the world. Many of these cases have had transformative impact on social structure and national policy, expediting the empowerment of ordinary citizens and non-citizens and protection of their human rights. Partly and unjustly due to the fact that Korea is not an English-speaking country, its dynamic rights practice and accumulated experiences have been allowed little space to contribute to the global scholarship of human rights, constitutionalism, and transnational law. Advancing rights discourse and practice in individual countries in Asia is particularly important for protecting human rights and empowering people in the region. As Asian countries do not have a supranational human rights adjudication mechanism as other continents do, constitutional courts are often the only venue for ordinary individuals in Asia to defend and vindicate their
fundamental rights, especially for those with little chance to make their voices influential during legislative processes. This project aspires to build a bridge to connect scholars, judges, lawyers, and individual rights-holders across Korea, Asia and the globe and to deepen and widen the scholarship and practice of human rights locally, globally, and transnationally.

To that end, the research will proceed using a two-way approach under the overarching theme of “How Korean constitutional rights practices are being transnationalized.” First, it will examine Korean constitutional rights practice in the context of global constitutionalism and transnational human rights law—how the human rights norms and practices around the globe are influencing the local. Second, it will recast global rights discourse and adjudication practices by investigating the implications of the Korean case—exploring how the local can enrich the global. Pursuing these interconnected inquiries, this project will discuss transnational features of Korean constitutional rights practice in multiple dimensions: first, constitutional rights practice by people, focusing on the mobilization and empowerment of individuals through the language of human and constitutional rights and the rights adjudication mechanism, inspired by foreign and international norms and practice; second, constitutional rights practice by the court, investigating how the Korean Constitutional Court interacts with the global legal sphere; and lastly, assessing constitutional rights practice in broader terms of democracy and transnational human rights protection. The project will highlight each point through in-depth study of several landmark cases adjudicated by the Court in recent years.

With respect to the first point, the paper will discuss how the constitutional rights adjudication system, international human rights norms and relevant practices of other countries inspire, mobilize and empower individuals to challenge long-standing and suppressive domestic norms and values.1 This section will examine two high-profile cases decided by the Court in 2005 and 2011 respectively: (1) the case on the Household Head System (hoju system),2 which had constituted a foundation of Korean family law, representing and reproducing traditional social and family norms based on patriarchy; and (2) the case on conscientious objection,3 the right to which is yet to be recognized in South Korea, where all male citizens are subject to two-year conscription. In the first case, the Court found the relevant provisions in family law

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1 Relevant empirical studies include BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS (2009).
2 Constitutional Court of Korea, 2001Hun-Ga9 (Feb. 3, 2005).
unconstitutional in violation of the constitutional principles of gender equality and individuals’
dignity in marriage and family life. In the second case, the Court rejected the petitioners’ claim
and upheld the criminal law imprisoning for up to three years those who refuse to serve in the
military, regardless of conscientious objector status. These two cases exemplify how
constitutional rights and principles interact with other deep-rooted values of the society, such as
preserving Confucian family traditions or defending the primacy of national security. These
cases also demonstrate how international human rights norms and practices of other countries
inspire citizens and facilitate constitutional rights dialogues and litigation in the nation. The
discussion will illuminate how international and foreign laws meet national issues and empower
individuals and civil society to engage in transnational rights practice.

In regard to the second dimension—constitutional rights practice by the Constitutional
Court of Korea, the paper will discuss two “globalizing features” of rights adjudication practice
in domestic constitutional courts. One is the basic structure of constitutional rights reasoning,
which has developed centering on the proportionality principle. The other is increasing
interactions between international, foreign, and national human rights norms and practices in
courts’ rights adjudication processes. With respect to the former aspect, the paper will show that
the practice of the Korean Constitutional Court bears a remarkable similarity with the global
trend of rights adjudication, and explore the background of this similarity. On the other hand,

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4 These common features of rights practice have been pointed out by Mattias Kumm, The Cosmopolitan
Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State, in RULING
THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeffrey
L. Dunoff & Joel P. Trachtman eds., 2008).
5 The classic work on this subject is ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (2010).
6 Mattias Kumm, Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality
Requirement, in LAW, RIGHTS, DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY (George
Pavlakos ed., 2007); KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS (2012);
Alec Stone Sweet & Jud Mathews, Proportionality Balancing and Global Constitutionalism, 47 COLUM.
7 One contributing factor is that the proportionality test provides a general structure and a common
language of constitutional rights reasoning, which enables and facilitates transnational dialogues between
courts and judges across borders. Another important element specific to Korea is that most of the first
generation constitutional scholars in Korea have studied in Germany and introduced German
constitutional law theories and practice to Korean academia and courts.
the research will discuss Korea’s meaningful differences and their implications as well. It will indicate that several distinctive features of the Korean Constitution and the accumulated adjudication practices of the Court over a 27 year period have produced notable variations and deviations from the standard proportionality test. Such distinctive areas include: social and economic rights, the right to equality, the rights to happiness and dignity, the provision prohibiting the violation of the “essential substance” of each constitutional right, and some basic principles in the Constitution which can be read as not allowing the proportionality test.

Concerning the second aspect—interactions between international, foreign, and national human rights norms and practices in the course of constitutional rights adjudication—the research will first clarify the legal status of international and foreign law in the Korean constitutional order, in particular the status of international human rights treaties. Article 6 of the Korean Constitution provides that international treaties and customs have “the same effect as national law.” While there are five different kinds of “national law” in Korea—the Constitution, statutes, enforcement decrees (issued by the President), enforcement regulations (issued by a relevant ministry), and ordinance (enacted by local councils), the Constitutional Court has made clear that several international treaties (which are not human rights treaties) have the same effect as statutes, and thus can be an object of constitutionality test, but not a standard for constitutional review of domestic law. However, the Court curiously and frequently cites major international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as a standard for constitutional review, without articulating their exact domestic legal status. Individual petitioners also increasingly invoke international human rights norms as grounds for their constitutional litigation challenging specific legislation or government actions. This practice trend by the Court and by individuals has triggered debates among constitutional and international lawyers in Korea, regarding the legal effect of international human rights law, as to whether it is equivalent to the Constitution (unlike other treaties), is the same as statutes (like other treaties), or is located somewhere between the Constitution and statutes. This paper will analyze relevant cases of the Court and argue that international human rights treaties are gaining

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8 An introductory survey on common and distinguishable features of constitutional practice in East Asian countries (Japan, South Korea, and Taiwan) was presented by Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805 (2011).
a constitutional status by growing transnational rights practices in the absence of the articulation of their precise legal status in the Constitution or in the judgments by the Court. This section will examine two cases in greater detail. First, it will review the case of conscientious objectors, in which the Court adopted Article 18 of the ICCPR as a standard for constitutional review, but eventually held that the challenged criminal law was not in violation of existing international human rights norms. Second, it will introduce a pathbreaking case brought by several guest workers in Korea, who as a group had been excluded from basic protection of labor-related human rights, including the Labor Standards Act. In this case, the Court importantly cited the relevant provisions of the ICESCR and found the relevant domestic law unconstitutional in violation of the right to work and the right to equality of guest workers.

The project will then investigate how the Court interacts with foreign legal practices—the question on which the Constitution is silent—examining whether and how the Court considers and cites laws and court cases of other countries for its constitutional rights reasoning. It will indicate that the attitudes of the Court toward foreign law have shown changes. In the Constitutional Court’s nascent stage, the period to “catch up,” the Court heavily referred to the practices of a limited number of countries, mostly the United States, Germany, and Japan—the countries that have historically influenced Korean law and that Korea regarded as advanced. The Court later became more attentive to how its constitutional decisions would be viewed by other parts of the world, and more cautious not to deviate too much from the “global standard.” Lately, the Court has expressed its further ambition to play a role as a regional and global leader, engaging in “standard setting” for global constitutional adjudication system and practice. In the course of this endeavor, the Court has shown a somewhat ambiguous attitude toward foreign law. While the Court justices, in their deliberation stage, still take into account foreign practices in a

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serious manner, they tend to refrain from citing foreign law too often, assuming it might undermine the authority and autonomy of the Court. At the same time, the Court does cite foreign practices clearly and importantly when it finds the citation necessary, and when it does, it takes a more extensive comparative approach than in the past. For example, in January 2014, the Court held the Public Official Election Law unconstitutional for disenfranchising prison inmates and those whose sentences have been suspended. In its opinion, the Court included a separate subsection, titled “Cases of Other Countries.” There the Court provided a detailed survey of relevant legislative practices of other states, including Australia, Italy, Japan, the United States, Germany, Canada, South Africa, Israel, and Sweden. It also introduced decisions by the U.S. Supreme Court, the Supreme Court of Canada, the Constitutional Court of South Africa, the High Court of Australia, the Constitutional Council of France, and importantly the European Court of Human Rights. This comparative discussion served as a critical ground for the Court to find the domestic law unconstitutional.

In recent years, the Constitutional Court of Korea has extended its global-mindedness beyond its adjudication practice in individual cases. The current President of the Court, Park Han-Chul, has been expressing nationally and internationally his ambition to create an “Asian Court of Human Rights” (and to host it in Korea). He cites foreign and international law more often than before, especially in his dissenting opinions. The current Court, under his leadership, endeavors to set a good model of constitutional rights adjudication for other countries in Asia and beyond. The Court expends significant efforts into taking part in global dialogues among constitutional judges. In September and October 2014, Korea hosted the 3rd Congress of the World Conference on Constitutional Justice in Seoul, the largest event ever attended by the heads of constitutional courts, supreme courts, and other equivalent organizations from almost

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11 One of the main duties of assistant judges working for justices in the Court is to research and write substantive reports about foreign laws and relevant court cases in other countries for the justices to refer to during deliberation and adjudication processes.
12 Constitutional Court of Korea, 2013Hun-Ma167 (Jan. 28, 2014).
13 Hirst v. United Kingdom (No. 2) [2005] ECHR 681.
14 In recent years, the Korean government and the Judiciary (including the Supreme Court, the Constitutional Court and the Ministry of Justice) have been vigorously pursuing the agendas of “Haengjeong Hanliu” and “Sabeob Hanliu,” meaning, creating “Korean waves in administration” and “Korean waves in judiciary,” which aim to export to other states the country’s successful administrative and judicial systems and policies based on its advanced information technology platforms.
100 countries, discussing the topic of “Constitutional Justice and Social Integration.”\(^\text{15}\) In 2012, the Court hosted the Inaugural Congress of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), with the theme of “Present and Future of Constitutional Justice in Asia.”\(^\text{16}\) The AACC is comprised of fourteen constitutional adjudicative institutions in Asia, including Afghanistan, Azerbaijan, Indonesia, Kazakhstan, Malaysia, Mongolia, Pakistan, the Philippines, Russia, South Korea, Tajikistan, Thailand, Turkey, and Uzbekistan. The Korean Constitutional Court played a leadership role in organizing this regional network of constitutional courts. The Court also participates in the Venice Commission on a regular basis, and holds frequent meetings with constitutional judges and scholars in other Asian and non-Asian countries. The Court’s English website provides a detailed introduction to the Court system and practice, updated news on its various transnational activities, and a searchable database of important decisions and publications issued by the Court, fully translated into English. The Court also launched the Constitutional Research Institute in 2011, a branch research institute of the Court, undertaking longer-term studies of constitutional issues from a more academic and comparative perspective.\(^\text{17}\)

These recent activities of the Court reflect its transformation in self-awareness regarding its relative positions and roles globally: from a listener to an active voice, from a follower to a leader, from an importer to an exporter, and from a law adopter to a norm producer. However, at the same time, the current Court has been criticized for being overly conservative and politicized under the influence of Korean President Park Geun-hye’s administration. Skepticism exists among scholars and lawyers that the Court’s increasing interest in international law and global constitutional practices stems less from its concern for human rights, but more from its self-minded political ambition—to enhance its status in the region and the globe as well as against its domestic rival, the Supreme Court of Korea. To further explore these complex observations, I plan to conduct interviews during winter break with current and former justices and assistant judges of the Court as well as expert scholars and lawyers in the field.


\(^\text{16}\) 92 participants from 29 countries attended this event. The Second Congress was held in Istanbul, Turkey in 2014. [http://www.aaccei.org/ccourt?act=index](http://www.aaccei.org/ccourt?act=index) (AACC website).

\(^\text{17}\) [http://ri.ccourt.go.kr/eng/](http://ri.ccourt.go.kr/eng/) (Constitutional Research Institute website).
Lastly, the research will dwell on the role of rights practice and constitutional review examined so far in broader terms of democracy and transnational human rights protection. It will discuss how constitutional rights practice can empower ordinary citizens and non-citizens to challenge actions and inactions by legislative and executive bodies, in which they mostly do not have effective participatory mechanisms. It will revisit the cases on the Household Head System and on the voting rights of people in prison or on suspended sentences, and discuss the role of constitutional litigation by affected individuals for fuller realization of democracy. Through the language of constitutional rights and principles and the rights adjudication system, Korean women have finally attained equal legal status as men in family in most respects, enabling them more equal exercise of their citizenship in broader society as well. In the second case, those deprived of their essential political right by excessive legislation regained their participatory role in democracy through the constitutional review process.

Furthermore, the research will illuminate how non-citizens, those residing within a state boundary but outside the political community, can actively partake in the constitutional process of the society they live in, through the mechanism of constitutional rights adjudication. As petitioners, non-citizens can challenge law and policy which violate or adversely affect their rights, but of which decisionmaking process they were not allowed to take part in. The guest worker case is exemplary. These migrant workers challenged the law that was unilaterally enacted without their inputs and that significantly violated their fundamental human rights. Their rights practice brought about a constitutional decision that led to fundamental reform in the foreign labor policy of the nation. When this case was filed to the Court, a serious debate was raised among the justices regarding whether and to what extent foreigners are holders of constitutional rights and whether they have standing to bring a constitutional petition to the Court. By answering in the affirmative to these questions, the Court extended the reach of constitutional review to protecting human rights of broader population. Examining these cases, the paper will argue that constitutional rights adjudication process, or judicial review, does not pose a threat to democracy, but can indeed be a facilitator of it, by providing a venue of rights discourse in and outside the courtroom to articulate, communicate, and accommodate conflicting views and

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18 Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 LAW & ETHICS HUM. RTS. 140 (2010) (arguing that the right to contest in constitutional settings is at least as empowering as the right to vote).
interests among diverse groups of citizens and non-citizens. Those who do not have voting rights but are bound by the law of a state thus can join the democratic process, in both deliberative and participatory senses, through the mechanism of constitutional review. The paper will note that this is another important dimension of transnationality of Korean constitutional rights practice. The tentative conclusion of this section is that constitutional rights practice not only complements majoritarian democracy, but plays an essential role in realizing a democratic society with a more inclusive, reflective, and cosmopolitan nature.

The concluding part of this project will summarize these multi-dimensional transnationalizing features of constitutional rights practice in Korea and assess their further implications. Although the Court’s increasing global engagement may have partly been motivated by the political ambitions of the Court or certain justices, globalization of constitutional rights practice extends opportunities to participate in transnational rights dialogues not only for judges and lawyers, but also for ordinary citizens and non-citizens. Transnationalization of rights practice can empower both the court and individuals, facilitate more effective and comprehensive human rights protection across borders, and promote the development of global constitutionalism.

This research project hopes to contribute to the scholarship of global constitutionalism and transnational human rights law in a broader sense. The popular use of the term “global constitutionalism” often focuses on the phenomenon of “constitutionalization of international law,” i.e., emergence and adoption of constitutional structure and principles in international legal order, including norms, organizations, dispute resolution mechanisms and decisionmaking processes. The understanding of global constitutionalism as a platform for this project goes beyond this aspect and is in line with Professor Mattias Kumm’s conceptualization of cosmopolitan constitutionalism. A cosmopolitan perspective overcomes the traditional separation between international and national law, and envisages the two levels of law as joint

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19 The paper will refer to the discussions of Habermas’s theory of discourse and public sphere and its critiques regarding constitutional adjudication (e.g., Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (1996); Habermas on Law and Democracy: Critical Exchanges (Michel Rosenfeld & Andrew Arato eds., 1998); Hugh Baxter, Habermas: The Discourse Theory of Law and Democracy (2011)), and Seyla Benhabib’s theory of “democratic iterations” in Seyla Benhabib, Another Cosmopolitanism (2006).


21 Kumm, supra note 4.
vehicles of a cooperative transnational enterprise for achieving human rights and global justice. It perceives constitutional rights practice as a concretization of abstract universal human rights norms and recognizes interactions between international and national rights discourse and practice as not only plausible, but also desirable.\textsuperscript{22} This understanding makes possible a comprehensive conceptualization of transnational human rights law, which seeks organic and mutual development of international human rights and constitutional rights practice in a normative as well as functional sense. It is hoped that the findings and analysis provided by this research will make an important addition to the global scholarship of transnational law, human rights, and constitutionalism.

\textsuperscript{22} \textit{Id.}