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Symposium: Judicial Constitutional Engagement with International Law in Cambodia, Japan, and South Korea

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with contributions by
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SYMPOSIUM

Judicial Constitutional Engagement with International Law in Cambodia, Japan, and South Korea

By *Ngoc Son Bui*[*] and *Maartje De Visser*[**]

A. Asia in World Comparative Constitutional Law

Writing in 2009, Cheryl Saunders correctly pointed out that "much of the discourse of comparative constitutional law focuses on the established constitutional systems of North America and Europe and a few outrider states with similar arrangements, based on similar assumptions."[1] She identified this state of affairs as resulting in the marginalisation of what is in fact the majority of countries in the world and leading to such outcomes as "overlooking the constitutional experiences of particular states and regions; assuming their effective similarity with western constitutional systems; reserving them for specialist study by those with anthropological or sociological interests and skills."[2] Likewise, Ran Hirschl has critically evaluated what he called the "World Series" syndrome, culminating among others in a sense in which "the focus on the constitutional 'north' betrays not only certain epistemological and methodological choices, but also a normative preference for some concrete set of values the constitutional north is perceived to uphold."[3] Other scholars have expressed similar sentiments and concerns.[4]

In the past decade, the field of comparative constitutional law has witnessed concerted efforts to address the gap in scholarly coverage just identified and achieve a greater degree of inclusion, featuring experiences from traditionally underrepresented regions and jurisdictions to enrich our knowledge bases and thereby also provide a more accurate starting

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1 *Cheryl Saunders*, Towards a Global Constitutional Gene Pool, National Taiwan University Law Review 4 (2009) pp. 1-38, 3.

2 Ibid.

3 *Ran Hirschl*, Comparative Matters – The Renaissance of Comparative Constitutional Law, Oxford 2016, p. 206.

4 See e.g., *Rosalind Dixon / Tom Ginsburg*, Introduction, in: Tom Ginsburg / Rosalind Dixon (eds.), Comparative Constitutional Law, Cheltenham 2011, p. 13; *Sujit Choudhry*, Bridging Comparative Politics and comparative Constitutional Law: Constitutional Design in Divided Societies, in: Sujit Choudhry (ed.), Constitutional Design for Divided Societies: Integration or Accommodation, Oxford 2008, p. 8.

point for theorising about constitutional choices and approaches.[5] In this regard, we can speak of world comparative constitutional law, which deliberately seeks to expand the jurisdictional scope of inquiries beyond the Europe-North America axis and devotes attention to substantive reflections on constitutional issues beyond national boundaries. This special issue aims to contribute to the growing corpus of world comparative constitutional law by putting the spotlight on a selection of Asian countries. More particularly, the contributions included in this special issue explore how the highest courts in Cambodia, Japan and South Korea deal with sources and considerations of international law when adjudicating cases with a constitutional dimension. In doing so, the special issue advances the jurisdictional expansion of world comparative constitutional law: while Japan and South Korea have been discussed with some regularity—though still not as frequently as several other Asian countries, and often in relation to the same theme of the arrangements for the delivery of constitutional justice—[6] Cambodia is only rarely integrated in the field.[7] By analysing these cases together, and foregoing the inclusion of a "global north" comparator, the special issue also takes seriously the need for comparative inquiries among countries that are not part of the "World Series". Further, by studying the influence, if any, that international law brings to bear on constitutional adjudication in those three countries, the special issue takes seriously Vicki Jackson's observation that constitutional law increasingly operates in a transnational environment[8] as well as the insight that world comparative constitutional law may require us to shift our gaze upwards, beyond the nation-state. Indeed, the interplay between local and global legal orders deserves the combined attention from both international scholars and comparative constitutional scholars, who may need to talk to one another more. This special issue should be seen as an invitation to do just that.

B. The Project on International Law in Asian Constitutional Courts

The three articles that make up the bulk of this special issue are part of a larger collaborative project on *International Law in Asian Constitutional Courts*. The various contributions to this project were presented and discussed at the workshop jointly organized by the Oxford Programme in Asian Laws and Singapore Management University's Yong Pung

5 See in relation to Asia e.g. the Constitutionalism in Asia series published by Hart, the Routledge Law in Asia series, *David Law / Holning Lau / Alex Schwartz* (eds), The Oxford Handbook of Constitutional Law in Asia, Oxford 2023; *Albert Chen / Andrew Harding* (eds.), Constitutional Courts in Asia – A Comparative Perspective, Cambridge 2018; *Po Jen Yap / Chien-Chih Lin*, Constitutional Convergence in East Asia, Cambridge 2021.

6 *Tom Ginsburg*, Judicial Review in New Democracies: Constitutional Courts in Asian Cases, Cambridge 2003.

7 For a notable exception, see *Benjmain Lawrence*, Authoritarian Constitutional Borrowing and Convergence in Cambodia, Contemporary Southeast Asia 43 (2021), pp. 321–344.

8 *Vicki Jackson*, Constitutional Engagement in a Transnational Era, Oxford 2009.

How School of Law, at St Hugh's College, Oxford, on 15 March 2024. As project leads, we requested contributors to address the following issues:

(a) An overview of the constitutional background of the relevant Asian country, including discussion of any provision that regulates the relationship between international law and domestic law as well as a brief background to the country's constitutional court, by which we mean all types of high judicial institutions that possess the competence to decide constitutional cases;
(b) An examination of the international treaties that the country has ratified, including their type and number;
(c) A detailed description of the number of cases in which international law instruments or arguments are used;
(d) A critical analysis of the competent court's engagement with international law, notably as regards the function of the citation of international instruments; the institutional environment in which the court has recourse to such instruments and conditions that are conducive to the use of international citations; and the reaction by academics and other state institutions to the court's practice.[9]

A set of papers exploring how constitutional courts in five Asian polities (namely Singapore, Hong Kong, the Philippines, Indonesia, and Taiwan) deal with international law has been published elsewhere.[10] This special issue features the cases of Cambodia, South Korea, and Japan.

C. Judicial Engagement with International Law in Cambodia, Japan and South Korea

In his contribution, Taing Ratana examines the judicial practice with regard to international law in Cambodia.[11] His focus is on the experience of that country's Constitutional Council, which was formally established in September 1993[12] and has been conceived in line with the French model of constitutional review. This Council has engaged with international law on several occasions in its rulings, with its engagement ultimately being inspired by an explicit constitutional acknowledgement of the former's domestic relevance, notably as far as human rights are concerned. Indeed, Article 31 of Cambodia's Constitution stipulates that "The Kingdom of Cambodia recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and

9 *Ngoc Bui Son / Maartje De Visser*, Introduction: Judicial Constitutional Engagement with International Law in Asia, Asian Journal of International Law (2025), pp. 1–7.

10 Ibid.

11 *Taing Ratana*, International Laws in the Constitutional Council of Cambodia: A Brief Understanding and Analysis of the Decisions, World Comparative Law 58 (2025), in this issue.

12 The institution commenced its work in June 1998.

conventions related to human rights, women's rights and children's rights," which has been taken as providing the imprimatur for judicial consideration of the relevant international norms. Taing notes that the country is a signatory to 18 such human rights treaties, alongside more than a hundred other international instruments. A perusal of the case law of the Constitutional Council yields 11 judgments in which international laws and principles were cited, out of a total of 339 judgments. The purpose of those citations is not entirely apparent. Taing discusses four possible themes. In some instances, he argues that the Council mentions an international instrument that Cambodia has ratified or an established international principle to reinforce the legislation under review to ensure compliance with the country's commitments on the international plane. On other occasions, he suggests that international law is referenced for symbolic reasons, without the Council providing an explanation for its usage of such law and with the latter playing a limited role in arriving at the outcome. In yet another case, harmonisation was at play, with the Council using international legal norms to interpret domestic legislation to achieve consistency between the former and the constitution. Finally, Taing opines that it is not entirely clear whether the Council also relies on international law for constitutional avoidance to obviate evaluating the validity of domestic legislation.

The second article, by Hiromichi Matsuda, explores how the Supreme Court in Japan has dealt with international human rights law in constitutional cases.[13] He begins by noting that the country's Constitution features a strong commitment to internationalism, on account of historic experiences, with Article 98(2) stating that "[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed." This provision is understood as giving international norms, including customary law, a status inferior to the constitution, but superior to domestic legislation. Notwithstanding the existence of Article 98(2), Matsuda explains that the Japanese Supreme Court has long been reluctant to engage with international law, either ignoring or dismissing arguments based on such law or refusing to find violations thereof in the case at hand, using several representative rulings to illustrate this "negative" attitude. Factors that may account for the observed judicial reluctance include the judges' lack of familiarity with international law as well as the low incidence of successful constitutional challenges due to the restraint generally practiced by Japanese courts in recognition of meticulous preventive scrutiny of draft legislation for constitutional compliance by the Cabinet Legislation Bureau. At the same time, Matsuda identifies that there is some evidence of a newer trend according to which there is a greater willingness on the part of some judges to mention international human rights law as well as recommendations of treaty bodies. He considers this to be a welcome development, and argues that, going forward, the Supreme Court should directly assess the conformity of domestic legislation with international treaties.

13 *Hiromichi Matsuda*, International Human Rights Law in Constitutional Cases: The Supreme Court of Japan, World Comparative Law 58 (2025), in this issue.

For her part, Jeong-In Yun investigates how the international human rights law has featured in the case law of the Constitutional Court of South Korea.[14] She begins by explaining that the Korean Constitution incorporates an active attitude towards the acceptance of international legal norms within the domestic order, with Article 6(1) of South Korean Constitution stating that "Treaties duly concluded and promulgated under the Constitution and the generally recognised rules of international law shall have the same effect as the domestic laws of the Republic of Korea." There are more than 3,500 treaties in force in the country, including 29 multilateral conventions related to human rights. This substantial number notwithstanding, Yun observes that the Korean Constitutional Court has been passive and inconsistent in reckoning with international human rights law as legally binding norms, not using these as independent standards of judicial review. While commentators usually attribute this reticence to considerations like apathy, lack of knowledge or workload constraints, she identifies a set of theoretical, normative and judicial structural reasons to make sense of the prevailing judicial practice. These include conceptions of the proper role of the judge under guise of a dualist understanding of the interplay between the domestic and the international legal order; the strong positivist legal tradition in South Korea, according to which judges should apply rather than create the law; and the absence of incentives or pressures like a regional human rights court. Yun concludes by suggesting the indirect application of international human rights law through Articles 10 and 37(1) of the Constitution, which have provided a basis for the recognition of domestic unenumerated rights: those provisions, she argues, could also profitably be used as a "channel" to incorporate the former into the domestic fundamental rights system.

D. Comparative Lessons and Insights

The three accounts included in this special issue offer several valuable comparative lessons and insights.

To start with, the Constitutions of Cambodia, Japan and South Korea explicitly identify certain types of international norms as part of the law of the land, thereby signalling to all state institutions—the highest courts included—that ensuring respect for such norms can (and arguably should) be part of the performance of their domestic constitutional mandate. What is more, we have seen that the first of those texts includes a reference to specific human rights treaties that can be deemed to be constitutionally consecrated by that mention, with the corollary that their judicial use as an interpretation aid or yardstick becomes natural if not axiomatic. As such, the framing of the constitutional text can provide the basis and an important impetus for the court to engage with international law. Especially as far as human rights law is concerned, the shared normative values that undergird such law and many domestic bills of rights arguably confirms the appeal for constitutional framers

14 *Jeong-In Yun*, Dualist Dilemma in International Human Rights Law at the Korean Constitutional Court—A Constitutional Analysis, World Comparative Law 58 (2025), in this issue.

to include a constitutional endorsement that the former can be profitably engaged with in establishing the meaning of, or even independently alongside, the latter.

Next, we can observe that all three courts studied in this special issue have been confronted with and have dealt with arguments deriving from international law in deciding constitutional cases. It should be clear, however, that their practice is internally uneven, however. In other words, judicial engagement with international law during constitutional adjudicatory processes in Asia is ambivalent.[15] The Cambodian Constitutional Council uses such law for a variety of purposes, and the judges of the Supreme Court of Japan similarly vacillate between a reluctance to use international norms and a willingness to countenance such norms in their opinions. The same appears to be true for the Korean Constitutional Court. One looks in vain for a clear judicial articulation of the approach that will be taken – an overarching systematic doctrine that can guide future cases as to when, how and why international law is deemed useful. Against this backdrop, it may be incumbent on constitutional and international scholars to work together to carefully and critically analyse the judicial practice with a view to identifying trends, inconsistencies and formulate guidelines that could inspire the relevant courts to move beyond ad hoc-ism.

In a similar vein, the accounts devoted to Japan and Korea both mention that scholars have identified a lack of familiarity with international law on the part of the judges as a contributory factor to the relatively poor engagement of the respective highest courts with such law. This focuses attention on the need for and choice of possible remedial practices, that can range from providing for dedicated judicial training in international treaties and custom (and earmarking resources for such training) to the hiring of law clerks with a background in international law to the eligibility and selection criteria for constitutional judges. We should also not forget the role that is played by legal counsel in formulating cogent international law arguments and offering sound theoretical justifications for their use, ideally informed by the work of scholars that conceptualise the relationship between the domestic and international legal order and role that the latter should play in relation to the former. This suggests that it may be informative to study the design and functioning of the entire judicial "eco-system" to make sense of the manner in which judicial engagement with international law can, and should, take place.

As for the design of the institutional system, it should be pointed out that the three cases canvassed in the special issue showcase divergence in the model of domestic constitutional review that they subscribe to. Cambodia has adopted the French model with a Constitutional Council; Japan follows the American system of decentralised review in the ordinary courts, with the Supreme Court at the apex; and South Korea has a specialist Constitutional Court. More significantly, perhaps, is the fact that the performance of constitutional scrutiny by these judicial institutions differs too. The Cambodian Constitutional Council seems active in the exercise of its review function, but it has rarely struck down legislation as

15 *Bui / De Visser*, note 9, p. 4.

unconstitutional.[16] The Japanese Supreme Court too has often been described as highly conservative and has invalidated laws on only a handful of occasions.[17] In contrast, the Korean Constitutional Court exercises its role with vigour and regularly finds fault with the legal measures referred to it for review. It could be suggested that the divergent practice of judicial review affects the frequency with which these three courts have engaged with international law. As we have seen, Cambodia's Constitutional Council has cited international laws and principles in less than a dozen cases, while the Japanese Supreme Court has similarly made reference to international law in relatively few decisions. Scholars have found, however, that South Korea's Constitutional Court made 114 references to 19 different international human rights instruments across 65 judgments delivered between 1988 and 2015.[18] When courts are more active in the exercise of domestic judicial review, they may also have more occasion to engage with international law, which can be used to consolidate their judgments.

In the end, the stories told in this special issue confirm the value of conducting research with a view to contributing to the development of world comparative constitutional law. The various Asian judicial experiences with international law are analysed in their own right, and with regard to relevant domestic conditions and considerations. This is important, as the limited scholarship devoted to this topic is centred on Western experiences[19] and to the extent that some Asian polities are featured, it should be clear that these cannot be taken as representative of the region as a whole. As Saunders notes, "there has been a tendency in comparative law, with implications for comparative constitutional law, to treat Asian legal systems as homogenous"—something that she considers to be "remarkable in the face of the evidence".[20] Indeed, Asia is a particularly pluralist region, and it is therefore to be hoped that accounts focusing on countries other than those canvassed as part of this project will see the light of day so as to help realise a more systematic overview of actual judicial practices in relation to international law, contribute to identifying the full array of factors that explain the judicial attitudes adopted and make sense of convergence or divergence among courts within and outside the region, as well as formulate suggestions on how to

16 *Teilee Kuong*, Constitutional Council of Cambodia at the Age of Majority: A History of Weathering the Rule of Law Storms in Peacetime, in: Albert Chen / Andrew Harding (eds.), Constitutional Courts in Asia – A Comparative Perspective, Cambridge 2018.

17 *David S. Law*, The Anatomy of a Conservative Court: Judicial Review in Japan, Texas Law Review 87 (2009), pp. 1545, 1547.

18 *Yoomin Won*, The role of international human rights law in South Korean constitutional court practice: An empirical study of decisions from 1988 to 2015, International Journal of Constitutional Law 16 (2018), pp. 596, 603.

19 See notably *André Nollkaempfer / Yuval Shany / Antonios Tzanakopoulos*, Engagement of Domestic Courts with International Law: Principled or Unprincipled?, in: André Nollkaempfer / Yuval Shany / Antonios Tzanakopoulos / Eleni Methymaki (eds.), The Engagement of Domestic Courts with International Law: Comparative Perspectives, Oxford 2024. The coverage of Asia was confined to Sri Lanka and China.

20 *Saunders*, note 1, p. 4.

effect any changes in this regard to ensure a better alignment of the constitutional and international legal orders.

International Laws in the Constitutional Council of Cambodia: A Brief Understanding and Analysis of the Decisions

By *Taing Ratana**

Abstract: Many scholars have discussed how international laws are applied in ordinary courts. However, very few documents and legal scholars in Cambodia have discussed how international laws are approached by the Constitutional Council. The Council is entrusted with the power to guarantee the respect for the Constitution. The decisions of the Constitutional Council shall be final without recourse and have the authority over all instituted powers as stated in the Constitution. However, as the 1993 Cambodian Constitution was established based on Annex 5 of the Paris Peace Agreement, in which "modern" values, including human rights and democracy, are incorporated, one should pay higher attention to the way the Constitutional Council treats or uses international laws and principles to understand whether or not Cambodia, legally speaking, abides by its international obligations. One of the reasons why the Council should be paid higher attention when it comes to guarantee the respects for the Constitution and international obligations is because the Council is entrusted with the power to interpret and make final decisions without recourse. For this reason, this article aims to delve into how the Constitutional Council approaches international laws and principles in its decision-making. This article is divided into five sections: A. Introduction, B. Background and Context, C. Cambodia's International Obligations, D. International Laws in the Constitutional Council of Cambodia, and E. Conclusion.

Keywords: Constitution; Decision; International Law

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A. Introduction

The relationship between international laws and domestic ones, including the Constitution, and the application of the former in domesic courts have been one of the central topics being discussed by many legal scholars in Cambodia. However, little attention has been paid to how international laws are approached by the Constitutional Council to render final-without-recource decisions. It is widely known that the Council is given competence to interpret the Constitution and laws adopted by the National Assembly and definitively reviewed by the Senate. Delving in-depth into how international laws are used to make the decisions may be helpful to understand Cambodia's commitment to international obligations, since some international laws are cited in the decisions of the Council. Whether or not the international laws mentioned in the decisions carry any significant weight will also be considerably discussed in this article. As it is difficult to find helpful documents on the issue because it is a novel topic to cover, this article will acquire sources through the existing available documents, including the Council's decisions achived at the Secretariat General of the Constitutional Council, books or articles written by various scholars. This article will approach selected decisions in which international laws are mentioned and conducts a thematic analysis of how the Council uses these international laws. In other words, this article aims to explore how the Constiutitional Council of Cambodia approaches international laws to make decisions. This article engages with the question of how international laws and principles are applied in the decisions of the Constitutional Council. The article is structured into five sections: A. Introduction, B. Background and Context, highlighting the background of the 1993 Constitution and the Constitutional Council of Cambodia and the status of international laws in domestic legal system, C. Cambodia's International Obligations, in which will look at the number of international instruments that bind Cambodia, especially the human rights-related instruments, D. International Laws in the Constitutional Council of Cambodia, pointing out Discourse Analysis, Writing Structure and Thematic Analysis, and E. Conclusion.

B. Background and Context

I. The 1993 Constitution and Constitutional Council of Cambodia

After the decades-internal conflict in Cambodia after the collapse of Khmer Rouge in 1979, the four main political factions—the State of Cambodia (SOC), the FUNCINPEC, the Khmer People's National Liberation Front (KPNLF) and the Khmer Rouge[1]—started to engage in a lengthy process of negotiation, reaching an "Agreement on a Comprehensive Political Settlement of the Cambodia Conflict" (alias Paris Peace Agreement) in Paris of France on 23 October 1991. With the high expectation of having a modern and advanced

1 The FUNCINPEC, the KPNLF and the Khmer Rouge formed a coalition government in exile to fight against the SOC.

constitution that values democracy, human rights, and the rule of law, as expressed by the interventions of the members of Constituent Assembly, the Annex 5[2] of this Peace Agreement served as the main guideline for establishing the 1993 Cambodian constitution—the sixth constitution of this country.[3]

Upon the general election held in 1993[4], under the auspices of the United Nations Transitional Authority in Cambodia (UNTAC), a Constituent Assembly was successfully formed and entered into function on 14 June 1993. The Assembly consisted of 51 seats held by the Cambodian People's Party (CPP), 58 seats by the FUNCINPEC Party, ten seats by the Buddhist Liberal Democratic Party (BLDP)—the successor of the KPNLF—and one seat by the MOULINAKA Party.[5] A permanent constitution-drafting commission, led by the president of the Constituent Assembly or by the vice president in the absence of the president, was then established. The Commission was tasked to draft a constitution, supported by the United Nations' legal experts, to guarantee that the Constitution conformed with the principles stipulated in the Paris Peace Agreement.

For about three months of drafting the Constitution and following the six-day debate, from 15 to 21 September 1993, the Constituent Assembly casted secret ballots on 21 September 1993 to adopt the Constitution with 113 votes in favor, five against, and two abstentions. This successful adoption was considered as a crucial step for the Cambodian society towards conflict resolution. Three days later, on 24 November 1993, in *Maha*

2 The five principles are: 1) The constitution will be the supreme law of the land. It may be amended only by a designated process involving legislative approval, popular referendum, or both, 2) Cambodia's tragic recent history requires special measures to assure protection of human rights. Therefore, the constitution will contain a declaration of fundamental rights, including the rights to life, personal liberty, security, freedom of movement, freedom of religion, assembly and association including political parties and trade unions, due process and equality before the law, protection from arbitrary deprivation of property or deprivation of private property without just compensation, and freedom from racial, ethnic, religious or sexual discrimination. It will prohibit the retroactive application of criminal law. The declaration will be consistent with the provisions of the Universal Declaration of Human Rights and other relevant international instruments. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights, 3) The constitution will declare Cambodia's status as a sovereign, independent and neutral State, and the national unity of the Cambodia people, 4) The constitution will state that Cambodia will follow a system of liberal democracy, on the basis of pluralism. It will provide for periodic and genuine elections. It will provide for the right to vote and to be elected by universal and equal suffrage. It will provide for voting by secret ballot, with a requirement that electoral procedures provide a full and fair opportunity to organize and participate in the electoral process, 5) An independent judiciary will be established, empowered to enforce the rights provided under the constitution and 6) The constitution will be adopted by a two-thirds majority of the members of the constituent assembly.

3 United Nations, Framework for a Comprehensive Political Settlement of the Cambodia Conflict, 23 October 1991, https://peacemaker.un.org/en/node/9235 (last accessed on 15 June 2025).

4 Acccording to the marit of the Paris Peace Agreement, the United Nations Transitional Authority in Cambodia (UNTAC) organized the 1993 election from 23-28 May 1993. Among the 4,764,439 registered voters, 4,276,192 (89.56 percent of voters) casted their ballots.

5 *Maurice Guaillard*, Cambodian Constitutional Law, Phnom Penh 2004 (Khmer version), p. 9.

Phasat Devavinichhay of the Royal Palace of Phnom Penh capital city, Samdach Preah NORODOM Sihanouk signed the Royal Kram promulgating this constitution as urgent in accordance with Articles 135 and 136 of Chapter XIV on the Transitional Provision of this constitution. Then the Constituent Assembly became the National Assembly.

With the Annex 5 of the Paris Peace Agreement and the involvement of the UNTAC legal experts in the Constitution-drafting process, the current 1993 Constitution seems to incorporate some universal values, binding Cambodia to democracy and human rights, while at the same time Khmer values are also protected under the Constitution. This is evidenced by a keynote address made by His Excellency IM Chhun Lim—the fomer President of the Constitutional Council of Cambodia (2016-2025)—who explicitly remarked that the principles in the Annex 5 are modern and fundamental core values in the Cambodian 1993 Constitution.[6] The key principles of the 1993 Constitution are: (i) the constitutional monarchy: Cambodia is a Kingdom where the King shall fulfill His functions according to the Constitution and the principles of liberal multi-party democracy and the king shall reign but does not govern and shall be the head of state for life.[7] (ii) Fundamental rights: The Kingdom of Cambodia recognizes and respects human rights as enshrined in the United Nations charter, the universal declaration of human rights and all the treaties and conventions related to human rights, women's rights and children's rights.[8](iii) The liberal multi-party democracy: The Kingdom of Cambodia adopts a policy of liberal multi-party democracy[9] (iv) The separation of power: the powers shall be separated between the legislative power, the executive power and the judicial power[10] and (v) the conditio sine quanon: the amendment of the Constitution shall not be done if (a) affecting the liberal multi-party democracy system, and (b) affecting the constitutional monarchy regime, and (c) Cambodia was declared to be in state of emergency.[11] Most of the principles are universal values which are the foundation of the 1993 Constitution.

To ensure the respects for the Constitution, a constitutional review body—named the Constitutional Council of Cambodia—was established in 1993. It was created in approximately four years after the making of the 1993 Constitution. The Constitutional Council of Cambodia has been entrusted with the power to interpret the Constitution and laws adopted by the National Assemby and definitively reviewed by the Senate, to examine the constitutionality of law, to rule on the electoral litigations, and to notify His Majesty the King on the proposal to amend the Constitution. As provided by law, the decisions of the Council shall be final without recourse and have the authority over all instituted

6 *H.E. IM Chhun Lim*, Keynote Address in Constitution's Day on 23 September 2020, Cambodia's Constitutional Values: Various Concepts in the Conference of 27th Constitutional Day (2020).

7 Article 1(1) of the Constitution of the Kingdom of Cambodia (1993).

8 Article 31(1) of the Constitution of the Kingdom of Cambodia (1993).

9 Article 51 (New)(1) of the Constitution of the Kingdom of Cambodia (1993).

10 Article 51 (New)(4) of the Constitution of the Kingdom of Cambodia (1993).

11 Chapter XVI (New-two) of the Constitution of the Kingdom of Cambodia (1993).

powers stipulated in the Constitution. With this being said, it seems that the Council is given jurisdiction by the Constitution to interpret all kinds of laws, including any treaties or conventions to which Cambodia is a party. This possibly means that the Council can review the constitutionality of international instruments.

It is also known that the decisions of the Council are made through majority vote among the Council's nine members. According to the Constitution, three members are elected by the National Assembly, three members are elected by the Supreme Council of the Magistracy and the remaining three members are appointed by His Majesty the King.[12]

Interestingly, despite the power authorized by the Constitution for adjudicating electoral litigations and interpreting the Constitution and laws, the Council is not considered as a judicial court, hence the members of the Council are not regarded as judges. The Council is not a part of the three branches, which distinguishes the Constitutional Council of Cambodia from the remaining governmental institutions. Although the Council is not a judicial court, the power vested in the Council make it resemble a judicial institution, as its decisions are final without recourse.

II. Status of International Laws in Cambodia's Legal System

There are a lot of debates centered around monism and dualism in Cambodia. In practice, Cambodia seems to be a dualist legal system, while there is also some monist features found in this system.[13] Conceptually, monism—a legal doctrine—in its purest form refers to the rules of international law being a part of domestic law. Unlike dualism, a monist state does not require domestic procedure for an international treaty to enter into force; and, in this sense, it is often deemed as "self-executing". However, in a dualist system, no special status is granted to international treaties and no rights and obligations deriving from treaties have any effects in national laws unless the treaties are "incorporated" into domestic law through a process of ratification. The international treaty that has already been "incorporated" into domestic law is also considered domestic law, and any amendments have to be made through later legislation.

In the case of Cambodia, the discussion on Cambodia's monism and dualism is often classified into two parts—human rights related and non-human rights related. Considering the human rights part, Dr. Say Bory, a prominent legal scholar and a former member of the Constitutional Council, stated that Cambodia is a monist country, but he still questioned whether national or international law holds primacy. As enshrined in Article 31(1) of the

12 *Teilee Koung,* Constitutional Council of Cambodia at the Age of Majority: A History of Weathering the Rule of Law Storms in Peacetime, in: Albert H. Y. Chen / Andrew Harding (eds.), Constitutional Courts in Asia: A Comparative Perspective, Cambridge 2018, p. 241 ff.

13 *Taing Ratana*, The Influence of Constitutional Law on Administrative Law: The Influence of the Constitutional Council's Decisions on the Administration in Cambodia, in: Kai Hauerstein / Jörg Menzel (eds.), The Development of Cambodian Administrative Law, Phnom Penh 2014, pp. 124 ff..

constitution, the United Nations (UN) Charter, Universal Declaration of Human Rights (UDHR) and other human rights treaties and conventions codifying women's and children's rights are ranked higher than other domestic laws since they are a part of the 1993 Cambodian constitution.[14] However, Dr. Meas Bora, another well-known legal scholar in Cambodia, argued that Cambodia is, in practice, a dualist state.[15] He pointed out that the term "respect" and "recognize" as stated in Article 31 of the 1993 Cambodian constitution[16] are considered "soft words" which do not suggest binding obligations.[17] Furthermore, the 1993 Cambodian constitution is the supreme law of the land under Article 152 new[18], which could be deemed higher than international instruments. In 2007, there was a landmark decision made by the Constitutional Council concerning the examination of the constitutionality of Article 8 of the "Law on the Aggravating Circumstances of Felonies", and the Council ruled that judges have to refer to both domestic and international laws recognized by Cambodia, particularly the Convention on the Rights of the Child, to issue a decision.[19] This decision simply states that international laws recognized by Cambodia, notably the Convention on the Rights of the Child (CRC), are directly enforceable in Cambodian courts without barriers.[20] With this being said, it seems obvious that ordinary courts have to take into account international laws before making decisions based on the aforesaid decision.

In terms of the non-human rights section, the Constitutional Council can renounce international treaties and conventions in case of inconsistency with Cambodia's independence, sovereignty, territorial integrity, neutrality, national and political unity, and administrative management in accordance with Articles 55 and 92.[21] Therefore, it can be assumed that non-human rights international treaties and conventions are considered lower than the 1993 Cambodian constitution; however, it remains uncertain if it is lower or equal to other ordinary laws.[22] According to Article 26 new and 93 new of the Constitution, international laws that are ratified by the National Assembly and the Senate are made in the form of Royal Decree.[23] Therefore, Dr. Say Bory assumes that human rights laws are ranked equal to the 1993 Cambodian constitution, but that non-human rights laws rank lower than the

14 *Say Bory (សាយ ប៉ូរី)*, General Administrative Laws (នីតិរដ្ឋបាលទូទៅ), Blossom Lotus 2012, p. 54.

15 *Meas Bora*, The 1993 Cambodian Constitution and International Law: A Normative Perspective, in: Hor Peng / Kong Phallack / Jörg Menzel (eds.), Cambodian Constitutional Law, Phnom Penh 2016, p. 79.

16 Art. 31 of the Constitution of Cambodia.

17 *Bora*, note 13, p. 78.

18 Art. 150 of the Constitution of Cambodia.

19 Decision Nº 092/003/2007 CC.D of July 10, 2007

20 *Daniel Heilmann*, Fundamental Rights Protection: A Comparative and International Law Perspective, in: Hor Peng / Kong Phallack / Jörg Menzel (eds.), Cambodian Constitutional Law, Phnom Penh 2016, p. 354.

21 *Bory (សាយ ប៉ូរី)*, note 12, p. 50.

22 *Bory (សាយ ប៉ូរី)*, note 12, p. 54.

23 Ibid.

Constitution although he left a doubt if the non-human rights ones are lower or higher than other Cambodian domestic laws.[24] With this being said, the 2007 decision did not mention whether or not non-human rights international treaties and conventions should be applicable in ordinary courts. How the Council treats the non-human rights laws remains uncertain either. Regardless of the arguments raised earlier, the Constitution does not mention a hierarchy of international laws. In practice, international laws must go through domestic procedures to become part of Cambodia's laws. It remains uncertain whether or not there is any difference how Cambodia treats international laws that have already been ratified and the ones that have not been ratified yet. This has never raised a legal issue so far. Therefore, this article only seeks to explore how international laws are applied in the decisions of the Constitutional Council of Cambodia. Table 1 below outlines the constitutional provisions related to international law that are relevant to this article.

Table 1: Constitutional Provisions Related to International Laws

Article	Provision
Article 8 Paragraph 2	The King shall be the guarantor of the national independence, the sovereignty and the territorial integrity of the Kingdom of Cambodia, and the guarantor for the respect of citizens' rights and freedom, and of international treaties.
Article 26 new	The King signs and ratifies international treaties and conventions after their approval by the National Assembly and the Senate.
Article 31	The Kingdom of Cambodia recognizes and respects human rights as enshrined in the United Nations Charter, the Universal Declaration of Human rights and all the treaties and conventions related to human rights, women's rights and children's rights. Khmer citizens are equal before the law, enjoying the same rights, liberties and duties regardless of race, color, sex, language, beliefs, religions, political tendencies, birth origin, social status, wealth or other situations. The exercise of personal rights and liberties by any individual shall not adversely affect the rights and freedom of others. The exercise of such rights and liberties shall be in accordance with the law.
Article 55	Any treaty and agreement incompatible with the independence, sovereignty, territorial integrity, neutrality and national unity of the Kingdom of Cambodia shall be abrogated.
Article 90 new (two) paragraph 5	The National Assembly votes the approval or the abrogation of international treaties or conventions.
Article 92	Any adoption by the National Assembly contrary to the principles of safeguarding the independence, the sovereignty, the territorial integrity of the Kingdom of Cambodia, and affecting the political unity or the administrative management of the nation, must be considered null and void. The Constitutional Council is the sole organ competent to pronounce this nullity.

24 Ibid., p. 55.

Article 93 new	The law signed and promulgated by the King shall be published in the Royal Gazette and shall be circulated on the whole territory of the country in the time limit as set above.
Article 128 new (former Article 109)	The Judicial power is the guarantor of impartiality and the protector of the citizens' rights and liberties.
Article 152 new-two (former Article 150 new)	The present Constitution is the supreme law of the Kingdom of Cambodia. All the laws and decisions of all state institutions must be in absolute conformity with the Constitution.
Article 160 new-two (former Article 158 new)	Laws and normative acts in Cambodia that guarantee the protection of the State properties, the rights, the liberties and the legal properties of private persons and that are in conformity with the national interests, shall remain in force until the new texts are made to amend or to abrogate them, except the provisions contrary to the spirit of the present Constitution.

C. Cambodia's International Obligations

Before understanding how international laws are applied in the decisions of the Constitutional Council, one must first know what kinds of international obligations Cambodia is bound by. As a member of the international community with firm commitments in fulfilling its international obligations, Cambodia has thus far signed, acceded to and/or ratified 141 international instruments which are divided into 23 categories, one of which is human rights-related. Cambodia is party to 18 human rights international instruments (see Table 2). According to Article 31 of the Constitution, regardless of whether or not the laws have been through domestic ratification procedures, the Constitutional Council should at least take the international instruments listed below into account when making its decisions. However, this matter remains subject to the official interpretation by the Constitutional Council.

Among the 18 human rights-related instruments, there are six conventions and covenants mentioned in the Constitutional Council's Decisions, namely the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG)[25], the International Covenant on Civil and Political Rights (ICCPR)[26], Convention on the Rights of the Child (CRC)[27], the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[28] and International Humanitarian and Human Rights Law[29] and the 1961

25 Decision Nº 13 CC.D Of August 25, 1999.

26 Decision Nº 065/007/2004 CC.D of October 22, 2004 & Decision Nº 196/004/2018 CC.D of August 15, 2018.

27 Decision Nº 092/003/2007 CC.D of July 10, 2007.

28 Decision Nº 086/013/2006 CC.D of November 25, 2006.

29 Decision Nº 065/007/2004 CC.D of October 22, 2004.

Vienna Convention on Diplomatic Relations[30]. Five of the laws mentioned above are human rights-related, while the remaining one international law is non-human rights-related.

Table 2: List of International Conventions and Covenants Ratified by Cambodia

No.	Date	International Instruments
1	14/10/1950 (Accession)	Convention on the Prevention and Punishment of the Crime of Genocide[31]
2	28/11/1983 (Ratification)	International Convention on the Elimination of All Forms of Racial Discrimination
3	26/05/1992 (Accession)	International Covenant on Economic Social and Cultural Rights
4	26/05/1992 (Accession)	International Covenant on Civil and Political Rights
5	27/09/2004 (Signature)	Optional Protocol to the International Covenant on Civil and Political Rights
6	28/07/1981 (Accession)	International Convention on the Suppression and Publishment of the Crime of Apartheid
7	15/10/1992 (Accession)	Convention on the Elimination of All Forms of Discrimination against Women
8	13/10/2010 (Ratification)	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
9	15/10/1992 (Accession)	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
10	30/03/2007 (Ratification)	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
11	15/10/1992 (Accession)	Convention on the Rights of the Child
12	12/08/1997 (Acceptance)	Amendment to Article 43(2) of the Convention on the Rights of the Child
13	16/07/2004 (Ratification)	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict
14	30/05/2002 (Ratification)	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

30 Decision Nº 156/004/2015 CC.D of August 12, 2015.

31 The Ministry of Foreign Affairs and International Cooperation, Cambodia's Signature on Multilateral Treaties and Party to Treaties, 1-9 (2023) (unpublished manuscript) (on file with the Department of Legal Affairs and Treaty of General Department of Legal, Consular and Border Affairs).

15	27/09/2004 (Signature)	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
16	20/12/2012 (Ratification)	Convention on the Rights of Persons with Disabilities
17	01/10/2007 (Signature)	Optional Protocol to the Convention on the Rights of Persons with Disabilities
18	27/06/2013 (Accession)	International Convention for the Protection of All Persons from Enforced Disappearance

Aside from the aforementioned international treaties and conventions, there are some international principles found in Article 38 paragraph 6 and 7 of the 1993 Cambodian constitution.[32] They are: (1) "The doubt shall benefit the accused" and (2) "[a]ny accused is presumed innocent up to the final verdict of the court". Moreover, some principles, including the principle of non-retroactivity[33], in dubio pro reo[34] and non bis in idem[35] are also found in some decisions of the Constitutional Council. However, it is unclear where these international principles derive from in the first place; these principles are still internationally recognized and adopted, which to a certain extent should also be covered in this article. A question arises: are these principles referred to by the Council the same way it refers to the international treaties and conventions in its decisions?

D. International Laws in Constitutional Council of Cambodia

I. Selected Decisions

Of the 339 decisions the Constitutional Council has issued as in 2023, there are eleven decisions in which international laws and principles are cited, while there are three decisions concerning the examination of the constitutionality of extradition treaties and one Notification on the denial of the request for the constitutional review of the "Law on the Approval of Additional Treaty" between Cambodia and Vietnam. The decisions and notifications concerning extradition treaties are not included in the analysis of this article, since it does not contain substantive international laws as discussed earlier. Only decisions concerning ratified international treaties, conventions and convenants will be selected for the following discussion. As shown in Table 2, there are seven international laws mentioned in six decisions. In this case, the following analysis will mostly discuss human rights-related instruments because there are more human rights-related instruments mentioned in

32 Art. 38 (6) and (7) of the Constitution of the Kingdom of Cambodia.

33 Decision Nº 038/001/2001 CC.D of February 12, 2001 & Decision Nº 224/006/2023 CC.D of July 31, 2023.

34 Decision Nº 099/004/2008 CC.D of July 24, 2008.

35 Decision Nº 123/004/2012 CC.D of November 16, 2012.

these decisions based on the thematic analysis. On top of that, decisions that mention international principles will also be covered.

II. Writing Structure of Decisions

The decision writing style of the Constitutional Council of Cambodia has been heavily influenced by the French court's style system. For this reason, the decisions of the Council are organized in three parts, namely "Visas", "Motif" and "Dispositif".[36] As observed in decisions, the "Visas" contain references to the Constitution and relevant laws, including, but not limited to previous cases. The order of the cited laws in the "visas" is based on the hierarchy of laws and regulations. However, the "Motif" starts with "whereas" in English[37] or "considérants" in French. Usually, the "Motif" part varies in length from one decision to another based on each particular case. However, the function of the "Motif" is to provide facts, explanations, arguments, and evidence, the meanings of which are expanded and interpreted by the Council. The "Motif" also mentions counter-arguments and the legal qualification of judicial facts; including, but not limited to, the recognition of a complaint.[38] On top of that, the decisions of the Constitutional Council are deemed as a non-rhetorical monologue decision in which no dissident point of views among the members of the Constitutional Council is provided.[39] Since 2017, there are some adjustments to improve the decisions of the Constitutional Council, and it clearly cited constitutional principles with reference to Articles of the Constitution although the outcome of the analyses and interpretation of constitutional principles are not included in the decision.[40] In essence, the Constitutional Council also cites the principles of international law in addition to the national ones.[41] In a nutshell, the "Motif" contains a legal explanation, which serves as a foundation for the final decision written in the "Dispositif" which is the last part of the decision, followed by the "Motif" as the Constitutional Council makes decisions. Usually, this part contains only two Articles. Through observation, all of the international laws and principles are found written in the second part, the "Motif", although there is no critical explanation and interpretation on the international laws.

36 *H.E. IM Chhun Lim (ឯកឧត្តម អឹម ឈុនលឹម)*, Methods of Drafting Decisions: Exerperiences of Constitutional Council of Cambodia of the Kingdom of Cambodia (វិធីសាស្ត្រនៃការតាក់តែងសេចក្តីសម្រេចៈ បទពិសោធន៍របស់ក្រុមប្រឹក្សាធម្មនុញ្ញនៃព្រះរាជាណាចក្រកម្ពុជា), p. 2, (unpublished manuscript) (on file with the Constitutional Council of Cambodia).

37 This is according to unofficial translation of the decisions.

38 Ibid., p. 2.

39 Ibid., p. 4.

40 Ibid.

41 Ibid.

III. Thematic Analysis of the Constitutional Council's Decisions

Decisions are likely to be driven by the consequences and beliefs in constitutional values of the Constitution and the interpretation involves vital human values enshrined in international treaties, such as human rights treaties, in the Constitution so that the latter is in line with international obligations.[42] In the case of Cambodia, the Constitutional Council is, with comprehensive review and analysis, based on legal grounds, laws, jurisprudence and relevant treaties, particularly the Constitution which has to be respected by the Constitutional Council in constitutional review and the interpretation of law.[43] However, there are seemingly very few documents on the approaches the Council uses to make decisions. Some decisions made by the Council may involve political, economic and socio-cultural considerations. But, it is still up to the Council as to what makes up a decision at the end of the day.

1. Theme 1: Reinforcement

The Constitutional Council of Cambodia usually mentions an international instrument that Cambodia has ratified or acceded to or international principles to reinforce or give weights to domestic laws that are under constitutional review for the purpose of ensuring Cambodia's compliance with its international obligations. There are some decisions that fall under this theme. In Decision No 086/013/2006 CC.D of November 25, 2006, the Constitutional Council heard the complaint made by Mr. TOUCH Rithy who demanded to "strike off" 5,413 Vietnamese names. The "Motif" of the decision contains arguments raised by Mr. TOUCH Rithy and legal arguments raised by representatives from the National Election Committee (NEC). The latter put forward some issues, including the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). In this case, the representatives of the NEC use the CERD to refute the arguments from Mr. TOUCH Rithy in a NEC's hearing.

Secondly, Decision No 099/004/2008 CC.D of July 24, 2008, concerns the electoral dispute during an election campaign. Mr. HUL Thol, representing Mrs. THAI Nary, filed a complaint against decision of the NEC to the Constitutional Council. Mr. HUL Thol accused Mr. SOM Sophat for tearing off poster of the wall of an Islamic Mosque, while the latter denied the accusation. When asked for witnesses, Mr. HUL Thol could not provide any, which led the Council to rule this case based on the principle of "in dubio pro reo"(n doubt, for the accused). In this case, the Council refered to this principle to reinforce the domestic laws. Thirdly, Decision No 123/004/2012 CC.D of November 16, 2012, concerns Mr. LY Sophorn's request to turn down on four NEC's decisions. The Council ruled the

42 *Chang-fa Lo*, Treaty Interpretation Under the Vienna Convention on the Law of Treaties: A New Round of Codification, Singapore 2017, p. 26.

43 The Secretariat of the Constitutional Council of Cambodia, Questions and Answers on Constitution (កម្រងឯកសារសំនួរ~ចម្លើយទាក់ទងនឹងរដ្ឋធម្មនុញ្ញ) (2011), pp. 44, 50.

case based on the principle of "non bis in idem"(no the same cases are tried twice) as the complaints had been already dealt with in Decision Nº 084/011/2006 CC.D. of November 24, 2006 and Decision Nº 094/005/2007 CC.D of November 21, 2007.

Thirdly, in 2018, after a major opposition party was dissolved due to an illegal act committed by the party leaders, Mr. SAM Rainsy, one of the party leaders who is living in-exile, called on the citizens to boycott the 2018 election, by calling it a "clean finger" campaign. The Constitutional Council received a complaint from attorney at law SAM Sokung, representing Mr. CHEA Chiv, THORNG Savourn and KRUY Kemsang, who posted pictures of their fingers on social media with some captions that seemed to dissuade people from voting. In a quite lengthy "Motif", the Constitutional Council mentioned the International Covenant on Civil and Political Rights (ICCPR), following Mr. SAM Sokung's argument that posting photos of fingers on social media with captions is covered by the right to freedom of expression in accordance with Article 19(2) of the ICCPR. According to the Council this argument is not justified as the rights stipulated under ICCPR often come along with other obligations, which in this case are the respect for other people's rights public order, good customs, national security, including, but not limited to democracy. In Decision No 196/004/2018 CC.D of August 15, 2018, the Council interpreted the ICCPR by weighing the rights and obligations provided by the Covenant. The Constitutional Council did not deny the application of Article 19 of the ICCPR, but this application shall be in the frame of the democracy, national security, public orders, and good customs of the nation, which shall not be mistreated by any Cambodian citizen. The decision of the Council gave additional weight to the application of Cambodia's domestic laws, which are completely consistent with the international obligations under the ICCPR.

Fourthly, there was the Decision Nº 223/005/2023 CC.D of July 31, 2023, concerned a request from Mr. YAN Sokhoeurn to contest the decision of National Election Committee (NEC), who claimed that he did not realize that sharing a video was considered as an incitement and illegal. Thus, the Constitutional Council decided this case based on the principle "ignorance of law excuses no one", meaning that the accused is liable for his acts. Fifthly, the Decision Nº 224/006/2023 CC.D of July 31, 2023, concerned Mr. SAM Sokung, a lawyer representing Mr. LY Menghorng, who contested the decision of the NEC involved the principle of non-retroactivity. Mr. SAM Sokung argued that Mr. LY Menghorng, posted inciting contents on social media on the 1st of July 2023 before the "Law on the Amendments of Election Law" that was used to punish Mr. LY Menghorng, entered into force on 5th of July 2023. However, the Constitutional Council rejected that the principle did not apply in this context owing to the posted contents remained on social media until the 14th of July, which means the principle of non-retroactivity did not work in this case. In these two cases, the principles of criminal law were used to resolve the cases so that domestic laws could be applicable.

2. Theme 2: Symbolism

The Constitutional Council of Cambodia could plainly mention international laws without reviewing or interpreting the provisions of the laws. The first Decision Nº 13 CC.D of August 25, 1999 concerns a request to examine the constitutionality of the "Law on the Period of Temporary Detention" whether or not it is inconsistent with Article 38(7) which stipulates that "[…] the doubt shall benefit the accused". In the second paragraph of the "Motif", the date of signature and accession of the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG) are cited without further reviewing the provisions of the Convention. The reference to the convention is followed by citing Decree Nº 01 ,dated 15 July 1979, on the establishment of People's Revolutionary Court to try Pol Pot and Ieng Sary for committing genocide. Article 2(1) of the Decree also determined the crime of genocide. In the last paragraph of the"Motif", the Council explains that "temporary detention", regardless of its period, does not make the accused a criminal. Therefore, it is not inconsistent with Article 38(7) of the Constitution. From the way the decision is written and organized, it was believed that the Council was using the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG), followed by the Decree in the previous administration to back up the 1993 Constitution, and ruled that the "Law on the Period of Temporary Detention" is in line with the Constitution. For this reason, the Council may symbolically use the Convention to justify that it also takes into account the instrument Cambodia has acceded to.

The second decision is Decision Nº 065/007/2004 CC.D of October 22, 2004, concerning a request to reviewing the constitutionality of the Law on the Amendment of Articles 2, 3, 9, 10, 11, 14, 17, 18, 20, 21, 22, 23, 24, 27, 29, 31, 33, 34, 35, 36, 37, 39, 40, 42, 43, 44, 45, 46 and 47 of the "Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia". Point 4 of the third paragraph of the "Motif" states that, "[t]he modification of the rights of the accused and the immunity of judicial officials and lawyers based on the 1966 International Covenant on Civil and Political Rights (The Article 42)". In Point 7 of paragraph 3 of the "Motif", the judges are qualified to be appointed shall have "experiences in International Humanitarian Law and Human Rights Law". The Constitutional Council listed down the amended parts and mentioned two international laws: (1) the 1966 International Covenant on Civil and Political Rights and (2) International Humanitarian Law and Human Rights Law. The Council did not further provide any explanation for the citation of the international laws.

The third Decision Nº 086/013/2006 CC.D of November 25, 2006, concerns the complaint from Mr. TOUCH Rithy—a member of the election committee of the Sam Rainsy Party—who requested to omit the names of 5,413 Vietnamese people from the electoral lists, and whose request had been turned down by the National Election Committee (NEC). In the "Motif" of the decision, arguments from both Mr. TOUCH Rithy and His Excellency MEAN Satik and His Excellency MAO Sophearith, the NEC representatives are briefly mentioned. Mr. TOUCH Rithy requested the Constitutional Council to revoke the decision

of the NEC, arguing that the people did not possess Khmer names, spoke Khmer with Vietnamese accent and that it was uncertain if they hold Cambodian identification cards. In response to the arguments raised by Mr. TOUCH Rithy, His Excellency MEAN Satik and His Excellency MAO Sophearith clarified the matters in accordance with the "Law on the Naturalization", ethnic minority and the International Convention on the Elimination of All Forms of Racial Discrimination. However, no further explanation of the significance of the convention is made in the decision, which is believed that the convention carries symbolic ground in the decision.

Fourth, the Constitutional Council of Cambodia cited the 1961 Vienna Convention on Diplomatic Relations without giving an in-depth explanation. In Decision No 156/004/2015 CC.D of August 12, 2015, concerning the request to review the constitutionality of the "Law on Associations and Non-Governmental Organizations" (NGOs), the Constitutional Council went through each chapter of the law in the "Motif". Chapter 5 on the Rights, Benefits and Obligations of the law, comprising six Articles, mentions taxation and incentives, including exemptions in accordance with the law. Article 23 of the law states that foreign staffs are not entitled to the immunities and privileges, like diplomats, as mentioned in the 1961 Vienna Convention on Diplomatic Relations (VCDR). The decision of the Council only quoted the Article 23 in which the convention is mentioned, and it does not carry any significant weights in the decision.

3. Theme 3: Harmonization

The Constitutional Council of Cambodia somehow utilizes this approach to interpret laws to ensure consistency between the Constitution and international laws or principles. The first instance is a five-page-long Decision No 040/002/2001 CC.D of February 12, 2001, concerning a request to review the constitutionality of the Law on the Establishment of Extraordinary Chamber in the Court of Cambodia before this law was submitted to be signed by His Majesty the King. Article 3(1) of the law refered to 10 Articles of the 1956 Criminal Code, including Articles 209, 500, 506 and 507. The provisions above stated that "the third level of penalty", which is death penalty under Article 21 of the 1956 Criminal Code. For this reason, the Council decided that "both literature and meaning of the sentence is opposite to the article 32 Paragraph 2 of the Constitution, which states that: the "[d]eath penalty shall not exist in any way." However, there was another catché. Article 3(2) of the law extended an additional 20-year sentence to the 10-year limitation for criminal offenses. This seems to violate the principle of non-retroactivity, since the offence was committed in 1975, while the stated law had been enacted in 1956. Interestingly, the Constitutional Council provided that "all principles have two elements: rules and exceptions, both of which have the same value." This principle was also stipulated in Article 6(2) of the Criminal Code, which states that the offenses could be abolished or the punishment for any offenses could be reduced by a new provision, except in cases where the offenses have already been punished. In this case, the new provisions, which are Articles 38 and 39 of the

"Law on the Establishment of Extraordinary Chamber in the Court of Cambodia", reduce the punishment from death sentence and labor servitude to life sentence and imprisonment. Hence, the law was declared constitutional, except the third level of penalty. With this being said, the Council mentioned the principle of non-retroactivity and its exception to ensure hamornous consistency between the "Law on the Establishment of Extraordinary Chamber in the Court of Cambodia", the Constitution and the international principle of non-retroactivity.

4. Theme 4: Avoidance

It is still unclear if the Constitutional Council of Cambodia applied a constitutional avoidance approach—a method of avoiding a constitutional question rather than resolving it on legal grounds, thereby refraining from declaring the unconstitutionality of a law. In 2007, His Majesty the King asked the Constitutional Council to review the constitutionality of Article 8 of the "Law on the Aggravating Circumstances of Felonies".[44] In the "Motif" of Decision Nº 092/003/2007 CC.D of July 10, 2007, the Council mentioned Article 8 of the law, followed by a further expansion of the Council's explanation, which argued that judges have to take into account "laws" that refer to domestic laws and international laws, especially the Convention on the Rights of the Child. However, this decision does not seem to follow the approach of constitutional avoidance, but as Teilee Kuong pointed out, the Council seems to suggest a more liberal approach in favor of international obligations.[45] Moreover, the Council assumed that ordinary courts take into account international laws when interpreting national laws, hence the review of the constitutionality of the national laws may not be necessary.[46] Although the decision did not seem to follow the constiutitonal avoidance doctrine, it seems to give rise to the doctrine when similar cases are raised to the Council in the future. Table 3 below outlines all decisions discussed in this section to provide a clearer overview of the thematic analysis.

44 Article 8 of the "Law on the Aggravating Circumstances of Felonies" states that: "For the felonies, and felonies with forced labour, the judge must not at all consider the attenuating circumstances for punishment, or reduce it to below the minimum or suspend it. For misdemeanours which do not seriously affect public orders, the punishment may be suspended entirely or partly. In this case, the perpetrator shall not serve out the whole of his/her sentence, unless he/she commits any other offense as provided for in the previous Articles, within the period of 5 years after being sentenced".

45 *Kuong*, note 12, p. 266.

46 Ibid., pp. 265-266.

Table 3: Thematic Analysis

No	Thematic Analysis	Decisions
1	Reinforcement	• Decision No 086/013/2006 CC.D of November 25, 2006 • Decision No 099/004/2008 CC.D of July 24, 2008 • Decision No 196/004/2018 CC.D of August 15, 2018 • Decision No 223/005/2023 CC.D of July 31, 2023 • Decision No 224/006/2023 CC.D of July 31, 2023
2	Symbolism	• Decision No 13 CC.D of August 25, 1999 • Decision No 065/007/2004 CC.D of October 22, 2004 • Decision No 086/013/2006 CC.D of November 25, 2006 • Decision No 156/004/2015 CC.D of August 12, 2015
3	Harmonization	• Decision No 038/001/2001 CC.D of February 12, 2001
4	Avoidance	• Decision No 092/003/2007 CC.D of July 10, 2007

E. Conclusion

In principle, as a party to an international instrument, a state party is bound by the obligations (i) to promote (ii) to respect (iii) to protect and (iv) to fulfill, in accordance with the spirit and purpose of that international instrument. In total, Cambodia has signed, acceded, and/or ratified 141 international treaties/convention/covenants. Thus far, Cambodia has been determined to comply with them. Although there have been few cases involving international laws and principles in the Constitutional Council of Cambodia, the eleven decisions have reflected the Constitutional Council's tendency to use international laws and principles for making its decision. Based on the thematic analysis of eleven decisions, it becomes obvious that the Constitutional Council of Cambodia upholds all international instruments that Cambodia has ratified and acceded to without discrimination.

There are five decisions made by the Constitutional Council that fall under the reinforcement theme. The international laws or principles mentioned in those decisions seem to be used as a significant legal ground to counter the arguments raised by plaintiffs or the accused or to settle the cases. Most of these decisions involve electoral disputes. In terms of the symbolism theme, there are only four decisions that fall under the latter. The international laws and principles mentioned in the decisions did not carry any significant weight for the ruling, and no in-depth explanations were given. It is difficult to know the reason why the international laws and principles are mentioned without further analysis or explanation. Furthermore, only one decision falls under the harmonization theme. In this decision the Constitutional Council interprets a law to harmonize international laws or principles. The Council explained that the "Law on the Establishment of Extraordinary Chamber in the Court of Cambodia" which extends the additional 20-year sentence is not unconstitutional because of the principle of "rules and exceptions" of the principle of non-retroactivity. At first glance, it seems unconstitutional, but the Council used the

principle to make the law in line with the principle of non-retroactivity. In terms of the avoidance theme, the decision falling under this theme may not be entirely considered an application of the constitutional avoidance doctrine, but a mere expansion of explanation regarding the consideration of international instruments before ruling on a case.

International Human Rights Law in Constitutional Cases: The Supreme Court of Japan

By *Hiromichi Matsuda*[*]

Abstract: Although the Supreme Court of Japan has long been reluctant to apply international human rights law as binding law, some Justices recently referred to human rights treaties and recommendations of treaty bodies in a positive manner in constitutional cases. In particular, Justices Miyazaki and Uga's dissenting opinion provided an important theoretical bases for reference to the recommendations by the treaty bodies. Within the constitutional system of Japan, international law, regardless of its direct applicability, has domestic effect. While the recommendations are not legally binding, the executive branch is obliged to respond to human rights treaty bodies with detailed reasonings. Failure to appropriately respond to human rights treaty bodies with persuasive reasoning can indicate that domestic law has legal problems, and judiciary should take this fact into account in constitutional review.

Keywords: Supreme Court of Japan; Domestic Effect of Treaties; Treaty Bodies

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A. Introduction

This article analyzes how the Supreme Court of Japan refers to international human rights law in constitutional cases. Although the Supreme Court of Japan has long been reluctant to apply international human rights law as binding law, some Justices recently referred to human rights treaties and recommendations of treaty bodies in a positive manner. Against this background, this article will analyze this recent trend from a theoretical perspective.

This article is organized as follows: Part B discusses the status of international human rights law in the Japanese constitutional system. Part C describes important constitutional cases in which international human rights treaties are cited. Part D will provide a theoretical analysis. Part E concludes with future directions.

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B. International Law Within the Constitutional System

The Constitution of Japan has a strong commitment to internationalism. It was enacted in 1946, right after World War II. Reflecting upon the devastation of Asia-Pacific War caused by ultra-nationalism, the Preamble of the Constitution declares: "[w]e, the Japanese people, […] determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government […]."

Based on this spirit, Article 98(2) of the Constitution stipulates that "[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed." Most treaties are approved by both houses of the Diet before ratification (Article 61, 60(2) of the Constitution of Japan). The Emperor, with the advice and approval of the Cabinet, promulgates treaties (Article 7(1) of the Constitution of Japan).[1]

In line with its historical background, Article 98(2) of the Constitution should be interpreted as incorporating the "collaboration of powers" approach in the implementation of international obligations.[2] All state organs, including the legislative, executive, and judicial branches, must collaborate with each other to faithfully observe Japan's international obligations.[3] Although the scholarly debate on Article 98(2) is complicated[4], the text clearly obliges the State to observe treaty and other international laws.[5] The prevailing view in Japan maintains that both customary international law and treaty law acquire domestic effect through Article 98(2) of the Constitution and are ranked higher than statutory law but lower than the Constitution.[6]

1 *Hiromichi Matsuda*, International Law in Japanese Courts, in: Curtis A. Bradley (ed.), The Oxford Handbook of Comparative Foreign Relations Law, New York 2019, p. 537.

2 松田浩道『国際法と憲法秩序——国際規範の実施権限』[*Hiromichi Matsuda*, International Law and Constitutional Legal Systems. The Competence to Implement International Norms (in Japanese)], Tokyo, 2020, p.167.

3 For further information, see *Ayako Hatano / Hiromichi Matsuda / Yota Negishi,* The Impact of the United Nations Human Rights Treaties on the Domestic Level in Japan, in: Christof Heyns / Frans Jacobus Viljoen / Rachel Murray (eds.), The Impact of the United Nations Human Rights Treaties on the Domestic Level. Twenty Years On, Second Revised Edition, Leiden / Boston 2024, p. 608; *Matsuda*, note 1, p. 537.

4 *Hae Bong Shin*, Japan, in: Dinah Shelton (ed.), International Law and Domestic Legal Systems. Incorporation, Transformation, and Persuasion, Oxford 2011, pp. 365-376 (discussing domestic incorporation of international law in the Japanese legal system); Yuji Iwasawa, International Law, Human Rights, and Japanese Law. The impact of International law on Japanese Law, Oxford 1998, pp. 28-36, 95-103 (discussing domestic application of international law in Japan); *Yuji Iwasawa*, Domestic Application of International Law, Recueil des Cours 378 (2016), p. 9.

5 The text is even clearer than is the text of the German constitutional provisions that provide the basis of friendly attitudes toward international law (*Völkerrechtsfreundlichkeit*). See Articles 9(2), 23-26, and 59(2) of the German Basic Law.

6 *Iwasawa*, note 4, International Law, Human Rights, and Japanese Law, pp. 28–36, 95–103. Iwasawa further argues that international norms are divided into two types—directly applicable norms and

C. International Human Rights Law in Constitutional Cases

Part C will discuss important constitutional cases in which the Supreme Court of Japan discussed international human rights law. Section I. will describe cases where international human rights treaties are treated negatively, and Section II. will discuss the recent cases where the Supreme Court Justices referred to international human rights law and recommendations of treaty bodies positively.

I. Cases in Which International Human Rights Treaties Are Treated Negatively

Japanese courts have long been reluctant to deal with international human rights law. In 1998, Iwasawa pointed out the (a) tendency of the courts to ignore arguments based on international human rights law, (b) tendency of the courts to summarily dismiss arguments based on international human rights law, and (c) reluctance of the courts to find violations of international human rights law.[7] Below are symbolic cases that show the Supreme Court's reluctance to deal with international human rights law.

1. Fingerprinting Case

A Japanese American missionary was charged with refusing fingerprinting and argued that the system of fingerprinting stipulated in the Alien Registration Law violated not only the Constitution but also Articles 7 and 26 of the International Covenant on Civil and Political Rights (ICCPR). However, the Supreme Court dismissed the arguments based on ICCPR, stating merely that "Reasons for Appeal, including the reasons alleging a violation of the Constitution are, in substance, mere allegations of violations of laws; they, therefore, constitute no legitimate ground for appeal."[8] Thus, the Supreme Court ignored the arguments based on ICCPR.

2. Shiomi Case

In *Shiomi* case, the Supreme Court discussed the legality of the nationality clause of the National Pension Law. The Court stated that "Article 9 of the Covenant on Economic, Social and Cultural Rights confirms that the right to social security is worthy of protection by the national social policy of the contracting states and declares the political responsibility to actively promote social security policies towards the realization of this right, but it does not stipulate the immediate provision of specific rights to individuals."[9] Many scholars

not directly applicable norms—through subjective and objective criteria with a relative approach. Ibid., pp. 44–81.

7 Ibid., pp. 92-306.

8 The Supreme Court of Japan, Judgment,15 December 1995, 49(10) Keishu 842, p.847.

9 The Supreme Court of Japan, Judgment, 2 March 1989, 741 Hanrei Times 87, p. 90.

interpreted the Supreme Court's rulings as denying the "domestic applicability" of the ICESCR entirely.[10]

3. Sarufutsu Case

In the first instance of the *Sarufutsu* case, which deemed the application of the National Public Service Law prohibiting political activities by public servants unconstitutional, non-legally binding foreign laws and unratified treaties were examined in detail. The Asahikawa District Court mentioned the more lenient restrictions on the political activities of public servants in the United States, United Kingdom, and Germany, as well as trends in relevant legal amendments and changes in precedents within Japan. The district court then referred to an unratified treaty stating, "Article 1(a) of the ILO Convention No. 105 prohibits all forms of forced labor as a sanction against holding or expressing political opinions or views ideologically opposed to the existing political, social, or economic system, and calls on member states not to use such labor, with the government expressing in the Diet that it is considering ratification."[11] Based on the domestic and international context, the court stated, "Considering the extent of regulation of political activities of public servants in modern states, the current situation, and the social changes that have occurred after the implementation of the National Public Service Law and the Personnel Authority Regulation 14-7 as mentioned above, regardless of whether the public servants are engaged in operational activities or not, and irrespective of whether they have discretionary powers or not, it is necessary for this court to proactively examine whether it is rational and constitutionally permissible to impose restrictions on their political activities and to prescribe criminal penalties, not just disciplinary sanctions, for violations."[12] The District Court declared the application of the National Public Service Law against the defendant unconstitutional, citing American case law and ILO conventions.

In response, however, the Supreme Court stated, "Even if there are common elements in the constitutional provisions of various countries, each nation's historical experiences and traditions vary, and there are differences in the citizens' consciousness of rights and sense of freedom. Therefore, the criteria for judging the rationality of restrictions imposed on fundamental human rights cannot be established independently of the social foundation of that country. Foreign legislative examples are an important reference, but it is never the right attitude in constitutional judgment to apply them directly to our country, ignoring these social conditions."[13] The Court rejected references to non-legally binding foreign laws, and international norms were not even mentioned.

10 See *Matsuda*, note 2, p. 198. However, understanding *Shiomi* case as a complete rejection of domestic applicability would be too far because even under the Supreme Court's decision in the *Shiomi* case, the path to utilizing the ICESCR is theoretically possible.

11 Asahikawa District Court, Judgment, 25 March 1968, 28(9) Keishu 676, 682.

12 Ibid., p. 683.

13 The Supreme Court of Japan, Judgment, 6 November 1974, 28(9) Keishu 393, 406-07.

As these symbolic examples show, the Supreme Court has been reluctant to apply international human rights law. Iwasawa analyzed the reasons behind this reluctance as the following:

Japanese courts are reluctant to deal with international human rights law largely because they are unfamiliar with this relatively new branch of law. Japanese judges are inadequately trained in international law, and much less so in international human rights law. The courts' reluctance to find violations of international human rights law, however, is not a phenomenon peculiar to international human rights law. It is merely a reflection of the judicial restraint generally exercised by Japanese courts. Japanese courts are highly restraint in judicial review and generally reluctant to invalidate legislation on constitutional grounds.[14] Japan's unique practice of *implementing-legislation-perfectionism* (完全担保主義 *Kanzen Tampo Shugi*) is one of the reasons why the number of Supreme Court rulings that declare laws unconstitutional is relatively low. Every time the Diet introduces a statute, the Legislation Bureau carefully checks the compatibility and consistency of the bill with the Constitution, existing law, and international obligations.[15] After a careful review, the Legislation Bureau proposes necessary amendments or the implementation of legislation. Thanks to this system, the legislature can usually eliminate unconstitutionality and unconventionality of statutory law in advance. Some even refer to the Legislation Bureau as "the second Supreme Court," as its review is extremely strict and perfectionist in nature.

However, *implementing-legislation-perfectionism* cannot function properly in some field of law, namely international human rights. This is because international obligations can sometimes evolve after ratification. Since *implementing-legislation-perfectionism* is not always perfect, all state organs, including the legislative, executive, and judicial branches, must carefully refer to and respond to the authoritative interpretations of human rights treaty bodies while formulating, interpreting, and applying domestic law to comply with international human rights law.

After 2008, the situation has changed because some Justices started positively citing international human rights law and recommendations by the treaty bodies. The following section will discuss this recent trend.

II. Cases Where International Human Rights Law Played a Positive Role

This section will describe three crucial Supreme Court cases in which Justices cited international human rights law positively.

14 *Iwasawa*, note 4, p. 303.

15 *Matsuda*, note 2, p. 175.

1. Nationality Act Case (2008)

Under the jus sanguinis principle, the Nationality Act did not allow a child born out of wedlock to a Japanese father and a non-Japanese mother to acquire Japanese nationality without legal marriage of the parents. Article 3(1) of the Nationality Act provided that: "A child who has acquired the status of a child born in wedlock as a result of the marriage of the parents and the acknowledgment by either parent may acquire Japanese nationality, if the father or mother who has acknowledged the child was a Japanese citizen at the time of the child's birth, and such father or mother is currently a Japanese citizen."

The Court invalidated a part of Article 3(1) because it violated Article 14(1) (the equality clause) of the Constitution.[16] The Court acknowledged that "the legislative purpose itself has a rational basis" and that "at the time the provision was established, there was a certain rational relationship between the legislative purpose and the social norms and societal conditions." The Court then referred to international human rights treaties, stating:

> *"In various countries, there appears to be a trend towards eliminating legal discriminatory treatment of children born out of wedlock. In the ICCPR and the Convention on the Rights of the Child, which our country has ratified, there are provisions that children should not be subjected to any discrimination based on birth. Considering the changes in the domestic and international social environment surrounding our country, it has become difficult to find a rational relationship between the aforementioned legislative purpose and the requirement for acquiring Japanese nationality through notification after birth."*

There are various views on these Supreme Court's reference to international human rights law in the academic literature. While some scholars praise these cases for referring to the recommendations of the treaty bodies, there are criticisms against the fragility of the decision's logic.[17] Indeed, it was misleading that the majority opinion of the Nationality Act Case cited binding treaties and non-binding materials without clear distinction. The fact that ratified treaties are legally binding needs to be sufficiently considered.[18]

Some scholars only accept the obligation of consistent interpretation of treaties with the Constitution, not vice versa, because the prevailing view maintains that treaties are ranked lower than the Constitution. It is indeed problematic to allow substantial constitutional amendment by using consistent interpretation. However, one can argue that such ranking is not absolute, and that Article 98(2) allows Japanese courts to interpret the Constitution

16 The Supreme Court of Japan, Judgment, 4 June 2008, 62(6) Minshu 1367, ILDC 1814 (JP 2008).

17 For detailed discussion, see *Matsuda*, note 2, p. 207.

18 *See* 初川彬「自由権規約委員会と国内人権機関の関係についての一考察」[*Akira Hatsukawa*, A Study of the Human Rights Committee and National Human Rights Institutions (in Japanese)] Hitotsubashi Hogaku 19 (2), p. 700.

in line with international obligations.[19] The most desirable approach is probably one of restrictive consistent interpretation, whereby a court would use international law as one of the interpretive tools, while considering the balance between other branches.

A good example of desirable consistent interpretation is Justice Izumi's concurring opinion in the Nationality Act Case. Justice Izumi stated: The gist of the provision of Article 3, para.1 of the Nationality Act is to grant Japanese nationality to children who were born to Japanese citizens as their fathers or mothers and are ineligible for application of Article 2 of said Act,[20] and the "marriage of the parents" is merely one of the requirements to be satisfied to achieve this. Therefore, said gist of the provision should be maintained to the greatest possible extent even if the part requiring the "marriage of the parents" is unconstitutional, and this is what the lawmakers would have intended. Furthermore, applying Article 3, para.1 of the Nationality Act in this manner conforms to the gist of Article 24, para.3 of the ICCPR which provides that "Every child has the right to acquire a nationality" and that of Article 7, para. 1 of the Convention on the Rights of the Child (CRC).[21]

While conducting consistent interpretation with treaties, Justice Izumi also carefully paid attention to the relationship between the judiciary and the legislature, by mentioning that this construction "may not be permissible when there is a clear probability that the Diet, from the legislative perspective, will not maintain the provision of said paragraph."[22]

1. The Case of Inheritance Share of Children Born Out of Wedlock (2013)

When judging whether the provision in Article 900(4) of the Civil Code, which sets the inheritance share of "non-legitimate" children to half that of legitimate children, violates Article 14(1) of the Constitution, the court referred to foreign law and international law as follows: "countries other than ours that establish a difference in the inheritance shares between legitimate and non-legitimate children do not exist in Western countries, and globally, it is a limited situation".[23] Following this, the court mentioned international norms:

Our country ratified the International Covenant on Civil and Political Rights (Treaty No. 7 of 1979) and the Convention on the Rights of the Child (Treaty No. 2 of 1994). Both treaties contain provisions that children shall not be subjected to any discrimination based on birth. Moreover, as related organizations of the United Nations, the Human Rights

19 松田浩道「国際法の国内的効力——宮崎・宇賀反対意見のインパクト」(*Hiromichi Matsuda*, Domestic effect of international law. Miyazaki=Uga dissenting opinion) Horitsu Jiho 1169 (2021) p. 79.

20 Art. 2(1) of the then Nationality Act provided that a child was a Japanese citizen if the father or mother was a Japanese citizen at the time of birth.

21 The Supreme Court of Japan, Judgment, 4 June 2008, 62(6) Minshu 1367, (Izumi, J., concurring).

22 Ibid.

23 The Supreme Court of Japan, Decision of the Grand Bench, 4 September 2013, 67(6) Minshu 1320, https://www.courts.go.jp/app/hanrei_en/detail?id=1203 (last accessed on 25 August 2025).

Committee is established under the former treaty, and the Committee on the Rights of the Child under the latter treaty. These committees are empowered to express opinions, make recommendations, etc., regarding the performance of the treaties by the contracting states.

After touching on the concerns by the treaty bodies, the Supreme Court stated, "The various changes related to the rationality of the provision in question, such as those mentioned above, cannot be taken individually as a decisive reason to deem the distinction in statutory inheritance shares irrational". However, "considering the trends in society, the diversification of family in our country and the accompanying changes in public consciousness, the trend in legislation in various countries, the content of the treaties ratified by our country and the remarks from the committees established based on these treaties, changes in the legal system related to the distinction between legitimate and non-legitimate children, and repeated issues raised in our past case law, it is clear that the respect for individuals within the family community has been more clearly recognized". The Supreme Court concluded, "considering all of the above, even taking into account the legislative discretion, the rational basis for distinguishing between the statutory inheritance shares of legitimate and non-legitimate children had been lost."

In the Nationality Act Case (2008) and the Case of Inheritance Share of Children Born Out of Wedlock (2013), the Supreme Court of Japan did not discuss the theoretical basis for its reference to the opinion of treaty bodies. Similar to the criticisms against Atkins v. Virginia[24] and Roper v. Simmons[25] in the United States,[26] many Japanese scholars criticized the decision.[27]

24 536 U.S. 304 (2002).

25 543 U.S. 551 (2005).

26 See, e.g., *Curtis A. Bradley*, The Juvenile Death Penalty and International Law, Duke Law Journal 52 (2002), p. 485 (arguing that juvenile death penalty issue must be resolved through U.S. democratic and constitutional processes); Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) ("The Court's discussion of these foreign views […] is therefore meaningless dicta. Dangerous dicta, however, since 'this Court. . . should not impose foreign moods, fads, or fashions on Americans'.") (quoting Foster v. Florida, 537 U.S. 990, n.990 (2002) (Thomas, J., concurring in denial of certiorari)). See also *Roger P. Alford*, In Search of a Theory for Constitutional Comparativism, UCLA Law Review 52 (2005) p. 712 ("the use of contemporary foreign and international laws and practices to interpret constitutional guarantees is ill-suited under most modern constitutional theories."); *Steven Calabresi / Stephanie Dotson Zimdahl,* The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision, William & Mary Law Review 47 (2005) p. 756 ("in the overwhelming majority of non-Fourth and non-Eighth Amendment cases, it is inappropriate for the Court to cite foreign law."); *Sarah Cleveland*, Our International Constitution, Yale Journal of International Law 125 (2006) ("international law has been a part of U.S. constitutional interpretation from the beginning and a principled resort to international law is fully part of the American tradition").

27 See e.g., 蟻川恒正「婚外子法定相続分最高裁違憲決定を書く(2)」/Tsunemasa Arikawa, Drafting Supreme Court Decision (2), Hogaku Kyoshitsu 400, pp. 132-133 (2014) (emphasizing the distinction between questions facti and question juris).

In the author's opinion, reference to persuasive authority in constitutional interpretation is desirable if the citation is "complete, careful and contextualized."[28] Japanese courts should add more reasoning on the relevance of persuasive authorities and distinguish foreign cases from Japanese ones when necessary. Otherwise, reliance on persuasive authority runs the risk of being ultra vires, because courts do not have the competence to substantially legislate nor amend the Constitution through interpretation.

In 2021, a detailed reasoning for referencing recommendations by treaty bodies appeared in the dissenting opinion by Justices Miyazaki and Uga, which will be discussed in the next section.

2. Surname Case, the Dissenting Opinion by Justices Miyazaki and Uga (2021)

In Japan, married couples need to have the same surnames. Plaintiffs claimed that requirements for the same surname in the Civil Code and the Family Register Act violate Article 14 of the Constitution, which guarantees equality before the law, and Article 24, which states that marriage should be based on "equal rights of husband and wife" and says laws must be enacted from the standpoint of individual dignity.[29]

The majority opinion largely omitted consideration of international law and rejected the constitutional challenge. In contrast, Justices Miyazaki and Uga provided meticulous reasoning based on the insights of international human rights law.[30] The dissenting opinion

28 See *Stephen Yeazell*, When and How U.S. Courts Should Cite Foreign Law, Constitutional Commentary 26, p. 71 (2009) ("'good' citation of foreign law will have the same characteristics as good citation of domestic law; they will be complete, careful, and contextualized.").

29 The Supreme Court of Japan, Decision of the Grand Bench, 23 June 2021, 1488 Hanrei Times 94.

30 An Opinion by Justice Miura also discussed "international trend" in detail: "the Convention on the Elimination of All Forms of Discrimination against Women […] obliges States Parties to eliminate all forms of discrimination against women, including indirect discrimination (Articles 1 and 2) and also obliges States Parties to eliminate discrimination against women in relation to the same right to enter into marriage only with their free and full consent as well as the same personal rights as husband and wife, including the right to choose a family name (Article 16, paragraph (1)(b) and (g)). In general recommendations, the Committee on the Elimination of Discrimination against Women stated that each partner has the right to choose his or her surname and that when by law or custom a woman is obliged to change her surname on marriage, she is denied that right. Furthermore, in the concluding observations on the periodic report of Japan, the same Committee has repeatedly recommended amendment to the provisions of law so that women can continue to use their pre-marriage surnames. As of 1947, many countries had adopted a system in which a husband and wife adopt the same surname. However, after going through the adoption and enforcement, etc. of the Convention on the Elimination of Discrimination against Women, there is no country acceding to the same Convention, except for Japan, that is now adopting a system that obliges a husband and wife to use the same surname. The legal system concerning marriage and the family is established in light of factors such as the social situation and the awareness of citizens of each country. However, in light of the universality of human rights and the purport of Article 98, paragraph (2) of the Constitution, it is also necessary to take into account the situation concerning international rules as mentioned above." 1488 Hanrei Times 104, see https://www.courts.go.jp/app/hanrei_en/detail?id=1824 (last accessed on 25 August 2025).

by Justices Miyazaki and Uga demonstrated that even though certain treaties may not have direct applicability in the sense of granting rights directly to citizens, they do possess the power to bind the organs of the state, including the executive, legislative, and judicial branches. Furthermore, Justices Miyazaki and Uga referred to the recommendations of the Committee on the Elimination of Discrimination against Women as a reason for violating Article 24(2) of the Constitution.

Justices Miyazaki and Uga said, "Based on the fact that Japan received the third formal recommendation requesting a legal amendment concerning the same surname system under the Convention on the Elimination of Discrimination against Women in 2016, it is strongly presumed that the same surname system is beyond the Diet's legislative discretion." The dissenting opinion said, "the legislative body has the obligation to sincerely comply with the Convention by revising and abolishing laws that are in violation of the obligations provided in the same Convention and by avoiding enactment of new laws that are against those obligations, as long as the provisions of the same Convention are stated by a legally binding text." After confirming the legally binding nature of the treaty provisions, the dissenting opinion discussed the concepts of "direct applicability" and "domestic effect":

> *"(C) Incidentally, as these provisions do not grant any right directly to Japanese nationals, the provisions are considered to be unlikely to be directly applied to citizens. However, this does not become a ground for denying that these provisions have a domestic effect. This is because in today's international jurisprudence, the possibility of direct application is not the premise of a domestic effect, and to the contrary, a domestic effect is generally considered as the premise of the possibility of direct application."*[31]

Justices Miyazaki and Uga further argued:

> *"The Diet has not amended Article 750 of the Civil Code for about a long period of 15 years from 2003, in which a problem was first pointed out to Japan regarding*

31 In order to fully understand this paragraph, we need to look back on the academic history on the question of "direct applicability" and "domestic effect" in Japan. The pioneering study on this topic in Japan was 高野雄一『憲法と条約』[*Yuichi Takano*, Constitution and Treaties (in Japanese)] Tokyo 1960. This work focuses on the significance of the involvement of the National Diet in the conclusion of treaties. After comparative legal analysis, Takano argued that Article 98(2) of the Japanese Constitution recognizes the domestic effect of treaties. However, the issue of domestic effect is only relevant to treaties possessing a self-executing nature, meaning that the concept of self-execution was taken as a premise for domestic effect. In response to this, Iwasawa, currently an ICJ Judge, reorganized the concept by making domestic effect a prerequisite for self-execution (direct applicability) in his work "Domestic Applicability of Treaties." *Yuji Iwasawa,* Domestic Application of International Law. Focusing on Direct Applicability, Leiden 2022. This book argued that "direct applicability" is a separate concept from "domestic effect," and "domestic effect" is a prerequisite for "direct applicability." Iwasawa's framework has become a prevailing understanding in Japanese international law studies. The dissenting opinion by Miyazaki and Uga followed this prevailing view and stated that direct applicability is not a prerequisite for domestic effect; rather, domestic effect is a prerequisite for direct applicability.

> *the same surname system by the Committee on the Elimination of Discrimination against Women, until the time when the Disposition was made. In 2016, after the 2015 Grand Bench Judgment, the Committee on the Elimination of Discrimination against Women made the third formal recommendation requiring Japan to perform the relevant obligation (the previous recommendation was made in 2003). These facts are inevitably considered to indicate that a reasonable period of time that is considered necessary to take that measure from a common sense standpoint has passed."*

The most significant point of this dissenting opinion is that the government's lack of counterarguments to the treaty bodies is recognized as one of the reasons for unconstitutionality. While recommendations formally do not have legally binding force, Japan has accepted the review by the treaty bodies and bears the obligation to report on the implementation of the covenant (e.g., Article 40 of the ICCPR; Articles 18 and 21 of the CEDAW). Having accepted the oversight by these treaty bodies through the ratification, it is necessary to appropriately counter the concerns of these bodies with valid reasons or explain why it is impossible to follow the recommendations. If Japanese government holds an interpretation different from the treaty bodies, it must provide particularly persuasive and detailed counterarguments. Failure to appropriately respond to human rights treaty bodies with persuasive reasoning can indicate that domestic law has legal problems. Justices Miyazaki and Uga said, "the Japanese government should be able to make a counterargument that the same surname system is not considered to lack the equality of a husband and wife. However, the Japanese government does not appear to have made such counterargument to the Committee on the Elimination of Discrimination against Women."[32] This fact is recognized as one of the reasons for unconstitutionality.

D. Theoretical Analysis

Professor Hajime Yamamoto interprets the dissenting opinion by Justices Miyazaki and Uga as referring to recommendation by treaty bodies as "influential authority."[33] Yamamoto has been advocating an interesting theory of "transnational human rights legal sources." Inspired especially by Jeremy Waldron's "*jus gentium*"[34] and Mayo Moran's "influential authority"[35], Yamamoto argues:

The legal standards, or sources of law, that domestic courts rely on to resolve human rights issues encompass transnational entities, thereby layering constitutional law with

32 1488 Hanrei Times 115, https://www.courts.go.jp/app/hanrei_en/detail?id=1824 (last accessed on 25 August 2025).

33 Ibid., p. 313.

34 *Jeremy Waldron*, Partly Laws Common to All Mankind. Foreign Law in American Courts, New Haven 2012.

35 *Mayo Moran*, Influential Authority and the Estoppel-Like Effect of International Law, in: George Williams / Hilary Charlesworth (eds.), The Fluid State, Sydney 2005.

international human rights norms and foreign human rights precedents in the domestic legal order. Transnational human rights legal sources are the totality of transnational human rights legal practices relevant to the Constitution of Japan, i.e., the totality of various basic human rights principles and their normative embodiment propositions.[36]

Yamada disagrees with Yamamoto and argues that "the theory of transnational human rights legal sources, while it could serve as a slogan to direct the attention of Japan's domestically inclined courts toward the transnational arena or to foster the nascent global perspective seen in the Supreme Court, currently seems to be merely a discussion that provides the courts with an irresponsible free hand."[37] It was true that both the Nationality Act Case (2008) and the Case of Inheritance Share of Children Born Out of Wedlock (2013) did not discuss a solid theoretical basis for the reference to the recommendation to the treaty bodies.

Justices Miyazaki and Uga's dissenting opinion provided a solid theoretical basis for reference to the recommendation by the treaty bodies, which had been lacking in the previous case law. Based on Justices Miyazaki and Uga's dissenting opinion, it would be essential to make clear that all state organs, including the legislative, executive, and judicial branches, must carefully refer to and respond to the authoritative interpretations of human rights treaty bodies while formulating, interpreting, and applying domestic law to comply with international human rights law.[38]

First, all Japanese state organs, including the legislative, executive, and judicial branches, are obligated to "faithfully observe" international law (Article 98(2) of the Constitution). Within the constitutional system of Japan, international law, regardless of its direct applicability, has domestic effect. Justices Miyazaki and Uga said, "the possibility of direct application is not the premise of a domestic effect, and to the contrary, a domestic effect is generally considered as the premise of the possibility of direct application."[39]

Second, Justices Miyazaki and Uga referred to the universality of human rights and the principle of equality to bridge the dimensional gap between international law and the Constitution. Justices Miyazaki and Uga says: "The equality of a husband and wife and the guarantee of the personal rights of a husband and wife as referred to in Article 16, paragraph (1), (g) of the Convention on the Elimination of Discrimination against Women are considered to have the same effect as the principles of individual dignity and the essential equality of the sexes referred to in Article 24, paragraph (2) of the Constitution.

36 山元一『国境を越える憲法理論＜法のグローバル化＞と立憲主義の変容』）[*Hajime Yamamoto*, Constitutional theory beyond borders. Globalization of law and transformation of constitutionalism (in Japanese)] Tokyo 2023, pp. 257-258, (translated by Matsuda).

37 山田哲史「人権の国際的保障」山本龍彦・横大道聡 編『憲法学の現在地』[*Satoshi Yamada*, International Protection of Human Rights, in: Tatsuhiko Yamamoto & Satoshi Yokodaido (eds)., The current position of constitutional study (in Japanese)] Tokyo 2020, pp. 108-109 (translated by Matsuda).

38 See *Matsuda*, note 19.

39 Ibid.

This idea just means that the Convention (international law) and the Constitution (domestic law) differ in the dimension but that the principles on which they are based are recognized to have mutually common universality."[40] The dissenting opinion, while adhering to the idea of the distinction between international law and constitutional law, positioned the recommendation by the treaty body as one of the reasons for the unconstitutionality. Although some scholars question this approach from the perspective of constitutional identity,[41] the present author considers that Justices Miyazaki and Uga have successfully bridged the dimensional gap between treaties and the Constitution.[42]

E. Conclusion

Although the Supreme Court of Japan has long been reluctant to apply international human rights law as binding law, some Justices recently referred to human rights treaties and recommendations of treaty bodies in a positive manner. In particular, Justices Miyazaki and Uga's dissenting opinion provided an important theoretical bases for reference to the recommendations by the treaty bodies. Within the constitutional system of Japan, international law, regardless of its direct applicability, has domestic effect. While the recommendations are not legally binding, the executive branch is obliged to respond to human rights treaty bodies with detailed reasonings. Failure to appropriately respond to human rights treaty bodies with persuasive reasoning can indicate that domestic law has legal problems, and judiciary should take this fact into account in constitutional review.

In Japan, all state organs, including the legislative, executive, and judicial branches, must carefully refer to and respond to the authoritative interpretations of human rights treaty bodies while formulating, interpreting, and applying domestic law to comply with international human rights law. In future cases, the Supreme Court should conduct a treaty conformity review rather than referring to international human rights law in the constitutional review. In accordance with the process of allocating the competence to implement international norms as stipulated in the Constitution of Japan, the Court has the responsibility to ensure the conventionality of domestic laws. Indeed, as the dissenting

40 Ibid.

41 For example, Professor Yukio Okitsu argues that "referring to treaties to fill the concrete meaning of the Constitution is in tension with the identity of the Constitution." 宍戸常寿ほか「<座談会>グローバル化と憲法のアイデンティティ――行政法学との対話」（*George Shishido,* et al., Roundtable: Globalization and Constitutional Identity. Dialogue with Administrative Law）Ronkyu Jurist 38 (2022), p. 176. See also, *Yamamoto*, note 36, pp. 315-16 ("Recognizing the normative imperativeness of recommendations seems to lead to a normative subjugation to some external 'other', as long as one simplistically regards "democratic legitimacy" as an issue pertaining to the self-governance principle.") (translated by Matsuda).

42 For more details, see 松田浩道「『個人』をめぐる憲法と国際人権法の交錯――宮崎・宇賀反対意見再論」[*Hiromichi Matsuda*, Interaction of constitutional and international human rights law. Revisiting Miyazaki-Uga dissenting opinion (in Japanese)], Yuhikaku Online, 30 April 2025, https://yuhikaku.com/articles/-/27834 (last accessed on 25 August 2025).

opinions of Miyazaki and Uga indicate, there is a way to bridge the treaty with another dimension of constitutional law. However, in future cases, Japanese courts should conduct a conventionality review directly rather than taking such a detour.[43]

43 Ibid.

Dualist Dilemma in International Human Rights Law at the Korean Constitutional Court – A Constitutional Analysis

By *Jeong-In Yun**

Abstract: The effective realization of international human rights law (IHRL) fundamentally depends on its implementation and enforcement within individual states, through legislative, political, and judicial processes. In South Korea, judicial practice has generally been reluctant to treat IHRL as binding law or as a direct source of fundamental rights when adjudicating human rights cases. Although references to IHRL have occasionally appeared, their application has remained limited and inconsistent, notably within the Constitutional Court as well. Existing scholarship largely attributes this judicial passivity to extra-judicial factors, such as individual judges' resistance to, or unfamiliarity with, international law. This article contends, however, that the constraints on judicial application of IHRL in Korea's courts, particularly the Constitutional Court, are rooted in objective, structural, and normative factors from a "constitutionalist approach". Within this framework, South Korean judges face a "dualistic dilemma" in applying IHRL, marked by theoretical, normative, and institutional constraints. Nevertheless, rather than concluding that this dualistic dilemma will inevitably distance Korean courts from active engagement with the IHRL, this article demonstrates how IHRL may also be employed within the Korean constitutional framework.

Keywords: International Human Rights Law; Korean Constitutional Court; Judicial Application; Internationalist Approach; Constitutionalist Approach; Dualist Dilemma

***

A. Introduction

Human rights are universal rights to which all human beings are entitled, regardless of their national, ethnic, regional, and personal attributes. In the early 20th century, the international law regime gained a new territory, international human rights law, which aims to protect the ideal of universal guarantees of human rights. For human rights to be effectively

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guaranteed, they must be supported by the legal order and social, cultural, and political conditions of each country where the individual human beings live.

However, the universality and idealism of international human rights norms often clash with the basic premise of modern international law, which recognizes the relativity of sovereign states. In this regard, as general international law theory and practice developed and put in place new normative concepts (e.g., jus cogens[1]) and modes of operation that diverge from conventional notions, various institutions (e.g., Human Rights Committee and individual communication[2]) have been devised to ensure international human rights norms reach individuals beyond the thresholds of particular states. Nevertheless, each national state's legal and contextual limitations remain obstacles to the full implementation of international human rights law. Thus, it is still a challenging question of how the legitimacy and legality of international human rights law could be secured within the domestic legal order. This article will analyze the Korean experience in this regard.

In the following, section B overviews how the South Korean Constitution incorporates international law into the domestic legal order, and how its effect and the relationship with domestic law can be understood. It thereby explains a constitutional framework that shapes the approach to the domestic implementation of international law in Korea. Against this backdrop, section C offers an in-depth analysis of the conditions affecting the domestic application of international human rights law, particularly its judicial application, within the Korean constitutional and judicial system. This part presents the constraining factors that have engendered the Korean (Constitutional) Court's way of using international human rights law, termed "dualist dilemma", from theoretical, normative, and judicial perspectives. Section D demonstrates the challenges due to the dualist dilemma in applying international human rights law, through some exemplary cases from the Constitutional Court. Based on that, nevertheless, section E explores and suggests alternative ways to address the dualist dilemma within the Korean constitutional framework.

B. International Law in the South Korean Constitutional Order

I. Constitutional Framework

The Constitution of the Republic of Korea (Korean Constitution) identifies the types, status, effect, and relationship of international law to domestic law as follows:

> *"Article 6(1): Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.*

1 See *Robert Kolb*, Peremptory International Law – Jus Cogens: A General Inventory, Oxford 2015.

2 On the UN Human Rights Committee's Individual Communication, see https://www.ohchr.org/en/treaty-bodies/ccpr/individual-communications (last accessed on 30 May 2025).

> *Article 60(1): The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.*
>
> *Article 73: The President shall conclude and ratify treaties; accredit, receive or dispatch diplomatic envoys; and declare war and conclude peace.*
>
> *Article 89: The following matters shall be referred to the State Council for deliberation: ...*
> *3. Draft amendments to the Constitution, proposals for national referendums, proposed treaties, legislative bills, and proposed presidential decrees.*
>
> *Article 5 of Addenda: The laws and treaties in force at the time this Constitution enters into force shall remain valid unless they are contrary to this Constitution."*

Article 6(1) is interpreted as a ground for "the principle of respect for international law", by which Korea intends to respect the international legal order by expressing an active attitude towards the acceptance of international law into domestic law.[3] And also, this provision specifies "treaties duly concluded and promulgated under the Constitution" and "generally recognized rules of international law" as the types of international law recognized within the Korean constitutional order.

The former refers to the bilateral or multilateral treaties that were concluded and ratified via a constitutionally prescribed process by the subject who was endowed with treaty-making power by the Constitution and then entered into force domestically by promulgation. In this, treaties broadly mean written agreements between states or with international bodies, even if it is not titled "Treaty [조약]".[4] For these treaties to have effect domestically, they must be "duly concluded and promulgated under the Constitution." Article 73 of the Constitution vests the power to conclude treaties in the President, Article 89 requires them to be considered by the State Council, and Article 60 requires certain treaties to get consent from the National Assembly before they are concluded and ratified.[5]

3 Since the original drafter of the Korean Constitution of 1948 noted as such, scholarship and practices have drawn the constitutional principle of respect for international law from this provision. For the original drafter's account, see *Chin-O Yu*, Sin-go Hun-beob-hae-ui [New Commentary on the Korean Constitution], Seoul 1957, pp. 53-54.

4 The treaty also includes documents entitled Charter [헌장], Convention [협약], Agreement [협정], Covenant [규약], Statue [규정], Protocol [의정서], Agreement Minute [합의서], Exchange of Notes [각서교환], Memorandum of Understanding [양해각서], and Agency-to-Agency Arrangement [기관간 약정]. *Mun Sik Jeong*, Hun-beob Je-6-jo [Article 6], in: Hun-beob-ju-seog-seo [Commentary on Constitutional Law], Seoul 2010, p. 151.

5 Treaties other than those listed in Article 60(1) do not require the consent of the National Assembly.

Article 60 ensures the exercise of executive power to be democratically controlled by the people's representatives, the National Assembly, on the one hand, and to give the National Assembly a negative legislative role by engaging in the executive branch's law-making related to foreign relations on the other hand.[6] If the National Assembly refuses to give its consent, the treaty cannot be promulgated nor incorporated into domestic law, so it can be said that the consent of the National Assembly is a procedural requirement for the acceptance into domestic law of the treaties listed in Article 60(1).[7]

The latter ("generally recognized rules of international law") refers to norms that are approved by the majority of countries and have universal effects in the international community. They include customary international law, the treaties generally accepted by the international community even though Korea is not a party, and also general principles of law. While most domestic scholars approve that the former, customary international law, falls within this category, there are disagreements as to the extent to which the latter can be included.[8] The Korean courts and the Constitutional Court have identified several customary international laws, such as sovereign immunity,[9] the principle of non-extradition of political offenders,[10] and the territorial principle of forcible execution.[11]

Article 6(1) also stipulates that the aforementioned international laws "have the same effect as the domestic laws", thus providing the basis for international law to have a domestic effect. Nonetheless, the provision does not specify how international law takes effect nor its hierarchical status within the domestic legal order, leaving this to scholarly interpretation. In the case of the general "treaties", most scholars do not recognize the same effect as the Constitution,[12] and the Constitutional Court has explicitly denied the con-

6 See *Seon-Taek Kim*, Hun-beob-sang-ui Oe-gyo-gwon-han Bae-bun-gwa Gu-che-hwa Ib-beob-ui Hun-beob-jeog Han-gye: Jo-yag-che-gyeol-e Iss-eo-seo Ui-hoe Gwan-yeo-gwon-eul Jung-sim-eu-lo [The Constitution's Distribution of Foreign Affairs Power between the Executive and Congress: A Study on the Congress's Approval to the Treaty-Making by the Executive], Constitutional Law 13 (2007), pp. 300-302.

7 *Jong-Bo Park*, Hun-beob Je-6o-jo [Article 60], in: Hun-beob-ju-seog-seo [Commentary on Constitutional Law], Seoul 2010, p. 275.

8 See *Jeong*, note 4, p. 153 and its footnotes 17 to 20. Apart from acknowledging that the general principles of law are a source of international law according to Article 38(1) 3 of the Vienna Convention on Law of Treaties, some scholars disagree that the general principles of law are included in the "generally recognized rules of international law" under Article 6(1) of the Constitution. See *In-Seop Chung*, Sin-gug-je-beob-gang-ui [New Lectures on International Law], Seoul 2025, pp. 133-34.

9 See Constitutional Court of Korea, 2016Hun-Ba388, May 25, 2017; Supreme Court, 97-Da9739216, December 17, 1998.

10 See Supreme Court, 84Do39, May 22, 1984.

11 See Seoul High Court, 2012Na63832, April 18, 2013.

12 There are a few scholars who argue for the supremacy of treaties based on monism. However, it is not widely accepted given that treaties are given domestic effect by the constitution and that giving constitutional effect to international legal rules amounts to making constitutional norms without a constitutional amendment process.

stitutional status of the treaties.[13] So, the normative status and domestic effects of general treaties are construed by interpreting Article 6(1) and Article 60(1) of the Constitution in a combined manner. Most constitutional law scholars interpret[14] that treaties concluded with the consent of the National Assembly have the same force as laws enacted by the National Assembly, and other treaties have the lower force than that; while there are views, mostly from international law scholars, conceiving treaties, regardless of the National Assembly's consent, to have the same effect as domestic laws.[15] In the case of "generally recognized rules of international law", their domestic legal status and effects are determined depending on the nature of each norm, and there are different views in scholarship: Equal to the law, or superior to the law enacted by the National Assembly but lower than the Constitution, or lower than the law depending its contents and nature.[16] For example, some scholars argue that certain jus cogens, as part of generally recognized rules of international law, should be regarded as higher than the domestic laws, or even higher than the domestic constitution,[17] in light of respect for the universally applicable norms in the international community as well as international pacifism.

Then, what does the Korean Constitution and scholarship state about the normative hierarchy and domestic applicability of international *human rights* law? The emergence and development of international human rights law in the twentieth century have brought about significant changes in the relationship between international and domestic law.[18] Due to its special properties and universal tenets, the normative hierarchy of international human rights law has justified special consideration. Some argue that international human rights law has a special dimension that is different from general international treaties, and thus it should be recognized at a constitutional level,[19] or at least a higher status than the

13 Constitutional Court of Korea, 2012Hun-Ma166, November 28, 2013, 25-2 KCCR 559 (stating "Our Constitution presupposes the supremacy of the Constitution over treaties and does not recognize so-called *constitutional treaties* that have the same effect as the Constitution, according to Article 6(1) of the Constitution and Article 5 of the Constitutional Addenda.").

14 See *Jeong*, note 4, pp. 166-167; See e.g., Constitutional Court of Korea, 2000Hun-Ba20, September 27, 2001, 13-2 KCCR 322.

15 There is also a strong view that treaties and domestic laws should be recognized as having equal effect regardless of the National Assembly's approval. Representatively, see *Chung*, note 8, pp. 122-126.

16 For a general overview of scholarly views, see *Chung*, note 8.

17 See *Dae Soon Kim*, Guk-je-beop-ron [On International Law], Seoul 2022, p. 290.

18 *Yoon Jin Shin*, Gug-je-in-gwon-gyu-beom-gwa Hun-beob: Tong-hab-jeog Gwan-gye Gu-seong-eul Wi-han I-lon-jeog Sil-cheon-jeog Go-chal [International Human Rights Norms and the Constitution: Constructing an Integrated Relationship], Seoul Law Journal 61 (2020), pp. 207-209.

19 See e.g., *Myong-Ung Lee*, Gug-je-in-gwon-beob-gwa Hun-beob-jae-pan [International Law of Human Rights and Constitutional Justice], Justice 83 (2005), pp. 184-86; *Zin Wan Park*, Se-gye-hwa, Gug-min-ju-gwon Geu-li-go Hun-beob: Gug-je-beob-ui Hun-beob-hwa [Globalization, Sovereignty of the People and Constitutional Law: Constitutionalization of International Law], Constitutional Law 14 (2008), p. 26.

statutes, i.e., placed between laws enacted by the National Assembly and the Constitution.[20] However, even though the constitutional fundamental rights and international human rights have similarities in content, given that i) there are differences in legal and political authority between the two legal systems,[21] ii) it appears inappropriate to recognize constitutional norms without a domestic constitutional amendment process,[22] and iii) given that Article 5 of the Constitutional Addenda indicates that any treaty is subordinate to the Constitution, the domestic legal effect of international human rights treaties is at least regarded as subordinate to the Constitution. The applicability of international human rights law from a normative standing point will be further discussed in Section C.

II. Ratification Status of Treaties

South Korea has concluded treaties with various international legal entities—including individual or multiple states or international bodies—in various areas. As of December 31, 2024, South Korea had a total of 3570 treaties in force (2820 bilateral and 750 multilateral).[23] The number of treaties has increased over time. For example, while only 102 treaties (66 bilateral and 36 multilateral) entered into force during the period from 1948 to 1960, 823 treaties (687 bilateral and 136 multilateral) entered into force during the period from 2011 to 2024, illustrating the explosive growth of treaties.

The South Korean government has concluded numerous bilateral treaties[24] with specific foreign governments, providing for special cooperation in a range of areas such as economic, social, cultural, and military affairs. As globalization has led to increased trade and activated industrial cooperation between countries, the number of treaties relating to economic issues is increasing, with a noticeable rise in agreements on double taxation, investment protection, and air services. Changes in economic, social, technological, and environmental conditions have given rise to new types of bilateral treaties. As an interesting example, there is a series of framework agreements on climate change cooperation with foreign governments in the context of the United Nations Framework Convention on Climate Change. Multilateral treaties[25] have also tremendously increased in the areas of global matters,

20 See e.g., *Sungjin Yoo*, Hun-beob-jae-pan-e-seo Gug-je-in-gwon-jo-yag-ui Won-yong-ga-neung-seong: Mi-gug, Nam-a-peu-li-ka Gong-hwa-gug, U-li-na-la-ui Sa-lye-leul Jung-sim-eu-lo [Invoking International Human Rights Treaties for Human Rights Cases in the Highest National Courts: South Korean, U.S., and South African cases], Ajou Law Review 7 (2013), pp. 18-28.

21 See also *Jonghyun Park*, Hun-beob-jae-pan-so-ui Gug-je-in-gwon-gyu-beom Hwal-yong-e Dae-han Geom-t0 [A Review of the Constitutional Court's Use of International Human Rights Norm], Constitutional Law 28 (2022), p. 110.

22 *Jongik Chon*, Hun-beob-jae-pan-so-ui Gug-je-in-gwon-jo-yag Jeog-yong [Application of the Constitutional Court's International Human Rights Treaty], Justice 170-2 (2019), p. 513.

23 For treaties concluded by the Republic of Korea as of December 31, 2024, see Ministry of Foreign Affairs, https://www.mofa.go.kr/eng/wpge/m_28574/contents.do (last accessed on 9 June 2025).

24 Ibid.

25 Ibid.

such as international trade, human rights protection, and combating transnational crime. International human rights treaties are among the most distinctive types of multilateral treaties. However, To date, South Korea has signed 29 multilateral treaties related to human rights, the international human rights treaties.[26] Of the nine core international human rights treaties, the South Korean Government acceded to and ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC), Convention on the Rights of Persons with Disabilities (CRPD), and International Convention for the Protection of All Persons from Enforced Disappearance (CED), while leaving the International Convention on the Rights of Migrant Workers and Their Families (CMW) unsigned. All eight ratified treaties, except for the CRC, have received the National Assembly's consent to ratification. With respect to Optional Protocols to the eight ratified treaties, however, several remain unsigned,[27] including the Optional Protocol to the CAT, the Third Optional Protocol to the CRC, the Optional Protocol to the ICESCR, and the Second Optional Protocol to the ICCPR.

C. Judicial Application of International Human Rights Law

The implementation of the international human rights law (IHRL), as a subfield of international law, could ultimately be ensured through domestic implementation and compliance. While national governments' efforts, including legislation and related actions in line with the IHRL, will be of primary importance for domestic implementation, a key and immediate effect may be brought by an active application of human rights treaties by the domestic courts. South Korean courts increasingly engage in citing international human rights treaties; however, in particular, when focusing on the Constitutional Court, which specifically handles various human rights cases, it appears slightly different. Despite increasing citation of IHRL in cases, the point is that the Constitutional Court appears not to be active in recognizing the IHRL's legally binding nature. Much existing literature and analysis have attributed such practice to personal reasons of judges and lawyers, such as apathy, lack of knowledge, and workload in utilizing external legal resources. However, I

26 First on the list is the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on December 9, 1948, and entered into force on January 12, 1951, and the most recent one is the International Convention for the Protection of All Persons from Enforced Disappearance, adopted on December 20, 2006, and entered into force on February 3, 2023.

27 For the list of international human rights conventions to which South Korea acceded, see Ministry of Foreign Affairs, https://www.mofa.go.kr/www/wpge/m_3996/contents.do (in Korean) (last accessed on 9 June 2025).

suggest that there are more fundamental reasons behind this, namely, theoretical, normative, and judicial structural constraints.

I. Theoretical Standpoints

1. Monism or Dualism

International and national legal scholars now generally agree that the traditional monist–dualist dichotomy of the relationship between international and domestic law is of little theoretical and practical significance. It is also widely acknowledged that developments in international human rights law have blurred the boundaries between the two normative regimes. In practice, most states, regardless of their constitutional designs and contexts, are assumed to be placed somewhere between monist and dualist positions.[28] However, the conceptual framework of monism and dualism still seems to work as a firm standpoint underlying the actual practice of international law in the domestic order of a given country.[29]

Article 6(1) of the Korean Constitution provides that international law "shall have the same effect as the domestic laws," but it does not specify the way how international law comes into effect or which normative status it holds domestically. For example, compared to the U.S. Constitution's Article 6(2) which provides that treaties are "the supreme Law of the Land"[30] and Article 55 of the French Fifth Republic's Constitution which provides that treaties are superior to Acts of Parliament,[31] or the German Basic Law's Article 25, which provides that general principles of international law are a part of and prevail over federal laws, [32] the text of the Korean Constitution leaves more room for interpretation regarding the normative nature and hierarchy of international law.

28 For such observation, see e.g., *Felix Lange*, Treaties in Parliaments and Courts: The Two Other Voices, Cheltenham 2024, pp. 188-193.

29 See *Madelaine Chiam*, Monism and Dualism in International Law, Oxford Bibliographies, 27 June 2018, https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml (last accessed on 9 June 2025), doi: 10.1093/obo/9780199796953-0168; *Eileen Denza*, The Relationship between International and National Law, in: Malcolm Evans (ed.), International Law, Oxford 2006, pp. 412-440.

30 Article VI, para 2 of the U.S. Constitution "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

31 Article 55 of the French Constitution of 1958 "Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie."

32 Article 25 of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law) "Die allgemeinen Regeln des Völkerrechtes sind Bestandteil des Bundesrechtes. Sie gehen den Gesetzen vor und erzeugen Rechte und Pflichten unmittelbar für die Bewohner des Bundesgebietes."

The same is true for the incorporation mechanism. Due to the ambiguous text, scholars have differed in their interpretation of whether the Korean Constitution is basically designed as a monist or dualist system. From reading the constitutional text, it appears that international law can be directly applied without additional legislation, and monist interpretation could be taken as has been by most international law scholars.[33] According to international legal scholarship, the supremacy of international law over domestic law seems ato be a given, even if it cannot be enforced domestically. Conversely, most constitutional law scholars[34] posit that the Korean Constitution is based on dualism, which presupposes two separate legal orders and legal authority. They discuss the domestic application of international law from an angle of legal and political legitimacy and interaction between national actors.[35]

Such epistemic differences stem not only from their respective disciplines' views on the legal system but also from theories and practices from foreign jurisprudence that have greatly impacted each discipline. For example, while international legal scholarship mostly refers to literature from the Anglo-American jurisprudence and focuses on the enforceability of international law in and out of individual states, constitutional legal scholarship based on civil law tradition—as is in the case of South Korea—addresses the effect of international laws through the lens of legitimacy and hierarchy of national legal order with the Constitution as a supreme legal authority.

2. Internationalist or Constitutionalist Approaches

Monist and dualist understandings of the relationship between international and domestic law thus explain approaches to, and even treatment of, international human rights law.

One approach, which I would term the "internationalist approach", rejects the strict distinction between international and domestic legal order, taking it for granted that once international law is formed by international actors through appropriate procedures, it should be effectively implemented within their respective national territories. Since individual states, as actors in the international community, are bound to compliance by signing or acceding to international treaties, this approach is interested in ensuring domestic implementation of international law to the greatest extent. This perspective interprets Article 6(1) of the Korean Constitution ("shall have the same effect as domestic law") as a direct incorporation of international law as part of domestic laws and an expression of a monist view of the Korean Constitution; and they relatively do not put much emphasis on the

33 See e.g., *Chung*, note 8; *Kim*, note 17; *Shin*, note 18.

34 See e.g., *Nak-In Sung*, Hun-beob-hag [Constitutional Study], Seoul 2022; *Seon-Taek Kim*, Hun-beob-sa-lye-yeon-seub [Case Studies of Constitutional Law], Seoul 2004.

35 On the ways of domestic implementation of international laws, such as the doctrines of transformation, incorporation or adoption, and execution, see e.g., *Kim*, note 17, pp. 269-78; *Joo-Yun Lee*, Dog-il Gug-nae-beob-sang Gug-je-beob-ui Ji-wi [The Status of International Law in German Domestic Law], Law Review 27 (2007), pp. 434-39.

hierarchical status of individual international legal norms in the national legal system. In the context of international human rights law, the internationalist approach rather pays much attention to and values the secondary rules, especially the enforcement mechanisms that the international human rights system has developed.[36]

The other approach, which I would term the "constitutionalist approach", sees a clear distinction between the international and the domestic legal order. International law cannot automatically have a domestic effect and be enforced, so it is the national constitution that should legitimize international law to have a domestic effect. From this perspective, therefore, it is important how the constitution envisages international law and how the international law could be implemented according to its normative status within the domestic legal order. In addition, as this perspective pays much attention not only to the legislative and judicial implementation of international law but also to the domestic mechanism of resolving normative conflicts and judicial reviewability, it is concerned not only with the content or nature of the international legal instrument itself, but also with the status and effect given to it through the process by which it was concluded and ratified. This theoretical and conceptual perspective largely corresponds to the approach to dealing with IHRL in Korean courts.

II. Normative Nature

The difficulty of domestic implementation of international human rights law, especially human rights treaties, might be explained by two aspects: One due to its nature as a subfield of international treaties and the other due to its nature as a human rights norm.

1. IHRL as International Treaties

The primary obligated parties to international law are the states. In an international community governed by the principle of respect for sovereignty, it is left to individual states to decide whether or not to accede to a treaty, to reserve certain provisions, and to perform their specific obligations domestically. There is no single authoritative supra-national body to enforce national compliance.[37] Moreover, there are some mechanisms in place to bypass the comprehensive implementation of the treaties.

One might be the use of reservations in treaties. Reservations are a unique mechanism of multilateral treaties that allow state parties to declare reservations to some provisions of

36 *Monica Hakimi*, Secondary Human Rights Law, Yale Journal of International Law 34 (2009), p. 601.

37 The international society has the International Court of Justice (ICJ) under the United Nations as a judicial body for resolving international disputes. If a state party fails to fulfil its obligations under a judgment, the other state party can file a complaint with the UN Security Council, and if the Security Council deems it necessary, it can issue an advisory opinion or decide on certain measures to enforce the judgment. However, advisory opinions are not legally binding, and enforcement measures are limited.

the treaty to exclude their application. It was devised to facilitate the establishment of a treaty regime by attracting a large number of states to participate in the treaty. However, in the case of human rights treaties, there is debate about whether reservations should be allowed, or at least limited. Based on the universality of human rights, international human rights instruments aspire to ensure the same level of human rights guarantees regardless of region, race, religion, politics, etc. However, given contextual diversities in each country, states are allowed to ratify the IHRL with reservations on provisions that conflict with their domestic laws. This is an effective and flexible way to expand the applicability of the international human rights norms to as many states as possible, but in practice, there are many states that have reservations to even core covenants and treaties. Even though reservations cannot be declared against the essence or purpose of treaties, it may excuse states for their avoidance of the core contents of the IHRL and, therefore, may undermine the notion of universality of human rights.

South Korea has made reservations to several provisions of the major human rights treaties, for example, the ICCPR, which it acceded to in 1990 with four reservations, and currently has one remaining.[38] The withdrawal of reservations to three provisions of the ICCPR is considered significant progress, and such domestic efforts could be evaluated as forward movements toward universal human rights protection in South Korea. In general, however, reservations could make it harder for domestic authorities to secure their obligation to implement the treaties as a whole. In other words, the presence of such a reservation could be understood to be an explicit expression of the government's intention to exclude the domestic application of the provision in question. Therefore, when the upholding of the relevant fundamental right is at issue in domestic courts, the reservations would likely have a negative impact on, or at least not favorably affect, the court's positive arguments.[39]

38 Initially, the South Korean government declared four reservations to Article 14, paras 5 and 7, Article 22, and Article 23. While three reservations have been withdrawn afterwards, which could be considered significant progress, Article 22 on freedom of association has not yet been withdrawn.

39 The fact that South Korea acceded to the ICCPR in 1990 with a reservation to Article 22, guaranteeing freedom of association, appears to have contributed to the delay in ratifying ILO Convention 87 (concerning Freedom of Association and Protection of the Right to Organize) and ILO Convention 98 (concerning the Right to Organize and Collective Bargaining), both of which guarantee freedom of association for workers. Although South Korea finally deposited its instruments of ratification for these ILO Conventions in 2021, it has not yet withdrawn its reservation to Article 22 of the ICCPR. The UN's ICCPR Committee has recommended the Korean government withdraw its reservation to Article 22, noting restrictions on the freedom of association of public employees and teachers and recommending that their right to organize be guaranteed.

See *Hyeyoung Lee*, Ja-yu-gwon-eu-lo-seo Gyeol-sa-ui Ja-yu-e Gwan-han Gug-je-beob-jeog Ui-mu-wa Han-gug-ui Sil-haeng: Ja-yu-gwon-gyu-yag Je-22-jo-e Dae-han Yu-bo Cheol-hoe-leul Chog-gu-ha-myeo [International Legal Obligations and South Korean Practice Regarding Freedom of Association as Liberal Rights: Calling for Withdrawal of Reservation to Article 22 of the ICCPR], Inha Law Review 25 (2022), p. 65.

2. IHRL as Human Rights Norm

The nature of international human rights law may make its direct application in domestic courts complicated.

First, while general international treaties are based on a transactional relationship between states to pursue exchangeable benefits, human rights treaties are based on a collaborative relationship, not a transactional one, with the common purpose of ensuring human rights of universal value.[40] While the former is more like a contract, meaning that if a party violates its treaty obligations, other party can enforce compliance by applying pressure or terminating the treaty; a human rights treaty is more like a common pledge by a group of states to realize the common value of human rights, and no state can terminate the treaty or take enforcement action against a state for failing to comply with its obligations. The UN's human rights monitoring system just examines human rights conditions around the world, by receiving periodic country reports and, for core international human rights treaties, using committees of independent experts to encourage implementation and make recommendations for legal and institutional improvements. In other words, the domestic implementation of IHLR cannot be enforced by coercive or punitive means but depends on the willingness of the state party to implement it.

Second, one of the most important reasons is that, as a norm guaranteeing human rights, international human rights law contains guarantees of universal fundamental values and can be considered as having a higher effect than general international treaties. Therefore, some scholars argue that international human rights treaties should be regarded as having supremacy over any domestic laws[41] or treated as having constitutional status.[42] The benefit of recognizing the supra-legal or quasi-constitutional status of human rights treaties is that domestic courts can apply them as a *standard* of review. However, applying international human rights law as a binding norm at the Constitutional Court to review domestic laws and state action, and thus invalidate them, can be awkward under a constitutionalist approach. Without an explicit constitutional basis for recognizing human rights treaties as constitutional norms, it is hardly acceptable for Korean judges whose capacity is limited to interpreting of law, not importing law outside the domestic legal order.

Lastly, the Constitution's enumeration of fundamental rights might have rendered IHRL invisible in domestic courts, especially at the Constitutional Court. The contents of IHRL and the list of fundamental rights of the national constitution often overlap. Never-

40 For a comparison between the two kinds of treaties, see *Shin*, note 18, p. 211.

41 See e.g., *Keun Gwan Lee*, Gug-je-in-gwon-gyu-yag-sang-ui Gae-in-tong-bo-je-do-wa Han-gug-ui Sil-haeng [Individual Communication Procedure under International Covenant on Political and Civil Rights and the Korean Practice], International Human Rights Law 2 (2000), p. 35; *Chan Un Park*, Gug-je-in-gwon-jo-yag-ui Gug-nae-jeog Hyo-lyeog-gwa Geu Jeog-yong-eul Dul-leo-ssan Myeoch Ga-ji Go-chal [Study on Domestic Effect and Application of International Human Rights Treaties], Lawyers Association 56 (2007), p. 141.

42 See e.g., *Lee*, note 19; *Park*, note 19.

theless, the direct application of IHRL in domestic courts might be useful if it is used as a basis for deriving specific fundamental rights that were not included in the constitutional text, or if it sets a better standard of human rights protection than domestic law and policy. However, the Korean Constitution provides grounds for guaranteeing freedoms and rights that are not enumerated. Article 10 of the Korean Constitution provides for the right to the pursuit of happiness, and Article 37(1) requires respect for unenumerated freedoms and rights, which provides a basis for constitutional interpretation to recognize new kinds of fundamental rights that are not specified in the Constitution. Moreover, the content of fundamental rights is not determined but is embodied through interpretation, which can be done within the scope of legal argumentation by judges who largely rely on positive domestic law. Thus, rather than feeling a burden by recourse to IHRL, the domestic judges seem to prefer active interpretation of the scope of the fundamental rights guaranteed by the Korean Constitution, instead of importing international human rights law.

III. Judicial Context

1. Jurisdictional Challenge

Direct judicial application is one of the most effective means to implement international human rights norms domestically.[43] It means that a domestic court recognizes rights or obligations derived from international human rights law and directly cites it as a binding standard to rule the cases. So, for international human rights law to be cited by domestic courts, its normative status must correspond to each court's jurisdiction. South Korean courts are composed of ordinary courts, with the Supreme Court as the highest court, on the one hand, and the Constitutional Court, which is exclusively responsible for constitutional matters, on the other.

Most commentators view international human rights treaties as having the status of law enacted by the National Assembly, which means they can be applied as ruling norms in ordinary courts dealing with civil, criminal, family, administrative, and other cases. According to a recent study that examined court applications of seven core international human rights treaties from 1992 to 2019 in Korea,[44] the number of decisions invoking international human rights treaties is increasing year on year, and the types of treaties cited, the types of rights at issue, and the types of cases and issues are becoming diverse. However, out of a total of 3,186 decisions from the first instance to the Supreme Court in which international human rights treaties were mentioned, there were only 120 cases

43 See also *Rosalyn Higgins*, Problems and Process: International Law and How We Use It, Oxford 1995, p. 205.

44 *Hyeyoung Lee*, Beob-won-ui Gug-je-in-gwon-jo-yag Jeog-yong: Pan-gyeol-mun Jeon-su-jo-sa-leul Tong-han Hyeon-hwang Jin-dan Mit Jeog-yong-dan-gye-byeol Non-jeung Bun-seog [Applying International Human Rights Treaties by Korean Courts: Normative Status and Interpretive Challenges], Korean Journal of International Law 65 (2020), p. 205.

in which the court accepted the claims based on international human rights treaties, while 3,051 cases (95.76%) did not.[45] Notably, the overwhelming majority of the court's cases were conscientious objection cases, citing the ICCPR, 3,000 cases (97.87%) of which did not accept claims based on the ICCPR. This demonstrates that courts do not take human rights treaties seriously as a legally binding source.[46] They are used just as a reference for interpreting domestic law[47] or used symbolically and decoratively in interpreting and applying domestic law to reach certain conclusions.[48]

Interestingly, the Constitutional Court, which is supposed to be the guarantor of fundamental rights, is not much different from the ordinary courts in terms of passive use of international human rights law. In practice, the Constitutional Court has held that general treaties ratified by the National Assembly, whose effects are considered to be the same as those of a law, are *subject* to judicial review.[49] Moreover, There is no case law that recognizes the status and effect of international treaties as above the laws enacted by the National Assembly. That means, in constitutional adjudications, general treaties cannot be used as a *standard* of judicial review that would render the domestic laws or governmental actions unconstitutional. If so, do human rights treaties make any difference? As discussed above, while some scholars urge that human rights treaties, distinctive from general treaties, should have a constitutional effect above any other domestic laws, most scholars[50] and practice have denied it. Meanwhile, some argued that the Constitutional Court has placed international human rights treaties on a normatively different footing from general treaties and seemed to have made them the standard of judicial review practically.[51] However, from a close reading of most judgments, the Court often found that the human rights treaty invoked by the claimant was not violated, without any argument,[52] or denied the normative status of certain human rights instruments[53] as generally recognized rules of international law.[54] In a study that thoroughly examined the use of international human rights norms

45 Ibid., p. 217.

46 Ibid., pp. 219-20.

47 *Chug*, note 8.

48 *Lee*, note 44, p. 241.

49 Constitutional Court of Korea, Practical Overview of Constitutional Adjudication, Seoul 2023, p. 153.

50 See e.g., *Sung*, note 34; *Kim*, note 34; *Kyung-Soo Jung*, Gug-je-in-gwon-beob-ui Gug-nae Jeog-yong-e Gwan-han Bi-pan-jeog Bun-seog [Critical Analysis of the Domestic Application of International Human Rights Law], Constitutional Law 8 (2002); *Park*, note 35.

51 See *Shin*, note 18, pp. 219-20.

52 See e.g., Constitutional Court of Korea, 98Hun-Ma4, October 29, 1998, 10-2 KCCR 637.

53 Mostly in the case of the Abolition of Forced Labour Convention, 1957 (No. 105).

54 See e.g., Constitutional Court of Korea, 97Hun-Ba23, July 16, 1998, 10-2 KCCR 243.

by the Korean Constitutional Court from 1988 to 2015,[55] the finding was that the Korean Constitutional Court did not directly apply international human rights law as a constitutional standard of judicial review that presupposes the recognition of constitutional effect or status, but rather used it indirectly as a strengthening argument or persuasive tool to support the judgments in constitutional interpretation.[56] For example, the Court has used the ICCPR in the conscientious objection case[57] and the CEDAW in the civil-service exam case[58] as reinforcing arguments for the unconstitutionality of the statutes in question, and it has held that the ICESCR should be just considered in constitutional interpretation while explaining the general principle of equality.[59] In other words, the Constitutional Court acknowledged that international human rights norms should be an important universal guideline for the protection of fundamental rights, but it was hesitant to use them as a standard of judicial review because it requires acceptance of international human rights norms as part of the constitutional norm or their constitutional effect.

In addition, in dealing with applicable laws, given that judicial training is deeply rooted in domestic positivist legal traditions, judges are likely to be reluctant to recognize international legal norms as equivalent to domestic legislation. Inherently, the civil law tradition and legal culture in South Korea expect judges to apply the law rather than to discover or create it. Hence, judges who mostly take a constitutionalist approach to international legal sources tend to be cautious and reluctant to establish new constitutional norms with their own authority. This tendency—different from simple unfamiliarity or lack of knowledge—helps explain why judges tended to avoid directly applying international human rights law as a standard for judicial review.

2. Absence of Institutional Incentives and Pressures

Another factor that might discourage Korean ordinary courts and the Constitutional Court from engaging in human rights treaties could be related to a lack of external pressure or institutional interests. In South Korea, the Supreme Court and the Constitutional Court are the final judicial authorities in all cases.[60] However, what if South Korea were part of a regional human rights protection system, similar to European countries in relation to the European Court of Human Rights? Imagine that a party that fails to obtain redress through the Supreme Court or Constitutional Court can appeal to a higher regional human rights

55 See *Yoomin Won*, The Role of International Human Rights Law in South Korean Constitutional Court Practice: An Empirical Study of Decisions from 1988 to 2015, International Journal of Constitutional Law 16 (2018), p. 596.

56 Ibid., p. 622.

57 Constitutional Court of Korea, 89Hun-Ma160, April 1, 1991, 3 KCCR 149, p. 154.

58 Constitutional Court of Korea, 98Hun-Ma363, December 23, 1999, 11-2 KCCR 770, p. 790.

59 Constitutional Court of Korea, 2004Hun-Ma670, August 30, 2007, 19-2 KCCR 297, p. 313.

60 The Supreme Court's ruling has the final say in any cases other than those falling into the Constitutional Court's jurisdiction.

court. What if a regional human rights court reaches a contrasting conclusion based on international or regional human rights treaties, and subsequently overturns the domestic court's decision and issues a direct enforcement order against the domestic court's decision? Then, the domestic court could not help but be conscious of the possibility that its judgment could be overturned by the higher regional human rights court. In contrast, the European Court of Human Rights can issue judgments based on the European Convention on Human Rights in cases of human rights violations brought by citizens of the member states and order the member states to enforce them. Thus, Europe has formed a so-called "Gerichtsverbund" consisting of national constitutional courts, the European Court of Human Rights, and the Court of Justice of the European Union, completing Europe's unique regional system of human rights protection.[61] So, it might be possible to assume that, if there were a kind of regional human rights court or so, the Korean Constitutional Court could have been better incentivized to develop a practice of actively citing and developing thorough arguments based on or drawn from international human rights treaties, regardless of the outcome of the case. If then, the individual party would be less tempted to file a case with the regional human rights court again, and the regional human rights court would not easily overturn the original case. However, since neither such external incentives nor pressure currently exists for South Korea's two top courts, they may lack motivation to actively utilize international human rights law.

IV. Dualist Dilemma in Judicial Application of IHRL

Over the past two decades, a large body of domestic literature has recognized and criticized the passive pattern of judicial application of international human rights law in Korea. Most studies have criticized judges for their lack of knowledge of and distance from international human rights law, and, therefore, it is often suggested that courts should have a more systematic method in place to utilize international law in their arguments.[62] This article, however, seeks to uncover objective and structural reasons why Korean courts have not been able to actively use international human rights law as a legally binding norm. The factors discussed so far illustrate the theoretical, normative, and judicial constraints that have influenced Korean courts in applying international human rights law. To recapitulate:

First, from the theoretical standpoint, the direct application of international law to a given case, which means that judges draw their norms of judgment from a legal system outside of the domestic legal order, would be perceived as exceeding the scope of their authority by domestic judges with a dualist understanding of the international legal order.

Next, international human rights norms, particularly human rights treaties, have some features that constrain their use at the domestic courts. As a kind of international law, there

61 In addition, as for the European network for human rights protection, see United Nations, Human Rights in Europe, https://europe.ohchr.org/human-rights/what-are-human-rights/human-rights-europe (last accessed on 30 May 2025).

62 See e.g., *Park*, note 43; *Lee*, note 19; *Shin*, note 18.

is no mechanism or authority to compel its application domestically, and some devices from treaty law help it be reserved in practice. In addition, as a human rights norm in content, it should complement the constitutional guarantees of fundamental rights. But it would be highly embarrassing under a constitutionalist approach to derive norms of constitutional status from international (human rights) law and to quash laws of national legitimacy with them.

Lastly, practically, for international human rights law to be applied in domestic law, the normative hierarchy needs to be appropriate to the case. However, domestic judges with a dualist view face a conflict between the resistance to granting constitutional effect to international human rights law and the task of better ensuring human rights. Moreover, the South Korean court system lacks external incentives to encourage or compel it to actively engage in international legal sources.

Those above factors are intertwined by a common premise: a dualistic understanding of international law. It makes its active and direct application challenging while recognizing the importance of international human rights law. If one could call it a "dualist dilemma", I will demonstrate how this concept has actually appeared in critical human rights cases, specifically at the Korean Constitutional Court.

D. Constitutional Court Cases Featuring Dualist Dilemma

I. Conscientious Objection Case

1. Background and Judgments

The issue of conscientious objection has been highlighted as a prominent example of the gap between international human rights norms and domestic reality in South Korea, which runs a mandatory military conscription. For decades, the Military Service Act has criminalized those who refuse to be conscripted "without just cause." Although Article 19 of the Korean Constitution guarantees freedom of conscience, the refusal to be conscripted for religious, ethical, political, or philosophical reasons was treated as "without just cause". Since the 2000s, the Constitutional Court has addressed the constitutionality of provisions of the Military Service Act multiple times and, ultimately, in a 2018 decision, it upheld the unconstitutionality of the military service system's failure to recognize conscientious objection. As a result, the alternative service to the military system was introduced. However, it seems still useful to examine how the Korean Constitutional Court has applied international human rights law through conscientious objection cases since they featured some interesting patterns.

In 2002, the first case concerning conscientious objection was filed to the Constitutional Court, challenging the constitutionality of Article 88(1) of the Military Service Act, and the Constitutional Court ruled down in 2004.[63] (hereinafter Case 2004a) In this case,

63 Constitutional Court, 2002Hun-Ka1, August 26, 2004, 16-2 KCCR 141.

the Seoul district court requested the Constitutional Court to review the Military Service Act by referring to Article 19 of the Constitution[64] as well as the recommendations of the UN Human Rights Committee to recognize the right to conscientious objection, referring comparative examples from Germany and the United States which recognized the right to conscientious objection.[65] The majority opinion of the Constitutional Court concluded that the provision in question was constitutional, reasoning that the right to claim alternative service could not be inferred from the freedom of conscience guaranteed by Article 19 of the Korean Constitution, and that the right to conscientious objection could only be recognized if it were explicitly provided for in the Constitution. The Court noted, however, the repeated resolutions of the United Nations and the European Union, as well as global trends recommending that legislators consider appropriate measures regarding conscientious objection.[66] However, the dissenting opinion by two judges emphasized that the right to conscientious objection should be recognized in keeping with Article 18 of the ICCPR and the UN Human Rights Committee's General Comment No. 22 on freedom of thought, conscience, and religion[67] and repeated Resolutions of the Human Rights Commission,[68] given that the Korean government had acceded to ICCPR without reservation to Article 18.[69]

Two months apart in 2004, another decision on the constitutionality of Article 88(1) of the Military Service Act was delivered,[70] but the Constitutional Court, albeit the same bench as before, did not refer to international human rights law at all. (hereinafter Case 2004b) Even two judges involved in a previous dissenting opinion did not engage in international law references, while emphasizing the legislator's obligation to uphold constitutional values and the need for an alternative service system.[71]

A decade later, in 2011, the Constitutional Court first considered the International Covenant as a standard of review in the majority opinion (hereinafter Case 2011a).[72] In the section entitled "Violation of International Covenants and Article 6(1) of the Constitution", the Court confirmed that if the right to conscientious objection is recognized by international treaties or generally accepted international legal instruments, it is legally binding. It noted that the UN Human Rights Committee, the UN Commission on Human Rights, and the ICCPR have explicitly affirmed the right to conscientious objection under

64 It provides "All citizens shall enjoy freedom of conscience."

65 See note 63, p. 148.

66 See note 63, p. 161.

67 UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), CCPR/C/21/Rev. 1/Add. 4, 30 July 1993.

68 See e.g., Resolution No. 46 in 1987, Resolution No. 84 in 1993 and Resolution No. 77 in 1998.

69 See note 63, p. 171.

70 Constitutional Court, 2004Hun-Ba61 et al., October 28, 2004.

71 Ibid.

72 Constitutional Court, 2008Hun-Ka22 et al., August 30, 2011, 23-2A KCCR 174.

Article 18 of the Covenant. However, the Court pointed out that the "right of conscientious objection" was nowhere identified as a fundamental human right in the ICCPR, and that the interpretations by the UN Human Rights Committee and UN Commission on Human Rights, clarifying the exercise of the right of conscientious objection could justified by Article 18 of ICCPR, lacked binding legal force.[73] In addition, in the following section "Generally Recognized Rules of International Law and Conscientious Objection," the Court stated that if the right to conscientious objection was recognized in international treaties to which Korea was not a party or customary international law, it could be used as a basis for conscientious objection as a "generally recognized rules of international law" as per Article 6(1) of the Korean Constitution. However, the Court denied conscientious objection as a generally recognized rule of international law, stating that there was neither an international human rights treaty that codified the right to conscientious objection, nor had customary international law been made on its protection.[74]

Interestingly, on the same day in another case reviewing the provision of the law criminalizing conscientious objectors against military training,[75] the Court provided a new standard for deploying international human rights law (hereinafter Case 2011b). The Court denied the right of conscientious objection as per ICCPR and the binding effect of international bodies' interpretations, likewise in Case 2011a; instead, it held that the provision at issue did not violate Article 6(1) of the Constitution and therefore was constitutional.[76] Notwithstanding the result, this judgment is noteworthy in that its standard of review was not the International Covenant, but rather Article 6(1) of the Constitution, which requires respect for international law.

Whilst maintaining such an inconsistent approach to the international human rights law regarding conscientious objection, the Constitutional Court finally declared in 2018 that the provision not providing an alternative service in the Military Service Act would not conform to the Constitution[77] as it excessively infringed on the freedom of conscience of the claimants (hereinafter Case 2018).[78] Unlike previous Case 2011b, the Court did not review whether Article 6 of the Constitution was violated; instead, through a strict proportionality test balancing the public interest of national security and the equitable burden of military service on the one side, and the significant disadvantages, including criminal penalties, faced by conscientious objectors on the other side, it drew on the

73 See note 72, pp. 196-97.

74 See note 72, pp. 197-98.

75 Constitutional Court, 2007Hun-Ka12 et al., August 30, 2011, 23-2A KCCR 132.

76 See note 80, pp. 156-57.

77 The decision of *non-conformity to the Constitution* implies that the provision in question is decided to be unconstitutional. Whereas the decision of *simple unconstitutionality* immediately invalidates the unconstitutional provision, this sentencing is used to avoid a legislative vacuum by maintaining the effect of the provision for a certain period and ordering legislators to reform it until then.

78 Constitutional Court of Korea, 2011Hun-Ba379 et al., June 28, 2018, 30-1B KCCR 370.

judgment. However, in section entitled "Conscientious Objection in Light of International Human Rights Norms", it listed in detail the development of international instruments and the ICCPR that guarantee the right to conscientious objection, emphasizing that Korea is a party to the ICCPR— resonating with the unconstitutionality opinion in Case 2004a—and pointing to the Charter of Fundamental Rights of the European Union as well as the jurisprudence of the European Court of Human Rights as a global trend.[79] This decision invalidated the provision in question, forcing the legislator to amend the law. In response, in 2019, the National Assembly eventually enacted a law for adopting alternative services.[80]

2. Analysis

The Korean Constitutional Court has shown some features in recognizing and applying the ICCPR in conscientious objection cases.

First, international human rights law was not applied as a source of recognizing the fundamental right to conscientious objection or as a standard of review. Like Article 19 of the Korean Constitution, the text of Article 18 of the ICCPR does not explicitly mention conscientious objection to military service. However, given that Korea acceded to the ICCPR, and the fact that the Human Rights Committee on ICCPR and consistent Resolutions by the UN Commission on Human Rights have recognized the right to conscientious objection should be derived from Article 18 of the ICCPR, the Court should have made efforts to seriously consider the direct application of international human rights law. From reading a series of decisions, however, it is identified that the Korean Constitutional Court has denied conscientious objection based on the international human rights instruments (Cases 2004a, 2011a, and 2011b) and, when cited, the Court used it just as a reference for strengthening arguments along with foreign cases that showcase global trends (Case 2018). In that sense, the Korean Constitutional Court seemed reluctant to actively engage in recognizing the international human rights norms as a binding force; instead, it took a roundabout approach through Article 6(1) of the Constitution, as was in Case 2011b.

Second, the Court showed an inconsistent and selective approach to dealing with IHRL. Some cases cited IHRL, while another case never mentioned it, even though its argument was in line with the former. Case 2004a and Case 2004b were decided by the same bench within a close timeframe, yet the latter did not mention the IHRL at all, in contrast to the former. Furthermore, depending on the situation, the Court's reliance on IHRL looks different. When the Court decided against the international community's request, it interpreted the human rights instruments narrowly and defied the secondary

79 See note 78, pp. 408-409.

80 Act on Assignment to and Performance of Alternative Service [Enforcement Date Jan. 1, 2020] [Act No 16851, Dec. 31, 2019] (Article 1 states "The purpose of this Act is to prescribe matters concerning the assignment to, and performance of alternative service, including others, to fulfil the duty of military service in lieu of active service, reserve service, or supplementary service on the grounds of freedom of conscience guaranteed by the Constitution of the Republic of Korea.").

norms attached to them, whereas the Court tended to emphasize the development and significance of IHRL regarding the issue and the legal binding of the Korean government when deciding in favor of the international community's request. It has been criticized for not complying with the principle of respect for international law.[81]

II. Death Penalty Case

1. Background and Judgments

The international community has embraced global and regional human rights instruments that regard the death penalty as a cruel and unusual punishment, urging its abolition and the introduction of alternative sanctions.[82] Accordingly, 112 countries worldwide have abolished the death penalty, and 23 countries are classified as abolitionists in practice as of 2022.[83] In South Korea, the death penalty has been in existence since the enactment of the Criminal Act in 1953, but it is categorized as an abolitionist in practice by Amnesty International, as it has not carried out any single execution since December 1997.

South Korea ratified the ICCPR in 1990, but has not acceded to its Second Optional Protocol,[84] which explicitly requires the abolition of the death penalty. The UN Human Rights Committee has consistently recommended that South Korea abolish the death penalty and ratify the Second Optional Protocol. In the meantime, the Constitutional Court has twice ruled on the constitutionality of the death penalty, each time upholding it. A third case, filed in 2019, is still pending. In this context, it is worth examining two points: How South Korea, although not a party to the Second Optional Protocol, was engaged in the global trend towards abolition of the death penalty as generally recognized rules of international human rights law; and whether the IHRL was used as a legal source to draw right to life that is not enumerated in the Korean Constitution.

In 1996, the Korean Constitutional Court ruled down the first case to review the provisions of the Criminal Act that provide for the death penalty.[85] (hereinafter Case 1996) The claimant, who had been sentenced to death for murder, filed a constitutional complaint with the Constitutional Court.[86] The Court held the provision in question constitutional,

81 See e.g., *Shin*, note 18, p. 222.

82 See, for example, article 3 of the Universal Declaration of Human Rights, adopted on December 10, 1948, Article 6 of the ICCPR, adopted on December 16, 1966, and the Convention for the Protection of Human Rights and Fundamental Freedoms (the 6th protocol adopted in 1982 and the 13th protocol adopted in 2002).

83 For the statistics, see Amnesty International Global Report, Death Sentences and Executions 2022 (ACT 50/6548/2023), p. 40.

84 The 2nd Optional Protocol to the ICCPR, aiming at abolishing the death penalty, was adopted, and proclaimed by General Assembly resolution 44/128 of December 15, 1989.

85 Constitutional Court of Korea, 95Hun-Ba1, November 11, 1996, 8-2 KCCR 537.

86 It was filed with the Constitutional Court in the form of the Hun-Ba case. This type of constitutional complaint, the so-called "constitutional review complaint", is a *sui generis* constitutional

stating that the death penalty did not violate the principle of proportionality if it was inevitable to protect other lives or public interests. The majority opinion of seven judges did not mention international human rights instruments at all. Only one of the two dissenting judges stated that "the death penalty should be abolished by the changes of the times" and "internationally, the International Covenant on Civil and Political Rights (see Article 6) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (see Article 1) emphasize the abolition of the death penalty, and an increasing number of countries have acceded to these agreements ... We the constitutional judges, in accordance with the changing times, have to play a leading role in social reform by resolutely declaring the unconstitutionality of the death penalty," referring to international and regional human rights treaties.[87]

In 2010, the Court ruled down upon the domestic court's request to review the death penalty concerning the case where the accused was sentenced death penalty for killing four people and sexually abusing three women (hereinafter Case 2010): "In the wave of internationalization and globalization, the number of countries that have joined the International Covenant on Civil and Political Rights is increasing, and it is questionable whether Korea is in a culturally and socially poor position to maintain the death penalty while the abolition of it is already a trend around the world," the Gwanju High Court said in its request. [88] Nevertheless, the Constitutional Court decided 5 to 4 in favor of constitutionality, stating that the death penalty was an inevitable option for the state to deprive the life of those who committed heinous crimes, with the recommendation that the state should impose the death penalty with special care.[89] What is striking about this decision is that not only in the constitutionality opinion by five judges but also in the opinion against the death penalty by four judges, even though they wrote their own opinions separately, none of them made any reference to international human rights instruments, and the legal arguments have not changed much from the previous Case 1996.

On July 24, 2022, there was an open hearing of the third death penalty case, which was filed with the Constitutional Court in 2019.[90] The case was brought to the Court by the Korean Catholic Church's Justice and Peace Committee on behalf of a man who was sentenced to death.[91] The leaders of major religious groups, human rights advocates, and even the National Human Rights Commission submitted amicus briefs asking that the death penalty be declared unconstitutional. They contend that the United Nations, of which South

adjudication in the Korean Constitutional Court. See *Jeong-In Yun*, Constitutional Review Complaint as an Evolution of the Kelsenian Model, ICL Journal 14 (2020), pp. 427-36.

87 Constitutional Court, 95Hun-Ba1, November 28, 1996, 8-2 KCCR 537.

88 Constitutional Court, 2008Hun-Ka23, February 25, 2010, 22-1A KCCR 36.

89 See note 88, p. 63.

90 Constitutional Court, 2019Hun-Ba59 (pending case).

91 *Cho Hyeon*, S. Korea's Catholic bishops call for legislation banning capital punishment, Hankyoreh, 13 February 2019, www.hani.co.kr/arti/english_edition/e_national/882013.html (last accessed on 30 May 2025).

Korea is a member, has long advocated for the abolition of the death penalty and that, by ratifying the European Convention on Extradition in 2011, the South Korean government became bound by the prohibition on executing extradited criminals from Europe. The Korean government in 2022 voted in favor of a United Nations General Assembly resolution calling for a moratorium on executions,[92] but in 2023, the Ministry of Justice proposed amendments to the Criminal Act to abolish the 30-year limit on the execution of the death penalty[93] and to introduce a life sentence without parole.[94]

2. Analysis

Although the abolition of the death penalty is the most evident human rights issue where the international community has consistently intervened in the Korean government, the two cases (Case 1996 and Case 2010) manifest the Constitutional Court's non-engagement in international human rights norms on a given issue as below:

First, the Court did not invoke international human rights law as a source of fundamental rights. Unlike other cases in which the fundamental rights at issue have explicit provisions in the Constitution, the right to life is not specified in the Korean Constitution. So, the Korean Constitutional Court had recognized the right to life as an a priori and natural right, the premise of all fundamental rights protected by the Constitution.[95] Considering that South Korea was already a party to the ICCPR, it could have cited Article 6 of the ICCPR as a legal source for the right to life. However, neither Case 1996 nor Case 2010 attempted to do so. The Court's decision not to reference international human rights norms as a basis for constitutional fundamental rights may be attributed to the perspective that international law cannot be directly incorporated as the highest constitutional norms within the domestic legal order, reflecting a dualist legal approach.

Second, the Court also refused to use the international human rights law as a binding legal norm, even though South Korea is obliged to respect the domestic effect of the ICCPR as a "treaty concluded and promulgated by the Constitution". While the abolition of the death penalty has long been pending in the legislature[96] and public debate, lower courts used to impose life imprisonment as a tentative alternative to the death penalty, with respect for international law and the Constitutional Court's precedent recommendation (refer to

92 UN General Assembly's resolution 77/222 on December 15, 2022.

93 *Yoo Cheong-mo*, Gov't to abolish 30-yr period of prescription for death sentence, Yonhap News Agency, 5 June 2023, https://en.yna.co.kr/view/AEN20230605006600315 (last accessed on 30 May 2025).

94 *Park Boram*, Gov't proposes bill on introduction of life sentence without parole, Yonhap News Agency, 30 October 2023, https://en.yna.co.kr/view/AEN20231030005600315 (last accessed on 30 May 2025).

95 See, for example, Constitutional Court of Korea, 2008Hun-Ka23, February 25, 2010, 22-1 KCCR 36, p. 80.

96 At the National Assembly, bills to abolish the death penalty have been proposed several times since the early 2000s but have repeatedly failed in legislation in the end.

Case 1996) on the gradual abolition of the death penalty. However, the Constitutional Court avoided recognizing the binding force of Article 6 of the ICCPR, even though South Korea has not acceded to the Second Optional Protocol to the ICCPR.

The ICCPR and the Recommendations by the UN Human Rights Committee deserve mention even if the Court disagreed with them. Even if not as a binding treaty, considering that the abolition of the death penalty has been internationally approved by many countries, the Constitutional Court could have regarded it as one of the generally accepted rules of international laws, which could "have the same effect as the domestic laws". Nonetheless, the Court did not take such an approach in either case.

E. Addressing the Dualist Dilemma

I. Limits in Direct Application of the IHRL

These cases demonstrate both passivity and inconsistency of the Korean Constitutional Court in applying international human rights law. Both issues exemplify attempts at universal application through instruments such as the International Covenant (ICCPR), its Optional Protocols, and a series of Resolutions and Recommendations of the UN Human Rights Committee. Nevertheless, South Korea has yet to reach international standards in its domestic legislation and judicial practice. The Constitutional Court has been reluctant to recognize the international human rights law as a binding law to review the cases; instead, the Court treats it only as a reference, as if treating foreign comparative laws. And even such a practice is inconsistent.

The cases show that while the Constitutional Court acknowledges certain obligations under the international human rights regime, it faces a "dualist dilemma", constrained theoretically, normatively, and institutionally from directly applying international human rights law in accordance with its normative status. In other words, there are objective limitations to the direct application of international human rights law as a legal norm with constitutional effect.

II. Indirect Application of the IHRL

Given that the dualist dilemma is hard to avoid in the *direct* application of IHRL in human rights adjudication, some alternative methods based on the Korean constitutional framework could be proposed by reducing the theoretical and normative conflicts, seeking to bring about practical results.

For example, in Case 2011b above, the Constitutional Court denied the binding force of the right to conscientious objection under the ICCPR and the interpretation of international bodies, but reviewed whether a provision criminalizing conscientious objectors violated Article 6(1) of the Constitution or not. As explained earlier, constitutional commentaries and literature conceive Article 6(1) of the Korean Constitution as a ground for the constitutional principle of respect for international law. The drafting author of the Korean Constitution,

Yu Chin-O clarified that Article 6(1) is a statement that Korea respects international law, regardless of whether Korea was a party or not, by stipulating that not only treaties but also generally recognized rules of international law have the same effect as domestic laws.[97] While some scholars questioned whether respect for international law can be an independent standard of unconstitutionality,[98] others go a step further and evaluate it as an advanced approach that utilizes how international human rights law and constitutional law can operate in an organic and normative integration.[99]

In this case, the Constitutional Court raised Article 6(1) of the Constitution as a standard of review on whether the provision in question respected international law as Article 6(1) required. Here, international human rights law is not directly applied but indirectly considered through Article 6(1) of the Constitution. That is, even though international human rights law is not recognized as a constitutional norm,[100] it can be seen as indirectly applied through the review of whether its contents are being implemented.[101] Regarding this indirect application, there is a view that it can be evaluated as an organic normative integration of international human rights law and the Constitution, in that it accepted international human rights treaties as substantive standard for judgment,[102] while there is a reservist view that the case was exactly not about review of violations of international human rights norms, but rather a judgment on situations where international human rights norms have not been respected and considered.[103] Although there are only a few Constitutional Court precedents applying this approach at the moment, the situation may change.

There is also scholarly discussion on methods of indirectly applying international human rights law through the interpretation of fundamental rights. Article 10 of the Korean Constitution states that "All citizens shall be assured of human worth and dignity and have the right to the pursuit of happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals," and Article 37(1) provides, "Freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution." Existing scholarship and the Constitutional Court's precedents have used these provisions as a basis for recognizing new kinds of fundamental rights that were not enumerated in the Constitution. Given that, the Court might also consider international human rights law as "the fundamental and inviolable human rights [or as] freedoms and rights that are not enumerated in the Constitution" by invoking Articles 10 and 37(1) of the Constitution. Using these provisions as a channel

97 See *Yu*, note 3, pp. 53-54.

98 For those who question, see e.g., *Lee*, note 19, p. 189, and for those who are on the positive side, see *Park*, note 21, pp. 97-143.

99 See *Shin*, note 18, p. 225.

100 *Won*, note 55, p. 623.

101 Ibid., p. 622.

102 *Shin*, note 18, pp. 219-21, p. 225.

103 *Park*, note 21, p. 121

to incorporate the human rights guarantees under international human rights treaties into the domestic fundamental rights system[104] could enrich the criteria and scope of human rights that can be guaranteed within the domestic constitutional framework. Since several jurisdictions have used the contents of international human rights law to substantiate the scope of fundamental rights,[105] the Korean Constitutional Court may employ the way of constitutional interpretation, without significant difficulties related to the dualist dilemma.

F. Conclusion

This article analyzes the conditions and difficulties of the domestic application of international human rights law, particularly judicial application, within the constitutional order of South Korea. It argues that the application of universal human rights across the boundaries of legal orders involves confronting structural constraints beyond mere individual judges' passive attitudes. Rather, the limited use of international human rights law in Korean courts could be attributed to theoretical, normative, and judicial structural constraints in crossing legal systems of different bases and legitimacy. Since domestic judges mostly would adopt a constitutionalist approach based on a dualist understanding of international law, they inevitably face difficulties in deriving constitutional standards of review from international human rights law. Confronted with this "dualist dilemma", the Korean Constitutional Court, as the highest domestic court protecting fundamental rights, has faced difficulties in directly applying international human rights law as a legally binding norm with constitutional status. As a result, the Court has often cited international human rights instruments merely as references for constitutional arguments, similar to its use of foreign legal sources.

However, in addressing the dualist dilemma, this article identifies some attempts by the Constitutional Court to engage in the implementation of international human rights law. Some cases demonstrated an indirect application of international human rights law: The Court reviewed violations of Article 6(1) of the Constitution, which requires respect for international law, instead of reviewing violations of international human rights law itself. In addition, an interpretive way may be suggested as well: Infusing the scope and contents of the constitutional fundamental rights with what international human rights law requires during interpretation. Articles 10 and 37(1) of the Korean Constitution could serve as links to recognize "freedoms and rights not enumerated in the Constitution" and to implement "fundamental and inviolable human rights of individuals." Such ways of using international human rights law appear to be a useful compromise that the Korean Constitutional Court might adopt while maintaining a constitutionalist stance in practice. It remains to be seen whether these approaches will persist and become established as a detour or whether they

104 See e.g., *Park*, note 41, pp. 173-74; *Kwang Hyun Chung*, Gug-je-in-gwon-gyu-yag-gwa Heon-beob-sang Gi-bon-gwon [International Human Rights Instruments and Fundamental Constitutional Rights], Journal of Constitutional Justice 6 (2019). pp. 67-70.

105 See *Lange*, note 28, pp. 133-155.

will clearly overcome the dualist dilemma and pave a new path for the domestic application of international human rights law within its constitutional framework.

ABHANDLUNGEN / ARTICLES

Theorising Constitutions Comparatively

By *Rosalind Dixon*[*] and *Elisabeth Perham*[**]

Abstract: The relationship between constitutional theory and constitutional comparison is an area of evolving scholarly interest and concern. Constitutional theory has long engaged in dialogue with constitutional practice, but often that dialogue is more implicit than explicit. In part because of that, it can focus on a relatively narrow range of countries, or 'the usual suspects' in constitutional law, and where that happens, the theories developed will not be able to account for the global variety of constitutional experiences and practices.

This essay thus starts from the proposition that comparative engagement by constitutional theorists with constitutional practice in a wide range of jurisdictions is desirable, and should be actively encouraged. But it also cautions that scholars must be attentive to taking constitutional comparison seriously, and to engaging in it in a methodologically rigorous way. In order to assist with this task, the essay set out three archetypical modes in which constitutional theory can be informed by constitutional practice—inductive, illustrative and reflexive—and illustrates those modes in practice (including in their hybrid forms and the way they can interact with each other) by reference to a range of recent works of constitutional theory.

It then turns to the question of how to ensure that such comparative engagement is methodically rigorous. We suggest that rigorous forms of comparative constitutional theorising involve three key commitments: transparency in the jurisdictions relied on, symmetry between the countries chosen and the scope of theoretical claims made, and self-awareness or reflexivity on the part of scholars as part of this process. Work that adheres to these commitments is more likely to constructively contribute to what is ultimately a collaborative quest by scholars to advancing our collective understanding of constitutions.

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A. Introduction

Comparative constitutional scholarship takes a variety of forms. Some of it is doctrinal in focus and is aimed at uncovering commonalities and differences in doctrinal approaches across different constitutional systems.[1] Some of it is historical in orientation: it seeks to uncover the genealogy behind certain constitutional norms and ideas, how different constitutional traditions have influenced others, or how different historical institutional trajectories have shaped contemporary constitutional developments.[2] Another strand of scholarship is more empirical or socio-legal in nature. It seeks to draw on the insights of economics, statistics, sociology, anthropology and comparative politics to understand the causal origins and/or consequences of different constitutional design and doctrinal choices, or else to map and understand what is happening on the ground in various constitutional systems.[3] All these forms of constitutional scholarship involve their own logic of comparison and case selection.[4]

Another strand of constitutional scholarship, however, is more theoretical in nature. It explicitly engages with normative and conceptual debates—by seeking to develop a mix of 'concepts' and 'principles' either internal or external to existing constitutional systems.[5] This can include theories of constitutional interpretation,[6] but also broader theories of constitutional design and decision-making.

1 *Rosalind Dixon*, Comparative Constitutional Modalities: Towards a Rigorous but Realistic Comparative Constitutional Studies, Comparative Constitutional Studies 2 (2024), p. 60.

2 See, e.g., *William Partlett,* Historical Methods and Constitutional Research, in: Rosalind Dixon / David Law / Malcolm Langford (eds.), Comparative Constitutional Methods: An Introduction, Cheltenham (forthcoming); *Elizabeth Hicks*, "New Institutionalism" and Historical Institutionalist Analysis, in: Rosalind Dixon / David Law / Malcolm Langford (eds.), Comparative Constitutional Methods: An Introduction, Cheltenham (forthcoming).

3 See, e.g., *Dinesha Samararatne*, Comparative Constitutional Law from and within the Global South: challenges, prospects and hopes, World Comparative Law 57 (2024), p. 337.

4 *Dixon*, note 1; *Mark Tushnet,* The Possibilities of Comparative Constitutional Law, Yale Law Journal 108 (1999), p. 1225; *Ran Hirschl*, Comparative Matters: The Renaissance of Comparative Constitutional Law*,* Oxford 2014.

5 *Adrienne Stone / Lulu Weis*, Constitutional Theory in a Comparative Context, in: Gary Jacobsohn / Miguel Schor (eds.), Comparative Constitutional Theory, Cheltenham 2025.

6 *Erwin Chemerinsky*, The Inescapability of Constitutional Theory, University of Chicago Law Review 80 (2013), p. 935.

The relationship between constitutional theory and constitutional comparison is an area of evolving scholarly interest and concern.[7] Constitutional theory has long engaged in dialogue with constitutional practice, but often that dialogue is more implicit than explicit.[8] In part because of that, it can focus on a relatively narrow range of countries, or 'the usual suspects' in constitutional law.[9]

Recent scholarship challenges that pattern, calling for a more explicit engagement by constitutional theorists with actual constitutional practice,[10] and with a wide variety of constitutional systems. These calls stem partly from a concern to avoid compounding prior colonial and neo-colonial era power structures within the global constitutional academy.[11] But they also come from an awareness of the variety of constitutional experiences and practices, and the importance to constitutional theorising of sufficiently accounting for this varied practice.

This essay joins those calls; and explores three archetypical modes in which constitutional theory can be informed and enriched by broad comparative constitutional engagement. In some cases, constitutional practice may simply be an arena for the *application* of existing theoretic ideas. This kind of theory application is familiar in the social sciences[12] and serves an important purpose in constitutional law—in encouraging a more rigorous approach to questions of constitutional design and constructional choice. But it is one-way traffic from theory to practice, rather than a true engagement between the two—and our concern is with this form of true dialogue or engagement.

One mode of comparative engagement for constitutional theorists is *inductive* and draws on comparative experience to drive theory building or formation.[13] Theorising of this kind is generally aimed at generating archetypical or prototypical constitutional categories

7 See e.g., *Stone / Weis*, note 5; *Silvia Suteu*, The View from Nowhere in Constitutional Theory: A Methodological Inquiry, in: Dimitrios Kyritsis / Stuart Lakin (eds.), The Methodology of Constitutional Theory, Oxford 2022.

8 *Suteu*, note 7; *Theunis Roux*, In Defence of Empirical Entanglement: The Methodological Flaw in Waldron's Case Against Judicial Review, in: Ron Levy / Hoi Kong, Graeme Orr / Jeff King (eds.), The Cambridge Handbook of Deliberative Constitutionalism, Cambridge 2018.

9 *Hirschl*, note 4, chapter 5.

10 *Stone / Weis*, note 5; *Aileen Kavanagh*, Keeping It Real in Constitutional Theory, Comparative Constitutional Studies 1 (2023), p. 244; *Suteu*, note 7.

11 *Philipp Dann / Michael Riegner / Maxim Bönnemann* (eds.), The Global South and Comparative Constitutional Law, Oxford 2020; *Philipp Dann*, Southern Turn, Northern Implications: Rethinking the Meaning of Colonial Legacies for Comparative Constitutional Studies, Comparative Constitutional Studies 1 (2023), p. 174.

12 *Udo Kelle*, Mixed Methods and the Problems of Theory Building and Theory Testing in the Social Sciences, in: Sharlene Nagy Hesse-Biber / R. Burke Johnson (eds.), The Oxford Handbook of Multimethod and Mixed Methods Research Inquiry, Oxford 2015, pp. 596-598.

13 Compare the use of empirical data to drive theory building in the social sciences: *Barney Glaser / Anselm Strauss*, The Discovery of Grounded Theory: Strategies for Qualitative Research, Aldine 1967. See also discussion in *Kelle*, note 12, pp. 599-601.

– this is what Ran Hirschl calls 'concept formation through multiple description'.[14] But it does so with the further aim of identifying concepts or normative principles immanent within existing constitutional categories and practices.[15]

A second mode is *illustrative*: It involves theorists developing ideas from an analytic or *a priori* basis, and then illustrating either their plausibility, or real-world application, by reference to a range of comparative examples.[16] In this sense, it is closely related to existing social science ideas about theory testing.[17] But some variants are also connected to more critical theoretical traditions, in which existing critical theories are applied to constitutional studies, and the argument is then illustrated through certain comparative cases.[18]

And a third mode is *reflexive*. It takes existing constitutional theoretic ideas and seeks to refine them by testing their relevance and application in *new* constitutional settings beyond those in which the theories were first developed and refining them in light of those insights. In this sense, it is a hybrid of social science-based ideas of theory testing and formation and closely related to ideas about applied theory.[19]

Each of these modes represents an ideal type, and in practice, constitutional theory may be informed by a variety of different modes of comparison. For instance, theorists may begin by identifying archetypical categories through a process of *inductive* comparison, then seek to illustrate their broader relevance—before they or others seek to refine them—*reflexively*. Or a scholar may take an existing theory and engage with it *reflexively*, before *illustrating* the breadth of the empirical challenge to an existing theory as a reason to refine and adapt existing theoretical categories.

Even though the modes often operate as hybrids, there is still value to distinguishing them as a means of clarifying the value and appropriate scope of comparison by constitutional theorists. Inductive comparison, for example, can be broad or narrow. *Illustrative* comparison can likewise be broad or narrow. What matters, in each case, is that scholars match the breadth of comparison to the generality of their theoretical claims: if the claims made by a particular theory are general in application, then the examples needed to illustrate that must be similarly broad and diverse in scope. But if the theory is more particularised and contextual, then the number and range of cases used to illustrate it may be similarly confined.

14 *Hirschl*, note 4, chapter 6

15 *Kavanagh*, note 10.

16 *Dixon*, note 1.

17 *Kelle*, note 12, pp. 597-98.

18 On these approaches, see e.g., *Michele Krech / Marcela Prieto Rudolphy*, Feminism and Comparative Constitutional Law, in: Rosalind Dixon / David Law / Malcolm Langford (eds.), Comparative Constitutional Methods: An Introduction, Cheltenham (forthcoming).

19 On applied theory, see e.g., the idea of 'applied ethics' as discussed by *Jennifer Flynn*, Theory and Bioethics, in: Edward N. Zalta / Uri Nodelman (eds.), Stanford Encyclopedia of Philosophy, Stanford 2020.

Reflexive comparison, in turn, will often involve a single country or jurisdiction: what matters, for it be useful, is that it tests and applies a particular theory in a *new* context, not considered by those developing a particular theoretical account. Only by engaging with new jurisdictions and cases can comparison of this kind help confirm and challenge the existing assumptions behind a particular theory—about either the range of archetypical constitutional categories, or necessary preconditions for a particular constitutional theory to apply.

To illustrate this, we draw on our own work on the topics of external constitutional advising, and responsive forms of judicial review, but also a range of recent leading works of constitutional theory by a range of other scholars in the field, on topics such as democratic constitutionalism, the separation of powers, gender constitutionalism, and constituent power and constitution making.

A key aim of the essay is to clarify what it means for constitutional theory to take constitutional comparison seriously, and to engage in it in a methodologically rigorous way. Specifically, we suggest that rigorous forms of comparative constitutional theorising involve three key commitments: transparency in the jurisdictions relied on, symmetry between the countries chosen and the scope of theoretical claims made, and self-awareness or reflexivity on the part of scholars as part of this process.

The remainder of the essay is divided into four parts following this introduction. Part B briefly situates constitutional theoretical scholarship within the broader terrain of public law scholarship, and its many different variants. Part C outlines the three basic modes of comparative engagement, as well as hybrids and variants of each. It also illustrates these different modes by reference to concrete examples drawn from existing constitutional scholarship. Part D explores the implications of each mode for the scope and breadth of comparative engagement by constitutional theorists, individually and collectively, focusing on the requirements of transparency, symmetry and self-awareness. And Part E offers a brief conclusion.

B. Constitutional Theory and its Relatives

Constitutional scholarship takes a variety of forms. Some scholarship is *doctrinal* in nature; and focused on describing and analysing doctrinal developments. Scholarship of this kind is valuable in its own right.[20] It can help inform both legal practice and judicial decision-making. It is also crucial to other modes of constitutional scholarship, which aim to analyse constitutional phenomena from an empirical, normative, critical or constitutional theoretic perspective.[21]

20 *Stone / Weis*, note 5; *Kavanagh*, note 10; *Adrienne Stone*, Comparative Constitutional Studies: The Case for Detail, Description and Doctrine, Working Paper, May 2025 (on file with authors); *Jason N. E. Varuhas*, Mapping Doctrinal Methods, in: Paul Daly / Joe Tomlinson (eds.), Researching Public Law in Common Law Systems, Cheltenham 2023.

21 *Dinesha Samararatne*, note 3. See also *Stone / Weis*, note 5; *Kavanagh*, note 10.

Empirical constitutional scholarship aims to understand either the causes or consequences of certain formal constitutional design or doctrinal choices. Within this sub-field of constitutional scholarship are further sub-fields: 'functionalist' scholarship seeks to understand the likely effects of certain formal constitutional design or constructional choices, whereas other more 'explanatory' scholarship seeks to unpack the likely origins or driving forces behind those choices.[22] But in each case, the relevant scholarship relies on either large-n statistical techniques, or qualitative case studies that reflect principles of case selection developed in comparative politics and designed to uncover causal pathways.[23]

Another form of constitutional scholarship is more *normatively* focused. For instance, it may seek to evaluate existing formal constitutional design or doctrinal choices against a set of normative criteria, or to propose reforms to constitutional design or doctrine based on these same criteria. Scholarship of this kind could be viewed as normative-evaluative or normative-prescriptive in nature: normative-evaluative scholarship takes a given constitutional phenomenon and evaluates its strengths and weaknesses against a pre-defined constitutional theoretic yardstick (such as equality, justice, democracy or the rule of law). Normative-prescriptive scholarship starts with a substantive constitutional theoretic goal or commitment, then considers the degree to which existing constitutional norms or doctrinal choices achieve that goal, the consequences of any failure to do so and what, if anything, can be learnt from this failure—either in terms of the limits of formal constitutional design or doctrine, or certain constitutional models, or a potential agenda for constitutional reform.

Equally, constitutional scholarship may start with an existing *critical theoretical* perspective and seek to 'read' or 're-read' a given constitutional phenomenon through this lens: doing so can help demonstrate the value and importance of the relevant critical theory, as well as the shortcomings of more traditional, liberal accounts of democratic constitutionalism. Scholarship of this kind may involve engagement with feminist ideas, queer theory, critical race theory, critical legal studies, or post-colonial or Marxist theory, or some combination of these theories.[24] Whatever its precise focus, it could be viewed as a form of 'critical constitutional studies': scholarship that starts with theories developed in other domains, which are then applied to the constitutional domain as a means of generating new critical insights about existing constitutional theoretic arrangements and theoretical ideas.

Constitutional theory is yet another distinct sub-field of constitutional scholarship: one that involves the development of ideas about constitutions and constitutionalism based on a mix of 'concepts' and 'principles' either internal or external to existing democratic constitutional systems. Constitutional concepts, as Stone and Weis note, 'are used to classify

22 On functionalism, see e.g., *Mark Tushnet*, Taking the Constitution Away from the Courts, Princeton 1999.

23 *Dixon*, note 1.

24 See *Flynn,* note 19.

and organise objects in a domain of study'.[25] In that sense, they are often closely linked to constitutional doctrines. Constitutional principles, in contrast, 'are propositions about relationships that obtain between concepts within the domain of study and other concepts or criteria'.[26] They may be drawn from existing constitutional doctrines or structures, and hence be immanent within or 'internal to an existing constitutional order'.[27] Or they may derive from broader ideas about democracy, the state, and self-government, in ways that make them external to a particular constitutional order.[28]

Constitutional theory, in this sense, could thus be considered as a sub-branch of political theory.[29] Some forms of constitutional theory may be especially close to political theory, and involve forms of critique that fall outside this definition of theories based on concepts and principles. Critical legal studies approaches, for example, are theories that highlight the high degree of indeterminacy in legal norms and standards, and the role of politics and power in shaping how that indeterminacy is resolved.[30] These same ideas can also be applied to constitutions and constitutional studies, in ways that inform a project of critical constitutional theory.[31]

Some suggest that what ultimately separates constitutional from political theory is its engagement with actual constitutional practice.[32] But we suggest that engagement of this kind is desirable, rather than definitional, to constitutional theorising, and as we explore below, especially beneficial if it is sufficiently transparent and open to revision and refinement in light of the experiences of new constitutional systems.

25 *Stone / Weis*, note 5.

26 Ibid.

27 See, e.g., *Tarunabh Khaitan / Sandy Steel*, Areas of Law: Three Questions in Special Jurisprudence, Oxford Journal of Legal Studies 43 (2023), p. 76 (noting that the normative foundations of an area of law are often at least in part internal to it, or based on inquiry into its 'aims' and 'functions'); *David Strauss*, What is Constitutional Theory, California Law Review 87 (1999), pp. 581-582 (suggesting that the normative foundations of constitutional theory often lie in 'bases of agreement that exist within the legal culture').

28 See e.g., *Richard H. Fallon Jr.*, How to Choose a Constitutional Theory, California Law Review 87 (1999), p. 535.For discussion see *Stone / Weis*, note 5. See also *Rosalind Dixon / Theunis Roux* (eds.), Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence, Cambridge 2018.

29 *Stone / Weis*, note 5.

30 *Duncan Kennedy,* A Critique of Adjudication: fin de siècle, Harvard 1997.

31 See e.g., *Günter Frankenberg*, Comparative Constitutional Studies: Between Magic and Deceit, Cheltenham 2018.

32 *Martin Loughlin*, Constitutional Theory: A 25th Anniversary Essay, Oxford Journal of Legal Studies 25 (2005), p. 183.

C. Three Modes of Theorising Constitutions—Comparatively

Constitutional theory does not develop in a vacuum: its subject matter is constitutions, and constitutionalism. And hence, almost all constitutional theory has *some* form of empirical constitutional foundation.[33] At the same time, the degree to which constitutional theory is grounded in practice varies considerably. As Stone and Weis note, some theories are formulated at a high level of abstraction, with little explicit grounding in constitutional practice, whereas others are developed with close attention to existing constitutional practice. And there are a variety of ways in which constitutional theorists may choose to engage with constitutional practices. We are calling these 'modes' of engagement, though one might also think of them as 'approaches to theory generation'.[34]

I. Three Modes of Comparative Engagement (by Theorists)

One mode in which theorists can engage with practice is *inductive*: it involves an attempt to reconstruct constitutional concepts or principles from the 'bottom up', through deep engagement with the detailed practices of a particular constitutional system.[35] In this sense, it is similar to empirically-driven approaches to theory building in the social sciences: it starts with data or practice, and proceeds from there to develop relevant constitutional concepts or principles.[36]

Engagement of this kind involves a process of 'thick description' of existing constitutional practice.[37] It is thus a close relative of what is often called a process of 'concept formation through multiple description',[38] or in the case of single country studies, an 'idiographic' approach to constitutional studies.[39]

The key difference is that constitutional theory generally involves a mix of concepts and principles, whereas comparison alone may be purely conceptually-focused.[40] That is, inductive engagement with comparative practice is aimed at developing concepts and ideas with explanatory value.[41]

33 *Stone / Weis*, note 5; *Kavanagh*, note 10.

34 *Stone / Weis*, note 5.

35 *Oran Doyle*, Constitutional Theory in Comparative Constitutional Studies, in: Rosalind Dixon / David Law / Malcolm Langford (eds.), Comparative Constitutional Methods: An Introduction, Cheltenham (forthcoming).

36 *Glaser / Strauss*, note 13. See also discussion in *Kelle*, note 12, pp. 599-601.

37 *Dixon*, note 1.

38 *Hirschl*, note 4, chapter 5.

39 Ibid., p. 197.

40 *Stone / Weis*, note 5. See also *David Pozen*, Self-Help and the Separation of Powers, Yale Law Journal 124 (2014), p. 74; and *Kavanagh*, note 10.

41 *Nicholas Aroney*, Explanatory Power, Theory Formation and Constitutional Interpretation: Some Preliminaries, Australian Journal of Legal Philosophy 8 (2013), p. 1.

An approach of this kind is often focused on a single country, or case study.[42] In part this is because deep engagement with constitutional practices is complex and time-consuming, and it is difficult to do this to the same level across multiple constitutional contexts. But even still, there will often be comparative judgments built into work of this kind.[43] Inductive approaches can also be explicitly comparative. To achieve this, they must involve a similar form of deep engagement with multiple constitutional systems identified as having distinctive practices, capable of generating different bottom-up accounts of how constitutions can and should operate. But the depth of engagement of this kind can also vary, depending on the scope and requirements of the project.

A second mode of comparative engagement by constitutional theorists is *illustrative* in nature: it aims to demonstrate the real-world plausibility of theoretical ideas, or that they have some meaningful basis in existing empirical reality. Some constitutional theorists suggest that engagement of this is kind is a necessary part of constitutional theorising, as without it there is a risk of 'theories of a fiction'.[44] Others suggest that it is desirable in order to 'keep theory real'.[45]

Engagement of this kind is closely related to modes of comparison that are causally oriented rather than theoretical in nature. Both are empirical in nature. But the relevant form of empiricism, in this context, is much thinner: it is focused on the empirical existence or plausibility of certain constitutional patterns or concepts, rather than their causal origins or consequences. In this sense, illustrative comparison of this kind can be seen as a form of theory testing in the social sciences: that is, as helping evaluate theoretical concepts, and their real-world applicability.[46] Theory testing of this kind may not involve showing that constitutional concepts or principles are 'true' or 'false': this is generally not possible in the social sciences, and certainly not in constitutional discourse where there is such wide scope for reasonable disagreement on underlying constitutional principles.[47] But it does involve showing the attractiveness, or at least plausibility, of an idea in a given concrete constitutional setting. It could thus be seen as equivalent to a form of 'plausibility probe' in the social sciences.[48]

A third mode of engagement is more *reflexive*. It takes existing constitutional theoretic ideas and seeks to test and refine them in a new comparative constitutional context. Engagement of this kind is closely related to the application of existing constitutional

42 *Rosalind Dixon*, Single Country Constitutional Comparisons (draft—manuscript with author).

43 Ibid.. See also *Hirschl*, note 4, chapter 5.

44 *Robert Leckey*, Bills of Rights in the Common Law, Cambridge 2015. See also *Roberto Gargarella*, The Law as a Conversation Among Equals, Cambridge 2022.

45 *Kavanagh*, note 10, p. 245.

46 *Kelle*, note 12, pp. 597-598.

47 Ibid.

48 *Carol Lynne Fulton*, Plausibility, in: Albert J. Mills / Gabrielle Durepos / Elden Wiebe (eds.), Encyclopedia of Case Study Research, Thousand Oaks 2010.

theoretical ideas to a new national context. Inevitably, the application of existing ideas to new contexts requires reflection and adaptation.[49] But the focus of this exercise is on enriching our understanding of a particular constitutional system; it is not per se about constitutional theory formation itself. [50]

Reflexive constitutional comparison, in contrast, involves a process of testing existing theories in new contexts, with a view to critically reflecting back on the original theory. The aim of reflexive comparison of this kind is two-fold. The first aim is better to understand the necessary pre-conditions for a theory to operate, or have normative appeal. This is in effect also an exercise in narrowing or qualifying the scope of application of a given theory. The second aim is to reveal the applicability of a theory to new contexts, not contemplated by the original constitutional theory. This can also involve the broadening of the theory, or its adaptation to fit those new contexts—or what social scientists would call a process of theory formation or building.[51]

Often, engagement of this kind involves deep engagement with a single country, or small set of countries. But it is also implicitly comparative in the sense that it involves the application of theoretical ideas in their original and a new, as yet untested, context. Increasingly, it also often involves an explicit engagement with more than one constitutional system.

The insights derived from reflexive comparison will depend on the generality of the original constitutional theory: generality, as Stone and Weis note, is a key dimension in the formulation of any constitutional theory.[52] And the more general a theory, the more likely a process of reflexive comparison is to reveal additional limitations on, or preconditions for, the theory; whereas the more context-specific the theory is, the more likely it is that reflexive comparison will expand its sphere of potential application.

Reflexive comparison of this kind can also travel in multiple directions: it can start with a focus on theories developed in the Global North and then move to the Global South to test and refine those theories, with a view to deepening their ability to account for constitutionalism in both the Global South *and* North. This traffic in ideas between the Global North, and South, and back is what Philip Dann, Michael Riegner and Maxim Bönnemann call the 'double turn' in comparative constitutional studies.[53]

It may also start with a focus on theories developed within the Global South—take for instance the idea of 'transformative constitutionalism' or constitutional 'guarantor' institu-

49 See, e.g., *Rosalind Dixon / Amelia Loughland*, Comparative Constitutional Adaptation: Democracy and Distrust in the High Court of Australia, International Journal of Constitutional Law 19 (2021), p. 455.

50 *Frank I. Michelman*, Reflection, Texas Law Review 82 (2004), p. 1737.

51 *Kelle*, note 12, pp. 599-601.

52 *Stone / Weis*, note 5.

53 *Dann / Riegner / Bönnemann*, note 11.

tions, both of which developed in the Global South.[54] A reflexive approach to comparison would involve testing out the applicability of these theories to new cases and contexts within both the Global South and North. South-South comparison of this kind itself involves a form of post-colonial constitutionalism, focused on horizontal comparison and lessons for constitutional theory from within the Global South. South-North comparison, in turn, could be viewed as its own distinctive form of post-colonial scholarly project, or a kind of 'inverted' or anti-colonial turn in comparative constitutional theorising.[55]

Hence, the language of reflexive comparison offers a means of conceptualising the many different directions of travel for constitutional ideas, within a theoretic frame, including the 'double turn', but also forms of horizontal comparison and reverse anti-colonial turn within the field.[56]

II. The Three Modes in Practice

Each of these modes can be seen as underpinning leading constitutional theoretical works, though to varying degrees. One could illustrate this by turning to classic or canonical texts in the field of constitutional theory. For instance, Rodolfo Sacco's theory of 'legal formants' is one of the leading theoretical ideas in continental constitutional theory, originally developed and illustrated by Sacco through a close form of *inductive* engagement with Italian constitutional experience.[57] But over time, Sacco also engaged in scholarly dialogue and collaboration with scholars in Africa and Latin America, thereby engaging in a form of reflexive comparison and confirmation of his original ideas.[58]

Our focus, however, is on illustrating these ideas by reference to more recent works of constitutional theory, including by a range of junior scholars working in or on topics relating to the Global South. The examples we give are just that: examples. They could be replaced by any number of other works of the same kind. However, they are examples chosen for both their currency and variety, and as thus illustrating these modes of engagement in the work of senior and junior, and male and female, scholars on a variety of topics and

54 See e.g., Karl E Klare, Legal Culture and Transformative Constitutionalism, South African Journal of Human Rights 14 (1998), p. 146; *Tarun Khaitan*, Guarantor Institutions, Asian Journal of Comparative Law 16 (2021), p. 40.

55 For a description of this approach, and examples focused on the development of the Sri Lankan Constitutional Council as part of a synergistic approach to constitutionalism, see e.g., *Dinesha Samararatne*, Resilience Through Synergy? The Legal Complex in Sri Lanka's Constitutional Crisis, Asian Journal of Law and Society 9 (2022), p. 1, and *Samararatne*, note 3.

56 *Dann / Riegner / Bönnemann*, note 11.

57 *Elisabetta Grande / Rodrigo Míguez Núñez / Pier Giuseppe Monateri*, The Italian Theory of Constitutional Comparison, The Italian Review of International and Comparative Law 1 (2021), pp. 10-11; *Michele Graziadei*, Rodolfo Sacco: An Intellectual Portrait, The Italian Law Journal 8 (2022), pp. 13-14.

58 *Grande et al,* note 57, pp. 21-22; *Graziadei*, note 57, p. 14.

jurisdictions in the common law and civil law world and in the Global North and the Global South.

Inductive engagement lies at the heart of several recent theories of democratic constitutionalism and the separation of powers. Aileen Kavanagh, for instance, relies on thick engagement with the constitutional practices of the United Kingdom to construct a theoretical account of the constitutional separation of powers that emphasises notions of inter-dependence, respect, restraint and comity among courts, parliaments and executive actors. Kavanagh calls this the idea of the 'collaborative constitution'.[59] But it is, in effect, simply one version of democratic constitutionalism that tracks core features of the British constitutional model (at least pre-Brexit), and hence an embodiment of inductive theorising through engagement with a single country case study.

Inductive engagement likewise underpins Wojciech Sadurski's account of constitutional populism in *Poland's Constitutional Breakdown.* Sadurski focuses, in this context, on a single jurisdiction (Poland) in order to construct an account of populism that involves attention to both discourses and actions—including the ways in which populists 'work within the inherited institutional architecture and subvert it for their purposes', seek to control the media, build counter-coalitions in civil society (against democracy) and engage in large-scale, rapid constitutional amendment or replacement—but under the guise of 'ordinary' legislative change.[60] Drawing on this experience, he seeks to construct a general account of the idea of 'illiberal, anti-constitutional populism', which can serve as a key conceptual tool for normative critique and responses to these trends.

In his subsequent book, *A Pandemic of Populists*, Sadurski goes on to test the generality of this idea—by engaging in a process of reflexive comparison focused on a range of countries under democratic stress, including Hungary, Poland, Brazil, Venezuela, India and the Philippines. The result is both the confirmation, and refinement, of the idea of anti-constitutional populism developed in *Poland's Constitutional Breakdown*. For instance, Sadurski notes the ways in which in these various countries, authoritarian populists have sought to centralise power, and remove mechanisms for the dispersal of authority; the ways in which authoritarian populists have sought consistently to capture and re-deploy the work of a broad range of institutions, including electoral institutions, but also the ways in which authoritarian populists have sought to change the method of voting (for instance to paper only in Brazil) or of translating votes into electoral representation (Hungary); the attacks by the executive, in Brazil and the Philippines, on legislatures as well as independent institutions (in Poland, of course, Law and Justice controlled the legislature); and the comprehensive nature of the control over the media in Hungary, and to a lesser but meaningful extent in Brazil, Venezuela and India.[61] Sadurski thus both confirms, and refines his idea of

59 *Aileen Kavanagh*, The Collaborative Constitution, Cambridge 2023.

60 *Wojciech Sadurski,* Poland's Constitutional Breakdown, Oxford 2018.

61 *Wojciech Sadurski*, A Pandemic of Populists, Cambridge 2022, chapters 2–3.

populist authoritarianism as distinct from more passive notions of 'democratic backsliding' or 'erosion'.

In *Global Gender Constitutionalism and Women's Citizenship,* Ruth Rubio-Marín engages in a similarly wide-ranging form of comparison to inform the *inductive* construction of four broad archetypes of 'gender constitutionalism': 'exclusionary', 'inclusive', 'participatory' and 'transformative' gender constitutionalism. Exclusionary constitutionalism, Rubio-Marín argues, can be understood through the prism of early 20th century constitutional struggles in the US.[62] Inclusive constitutionalism is theorised through attention to the European constitutional model.[63] The idea of participatory gender constitutionalism draws on constitutional experiences in Canada (1982), Nicaragua (1987), Brazil (1987–1988), Colombia (1991) and South Africa (1994–1996).[64] Transformative gender constitutionalism draws on the constitutional text and jurisprudence of South Africa, Canada and Colombia, and particularly their jurisprudence challenging the public-private divide, and German ideas about the relationship between constitutions and motherhood.[65] But Rubio-Marín also draws on a wide array of jurisdictions to theorise other dimensions and variants of this transformative gender constitutional model.[66] Her account is also ultimately principled as well as conceptual: she seeks to argue for, and defend, a gender transformative model of constitutionalism—based on its capacity to advance 'women's empowerment' and a 'constitutional egalitarian ethos'.[67]

Illustrative comparison is likewise a feature of recent works on democracy and constitutionalism. In *The Law as a Conversation Among Equals,* Roberto Gargarella argues for a new egalitarian, participatory form of democratic politics—as the most normatively attractive model of constitutional government today, capable of meeting the 'dramas' of the current moment. Those dramas, Gargarella suggests, include both rising dissatisfaction with the democratic project, and authoritarianism, as well as broader conditions of economic marginalisation and inequality. Responding to these dramas, he argues, means involving citizens in the process of self-government, and ensuring that elite structures (such as courts and legislatures) do not prevent citizens from engaging in the kind of radical rethinking or redistribution necessary to achieve true substantive social and economic equality.

Gargarella largely constructs his ideal of democratic politics in dialogue with other more traditional liberal models of constitutionalism. Yet Gargarella is also a deeply knowledgeable comparative constitutional scholar. Hence, he seeks to illustrate the attractiveness of his account of democracy by reference to a range of real-world examples of participatory

62 *Ruth Rubio-Marín*, Global Gender Constitutionalism and Women's Citizenship, Cambridge 2022, pp. 46–47.

63 Ibid., p. 127.

64 Ibid., pp. 139–147.

65 Ibid., pp. 217–224.

66 This includes Ecuador, Brazil, Nepal, Malawi, Mexico, Paraguay and Taiwan, among others.

67 *Rubio-Marín*, note 62, pp. 14–15.

constitutional politics, and weak-form judicial review. These include constitutional assemblies in Iceland, Ireland, Australia, Canada (in both British Columbia and Ontario), Chile and the Netherlands.[68] They also include the various mechanisms by which constitutional systems make space for democratic 'dialogue' and disagreement with courts, including through formal legislative override of court decisions (as in Canada under s 33 of the *Charter of Rights and Freedoms,* the so-called 'notwithstanding clause') or weak-form judicial remedies, such as the form of declaratory or 'engagement' remedies employed by the Constitutional Court of South Africa.[69]

Similarly, *reflexive* comparison underpins a range of key works in the field on constitutions and constitution making. For instance, in *Making Constitutions in Deeply Divided Societies,* Hanna Lerner suggests that prior constitutional theory was dominated by two competing understandings or paradigms: an 'essentialist paradigm of the 'nation-state constitution… as [a] legal embodiment[t] of [a] pre-constitutional homogeneous' unity; and a 'procedural paradigm of the "liberal constitution"' based on the idea of constructing 'a political collectivity on the basis of shared democratic procedures'.[70] But Lerner engages in a process of reflexive comparison focused on constitution making in deeply divided societies, namely Ireland in 1922, India in 1947–50 and Israel in 1948–50. Based on this, she concludes that existing theories overstate the capacity for deeply divided societies to reach agreement on either a shared substantive vision of the nation state or liberal-democratic procedures. In other words, she uses reflexive comparison to reveal the limits to existing constitutional theory, and the need for alternative theories capable of accommodating the idea of constitution making even in the absence of agreement of this kind.

In his 2023 *International Journal of Constitutional Law* Foreword, 'Is it Time to Abandon The Theory of Constituent Power', Sergio Verdugo explores both whether traditional and modified versions of constituent power theory provide an accurate description of modern processes of constitution making, and—if so—whether it is one that is normatively appealing. He concludes that the answer is no: traditional theories tend to downplay social and political pluralism, and are highly susceptible to 'abusive' uses by would-be authoritarian actors.[71] Even reformed or modified theories also face a double-edged challenge: either they over-estimate the capacity for peaceful democratic protest and deliberation under conditions of conflict and polarisation or, where there is greater social stability and

68 *Gargarella*, note 44, pp. 290–297.

69 Ibid., pp. 247–252, 266–269. On weak-form remedies, and engagement remedies specifically, see *Rosalind Dixon / Po Jen Yap*, Responsive Judicial Remedies, Global Constitutionalism 12 (2025), p. 323; *Brian Ray*, Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave, Cambridge 2016; *Katharine G. Young*, Constituting Economic and Social Rights, Oxford 2012.

70 *Hanna Lerner*, Making Constitutions in Deeply Divided Societies, Cambridge 2011, p. 6.

71 *Sergio Verdugo*, Is It Time to Abandon the Theory of Constituent Power?, International Journal of Constitutional Law 21 (2023), pp. 14, 18, 21.

cohesion, contemplate too radical a form of change.[72] Instead, Verdugo suggests the value of more continuumised notions of political legitimacy within democratic constitution-making processes, and theories that embrace the idea of political compromise, and a mix of constitutional continuity and change. In reaching this conclusion, Verdugo also engages in what is implicitly a form of *reflexive* comparison focused on a range of Latin American constitutional systems: he considers recent processes of constitution making in Bolivia and Venezuela to highlight the potential for abuse inherent in traditional versions of constituent power theory.[73] He likewise considers various modified versions of constituent power theory in the context of recent constitution-making processes in Chile and Ecuador, suggesting that these experiences reveal the false dichotomy between continuity and change created by (even modified) constituent power theory.[74]

III. Hybrids and Variants

Of course, the modes of comparative engagement we sketch in Part C.I are ideal types and so none of them is completely distinct. In practice, they often overlap and inform each other. In part, this is because constitutional theorists often build their ideas iteratively, through multiple related works and projects, each of which employs a slightly different methodology. They also often will typically approach a research question from multiple directions.

For example, constitutional scholars may begin their engagement with comparative experience *inductively* but go on to test the broader plausibility of a theoretical account through a process of *reflexive* comparison, or to demonstrate its broader applicability, via a process of *illustrative* comparison. Or they may begin by identifying the need for research on a question through a process of *reflexive* comparison, which helps identify gaps or problems within an existing theory, but then go on to develop a new theory through a process of *inductive* constitutional comparison.

A good illustration is the work of Berihun Gebeye on African constitutional theory. In *A Theory of African Constitutionalism,* Gebeye develops a novel theory, in law, of 'legal syncretism', or 'the process and the result of [the] adoption, rejection, invention, and transformation of diverse and seemingly opposite legal rules, principles, and practices into a constitutional state with imperial or colonial legacies',[75] which he suggests provides a useful framework for understanding and reforming African constitutionalism in a post-colonial era.[76] One way to view this theory is that Gebeye develops it *inductively*, from a careful, contextual and bottom-up study of constitutional developments in Ethiopia,

72 Ibid., pp. 22, 67–69.

73 Ibid., pp. 18, 42–44.

74 Ibid., pp. 64–66.

75 *Berihun Adugna Gebeye*, A Theory of African Constitutionalism, Oxford 2021, p. 33.

76 Ibid., chapter 1, 7.

Nigeria and South Africa, pre and post-independence. But another perspective is that the theory is constructed *reflexively*, by taking existing theories in religion and anthropology, and applying and refining them in light of constitutional experiences in these countries, to create a distinctive version applicable to law.[77] Alternatively, one could see Gebeye's theory as a reflexive refinement of existing theories within law and political theory itself, namely: as arrived at through a process of applying, testing and refining rival ideas about 'legal centralism' and 'legal pluralism' in these African contexts.[78] Neither theory, Gebeye suggests, fully or adequately accounts for the complexities of African constitutionalism.[79] It is only by mixing and reconciling them, in distinctive and *syncretic* ways, that these theories start to have the potential adequately to describe, or prescribe changes to, African constitutionalism.

Our own work on constitutional theory provides useful examples. In a project on Modes of External Constitutional Advising*,* for example, one of us (Perham) proposes a typology of modes of advising adopted by external constitutional advisers involved in constitution-making processes.[80] The research question the typology was responding to asked what are the distinct modes in which external constitutional advisers provide advice, and the project approached this question from two different directions. From one direction, it began with a survey of external constitutional advising across constitution-making instances in a number of jurisdictions in one region (Oceania). Based on that survey, particular choices made by external constitutional advisers and those instructing them began to emerge—and the construction of the typology began to emerge *inductively* from that direction. A case study of the role of external constitutional advisers in the making of the 1979 Constitution of the Marshall Islands (one of the constitution-making instances in the broader survey) then provided an opportunity for *illustrative* comparison—moving from regional comparison to in-depth single jurisdiction research to demonstrate the purchase and plausibility of the inductively-developed theory in a particular instance.

At the same time, and moving in another direction, the typology was also informed and refined through engagement with existing constitutional theoretic ideas about constitutional borrowing that had been developed in other contexts and jurisdictions—for example, from Vicki Jackson's work on the borrowing of outside ideas from foreign courts by the US Supreme Court and other apex courts[81]—as well as existing part-theoretical, part-empirical work about international influences on constitution making written by academics who had served as advisers in other contexts.[82] Viewed from this direction, a *reflexive* mode of com-

77 Ibid.*,* pp. 29-33.

78 Ibid., pp. 14-28.

79 Ibid., p. 22.

80 *Elisabeth Perham*, Modes of External Constitutional Advising, PhD Thesis UNSW, 2024.

81 *Vicki Jackson*, Constitutional Engagement in a Transnational Era, Oxford 2010.

82 See e.g., *Cheryl Saunders*, International Involvement in Constitution Making, in: Hanna Lerner / David Landau (eds,), Comparative Constitution Making, Cheltenham 2019; *Zaid Al-Ali*, Constitu-

parison was used to test existing ideas and understandings about the broader phenomenon of constitutional borrowing and international influences in constitution making, developed in other contexts, by reference to an understudied region (Oceania) and an understudied case of constitution making.

In *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age,* one of us (Dixon) proposes a theory of judicial representation-reinforcement styled as a response to similar, more US-centric ideas developed by John Hart Ely.[83] In *Democracy and Distrust,* Ely argued that the US Supreme Court should orient the process of judicial review to countering two broad risks to democracy: the risk of political incumbents seeking to self-entrench or block 'the channels of political change', and the risk of majoritarian processes infringing the rights of 'discrete and insular minorities'.[84] *Responsive Judicial Review* starts from a similar position, but suggests that defining the risks to democracies in these terms is potentially both under- and over-inclusive, given contemporary social science and comparative insights.

Hence, Dixon argues that judicial review should be oriented to responding to a somewhat different set of democratic pathologies or blockages in cases of constitutional indeterminacy: the risk of electoral or institutional monopoly power, democratic blind spots and burdens of inertia. Further, Dixon relies on a wide-ranging process of *illustrative* comparison to demonstrate the capacity of courts effectively to counter these risks to democracy, assuming at least three minimal pre-conditions are met: namely, a sufficient degree of judicial independence, legal and political support for judicial review, and remedial power for courts (whether express or implied).

Underneath these ideas, however, also sits both an explicit and implicit process of *reflexive* comparison. The book, for example, identifies potential weaknesses in Ely's ideas by applying them to a range of comparative contexts. It also develops the relevant preconditions for the theory of responsive judicial review by testing its plausibility in a range of contexts, where these conditions are, or are not, present.[85] Further, the concepts of *democratic burdens of inertia* and *democratic blind spots* derived both from a prior process of scholarly engagement with the ideas of other constitutional scholars such as Guido Calabresi, Bill Eskridge, Mark Graber and David Strauss,[86] and with the comparative

tional Drafting and External Influence, in: Rosalind Dixon / Tom Ginsburg (eds.), Comparative Constitutional Law, Cheltenham 2010.

83 *Rosalind Dixon*, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age, Oxford 2023.

84 *John Hart Ely*, Democracy and Distrust: A Theory of Judicial Review, Harvard 1980.

85 *Dixon*, note 83.

86 See e.g., *Guido Calabresi*, Foreword: The Supreme Court 1990 Term: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores), Harvard Law Review 105 (1991), pp. 80, 104; *William N. Eskridge Jr. / Philip P. Frickey,* The Supreme Court, 1993 Term —Foreword: Law as Equilibrium, Harvard Law Review 108 (1994), p. 4; *Mark A. Graber*, The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary, Studies in American Political

experiences of a range of jurisdictions with, and without, broad and strong forms of judicial review (for example, Canada, New Zealand and Australia).[87] This process of comparative engagement was also *inductive*, as well as *reflexive*, in character: it informed the idea that there were dangers to overly weak, as well as overly strong, forms of judicial review; and helped inform the construction of the core concepts of *democratic burdens of inertia* and *blind spots,* which lie at the centre of a theory of responsive judicial review.

The same analysis could be applied to other leading constitutional theories, of the kind explored in Part C.II *supra*. Sadurski, for example, engages in broad forms of *inductive* comparison to construct his theoretical account of constitutional populism. There is also a close connection between his two major recent books on populism, one of which is almost wholly inductive (*Poland's Constitutional Breakdown*) and one of which combines both inductive and reflexive comparison across a wider canvas (*A Pandemic of Populists*).

In *The Law as a Conversation Among Equals,* Gargarella largely seems to develop his account of democracy through a process of imaginary dialogue with past political theories and thinkers. Hence, the prime focus of his comparative engagement is *illustrative* in nature. But there are also indications that his theory is informed by a process of *reflexive* constitutional comparison—and especially, engagement with the leading progressive constitutional projects in Latin America. This is in part because *Conversation Among Equals* builds on the work and theoretical insights developed in his previous book on *Latin American Constitutionalism*, *1810–2010: The Engine Room of the Constitution*, and the process of *reflexive* comparison it involved: the book used a wide-ranging account of Latin American constitutional practice to challenge the dominant emphasis in (then) contemporary constitutional theory on constitutional rights provisions.[88] But it is also an explicit part of Gargarella's argument in *Conversation Among Equals.*

Gargarella notes in the more recent scholarship that the 1917 Mexican Constitution was an 'important achievement' in progress towards a more inclusive, egalitarian form of constitutional politics.[89] The same could be said, he notes, for the 'new constitutionalism' in Latin America adopted in the 1990s, or the neo-Bolivarian constitutional models adopted in Bolivia and Ecuador in recent decades.[90] But close engagement with the implementation of these reforms also informs Gargarella's scepticism about 'traditional', liberal, elite-driven models of constitutionalism and the separation of powers: none of these Constitutions,

Development 7 (1993), p. 35; *David A. Strauss,* The Modernizing Mission of Judicial Review, University of Chicago Law Review 76 (2009) p. 859.

87 See *Rosalind Dixon*, Weak-Form Judicial Review and American Exceptionalism, Oxford Journal of Legal Studies 32 (2012), p. 487; *Rosalind Dixon*, A Minimalist Charter of Rights for Australia: The UK or Canada as a Model?, Federal Law Review 37 (2009), p. 335, *Rosalind Dixon*, The Core Case for Weak-Form Judicial Review, Cardozo Law Review 38 (2017), p. 2193.

88 *Roberto Gargarella,* Latin American Constitutionalism, 1810–2010: The Engine Room of the Constitution, Oxford 2013.

89 *Gargarella*, note 44, p. 177.

90 Ibid., pp. 176–177.

Gargarella suggests, has achieved anything like the social and economic transformation or redistribution needed to achieve political and material equality, and trust in democratic forms of government.[91] This process of *reflexive* comparison also seems a central motivating force in Gargarella's attempt to develop a more radically bottom-up, participatory, deliberative and dialogic model of constitutional politics.

The same is true for leading theoretical work on constitution-making and amendment. Lerner, for example, engages in a process of *reflexive* comparison (focused on Ireland, India and Israel) to identify limits in, or gaps, in existing constitutional theories of constituent power and constitution making. But she also goes on to engage with the constitution-making processes in those countries *inductively*, to construct a new theory of incremental constitution making. In addition, she mines the variety of different approaches to incrementalism in each country to construct a set of sub-types of incremental constitution making, involving what she labels 'informal consociationalism' (Israel), 'constructive ambiguity' (India) and 'symbolic ambivalence' (Ireland).[92]

In 'Is it Time to Abandon the Theory of Constituent Power', Verdugo engages in a form of *reflexive* comparison, suggesting that the application of the theory in various Latin American contexts points both to its descriptive limits, and to its limits as a normatively desirable theory. At the same time, he explores different variants of modified constituent power theory, involving courts as mediators of the scope of the power. And in doing so, he engages in a process of *inductive* comparison: in Colombia, Verdugo notes, courts helped 'open up' the process of constitution making in adverse conditions; in Chile, courts were empowered to supervise the constitution-making process, and in Tunisia, courts found that they have implied power to regulate or supervise secondary aspects of the process.[93] A process of comparative engagement thus served to identify different variants of the relationship between courts and constituent power.

Each of the three modes of comparative engagement should therefore be seen as an ideal type, within a broader terrain of complex, real-world comparative constitutional engagement. There is still value, however, to distinguishing them, as ideal types: doing so allows for a clearer account of the appropriate scope and focus of each mode of comparative engagement, by constitutional theorists. And it arguably helps guard against the danger that the claims made by a particular constitutional theory will not be adequately grounded in practice.

D. Scope and Methods

What is necessary to ensure that the claims a particular theory makes are supported by underlying constitutional practice? First and foremost, transparency in the relationship

91 Ibid., chapter 12.

92 *Lerner*, note 70, chapters 3–5.

93 *Verdugo*, note 71, pp. 24–25.

between constitutional theory and practice; second, symmetry between the generality of claims made and relevant scope of comparison; and third, a degree of self-awareness or reflexivity on the part of scholars as to how they approach this relationship.[94]

I. Transparency

Why is transparency of this kind important? Transparency allows other scholars to assess the rigour and persuasiveness of theoretical claims in light of their empirical underpinnings and foundations. It also provides the basis for a more meaningful engagement with those ideas by future scholars.

An important determinant of how we engage with comparative practice, as theorists, is the existing state of the scholarly literature. If it is already deeply informed by comparison, or well-developed, the best starting point will often be reflexive in nature, and aimed at testing and refining those existing ideas. Conversely, the earlier the relevant set of theoretical ideas are, the more likely it is that inductive or illustrative modes of theorising and comparison will be appropriate.[95] To assess this, however, the necessary starting point is transparency within existing constitutional theory: we need to know what practices inform existing theories, in order to select between these different modes of comparison.

Moreover, transparency is important to comparative constitutional theorising as a collective enterprise. All constitutional scholarship is ultimately a collective enterprise—both through the peer review process, and through a broader process of scholarly dialogue that helps refine and improve our understanding. Constitutional theory likewise depends on a form of scholarly dialogue. But this is even more true for *comparative* constitutional scholarship and engagement.[96]

In prior work, one of us (Dixon) has argued that the best, safest guide to a rigorous comparative constitutional studies is one that relies on collaborative and overlapping forms of scholarship, where the ideas developed by one theorist are tested and refined by another in an overlapping and complementary set of studies.[97] Transparency in case selection aids this kind of collaborative approach, and the same norms apply to constitutional theorising. The more we surface the jurisdictional underpinnings to our theories, the more we invite

94 See *Liora Lazarus*, Constitutional Scholars as Constitutional Actors, Federal Law Review 48 (2020), p. 483; *Liora Lazarus*, Constitutional scholars and scholactivism, International Journal of Constitutional Law 20 (2022), p. 559.

95 This difference might also be one reason that different modes of comparative engagement are more common in some areas than others, depending on their 'newness' in the field. We are indebted to Berihun Gebeye for pressing us on this point. Relatedly, see *Mark Graber*, Generational and constitutional change, DPCE 3 Online (2022), p. 1549 (reflecting on the foci of different generations of constitutional scholars).

96 *Dixon*, note 1, p. 193; *Rubio-Marín*, note 62, p. 11.

97 *Dixon*, note 1.

and allow other theorists to test and refine our theories in light of related but distinct real world constitutional systems and cases.

As Part B notes, almost all inductive comparison relies to some degree on prior doctrinal scholarship setting out the contours of constitutional doctrine and practice in various jurisdictions. The broader this reliance, the more general a process of inductive comparison and theory formation can also be. Take Rubio-Marín's development of the idea of gender constitutionalism, and its many variants: Rubio-Marín suggests that this kind of *general* theorising about the relationship between gender and constitutions was only possible through engagement with the work of many different scholars of gender and constitutions worldwide.[98]

Almost all empirical comparison also involves collaboration among scholars: either it involves scholarly teams to code the data necessary for large-n analysis, or else a process of iterative, 'concentric' qualitative comparison among scholars. The leading tools for qualitative forms of empirical comparison involve applying concepts such as the 'most similar' or 'most different' cases principle, and yet no individual scholar can hope accurately to survey every jurisdiction with a view to applying this principle. Instead, they must rely on a more limited form of survey or 'scoping' exercise, which seeks to identify similar or different cases—in the hope that others will then retest their findings on the basis of related pairings of cases.[99]

Reflexive comparison will be especially well-suited to a dialogue or collaboration of this kind among scholars. Often, collaboration of this kind can allow theories to be tested in new contexts, by scholars with specific expertise in constitutional law in those contexts. And this can mean that in developing a theory, scholars can choose *either* to focus on a narrower set of jurisdictions and offer suitably qualified theoretical ideas in the hope they will then be further expanded and generalised by others drawing on different contexts and examples, *or* on a broader set of jurisdictions and claims, knowing that those claims might then be narrowed through future processes of reflexive comparison.[100]

Take the challenge by Verdugo to ideas about constituent power: Verdugo takes existing ideas about constituent power developed in Europe (for example, by Carl Schmitt and Emmanuel-Joseph Sieyès), and engages in a reflexive re-examination of them focused on constitutional systems in Latin America. This also corresponds to Verdugo's expertise

98 *Rubio-Marín*, note 62, pp. 10–12 (comparing the exercise to collective carpet-weaving, or a symphonic choir).

99 *Dixon*, note 1.

100 This might be one answer to Stone and Weis's critique of Waldron's theory of constitutional rights in *Jeremy Waldron*, The Core of the Case Against Judicial Review, Yale Law Journal 115 (2016), p. 1346: while Waldron offered a theory that was too general relative to the empirical basis he drew on, he could be understood to have done so in a tentative way, open to the possibility of reflexive refinement.

in Chilean constitutional law,[101] and broader Latin American constitutional developments (especially in Bolivia),[102] as well as his Spanish-language skills.

Verdugo's *Foreword* then led to a vibrant exchange among scholars invited to respond to his argument, several of whom adopted a reflexive and comparative approach to testing the persuasiveness of Verdugo's theoretical claims. This again allowed for the process of reflexive engagement to draw on true comparative expertise: Christine Bell, for example, focused on the experience of constitution making in post-conflict settings in Kenya and Nepal as a basis for affirming Verdugo's view that constitutional legitimacy is best seen as a continuum, and through the prism of compromise, rather than an on/off idea of constituent power.[103] This response builds on the deep expertise of Bell as a leading scholar of post-conflict constitutions.[104]

Conversely, Nicholas Aroney, Erin Delaney and Stephen Tierney focused their response to Verdugo on federal constitutional systems, such as Australia, the US, India and Switzerland, drawing on the constitutional experiences of these systems to suggest potential limits or qualifications to Verdugo's theory. Indeed, they suggested that in situations of 'coming together' federalism,[105] the idea of constituent power may remain more important than Verdugo suggests—as at least one possible conceptual answer to the central *problematique* facing federal systems, namely: 'the foundational recognition of a plurality of territorially demarcated jurisdictions and their constituent populations'.[106] Again, this reflexive engagement is based on deep expertise on the part of the authors: Aroney, Delaney and Tierney are some of the world's leading scholars of constitutional federalism, and have particular expertise in the origins and operation of federalism in Australia and the US, among other countries.[107]

101 See, e.g., *Sergio Verdugo / Luis Eugenio García-Huidobro*, How Do Constitution-Making Processes Fail? The Case of Chile's Constitutional Convention (2021–22), Global Constitutionalism 13 (2024), p. 154.

102 *Sergio Verdugo*, The Fall of the Constitution's Political Insurance: How the Morales Regime Eliminated the Insurance of the 2009 Bolivian Constitution, International Journal of Constitutional Law 17 (2020), p. 1098.

103 *Christine Bell*, Constitutionalizing Conflict: Beyond Constituent Power: Afterword to the Foreword by Sergio Verdugo, International Journal of Constitutional Law 21 (2023), p. 1189.

104 See e.g., *Christine Bell*, On the Law of Peace: Peace Agreements and the Lex Pacificatoria, Oxford 2008; *Christine Bell*, Introduction: Bargaining on constitutions – Political settlements and constitutional state-building, Global Constitutionalism 6 (2017), p. 13.

105 *Nicholas Aroney / Erin F. Delaney / Stephen Tierney*, Federal Exceptionalism and Constituent Power: Afterword to the Foreword by Sergio Verdugo, International Journal of Constitutional Law 21 (2023), p. 1182.

106 *Aroney / Delaney / Tierney*, note 105, p. 1183.

107 See, e.g., *Nicholas Aroney*, The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution, Cambridge 2009; *Erin F. Delaney / Ruth Mason*, Solidarity Federalism, Notre Dame Law Review 98 (2022), p. 617; *Gabrielle A. Appleby / Erin F. Delaney,* Judicial Legitimacy and Federal Judicial Design: Managing Integrity and Autochthony,

Similar forms of reflexive comparison are implicitly contemplated by other scholars, such as Gebeye in his development of a theory of African constitutionalism. In developing a theory of legal syncretism, Gebeye engages deeply with the experiences of Ethiopia, Nigeria and South Africa, but also with a broader range of African jurisdictions. Through this mix of inductive theory formation, and reflexive testing of existing theoretical ideas, Gebeye also generates a theory that he suggests is capable of explaining constitutionalism and pointing to constitutional reforms across Africa.[108] But Gebeye further gestures at the possibility that the idea of legal syncretism could guide or inform constitutional debate and reform in other post-colonial contexts[109]—he does not spell those possibilities out, but leaves them to future processes of reflexive comparison and testing by other scholars working in and on the Global South. Both postures are hallmarks of rigorous approaches to constitutional scholarship, and they are especially valuable in this context: transparency in comparative engagement helps promote a truly collaborative approach to theory formation, testing and refinement.

II. Symmetry

A second requirement of rigorous constitutional theorising is that it draws on a set of comparative practices adequate to ground the claims that it seeks to make. For instance, as noted in Part A *supra*, both *inductive* and *illustrative* comparison can be broad or narrow in scope. The most important consideration, in the selection of comparative cases, is symmetry: the scope of comparison must match the generality of the claims a constitutional theory makes. That is, the broader the process of comparison, the more feasible it is to develop a general theory of constitutions or constitutionalism, whereas the narrower the comparison, the more qualified or limited the theory must be.

Take Aileen Kavanagh's theory of collaborative constitutionalism. On one view, this is a theory of British constitutionalism, and hence can legitimately rely on an inductive process of theory formation based solely on British constitutional experience. But on another view, the theory is more general, and seeks to guide courts, legislators and executive actors in all constitutional democracies toward an ethos of mutual respect, reciprocity and restraint. And if so, as Stone and Weis note, one could legitimately expect the theory to engage with a broader range of cases, beyond the United Kingdom.[110]

Yale Law Journal 132 (2023), p. 2419; *Stephen Tierney*, The Federal Contract: A Constitutional Theory of Federalism, Oxford 2022.

108 *Gebeye*, note 75, chapter 7.

109 Ibid.

110 *Stone / Weis*, note 5, p. 13: 'Kavanagh seeks to reorient constitutional theory, and ultimately constitutional practice, toward an understanding of the separation of powers that values and promotes interaction along collaborative lines. And yet, it is unclear how tenable this normative thesis is given the theory's empirical base – although descriptively robust – is limited to a single jurisdiction'.

In Hungary or Poland, for example, an argument for judicial restraint could be understood as an argument in support of courts upholding a range of abusive forms of constitutional change.[111] Or in Venezuela, an argument for comity between branches could be understood as an invitation to collusion between the Maduro regime and the Supreme Court —a form of collusion that has arguably already occurred and contributed to a form of 'abusive judicial review', which itself has accelerated the erosion of constitutional democracy in that jurisdiction.[112] Broader comparative engagement, therefore, might ultimately point to the importance of both collaboration, contestation and (necessary) conflict as values within a healthy democratic constitutional order.[113]

This point is put this way by Adrienne Stone and Lulu Weis in their important work on generality versus specificity in constitutional theorising: for 'propositions that apply beyond a single case or single jurisdiction […] comparative work is needed in the process of theory-formation'.[114] The scope of that comparative work varies in accordance with the generality of the relevant theoretical propositions being advanced.

For *reflexive* comparison, the choice of comparators is more open. A scholar may choose to focus on a single country or jurisdiction, or small sub-set of countries or jurisdictions, regardless of the ingoing generality of the relevant constitutional inquiry. What matters is *novelty*: attention to cases that go beyond those already embedded, or implicit, in existing constitutional theoretical scholarship.

There is clearly value to studies that focus on the same countries, or cases, as an original constitutional theoretic study: studies of this kind can help critically re-examine or revisit the experiences of an existing constitutional system and thereby assess whether they do in fact support the inductive process of constitutional theory formation. But scholarship of this kind is not comparative in nature. It may be 'thick' doctrinal, or socio-legal, in focus, but it does not involve any true form of reflexive comparison.[115]

True reflexive comparison requires a focus on certain constitutional experiences outside the contemplation of a constitutional theorist in the process of theory formation.[116] Only in this way can the process help test whether the original theory is in fact more general in application than originally thought, or else, more limited or qualified in scope.

Comparison of this kind can be conducted by the original constitutional theorist themself, as part of an *iterative* process of constitutional theory formation and testing. But

111 *Sadurski*, note 60. See also *Rosalind Dixon / David Landau*, Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy, Oxford 2021.

112 *David Landau / Rosalind Dixon*, Abusive Judicial Review: Courts against Democracy, UC Davis Law Review 53 (2020), p. 1313.

113 *Rosalind Dixon*, A Not Too Collaborative Constitution? Collaboration as Constitutional Value vs Model?, Working Paper (on file with authors).

114 *Stone / Weis*, note 5, p. 13. See e.g., *Michael G. Breen*, The Origins of Holding-Together Federalism: Nepal, Myanmar, and Sri Lanka, Publius: The Journal of Federalism 48 (2018), p. 26.

115 *Dixon*, note 1.

116 See e.g., *Lerner,* note 70.

it can also be conducted by other scholars, seeking to test and refine existing theories. In this sense, reflexive comparison is distinct from that which occurs in the process of inductive theory formation: here, Stone and Weis suggest, it may be too late for comparison 'after the point of theory formation'.[117] The theory itself may not be sufficiently flexible to allow for appropriate adjustment in light of new cases and contexts. But for reflexive comparison, the aim is to expand or qualify the theory in light of new cases and contexts, and hence that process can occur iteratively, through ongoing individual and collective scholarly endeavours.

III. A Self-Aware and Reflexive Scholarly Outlook

Finally, the hallmark of rigorous comparative engagement, by constitutional theorists, rests on a closely related form of scholarly self-awareness or reflexivity.[118] (It is likewise important for judges and lawyers to engage in in reflexive or 'reflective' processes of comparison, in order critically to test their assumptions about existing constitutional norms and values.[119])

There are some general guidelines to help scholars in their approach to this task, but these guidelines depend on the specific type of engagement between constitutional theory and practice. They do not tell a scholar which type of engagement to prefer; this is something that will almost always depend on the question being asked, and the existing state of the constitutional theory literature.

Hence, it will be especially important for scholars to approach this task in a reflexive and self-critical way that questions and tests, rather than pre-supposes, what mode of comparison should be preferred; and that acknowledges the idea of overlap and blurred boundaries between modes—as well as their different demands and requirements.

In this sense, the idea of 'reflexivity' in comparative constitutional theorising can be understood as operating at two levels: one that involves idea of testing and refining existing theories in light of the insights gained from the application to new contexts, and the other, a form of self-awareness and self-criticism on the part of scholars as to the relationship between constitutional theory development and constitutional comparison.

117 *Stone / Weis*, note 5, p. 9.

118 *Lazarus*, note 94.

119 Judges and lawyers are also likely to engage in good decision-making when they engage in reflexive or reflective processes of comparison, aimed at encouraging self-reflection about existing constitutional norms, values and assumptions: see e.g., *Sujit Choudhry*, How to do Comparative Constitutional Law in India: *Naz Foundation*, Same Sex Rights, and Dialogical Interpretation, in: Sunil Khilnani / Vikram Raghavan / Arun K. Thiruvengadam (eds.), Comparative Constitutional in South Asia, Oxford 2016; *Michelman*, note 50; *Dixon*, note 1; *Jackson*, note 81.

E. Conclusion

Not all constitutional theory is developed in dialogue with constitutional practice. But constitutional theorising clearly benefits from engagement with comparative constitutional practice. *Inductive* processes of comparison create the possibility of new understandings, developed from the bottom up, of the relationship between the individual and the state, and the scope, structure and identity of state institutions. *Reflexive* modes of comparison open up possibilities for the refinement of existing theoretic ideas—pointing both to a better to understanding of the necessary preconditions for a theory to apply, and hence helping to narrow its scope of operation, or else ways of adapting existing ideas to broaden their application in ways that are appropriately cognisant of the variety of constitutional forms worldwide. *Illustrative* comparison likewise serves to test the plausibility of theoretical ideas against real-world settings and conditions.

Constitutional theorists should thus be actively encouraged toward a comparative turn, especially a turn toward a broad range of constitutional experiences that include the attention to constitutionalism in the 'Global South'.[120] Existing constitutional theorising often engages with the Global South, but with a relatively narrow range of jurisdictions within it. Therefore, part of the call for a comparative turn in constitutional theorising is a call to engagement with constitutional practices in countries beyond the 'usual suspects'. The more we understand the variety of ways in which constitutional theory can engage with practices in a wider range of jurisdictions, the richer theory will also be.

Part of the aim of the essay is to call for a more transparent, symmetric and self-aware approach when engaging with this broader range of constitutional practices within constitutional theorising. The article does not seek to prescribe an overly demanding standard of comparative engagement. On the contrary, it suggests that constitutional theory can be enriched by comparative practise in three distinct, if overlapping ways. And that some of these modes, illustrative—for example, are relatively undemanding.

However, it suggests that transparency, symmetry and self-awareness around comparative engagement is extremely important to the rigour of constitutional theorising. Like Stone and Weis, we suggest that this applies from the outset in the development of constitutional theory, but we emphasise that it is equally important in the refinement of constitutional theoretic ideas through processes such as reflexive and illustrative comparison.

The article therefore is at once an invitation to comparative engagement and a call for greater rigour in that process. But the standards of rigour we propose are eminently achievable, indeed, even fairly undemanding. They are a call for matching modes of theory formation with appropriate forms of case selection, and above all for transparency by

120 *Philipp Dann*, Southern Turn, Northern Implications: Rethinking the Meaning of Colonial Legacies for Comparative Constitutional Studies, Comparative Constitutional Studies 1 (2023), p. 174; *Samararatne*, note 3; *Theunis Roux*, Grand Narratives of Transition and the Quest for Democratic Constitutionalism in India and South Africa, World Comparative Law 57 (2024), p. 5.

authors in identifying what countries they have engaged within theory formation, why, and what this says about the narrowness or breadth of the ideas they have developed.

Remedies and Institutional Support in Social Rights Litigation

By *Edward Béchard-Torres*[*]

Abstract: In some jurisdictions of the Global South, courts seized with social rights claims have occasionally issued orders that help build state capacity. These remedies can take various forms. Some are managerial, others are dialogic. Some are specific and individualized, while others attempt to confront structural problems. Generally, these orders neglect the work of developing substantive rights doctrine. Instead, they work to build a more effective, coordinated, and attentive government. In short, these orders see courts offer *institutional support* to other state actors. This Article surfaces institutional support as a potential approach in social rights litigation. Drawing on landmark social rights proceedings in India, South Africa, and Colombia, the Article argues that this varied remedial approach has already been successfully deployed and may constitute one of the contributions of courts in the Global South to comparative law. Institutional support can also be understood as a trade-off between the competing dimensions of transformative constitutionalism. On one hand, the approach presents paths for achieving meaningful judicial impact, while curbing some of the risks associated with enforcing social rights. On the other, it neglects the work of elaborating social rights' critical political vision, as well as substantive rights doctrine. Institutional support also implies an uncoupling of constitutional rights and judicial remedies, but this particular feature is welcome. The uncoupling of right and remedy can help manage the public's expectations of what courts can accomplish, and it can help foster a rights discourse that is less court centric.

Keywords: Social and Economic Rights; Remedies; State Capacity

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A. Introduction

In some jurisdictions of the Global South, courts seized with social rights claims have issued orders that help build state capacity. These remedies can take various forms. "Strong-

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form" or "managerial" orders might be deployed to promote the implementation of social programs. "Weak" or "dialogic" orders might be issued to encourage information-gathering.[1] Such interventions can sometimes take the form of simple and specific commands, but they can also be nested in sprawling responses to structural problems.[2] Across the board, these remedies represent a turn away from substantive rights doctrine. They instead press courts in the service of building a certain kind of government. Put simply, these orders see courts offer other public actors *institutional support*.

This Article considers institutional support as a remedial posture for courts engaged in social rights litigation. The approach centers weak state capacity as a critical obstacle to fulfilling rights. Part A revisits some of the landmark social rights proceedings in India, South Africa and Colombia, and argues that many of those orders have an underlying logic of institutional support. This broad judicial ethic may thus constitute one of the rich contributions of comparative law from the Global South[3]—and one of relevance to jurisdictions in the Global North, which are hardly unfamiliar with deficiencies in state capacity.

Part B offers a few observations on why "institutional support" might be attractive for judges, and what it means for the judicial role. Institutional support offers several paths for increasing judicial impact, while curbing some of the risks associated with social rights enforcement. For better or worse, institutional support also implies an uncoupling of constitutional rights and judicial remedies. Court orders may offer specific forms of relief that address shortcomings in state capacity, but this leaves the content of social rights to the realm of political contestation and social movements. Part B argues that this dynamic is indeed welcome. The uncoupling of right and remedy might help manage the public's expectations of what courts can accomplish, and it can help foster a rights discourse that is less court-centric.

1 For more on distinction between strong- and weak-form remedies, see e.g., *Mark Tushnet*, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law, Princeton 2008; *Rosalind Dixon*, Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited, International Journal of Constitutional Law 5 (2007); *Katharine G Young*, Constituting Economic and Social Rights, Oxford 2012.

2 For more on distinction between individualized relief and structural remedies, see *Kent Roach*, Remedies for Human Rights Violations: A Two-Track Approach to Supranational and National Law, Cambridge 2021; *Kent Roach*, Polycentricity and Queue-Jumping in Public Law Remedies: A Two-Track Response, University of Toronto Law Journal 66 (2016).

3 See generally *Philipp Dann / Michael Riegner / Maxim Bönnemann*, The Southern Turn in Comparative Constitutional Law, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020.

B. Institutional Support and the Rights-Fulfilling State

I. The Turn Towards State Capacity as a Structural Rights Problem

Scholars have long recognized a relationship between weak state capacity and the judicial role. In some jurisdictions, weak institutions have prompted a modest redrawing of the separation of powers, with courts assuming responsibilities that they have been reluctant to elsewhere.[4] Problems of "mis-governance"—ranging from incompetence, inattentiveness, intransigence or mere inertia—have occasionally provoked courts into becoming assertive managers of other state actors.[5] Some judicial interventions have also indirectly encouraged governments to invest in their rights-respecting capacities.[6] Judicial dialogue is said to help state actors overcome bureaucratic blockages, for instance.[7] Some of this activity prompted Madhav Khosla and Mark Tushnet to publish their "preliminary inquiry" of judicial interventions that buttress weak state capacity.[8]

Institutional support—understood as a general remedial orientation—further cements this relationship between judicial role and state capacity. The term is used to refer to a variety of court orders that can bolster other state actors' performance and effectiveness—or, at least, that compensate for their absence. In doing so, it positions weak state institutions as a central rights problem capable of animating judicial activity. And it suggests that what may be underlying facially varied approaches to enforcing social rights is an implicit theory of "effective public administration".[9]

4 *Armin von Bogdandy et al.*, Ius Constitutionale Commune en América Latina: A Regional Approach to Transformative Constitutionalism, in: Armin von Bogdandy et al. (eds.), Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune, Oxford 2017, p. 6; for an account of the judicial role in Southern constitutionalism that revolves around failed institutions, see *David Landau*, Institutional Failure and Intertemporal Theories of Judicial Role in the Global South, in: David Bilchitz / David Landau (eds.), The Evolution of the Separation of Powers: Between the Global North and the Global South, Cheltenham 2018.

5 *Katharine Young*, The New Managerialism, in: Vicki Jackson / Yasmin Dawood (eds.), Constitutionalism and a Right to Effective Government, Cambridge 2022, p. 136; *Gaurav Mukherjee / Juha Tuovinen*, Designing Remedies for a Recalcitrant Administration, South African Journal of Hum Rights 36 (2020), p. 389.

6 *César Rodríguez-Garavito / Diana Rodríguez-Franco*, Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South, Cambridge 2015, pp. 16–17; *Brian Ray*, Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave, Cambridge 2016.

7 *Dixon*, note 1, pp. 394–406.

8 *Madhav Khosla / Mark Tushnet*, Courts, Constitutionalism, and State Capacity: A Preliminary Inquiry, American Journal of Comparative Law 70 (2022); *Vicki Jackson / Yasmin Dawood* (eds.), Constitutionalism and a Right to Effective Government, Cambridge 2022.

9 For the suggestion that a "theory of effective public administration" might underlie varied enforcement approaches in social rights litigation, see *Young*, note 5, pp. 136–137.

Some scholars have charted the judicial move from "substance" to "process".[10] However, the approach imagined here is more ambitious than mere process. Institutional support presses courts in the service of building an effective, rights-conscious government: one where social programs are effectively coordinated, financed, and implemented; where public policy is evolving, responsive and data-informed; and where public officials treat the vital needs of the most vulnerable with care and concern. This account of rights-affirming governance is rooted in a "thicker" understanding of state capacity—one which includes, but goes well beyond, a government's mere "ability to accomplish its intended policy goals".[11]

Many different kinds of orders can fall within its scope. These orders can occasionally be "weak-form" or "dialogic", and leave the details of a broad response to other state actors.[12] They can also assume a "strong-form" of specific, managerial commands. Occasionally, they might be experimentalist and engage stakeholders and other state actors in elaborating a response to an identified issue.[13] Similarly, institutional support can be offered through "complex" orders that address systemic rights deprivations, or through simple forms of individualized relief that address the needs of specific litigants.[14]

The "support" that is imagined here can still involve coercion and accountability of state actors and officials. For instance, some of the proceedings considered below feature ongoing supervision of state officials—with the occasional hanging threat of contempt proceedings. They also include judge-led confrontations with "lackadaisical public administrations".[15] But this accountability is to a performance ideal, and not to some substantive account of what social rights guarantee. Framing the judicial role as "support" positions other state actors in a sympathetic light. It assumes that these actors share the desire to embody the effective, coordinated, rights-conscious state—even if they may depend on a curial intervention to attain it.

Of course, different problems, institutional contexts, or political moments will call on courts to make sensitive judgment calls over which kind of "institutional support" ought to be put into practice. The constraints that shape this work are similar to those which

10 See e.g., *Ray*, note 6.

11 *Mark Dincecco*, State Capacity and Economic Development: Present and Past, Cambridge 2017, section 1.1.

12 For more on "dialogic", "weak" or "open" remedies, see *Young*, note 1, p. 147; *Aruna Sathanapally*, Beyond Disagreement: Open Remedies in Human Rights Adjudication, Oxford 2012, pp. 14–15, 105; *Tushnet*, note 1, pp. 247–248; for "dialogic judicial activism", a more aggressive enforcement posture that still relies to some degree on dialogue, see *Rodríguez-Garavito / Rodríguez-Franco*, note 6, p. 16.

13 On the differences between "managerial", "conversational", or "experimentalist" approaches to social rights enforcement, see *Young*, note 1.

14 On the distinction between individual and structural responses in human rights litigation, see notably *Roach*, note 2; *Edward Bechard-Torres*, Giving the Individual Remedy in Social Rights Litigation Its Due, Comparative Constitutional Studies 2 (2024), p. 81.

15 *Mukherjee / Tuovinen*, note 5, p. 18.

shape the activity of other "responsive" courts.[16] Judges have to navigate public sentiment, political dynamics, procedural rules, judicial ideology, legal culture, as well as courts' limited capacity to invest resources in long-running, complex cases.[17] All this said, the interventions that fall within this family of institutional support are often assertive and muscular. That is because the softest of enforcement approaches—for instance, the kind of bare declaratory relief fashioned in *Grootboom*[18]—often assumes that the state has the capacity to mount a compelling response. Institutional support proceeds on the premise that the state lacks such capacity, and that some degree of judicial involvement may be required for governments to succeed. Thus, these kinds of interventions might regularly include "strong" or "moderate" remedies, as well as ongoing supervision.[19] As the South African Constitutional Court suggested more recently in *Mwelase*, if "temporary, supervised oversight of administration" is required "where the bureaucracy has been shown to be unable to perform, then there is little choice: it must be done".[20]

It might then be asked why it is valuable to surface "institutional support" as a body of enforcement approaches, when it simply draws on existing categories taken up in the literature—whether that be "strong" or "weak" orders, conversational, experimentalist, or managerial, to name but a few.[21] Part B attempts to situate institutional support among these other approaches, and identifies key similarities and differences. For now, it should suffice to say this. First, "institutional support" reveals how facially different remedies—some of which may be strong-form and "managerial", others may be "weaker" and dialogic—may indeed be animated by a common, underlying conception of the judicial role. Second, recognizing institutional support can reveal how strong-form, managerial orders actually flow from a fairly deferential posture. If an existing social program has been left unimplemented because of a breakdown in coordination between different state agencies, a court practicing institutional support might issue specific, "managerial" commands. In such a case, judicial strong-arming is actually *compatible* with deference, since judges are preserving—and indeed enforcing—the legislature and executive branches' desires on matters of policy. Third, surfacing institutional support helps mark an important conceptual shift away

16 *Malcolm Langford*, Judicial Politics and Social Rights, in: Katharine Young (ed.), The Future of Economic and Social Rights, Cambridge 2019, p. 80.

17 *Rosalind Dixon*, In Defence of Responsive Judicial Review, National Law School of India Review 34 (2023), p. 106.

18 South Africa and Others v Grootboom and Others, [2000] ZACC 19, [2001] (1) SA 46 (CC) [Grootboom].

19 For more on a classification of judicial activity according to "weak", "moderate", or "strong" rights, remedies, and supervision, see *Rodríguez-Garavito / Rodríguez-Franco*, note 6; *Malcolm Langford / César Rodríguez-Garavito / Julieta Rossi*, Introduction: From Jurisprudence to Compliance, in: Malcolm Langford / César Rodríguez-Garavito / Julieta Rossi (eds.), Social Rights Judgments and the Politics of Compliance: Making it Stick, Cambridge 2017.

20 Mwelase and Others v Director-General for the Department of Rural Development and Land Reform, 2019 ZACC 30, para 49.

21 For a summary of established enforcement approaches in social rights litigation, see *Young*, note 1.

from conversations around what social rights guarantee—a question of substantive rights doctrine—and towards conversations around whether and how courts can contribute to buttressing state capacity.

The following sections provide a selection of examples of institutional support being mobilized in social rights cases. These examples are organized around a few recurring sites: improving social program implementation, and encouraging the state to be more attentive and informed about the needs of the most vulnerable. There are certainly other forms of support and capacity building that are conceivable.

The turn towards these examples is meant to be illustrative. They show that some courts are—at least occasionally—comfortable in engaging in this kind of work, and that it can produce rights-affirming results. Moreover, drawing on well-known social rights cases means that we have the benefit of a modest body of empirical evidence measuring the courts' efficacy. The examples are drawn from social rights cases in Colombia, South Africa, and India. These middle-income countries are widely recognized as leading jurisdictions.[22] They have varied experience enforcing social rights, and their work has been nourished by rich scholarly communities.[23] These apex courts are also rooted in different legal cultures and political environments. The approaches they have mobilized are therefore not confined to their own borders—or necessarily to middle-income jurisdictions more generally. Indeed, as suggested above, problems related to a lack of state capacity can also occasionally arise in jurisdictions in the "Global North".[24]

II. Ensuring That Social Programs Are Effectively Implemented

Inadequate implementation of social programs can lead to widespread rights deprivations.[25] Experience suggests that judicial remedies can help shore up this basic failing in state

22 See e.g., *Daniel Bonilla Maldonado*, Introduction, in: Daniel Bonilla Maldonado (ed.), Constitutionalism of the Global South: The Activist Tribunals of India, South Africa and Colombia, Cambridge 2013; and *Rodríguez-Garavito / Rodríguez-Franco*, note 6.

23 On the varied enforcement approaches adopted by these jurisdictions' apex courts, see e.g., *Manoj Mate*, Public Interest Litigation and the Transformation of the Supreme Court of India, in: Diana Kapiszewski / Gordon Silverstein / Robert A. Kagan (eds.), Consequential Courts, Cambridge 2013; *Magdalena Sepúlveda*, Colombia: The Constitutional Court's Role in Addressing Social Injustice, in: Malcolm Langford (ed.), Social Rights Jurisprudence: Emerging Trends in International and Comparative Law, Cambridge 2009; *Dennis Davis*, Adjudicating the Socio-Economic Rights in the South African Constitution: Towards Deference Lite?, South African Journal of Human Rights 22 (2006).

24 *Michaela Hailbronner*, Transformative Constitutionalism: Not Only in the Global South, American Journal of Comparative Law 65 (2017); on the suggestion that governance issues in the Global South make these same jurisdictions ripe sources of inspiration for jurisdictions in the "North", see *Mariana Pargendler*, Corporate Law in the Global South: Heterodox Stakeholderism, European Corporate Governance Institute - Law Working Paper 718 (2023).

25 On the issue of coordination breakdowns between different levels of government, see *Mukherjee / Tuovinen*, note 5, p. 11.

capacity.[26] Court orders might attempt to repair breakdowns in coordination between state actors, overcome gaps in implementation, or ensure that existing programs are being financed at a level sufficient to meet their anticipated costs. These orders do not necessarily challenge government policy. Quite the opposite: they can make government more effective at achieving its own objectives.

Many of the orders issued throughout the Indian Supreme Court's celebrated "right to food" proceeding share this basic orientation.[27] At the time the original writ petition was filed, India's public distribution system possessed close to 50 million tons of surplus grain in stock, but had failed to distribute it.[28] The Supreme Court's earliest order voiced a particular role-conception: while policy is "best left to the Government", the Court may have to ensure "that the food grains which are overflowing in storage receptacles […] should not be wasted". The decision adds—in a phrase that the Court would repeat throughout the proceedings—that "mere schemes without any implementation are of no use".[29]

A drumbeat of subsequent court orders further encouraged implementation by converting different social programs into legal entitlements.[30] Such orders encouraged the implementation of India's public food distribution system,[31] as well as programs related to child development,[32] and mid-day meal programs,[33] to take but a few examples.[34] In a similar vein, some of the Court's orders sought to repair coordination breakdowns between government actors at the central, state, and local levels.[35] State governments had failed to discharge their existing obligations to identify families below the poverty line,[36] dispense

26 For a narrow understanding of state capacity as a lack of proper coordination and effective implementation, see *Dincecco*, note 11, section 1.1.

27 People's Union for Civil Liberties v Union of India & Others, Petition (Civil) No. 196/2001.

28 For more on the proceedings, see *Lauren Birchfield / Jessica Corsi*, Between Starvation and Globalization: Realizing the Right to Food in India, Michigan Journal of International Law 31 (2010), p. 692; *Poorvi Chitalkar / Varun Gauri*, India: Compliance with Orders on the Right to Food, in: Malcolm Langford / César Rodríguez-Garavito / Julieta Rossi (eds.), Social Rights Judgments and the Politics of Compliance: Making It Stick, Cambridge 2017, p. 294; *S. Muralidhar*, India: The Expectations and Challenges of Judicial Enforcement of Social Rights, in: Malcolm Langford (ed.), Social Rights Jurisprudence: Emerging Trends in International and Comparative Law, Cambridge 2009, p. 116.

29 PUCL Interim Order (20 August 2001); see also PUCL Interim Orders (2 May 2003) and (29 October 2010).

30 Chitalkar / Gauri, note 28, p. 298.

31 PUCL Interim Orders 23 July 2001, 28 November 2001, 8 May 2002, and 29 April 2004.

32 PUCL Interim Orders 8 May 2002, 29 April 2004, 7 October 2004, and 13 December 2006.

33 PUCL Interim Orders 28 November 2001, 20 April 2004, and 17 October 2004.

34 Chitalkar / Gauri, note 28, p. 299.

35 Ibid, p. 298.

36 PUCL Interim Order 3 September 2001.

ration cards,[37] or distribute grain allocated by the central government,[38] for instance. Last, the Court's "institutional support" also meant establishing a Central Vigilance Committee to reduce corruption in the public food distribution system.[39]

State actors may not have consistently complied, but the mid-day meal plan saw its coverage increase by nearly 61 million children from 2001 to 2006, increasing recipients' caloric intake considerably.[40] The mid-day meal plan is also credited with meaningfully increasing girls' school enrolment.[41] Although a supportive political environment helped buttress this change, the available evidence suggests that the Court's intervention played a valuable causal role.[42]

This strand of institutional support is also evident in some of the landmark orders issued by the Constitutional Court of Colombia. Consider the "included benefits" line of cases. Courts once routinely needed to issue orders to deliver benefits that had already been promised by the country's national healthcare plan.[43] Colombia maintains a list of benefits that must be funded by private health insurance companies to individuals within Colombia's contributory and subsidized regimes.[44] Exploiting weak regulatory oversight, insurance companies had commonly refused to pay for these "included" treatments.[45] The *tutela*

37 PUCL Interim Order 28 November 2001.

38 See e.g., Ibid. and PUCL Interim Orders 17 September 2001 and 12 August 2010.

39 PUCL Interim Orders 12 July 2006 (noting widespread corruption in Public Distribution System and establishing the Central Vigilance Committee), 12 August 2012 (recommending computerization of the Public Distribution System) and 17 September 2012 (cataloguing the 22 reports of the Central Vigilance Committee).

40 *Daniel Brinks / Varun Gauri*, The Law's Majestic Equality: The Distributive Impact of Judicializing Social and Economic Rights, Perspectives on Politics 12 (2014), pp. 375–393.

41 *Jayna Kothari*, Social Rights Litigation in India: Developments of the Last Decade, in: Daphne Barak-Erez / Aeyal Gross (eds.), Exploring Social Rights, Oxford 2007, p. 181; an earlier study found that the provision of a mid-day meal decreased the proportion of girls out of school by as much as 50% *Jean Drèze / Geeta Kingdon*, School Participation in Rural India, Review of Development Economics 5 (2001).

42 See e.g., *Rosalind Dixon / Rishad Chowdhury*, A Case for Qualified Hope? The Supreme Court of India and the Midday Meal Decision, in: Gerald Rosenberg / Sudhir Krishnaswamy / Shishir Bail (eds.), A Qualified Hope: The Indian Supreme Court and Progressive Social Change, Cambridge 2019.

43 *Alicia Ely Yamin / Andrés Pichon-Riviere / Paola Bergallo*, Unique Challenges for Health Equity in Latin America: Situating the Roles of Priority-Setting and Judicial Enforcement, International Journal for Equity in Health 18 (2019), p. 107; *Alicia Ely Yamin*, The Right to Health in Latin America: The Challenges of Constructing Fair Limits, University of Pennsylvania Journal of International Law 40 (2019), pp. 719–720.

44 *Katharine Young / Julieta Lemaitre*, The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa, Harvard Human Rights Journal 26 (2013), pp. 187–188.

45 *Alicia Ely Yamin / Oscar Parra-Vera*, Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates Hastings, International Journal of Comparative Law 33 (2010), pp. 435–436; *Everaldo Lamprea / Johnattan García*, Closing the

– an accelerated legal proceeding tailored to protect fundamental constitutional rights[46] Rev Dev Econ ultimately provided some relief. A meaningful portion of *tutela* healthcare cases saw courts simply order payment for "included" medicines and treatments.[47] Indeed, the number of such "included benefits" cases likely numbered in the hundreds of thousands over the last two decades.[48]

To be sure, much of Colombian *tutela* jurisprudence would *not* fall within this tradition of institutional support. Many cases adopt a more traditional and substantive approach of enforcing social rights' "vital minimum".[49] However, these "included benefits" cases stand as a class apart, and should be thought of as species of institutional support. These orders helped compensate for the insurance industry's refusal to obey its legal duties to pay for certain medications and treatments, and for the government's failure to exercise vigilant oversight.[50] That is, court orders worked to enforce—rather than subvert—existing government policy.[51] Later, the Court's more ambitious foray into the systemic failings of Colombia's healthcare regime similarly targeted pervasive mismanagement and a lack of implementation.[52]

There are aspects of the Constitutional Court's landmark proceeding concerning internal migrants displaced by violence—Decision T-25/04—which similarly put into motion this ethic of institutional support.[53] The Court's response, which unfolded over a decade in more than 250 orders, is too sprawling to thoroughly examine here. However, it is clear that the Court's response was animated—at least in part—by a concern of weak institutional performance. The Court voiced the concern that a lack of "implementation, follow-up and evaluation of policy" had "contributed in a constitutionally significant man-

Gap Between Formal and Material Health Care Coverage in Colombia, Health & Human Rights Journal 18 (2016), pp. 50–51; Procuraduría General de la Nacíon / DeJuSticia, El Derecho a la Salud en perspectiva de derechos humanos y el Sistema de Inspección, Vigilancia y Control del Estado Colombiano en Materia de Quejas en Salud, Bogotá 2008, pp. 81–104; Defensoría del Pueblo, La tutela y el derecho a la salud (2006-2008), Bogotá 2009.

46 Constitution of Colombia, 1991 see Title VIII, Ch 4 (Constitutional Court) and article 86 (acción de tutela).

47 *Yamin / Pichon-Riviere / Bergallo*, note 43, p. 107; *Yamin,* note 43, pp. 719–720.

48 Defensoría del Pueblo, note 46, p. 30; *Yamin / Parra-Vera*, note 45, p. 443; Defensoría del Pueblo, note 45, pp. 64–77.

49 See e.g., Decision T-426/92, (CC); Decision T-458/97, (CC) at section 23; Decision C-776/03, (CC) at section 4.5.3.3.2.

50 On this particular failing of the Colombian healthcare system, see *Yamin / Parra-Vera*, note 45, pp. 435–436; *Yamin / Pichon-Riviere / Bergallo*, note 43, pp. 106–107; *Young / Lemaitre*, note 44, pp. 187–189.

51 *Bechard-Torres*, note 15; *Yamin / Pichon-Riviere / Bergallo*, note 43, pp. 107–108; *Yamin / Parra-Vera*, note 46, p. 443; for a defense on health rights litigation on this basis, see *Benedict Rumbold et al.,* Universal Health Coverage, Priority Setting, and the Human Right to Health, Lancet 390 (2017), p. 713.

52 Decision T-760/08, (CC) at section 3.3.15; *Young / Lemaitre*, note 45, pp. 191–192.

53 Decision T-025/04, (CC).

ner to the disregard of fundamental rights".[54] A later decision articulated a "principle of coherence in policy", which requires that social programs be financed such that they can be fully implemented.[55] Accordingly, some of the Court's orders directed state agencies to follow-through on existing programs, while others commanded state officials to calculate and make available the financial resources required to implement existing policies.[56]

III. Promoting Data-Informed Policy, Encouraging Special Attention for the Most Vulnerable

Court orders can also promote responsive, data-informed policymaking. They can similarly encourage state actors to be more caring and attentive towards the needs of the most vulnerable. As before, these orders are not concerned with social rights' substance, but are instead concerned with building a certain kind of state. Realizing such a state is not without challenge. Courts have to confront a lack of political will, as well as, potentially, deep prejudice felt towards certain vulnerable communities. They may also have to shore up the state's rights-respecting capacities, since state agencies will require material investment before their decision-making towards vulnerable populations can be well-informed, caring, attentive, and responsive.

The judges of the Constitutional Court of Colombia presiding over the internal migrant proceedings understood that reliable data is essential to fulfilling basic rights. The Court thus directed state officials to gather data on the internally-displaced, so as to discern their number, their location, and their needs.[57] It also oversaw a participatory process to construct "rights-based indicators" to measure the efficacy of the state's measures and response.[58] Meanwhile, the Constitutional Court of South Africa has signaled a willingness to review government policy based on inadequate information,[59] an approach which is thought to contribute to a "deepening of democracy"—or, to put the point in slightly different terms, to building a certain kind of state.[60]

Engaging the kind of fruitful destabilization described by Charles Sabel and William Simon, court orders can also promote more deliberative and dynamic policymaking processes.[61] In India's right to food proceeding, for instance, the Supreme Court's regular hearings would occasionally serve as a forum to raise and disseminate novel policy ideas.

54 See Ibid. at section 6; translated in *Rodríguez-Garavito / Rodríguez-Franco*, note 6, pp. 77–78.

55 See Decision T-25/04 at sections 8.1 and 6.3.1.1.

56 Decision T-025/04, supra note 53 at sections 8.1 and 6.3.1.1.

57 *Rodríguez-Garavito / Rodríguez-Franco*, note 6, pp. 3–4.

58 Ibid., p. 22.

59 Mazibuko and Others v City of Johannesburg and Others, [2009] ZACC 28, [2010] (4) SA 1 (CC) at paras. 66-67 [Mazibuko].

60 Ibid. at para 71.

61 *Charles Sabel / William Simon*, Destabilization Rights: How Public Law Litigation Succeeds, Harvard Law Review 117 (2004).

Judges repeatedly issued non-binding policy suggestions (sometimes sourced from recommendations from some state actors or civil society organizations) and paired them with requests for state officials to respond.[62] Officials at the state level were thus encouraged to be more dynamic and responsive.

For its part, South African evictions jurisprudence demonstrates how courts can prod state actors to invest in their capacity to be more caring, and more attentive, towards communities experiencing real vulnerability. In a series of well-known cases, the Constitutional Court of South Africa required municipalities to engage in "respectful face-to-face engagement or mediation" prior to evicting individuals experiencing homelessness.[63] State officials had to listen respectfully to members of the affected population, and demonstrate sensitivity, flexibility, and reasonableness in their engagement.[64] Officials were instructed to keep records so that their conduct could be scrutinized during judicial review.[65]

This process of engagement is not intended to guarantee a particular result. However, experience suggests this remedy regularly yields practical solutions for individuals experiencing distress, and encourages state officials to expand what they were previously willing to do to fulfill social rights. In *Olivia Road*, to take an early example, 400 residents contested a planned mass expulsion in Johannesburg.[66] The Constitutional Court ordered the parties to engage with one another meaningfully "to resolve the differences and difficulties aired in this application in light of the values of the Constitution", the duties of the municipality, and the rights of community members.[67] The resulting agreement saw the city promise changes to its housing policy and to desist from the mass eviction.[68] It instead promised to invest in building safety and to facilitate access to essential services at reasonable cost.[69]

Engagement has since emerged as a general requirement that must be met before an eviction can be authorized.[70] This requirement has been resisted by some state officials

62 See e.g., PUCL Interim Orders 2 May 2003, 9 May 2005, 10 February 2010, 12 August 2010, 31 August 2010, and 6 September 2010.

63 Port Elizabeth Municipality v Various Occupiers, [2004] ZACC 7, [2005] (1) SA 217 (CC) ; Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others, [2008] ZACC 1, [2008] (3) SA 208 (CC) [Olivia Road]; Residents of Joe Slovo Community, Western Cape v Thubelish Homes and Others, [2009] ZACC 16, [2010] (3) SA 454 (CC) [Joe Slovo].

64 Olivia Road, note 63, paras. 14-15 and 19-21.

65 For a closer examination of this model and its promise, see *Sandra Liebenberg*, Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law, Nordic Journal of Humam Rights 32 (2014), pp. 324–325.

66 Olivia Road, note 63.

67 See text of the Court's interim order, reproduced in *Ray*, note 6, pp. 115–116.

68 *Stuart Wilson*, Litigating Housing Rights in Johannesburg's Inner City: 2004-2008, South African Journal of Human Rights 27 (2011), pp. 147–148.

69 *Ray*, note 6, pp. 115–116.

70 *Liebenberg*, note 65.

who insist that they lack the capacity to engage in this process in every instance eviction is sought. The Constitutional Court has been indifferent to these arguments.[71] From the perspective of institutional support, this indifference is sensible: catalyzing broader investment in state capacity is an important part of the point. These decisions signal to state actors that they must invest in their rights-respecting administrative capacities for the future.[72]

C. Understanding Institutional Support and its Vision for the Judicial Role

Institutional support calls for a few shifts in thinking about the role of courts. Perhaps most obviously, it suggests that accounts of judicial review centered around the need to discipline the exercise of public power and to thwart a "tyranny of the majority" are overly simplistic.[73] The interventions considered above are not concerned with abuses of power. They are more commonly a response to the problem of weak state capacity. This Part provides an explanatory and justificatory account of institutional support as a judicial orientation. It situates and compares this approach to others. It also considers the upsides of uncoupling judicial remedies from the substance of constitutionalized social rights.

I. Situating Institutional Support Amongst Other Enforcement Approaches

Institutional support cuts across different enforcement approaches that scholars rely on to organize the field. In an effort to shore up state capacity and build rights-affirming government, courts might engage in approaches which are managerial, dialogic, experimentalist or responsive in nature.[74] In this way, "institutional support" echoes Katherine Young's call to dislodge established typologies in favour of a vision of the judicial role that is focused on "catalyzing" more effective, rights-affirming government.[75] But institutional support also bears important differences from how some of these approaches are conventionally imagined. Surfacing its distinctiveness is therefore valuable.

For instance, some of the orders considered above are "strong-form" or "managerial". However, "managerialism" is traditionally associated with judicial commands that enforce the content of constitutional rights.[76] Projecting that assumption onto these kinds of orders would be both mistaken and harmful. It would be mistaken because these orders do not represent an effort to enforce a detailed, substantive account of social rights—in a "minimum core" variety or otherwise. Instead, under an ethic of institutional support, judicial

71 Olivia Road, note 63, paras 14-15, 19 and 21; *Ray*, note 6, p. 117.

72 See e.g., *Ray*, note 6, pp. 107 and 117.

73 *Khosla / Tushnet*, note 8.

74 For general descriptions of these categories, see *Young*, note 1.

75 See e.g., Ibid; *Young*, note 5; *Kent Roach*, Dialogic Remedies, International Journal of Constitutional Law 17 (2019), pp. 862-863 (on the principle of effective redress animating the work of "neo-Diceyan critics").

76 *Young*, note 1, p. 155.

commands might be deployed to compel the implementation of social programs, or to improve coordination between different levels of government or state actors. Put simply, these orders represent a form of practical assistance that courts can offer to make government work more effectively.

The view is also harmful because it results in unduly narrow interpretations of what social rights guarantee. If court orders are understood to be enforcing rights, they might be turned to as a window revealing rights' "true" meaning.[77] Some social rights scholarship indeed adopts this methodological posture. In their important review of India's right to food case, Lauren Birchfield and Jessica Corsi write that the Indian Supreme Court's interim orders "gradually defined the right to food in terms of what policies are required of the state and central governments in order for them to adequately fulfill their constitutional obligations".[78] This article has advanced a different reading. It has suggested that many of the Indian Supreme Court's brief orders were more concerned with buttressing state capacity, and improving program implementation. It would unduly constrain the right to food to read these orders as the definitive statement on what this right encompasses, a point this article will return to below.

Some of the other orders that fall within the umbrella of institutional support are dialogic or conversational, since they invite a response from—and ultimately defer to—the political branches.[79] However, here too there is an important difference. "Dialogue" is often presented as a collaboration between courts and the political branches as they jointly elaborate on rights' meaning.[80] By contrast, institutional support is not guided by a desire to clarify rights' full meaning, nor will it necessarily guarantee the fulfillment of social rights. Instead, these orders prod state actors towards certain performance ideals. The rights themselves must be pursued more broadly in political processes.

Institutional support instead possesses elements of "experimentalist" and "responsive" approaches.[81] Experimentalists imagine a process of consulting, generating information, and deliberating with stakeholders over vital rights matters.[82] Courts supervise the process to ensure its integrity, and perhaps to set rough boundaries, but without articulating social rights' content. Such experimentalist approaches can be particularly effective when de-

77 *Daryl Levinson*, Rights Essentialism and Remedial Equilibration, Columbia Law Review 99 (1999), p. 880.

78 *Birchfield / Corsi*, note 29, p. 700.

79 *Dixon*, note 1; *Tushnet*, note 1; *Jeff King*, Judging Social Rights, Cambridge 2012; *Young*, note 1, p. 147 (labelling the approach "conversational"); see also *Rodríguez-Garavito / Rodríguez-Franco*, note 6 (championing "dialogic judicial activism").

80 See e.g., *Barry Friedman*, Dialogic and Judicial Review, Michigan Law Review 91 (1993), p. 653 (writing that, under dialogic review, "[c]onstitutional interpretation is an elaborate discussion between judges and the body politic").

81 See notably *Sabel / Simon*, note 62; *Alana Klein*, Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights, Columbia Human Rights Law Review 39 (2008); *Ray*, note 6.

82 *Klein*, note 82, p. 397.

ployed against public institutions that have persistently failed to meet their own objectives and that are insulated from accountability.[83] Institutional support may differ only to the degree to which it focusses on weak state capacity. Furthermore, unlike experimentalist approaches, judges engaging in institutional support might be comfortable relying on a wider range of remedies. Courts could, for example, engage in the kind of strong-form managerialism described above.

Institutional support likewise overlaps with "responsive" judicial review, which has been championed for its ability to compensate for weaknesses in the quality of a country's democracy.[84] Responsive interventions target excess concentrations of political power, "blind spots" in the formulation of legislation and policy, or "burdens of inertia" that can blunt democratic demands for change.[85] Like institutional support, responsive interventions are oriented towards achieving some ideal of state performance. They also both "ask […] a lot of judges", who must be sensitive to their institutional context and to their limited capacities, and who must exhibit "boldness and humility, as well as a mix of legal skill and social and political awareness".[86] The approaches differ, once again, on their points of emphasis. Institutional support remains focused on the kind of garden variety issues that can compromise state capacity, which will often simply mean a government's "ability to accomplish its intended policy goals".[87] Responsive review is more concerned with bolstering the quality of a state's democracy. The two points of focus may be complimentary—and indeed both can be deployed—but they are distinct.

II. An Explanatory and Justificatory Account

What might explain judges comfort in engaging in institutional support, and is it a justifiable form of judicial intervention? This section gestures towards a few potential responses, while acknowledging that more experience and more study would be needed to adequately judge institutional support's worth. Briefly stated, the approach targets structural sources of rights deprivations, and it may present a path for increasing judicial impact. This set of tools can likewise curb some of the enforcement problems associated with the judicialization of social rights. And it can frame the courts' role in a way that better manages the public's expectations.

First, this judicial orientation targets a systemic rights problem. Weak state capacity and a lack of rights consciousness in public decision-making are structural causes of social

83 *Sabel / Simon*, note 62, p. 1020.

84 See notably *Rosalind Dixon*, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age, Oxford 2023; *Dixon*, note 1.

85 *Dixon,* note 86, p. 6.

86 *Dixon*, note 18, p. 106.

87 *Dincecco*, note 11, section 1.1.

rights deprivations.[88] This is true in both Global North and Global South.[89] Government capacity is imagined here in broad terms, and can be undermined by any of the following: a lack of program financing or implementation; breakdowns in coordination between disparate state actors; corruption; inertia or gross incompetence among public officials; rushed and non-deliberative decision-making; a lack of information regarding a particular policy's impact; or, the failure to revise laws and policies continuously, in light of new information or developments. Many of the examples considered above address these governmental shortcomings. To be sure, courts could never resolve all capacity-related shortcomings. Some of the more ambitious interventions considered above strained courts' logistical capacity, and left judges with a limited appetite to re-embark on similar proceedings. Nevertheless, courts might still make a meaningful contribution to realizing social rights by curbing *some* of these obstacles to humane, effective, and responsive government.

Second, institutional support can represent an effective strategy for facilitating judicial impact. Indeed, institutional support might represent one variety of what the scholar Yvonne Tew calls "mini-maximalism".[90] That is, courts can resort to reasoning which is limited and fairly uncontroversial to deliver a decision of significant political consequence.[91] This dynamic is present here. As far as political vision is concerned, institutional support can remain stubbornly modest. The approach allows judges to sidestep rights-related controversies, as well as deep disagreement on matters of political economy and distributive justice. It similarly appears to abandon the promise of substantive, "minimum core" enforcement.[92] Instead, these interventions are marked by ideological commitments that are more moderate, but also presumably more widely-shared. These commitments include an emphasis on effective state action; reasonable information-gathering processes; participation, deliberation and transparency in public decision-making; heightened attention for individuals experiencing poverty; and public policy that is responsive to changing conditions.

This political palatability can lead to greater impact. An approach which is light on ideological commitments may encourage compliance and reduce resistance. Controversial

88 *von Bogdandy et al*, note 4, pp. 6–9; *Landau*, note 4; *Mukherjee / Tuovinen*, note 5, p. 9; regarding South Africa specifically, see *Sandra Liebenberg*, The Art of the (Im)possible? Justice Froneman's Contribution to Designing Remedies for Structural Human Rights Violations, Constitutional Court Review 12 (2022), p. 139.

89 See e.g., *K. Sabeel Rahman,* Building the Government We Need: A Framework for Democratic State Capacity, Roosevelt Institute, 6 June 2024, https://rooseveltinstitute.org/publications/democratic-state-capacity/ (last accessed on 1 September 2025).

90 *Yvonne Tew*, Strategic Judicial Empowerment, American Comparative Law Journal 72 (2023).

91 Ibid.

92 On minimum core enforcement, see *David Bilchitz*, Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance, South African Law Journal 117 (2002).

court rulings can provoke backlash, and orders can sometimes be ignored with impunity.[93] By contrast, it may be harder for officials to publicly rebuke courts which command them to follow-through on their own plans and policies. As discussed above, institutional support also presents other state actors in a sympathetic light, and can avoid antagonizing public officials. Occasionally, state actors might even welcome these kinds of interventions. In 2013, for instance, the Colombian national pension regulator asked the Constitutional Court to find that its various institutional failings resulted in an unconstitutional state of affairs, inviting a response which at times resembled institutional support.[94] Although good relationships are hardly guaranteed, judges have been able to maintain somewhat collaborative relationships with other state actors while engaging in institutional support. To be sure, a court's political clout will depend on its standing with the wider public. And authoritarian governments may resist such judicial interventions, even if they help stage the government in a positive light. As discussed above, institutional support demands much of judges, who must navigate a series of complicated decisions with "a mix of legal skill and social and political awareness".[95]

Nevertheless, the approach's political palatability might encourage judges to be more interventionist than they otherwise would be. Judges sometimes hesitate to issue specific commands, or to supervise state actors' compliance, out of fear of breaking with some sense of institutional comity. This concern shaped South African remedial practice, producing an early preference for declaratory relief and one-shot orders that are not subject to continued supervision.[96] Institutional support's political palatability and supportive posture might encourage judges to feel comfortable drawing on a wider range of remedial solutions—including potentially complex, ongoing supervision of systemic rights problems. This would be valuable, if true, because declaratory relief and one-off orders have some history of failing to instigate timely and meaningful change.[97]

93 On the general problem of social rights non-compliance, see *Langford / Rodríguez-Garavito / Rossi*, note 20.

94 *David Landau*, Choosing Between Simple and Complex Remedies in Socio-Economic Rights Cases, University of Toronto Law Journal 69 (2019), p. 115.

95 *Dixon*, note 18, p. 106.

96 *Kent Roach / Geoff Budlender*, Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable, South African Law Journal 122 (2005), p. 325.

97 Famously, the laggard follow-up to the Constitutional Court of South Africa's declaratory order in Grootboom exposed the risks of assuming government's capacity and cooperation, see e.g., *Kameshni Pillay*, Implementation of Grootboom: Implications for the Enforcement of Socio-Economic Rights, Law, Democracy and Development 6 (2002); *Sandra Liebenberg*, South Africa: Adjudicating Social Rights Under a Transformative Constitution in: Malcolm Langford (ed.), Social Rights Jurisprudence: Emerging Trends in International and Comparative Law, Cambridge 2008, pp. 90–99; for the view that Grootboom's meaningful effects were felt over the longer-term, see *Malcolm Langford / Steve Kahanovitz*, South Africa: Rethinking Enforcement Narratives in: Malcolm Langford, César Rodriguez-Garavito / Julieta Rossi (eds.), Social Rights and the Politics of Compliance: Making It Stick, Cambridge 2017, p. 315.

Of course, this ideological modesty comes at a cost. Most obviously, this approach declines to enforce the "minimum core" content of social rights. These interventions also shy away from engaging with rights' critical political visions. Social rights, after all, are an integral part of the transformative project's emancipatory commitment,[98] and its critique of existing distributions of social and economic power.[99] These rights are sometimes thought to have a role in creating a critical space for change and contestation—"a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created", where "change is unpredictable but the idea of change is constant".[100] Judges decline to nourish this space of contestation when they pursue enforcement models which largely decline substantive, critical scrutiny of existing distributions and government policy. Indeed, as Sanele Sibanda warns, these interventions may represent a form of "law without politics" that can limit the transformation of socio-economic conditions.[101] For better and for worse, then, institutional support concedes that critical potential underlying social rights in favour of more politically-palatable interventions that may—for that very reason—have greater impact. And if that is true, it would gesture towards some of the tensions and trade-offs inherent in the project of transformative constitutionalism.

Third, institutional support can help courts navigate the distinctive challenges of social rights enforcement. These challenges are well-known. For one, social rights suffer from a meaningful degree of indeterminacy.[102] Rights to access adequate education, healthcare or housing are hardly self-explaining. The indeterminacy problem is especially pronounced for the dimensions of these rights that are said to be "programmatic", "aspirational", or subject to "progressive realization".[103] But indeterminacy persists even when lawyers focus on a

98 *Hailbronner*, note 25, p. 529; *Heinz Klug*, Transformative Constitutionalism as a Model for Africa? in: Philipp Dann, Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford University Press 2020, p. 145.

99 *Karl Klare*, Legal Culture and Transformative Constitutionalism, South African Journal of Human Rights 14 (1998), pp. 153–154; see also *Catherine Albertyn / Beth Goldblatt*, Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality, South African Journal of Human Rights 14 (1998), p. 249.

100 *Pius Langa*, Transformative Constitutionalism, Stellenbosch Law Review 17 (2006), p. 354.

101 *Sanele Sibanda*, Not Purpose-Made - Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty, Stellenbosch Law Review 22 (2011), pp. 489–491; *Sanele Sibanda*, When Do You Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism, Law, Democracy and Development 24 (2020).

102 On the difficulties of determining the content of a so-called minimum core of economic and social rights, see *Katharine Young*, The Minimum Core of Economic and Social Rights: A Concept in Search of Content, Yale International Law Journal 33 (2008), p. 160.

103 For states' obligation to progressively realize social rights over time, see *Ben Saul / David Kinley / Jacqueline Mowbray*, The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials, Oxford 2016, p. 146-155; CESCR General Comment

so-called "minimum core", representing human beings' vital needs.[104] It can be difficult to establish precisely what kind of medical treatments, nutrition levels or shelter meets necessary thresholds to support a dignified life.[105] What is perceived to be "vital" has long been shown to vary across cultures, regions, level of development, and time.[106]

Further complicating matters, these rights are consequential. That is, they refer to a state of affairs that has been realized through an intermediate policy.[107] There are countless ways healthcare or housing can be made more accessible. The underlying rights will often be agnostic about the means by which the result is obtained. At most, these rights define only goals and boundaries; they do not outline how these outcomes should be achieved.[108]

Institutional support succeeds in sidestepping this indeterminacy problem altogether. The approach does not require judges to settle on a substantive account of what rights guarantee, and to then encase that right in a binding command. Judges need not necessarily expound on rights doctrine at all. They might instead ask themselves whether the case presented to them falls within one of the accepted classes of "support" that courts are prepared to offer. Such an approach would leave the content of social rights for political debate and contestation outside of the courtroom by elected officials, activists, social movements, and other political actors.[109]

Next, there are sharp limitations on what courts can do, at least legitimately. These concerns are also well-known. Courts lack the expertise to design social welfare programs,[110] or to manage the polycentric issues involved in setting socio-economic policy and allocating resources.[111] Sweeping court orders risk producing unintended consequences, and impacting the interests of countless others.[112] In the area of social rights, judicial interven-

No 3, UN Doc 5/1991/23, 14 December 1990, (distinguishing duties to the minimum core and duties to progressively realize rights) [General Comment 3].

104 See General Comment No 3, note 3, para 10 (referring to "minimum essential levels").

105 *Young*, note 101, p. 130.

106 See e.g., *Johan Galtung*, Goals, Processes, and Indicators of Development: A Project Description, Tokyo 1978, p. 13.

107 *Frank Cross*, The Error of Positive Rights, UCLA Law Review 48 (2003).

108 *Susan Sturm*, A Normative Theory of Public Law Remedies, Georgetown Law Journal 79 (1991), pp. 1363–1364; *David Bilchitz*, Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights, Oxford 2008, p. 198.

109 *Richard Fallon*, Judicially Manageable Standards and Constitutional Meaning, (2006) Harvard Law Review 119, pp. 1324–1328; *Lawrence Sager*, Fair Measure: The Legal Status of Underenforced Constitutional Norms, Harvard Law Review 91 (1978), pp. 1221, 1227; see also *Philip Harvey*, Aspirational Law, Buffalo Law Review 52 (2004).

110 *Joel Bakan*, What's Wrong with Social Rights?, in: Joel Bakan / David Schneiderman (eds.), Social Justice and the Constitution: Perspectives on a Social Union for Canada, Ottawa 1992, p. 86.

111 *Roach*, note 2; see also *Lon Fuller*, The Forms and Limits of Adjudication, Harvard Law Review 92 (1978).

112 *King*, note 80, p. 111–116.

tions run a healthy risk of inefficiently distributing public resources,[113] or of regressively siphoning funds from the vulnerable and unrepresented towards able litigants with sharp elbows.[114] Moreover, courts can strain their relationships with other political actors, whose cooperation is necessary to realize the rights project.[115] Judicial intervention on these matters also risks foreclosing public debate on fundamental political questions.[116]

Institutional support does some work to navigate these risks. The approach rarely positions judges to have the final say on matters of socio-economic policy. Courts thus avoid usurping policy-making prerogatives better left to other state actors. Courts instead shift their efforts to ensure that governmental activity is performed in accordance with certain maxims of effective, rights-fulfilling government. As discussed above, the approach can also help maintain healthy relationships between courts and other state actors: institutional support's political commitments tend to be more neutral and palatable, and it often avoids placing courts in an antagonistic position vis-à-vis the legislature and executive.

This approach may also skirt some of the regressive distributive impacts associated with social rights enforcement. Some of the most objectionable instances of social rights "mis-enforcement" feature a specific dynamic: more affluent litigants obtain judicial orders which drain cash-strapped public programs, harming the most vulnerable in the process.[117] The risk of such regressive enforcement may be low for remedies that fall under the umbrella of institutional support. Many of the specific commands considered above simply "compel the provision of vital goods that have been promised by public policy, but which government actors (or their private proxies) have failed to deliver".[118] Put in different terms, this kind of relief often helps bridge "the government's stated plans and programs, on the one hand, and its weak and underperforming institutions, on the other".[119] Scholars have likewise drawn concern to individualized relief which can prioritize the needs of litigants over those individuals who are similarly situated, compromising the "horizontal

113 *Albie Sachs*, The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case, Current Legal Problems 56 (2003), p. 598.

114 *Octavio Luiz Motta Ferraz*, Social Rights, Judicial Remedies and the Poor, Washington University Global Student Law Review 18 (2019), p. 573; *Octavio Luiz Motta Ferraz*, Health as a Human Right: The Politics and Judicialisation of Health in Brazil, Cambridge 2021; *David Landau*, The Reality of Social Rights Enforcement, Harvard International Law Journal 53 (2012); *Albie Sachs*, The Strange Alchemy of Life and Law, Oxford 2009, pp. 177–179.

115 *Young*, note 1, pp. 161 and 165.

116 *Cross,* note 108; *David Beatty*, The Last Generation: When Rights Lose Their Meaning, in: David Beatty (ed.), Human Rights and Judicial Review: A Comparative Perspective, New York 1994, p. 350; *Young*, note 1, p. 134.

117 See e.g., *Pedro Felipe de Oliveira Santos*, Beyond Minimalism and Usurpation: Designing Judicial Review to Control the Mis-Enforcement of Socio-economic Rights, Washington University Global Student Law Review 18 (2019); *Ferraz*, note 116, p. 573; *Landau*, note 116, p. 191; *Bechard-Torres*, note 15, pp. 83–85.

118 *Bechard-Torres*, note 15, p. 88.

119 Ibid.

equality" of rights bearers.[120] However, within the broad family of remedies that can be considered institutional support, there are "structural" responses that judges could prefer where this is in issue. Broadly, the interventions defended in this Article possess the kind of attention to context and outcome that can help courts avert the regressive impacts that can result from approaches which are unduly rigid, formalistic or mechanical.

Lastly, as a role-conception for courts, institutional support signals to the public some of the limits of what courts can offer, and can help manage the public's expectations. Positioning judges as "guardians of the constitution" risks setting unduly high expectations. The risk of frustrated expectations is especially pronounced for ambitious "transformative" constitutions, which aspire to reshape social, political and economic institutions in a more egalitarian mold.[121] The public can experience deep frustration when rights go unfulfilled, and when promised transformation fails to arrive. Courts can even become the targets of this general frustration.

Institutional support might better manage the public's expectations. Courts would stand ready to curb some instances of state failure and institutional under-performance. Those who desire more would have to direct their energies towards political and democratic processes. Clarifying the limits of the judicial contribution can also be helpful for rights advocates and civil society organizations, who might benefit from guidance regarding where to strategically invest their resources. Admittedly, managing the public's expectations can be difficult: journalists, lawyers, law professors, activists and judges alike may strain to adequately communicate the court's role. But some modest work of expectation management could still be welcome, particularly in jurisdictions where the public has grown dissatisfied with the perceived lack of judge-led change.

III. Uncoupling Constitutional Rights from Judicial Remedies

There is another move that requires justification. As a judicial orientation, institutional support would see judges neglect the work of developing a substantive account of what social rights guarantee. Instead, may be focused on improving state capacity and institutional performance – or compensating for its absence. But this would result in an uncoupling of constitutional rights, on the one hand, and judicial remedies, on the other. This section defends this uncoupling—and the reframing of the judicial role that comes with it—as both conceptually necessary and politically fruitful.

Scholars across public and private law have occasionally defended such an uncoupling of right and remedy, a view occasionally termed the "disparity thesis".[122] Lawrence Sager

120 *Robert Leckey*, The Harms of Remedial Discretion, International Journal of Constitutional Law 14 (2016), p. 590.

121 *Klare*, note 101, p. 150.

122 *Sager*, note 111; *Stephen Smith*, Rights, Wrongs, and Injustices: The Structure of Remedial Law, Oxford 2019; see generally *John Jeffries*, The Right-Remedy Gap in Constitutional Law, Yale Law Journal 109 (1999).

and Stephen Smith have suggested that rights and remedies are best thought of as distinct spheres of activity that respond to fundamentally different questions.[123] Rights speak to what we are owed—and constitutional rights focus on what the state owes us. Remedies speak to a narrower, pragmatic question—namely, what kind of assistance can courts offer rights-bearing individuals.[124] And when judicial activity is curbed by a variety of institutional considerations—as it inevitably is in the context of social rights litigation[125]—one should not expect the answer to the *rights* question to overlap cleanly with the *remedies* question.

On this view, there will be rights that will inevitably go under-enforced by courts, and the balance would be left to the political process.[126] As political constitutionalists have stressed, rights can have a rich life in social movements, in public debate, in legislatures, and in various state agencies.[127] They can be fruitfully mobilized by social movement leaders, non-governmental organizations, politicians, bureaucrats and other public officials. Rights discourse, after all, has a special potency as a "deeply rooted and attractive moral discourse".[128] Rights rest on solemn constitutional commitments, and have been recognized in prominent international treaties.[129] They can thus help ground a potent critical posture to challenge institutions, laws, and practices.[130]

Other scholars have viewed rights and remedies as deeply and inevitably linked, even reflecting one another. Those who hold this view may begin from the Diceyan premise that judges are guarantors of constitutional norms, and enforcers of the rule of law.[131] The sole function of a remedy is thus to enforce a right and to accomplish effective redress. Legal realists have settled on a similar view of the right-remedy relationship. They doubt the existence of a right in the absence of an effective remedy, since a "right is as big, precisely, as what the courts will do" to enforce it.[132] Remedies can therefore be read as

123 *Smith*, note 122; *Sager*, note 111, p. 1213.

124 See e.g., *Smith*, note 122, p. 8; *Stephen Smith*, Rights and Remedies: A Complex Relationship, in: Hon Robert Sharpe / Kent Roach (eds.), Taking Remedies Seriously, Ottawa 2009, p. 33.

125 *Gaurav Mukherjee*, The Political Economy of Effective Judicial Remedies, International Journal of Constitutional Law 21 (2023), p. 68; *Sager*, note 111, p. 1213.

126 *Sager*, note 111, p. 1221 and 1227; *Harvey*, note 111; *Fallon*, note 111, pp. 1324–1328.

127 See eg, *Mark Tushnet*, Taking the Constitution Away from the Courts, Princeton 1999; *Mark Tushnet*, The Relation Between Political Constitutionalism and Weak-Form Judicial Review, German Law Journal 14 (2013).

128 *Gráinne de Burca*, Reframing Human Rights in a Turbulent Era, Oxford 2021, pp. 3–4.

129 Ibid.

130 See e.g., *Jens Theilen*, The Inflation of Human Rights: A Deconstruction, Leiden Journal of International Law 34 (2021).

131 *Roach*, note 76, pp. 862–865 (noting recent works of "neo-Diceyan critics" who have resurfaced the principle of effective redress).

132 *Karl Llewellyn*, The Bramble Bush: The Classic Lectures on the Law and Law School, Oxford 2008, pp. 83–84.

being revelatory. As Daryl Levinson puts it, the "only way to see the constitutional right […] is to look at remedies".[133]

However, uncoupling right and remedy is important as a matter of conceptual clarity. It can also help lawyers and political actors avoid unduly narrow interpretations of rights. Evidently, institutional dynamics limit what courts are willing or able to order. A courts' remedial practice may be shaped by a wish to be deferential to the political branches, by fear of political backlash, or by some self-awareness of the limits of judges' knowledge and legitimacy.[134] But, crucially, if rights and remedies are thought to reflect one another, the restraint or institutional self-awareness that courts show will be interpreted as a limit on the underlying rights themselves. Such a move would be mistaken. Consider the following example. A court might decline to order relief for an individual experiencing homelessness out of deference for the executive or legislative branches. Such a decision says *something* about the court's sense of its institutional role, but it says little about the nature, or the content, of the right to housing.

This risk of failing to distinguish right and remedy is on display in Lauren Birchfield and Jessica Corsi's important survey of the Indian Supreme Court's interim orders in *PUCL*.[135] As described above, Birchfield and Corsi suggest that the Court's interim orders "gradually defined the right to food in terms of what policies are required of the state".[136] But this reading unduly constrains the right to food's meaning. The right to food can vary in its ambition, it can be realized through a variety of policy or economic arrangements, and it can evolve over time, as the state's resources and capacity increase. As this Article has argued, many of the Supreme Court's brief and specific orders have more to do with buttressing state capacity. As such, they cannot be read as the definitive statement on what the right to food encompasses.

Such a narrow interpretation of rights can also give state officials a way of defending themselves against novel claims. Once an order has been issued by a court and complied with, officials might then argue that the right has already been fulfilled, and that no more work is constitutionally required.[137] Such a move may do harm to political movements whose work will be key to social rights' realization. Lawyers must be wary about stifling rights discourse in this way.

Judges keen on practicing institutional support might even clarify that such an uncoupling has taken place. This would begin with clear recognition that constitutional rights and judicial interventions reflect distinct issues or areas of activity. Social rights might

133 *Levinson*, note 78, p. 880.

134 *Owen Fiss*, Foreword: The Forms of Justice, Harv L Rev 93 (1979), pp. 50–52.

135 *Birchfield / Corsi*, note 29.

136 Ibid., p. 700.

137 On this risk, see *Natalia Angel-Cabo / Domingo Lovera Parmo*, Latin America Social Constitutionalism: Courts and Popular Participation, in: Helena Alviar Garcia / Karl Klare / Lucy Williams (eds.), Social & Economic Rights in Theory and Practice: Critical Inquiries, New York 2014.

be acknowledged as being beyond the judiciary's ability to fully define or enforce. Next, judges might elaborate on the kinds of instances in which they would be willing to award a remedy—or, more specifically in the tradition of institutional support, what kinds of capacity-building orders they would entertain. Courts may well consider other zones of intervention – including those that fall under the umbrella of "responsive" judicial review—but these zones of intervention would all be shaped, honestly and transparently, by the courts' institutional limitations.

Judges' engagement with rights doctrine could then take a couple of forms. They might simply decline to say much about the content of these rights. Far from monopolizing rights enforcement, judges could acknowledge that constitutional rights must remain orienting objectives for the political process, and must be pursued in those arenas. The result might be a *remedies*-first approach to social rights litigation, where litigants and judges could discuss the availability of relief without ever saying much about the constitutional rights that exist in the background.

Alternatively, courts might articulate rights in a maximalist fashion—that is, in their most demanding and ambitious forms—but then clarify that the court's actual *orders* will be limited to certain accepted cases of institutional support. That is, a robust description of social rights would be paired with a flexible selection of remedies running the spectrum from weak to strong, simple to complex, and including varieties of "institutional support" as well as other species of intervention considered appropriate.[138] On this approach, judges would once again gesture towards the importance of the political process. However, they would also offer rights advocates a helping hand by outlining an ambitious, aspirational account of rights that may then be mobilized in political discourse.

D. Conclusion

This Article has surfaced institutional support as a potential orientation for courts in social rights litigation. It centers the problem of weak state capacity as a structural rights obstacle. It includes within its broad umbrella both structural and individual remedies, as well as some managerial, dialogic, and experimentalist interventions. Indeed, some of the orders in landmark social rights proceedings are perhaps better understood as putting institutional support into motion. This Article has argued that this approach can deliver meaningful rights victories, better manage public expectations, and curb some of the risks related to the judicialization of social rights.

Admittedly, this remedial orientation comes at a steep cost. The investment of court resources and goodwill required to help build state capacity is considerable. Courts which have embarked on impactful proceedings sometimes lack the appetite to re-commit to

138 In a sense, this approach represents a variation of "dialogic judicial activism" described by Rodriguez-Franco and Rodriguez-Garavito, which they describe as including a strong account of rights, moderate remedies, and strong monitoring, see *Rodríguez-Garavito / Rodríguez-Franco*, note 6, pp. 16–17.

such endeavors again. The approach also declines to recognize a minimum core of social rights that are susceptible to immediate fulfillment. Similarly, institutional support can concede the judicial effort to elaborate on social rights' critical political. Its emergence in comparative law thus gestures towards some of the tensions inherent in the project of transformative constitutionalism.

BOOK REVIEW SYMPOSIUM: INDIA'S COMMUNAL CONSTITUTION: LAW, RELIGION AND THE MAKING OF A PEOPLE BY MATHEW JOHN

Review Essay

Mathew John, India's Communal Constitution: Law, Religion and the Making of a People, Cambridge University Press, Cambridge 2023, 147 pages, AUD$179.95, ISBN: 9781009317757

By *Geetanjali Srikantan*[*]

Can the Indian Constitution be understood as the product of liberal ideas and secular values or does it harbour darker cognitive possibilities? Mathew John's thought-provoking monograph argues that there is a structural tendency within the Indian Constitution to identify the Indian people along communal lines which he labels as the Communal Constitution. This structural orientation within the Indian Constitution could displace the liberal tradition enshrined within the Constitution. Such structural orientation can be traced back to the politics and history of colonial India involving constitutional continuities which are in variance with the framework of liberalism that underlies the Constitution.

John's argument is framed around understanding communal identities through the prism of religion. This necessarily involves understanding colonial governance of religious communities which is foregrounded through three main axes. These are the adoption of toleration as state practice, social reform movements in the nineteenth century and the conceptualisation of Indian participation in the British government—particularly representation for minorities. The adoption of religious toleration by the colonial government as a doctrine of state sought to bring about a model of governance that had been implemented in Europe as a solution to the wars of religion. This model was seen as the ideal way to resolve the problem of governing an extraordinarily diverse population which the colonisers perceived as being irreconcilably divided. This led to a search for the foundational truth behind religious practices to determine whether the state should stay neutral in respect to them. This form of truth seeking had a tremendous impact on Indian society leading to movements for

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social reform among religious communities. Political representation assumed importance and took shape within a "communally organised terrain" (p. 9).[1]

This argument is elaborated in four chapters. Chapter 1 focuses on the essential practices test used to adjudicate cases relating to religious freedom under Article 25 of the Indian Constitution through its connection to toleration and social reform in the colonial context. The concept of toleration led to truth seeking-which was the task of finding the true religious foundations of the laws of the Hindu and Muslim communities. This language of truth seeking had an impact on Indian nationalists who began to advocate social reform in the religious communities that they belonged to. They sought to weed out abhorrent practices with reference to finding doctrinal truths. Therefore, reform based on communal identities became the basis for Indians to organise themselves as a people. Through a discussion of the Ayodhya case which was about a place of worship disputed by both Hindus and Muslims, it is shown that the essential practices test manifests a communal imagination as religion had to be identified on the basis of its essential truths. The resolution of inter-religious conflict thus depended on the identification of axiomatically and doctrinally divided Hindu and Muslim communities.

Chapter 2 takes forward this argument in the context of the personal law system in India which provides for Hindus and Muslims to be governed by the laws of their communities in respect to marriage, divorce and succession. The colonial history of personal law is analysed in relation to the quandary faced by colonial administrators as to whether scriptural texts should be privileged over customary practices as the source of doctrinal truth. Certain strands in Indian constitutional practice have coopted the colonial understanding of personal law by holding that personal laws are immune from scrutiny for violations of fundamental rights due to them being scripture based and not enacted by the legislature. Although there have been challenges to this position as evidenced by the decision in the *Shayara Bano* case the idea of religious communities being organised in scriptural and doctrinal terms persists in Indian constitutional law.

Chapters 3 and 4 further take up the question of the communal conceptualisation of the Indian people. Chapter 3 provides us with an account of how the colonial idea of minority rights was the basis for participation in the British Government. Institutional mechanisms such as separate electorates were introduced to ensure that the interests of different communities who were called "minorities" were represented. This understanding of minority rights was transformed in the Indian Constitution wherein separate electorates were abolished and lower caste groups gained these privileges under the logic of ensuring social justice. Minority rights took on a new significance becoming a term used for religious and linguistic groups. Chapter 4 carries forward the impact of these distinctions in the context of caste identities showing the understanding of castes as social groups within a scripturally defined hierarchy in the Hindu religion is the dominant understanding in

1 *Mathew John*, India's Communal Constitution: Law, Religion and the Making of a People, Cambridge 2023.

Indian constitutional practice -although caste injustice is also present in other religious communities. Thus "the Hindu resolution of caste also nationalises and entrenches caste in explicitly communal terms" (p. 98).

The stimulating aspect of *India's Communal Constitution* is its stress on colonial inheritance more than institutional continuity. It emphasises that conceptual frameworks used by colonial administrators are inherent within the Constitution and play a role in deciding constitutional matters such as the guarantees provided by fundamental rights and the nature of constituent power. Colonial continuity is not as important as conceptual continuity. In this context, John's account offers us an alternative understanding of the Indian Constitution from other scholarly accounts such as that of Madhav Khosla and Sandipto Dasgupta who stress on the revolutionary break that the Indian Constitution makes with the colonial past.

However, the argument of conceptual continuity becomes less convincing in relation to developments in the contemporary context wherein a Hindu nationalist government seeks to shift the ground on political ideas. This shift is detailed by Hilal Ahmed who argues that the state under the current BJP government is seen as a sovereign entity that works on behalf of the people in the realm of politics and not economics. Citizens are expected to create employment for themselves and not see employment as a right—leading to a responsive government—responsive people formulation.[2] This is linked to what Ahmed calls Hindutva constitutionalism which among other features capitalises on the language of minority rights to portray Hindus as victims due to them being minorities in parts of India such as Kashmir and Manipur and due to India being surrounded by Muslim-majority states. The solution according to Hindutva groups is the abolition of the majority-minority distinction and the creation of a national political community[3].

One may argue that this proposal is communal in nature and further entrenches Hindu majoritarianism due to the attitudes of Hindutva groups towards Muslims and other religious minorities. However, the question remains as to whether this form of constitutionalism can be seen as conceptually linked with colonial constitutionalism.

Another area which could have received more attention in relation to the question of conceptual continuity is the Uniform Civil Code which finds place in the Indian Constitution as a proposed code to do away with personal law by introducing a uniform regime of citizenship in relation to family law. Although it is featured in the book and is mentioned as being a "jurisprudence of exasperation" (p. 62) due to its overtly communal tones, it may have been interesting to reflect on recent calls for the recognition of same sex marriages and civil partnerships within Indian family law and whether that draws on a conception of equal citizenship or community. This could be a question that the author could address in future work.

2 *Hilal Ahmed*, New India, Hindutva Constitutionalism and Muslim Political Attitudes, Studies in Indian Politics 10 (2022) p. 65.

3 Ibid., p. 68.

The novelty of *India's Communal Constitution* lies in its invitation to think constitutional history and constitutional doctrine afresh. The book's arguments will interest students, educators and others who are interested in Indian constitutionalism. Activists and policy makers will benefit from its cautionary approach towards constitutional liberalism.

Review Essay

By *Moiz Tundawala*[*]

A. What Happens to the National and Secular in 'India's Communal Constitution'?

After the suppression of the Indian rebellion of 1857 and the British takeover of Delhi, the well- known irreverent mystical poet Mirza Ghalib was reportedly asked by a military official whether he was a Muslim. Ghalib is said to have quipped, "Only half Muslim; I drink wine but refrain from swine." Since Muslims were initially blamed for the insurrection within the British Indian army, colonial authorities may have sought to ascertain Ghalib's religious identity to determine if he posed any further threat. However, in later years, as the British regime's suspicion of the community eased, Muslims were recognized as a minority and entitled to special safeguards in the political sphere. This recognition, though, came at the cost of preventing them from uniting with the Hindu majority to challenge colonial rule as a secular national solidarity.

The extension of such colonial practices into the postcolonial state is the focus of Mathew John's significant new contribution to the field of Indian constitutional studies. For nearly two centuries, the British governed India by apprehending and classifying its vast and heterogenous population into different segments based on religion, caste, and other similar criteria privileged by colonial forms of knowledge. To manage this diversity and render it amenable to effective governance, a previously fuzzy and contextual sense of selfhood rooted in India's vibrant non-modern traditions was systematically diminished and transformed into fixed and enumerated group identities legible to an alien modern administration.[1] Far from restoring the richness of indigenous social life, John argues that the postcolonial constitution and its associated institutional practices exhibit a deep affinity with the governing rationale of the colonial state. Despite adopting the language of individual rights and popular sovereignty, he demonstrates—through a wide-ranging engagement with the juridical treatment of themes such as religious freedom, personal law, minority status and ex-untouchable Dalits—that the constitutional text and its interpretation continue to frame the Indian people essentially in terms of their communal identities.

B. The Constitution of Unity In Diversity

While the book provides a compelling descriptive and analytical account of the "Communal Constitution", its diagnosis of this structural orientation of Indian constitutionalism as a

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1 *Sudipta Kaviraj,* On State, Society and Discourse in India, in: Sudipta Kaviraj (ed.), The Imaginary Institution of India, New York 2010.

"constitutional failure" and a "pathological expression of constituent power" is unconvincing.[2] John critiques India's constitutional project through the lens of the global ideology of liberal constitutionalism, the normative assumptions of which it neither fully subscribes to, nor sets for itself as an aspirational standard. India, rather bears fidelity to the democratic, if not revolutionary, impulse of the modern world, where liberalism is both supplemented with, and at times, supplanted by the constituent power of the people giving themselves their own constitution. The "people", however, is not merely an abstract idea or a concrete fact; it is simultaneously a symbolic unity of free and equal citizens who authorize the government, and also in reality, a diverse plurality of groups and communities which are in turn governed by it.[3] Therefore, more than a binary opposition between liberal individualism and parochial communalism, there is within the modern constitution, an internal division between the people as one and the people as many.

In India, this double sense of the people has, officially at least, taken the form of a constitutional duality that separates yet brings together the political domain of national unity and the cultural domain of communal diversity. At its founding moment, which was accompanied by partition and the creation of Pakistan, additional political rights for Muslims and other religious minorities were, in fact, discontinued, as separate electorates and weighted representation gave way to the institution of adult suffrage democracy with a single electoral roll in every territorial constituency. Affirmative action was made available to oppressed castes not on the grounds of community identity, but for historical and sociological reasons related to untouchability and backwardness. Even though secularism was not formally stipulated as a constitutional value, there was an implicit prohibition on the establishment of a Hindu state or nation. What minority groups lost politically in the name of the people as a singular collective was compensated for by granting them distinct cultural, linguistic, and educational rights, alongside the right to freedom of religion, which they could exercise at par with other majority communities.[4] India's original Constitution was thus not communal in the way John portrays it, but instead a distinct explication of the new state-making idea of "unity in diversity".

C. Theological and Secular Entwinement

It is true that over the years, the constitutional scheme of distinguishing between the political and the cultural has proven unsustainable. However, the inseparability of these two categories, and more broadly that of state and religion, has long been anticipated and theorized globally, both on the political left and the political right. While in the mid-nineteenth century, the young Karl Marx intriguingly described a secular state as

2 *Mathew John*, India's Communal Constitution: Law, Religion, and the Making of a People, Cambridge 2023, pp. 1-3.

3 *Martin Loughlin*, The Concept of Constituent Power, European Journal of Political Theory 13 (2014), pp. 218-237.

4 *Rochana Bajpai*, Debating Difference: Group Rights and Liberal Democracy in India, Oxford 2011.

"the perfect Christian state",[5] the first half of the twentieth century saw Carl Schmitt develop his influential thesis about the significant concepts of modern state theory being "secularized theological concepts".[6] Eschewing strict separationism, the normative theorist Cecile Laborde has recently made a case for "minimal secularism", which engages with religion by disaggregating it into the liberal democratic values of public justification, equal inclusion, and personal liberty.[7] This entwinement of the secular with the theological remains an inherent feature of political life in many parts of the world to the present day, and constitutional design and practice cannot wish it away, even if deemed problematic from the perspective of old-fashioned liberal constitutionalism.

Rather than denying it, constitutional actors in India have openly engaged with the entangled relationship between the religious and the secular, the best illustration of which is the judicial enunciation of the essential practices doctrine, alongside the community-based system of personal law, that governs family matters of marriage, divorce, succession and guardianship. When religious freedom is regulated for the sake of social reform, the Supreme Court determines the scope of this right not in liberal, secular or non-communal terms, but by ascertaining whether the practice under scrutiny is essential to the religion with which it is associated. Such a hermeneutical approach, John suggests, is entirely continuous with colonial governmentality, where complex customary faith traditions were reduced to simpler religions grasped through scripturally defined axiomatic truths.[8]

However, instead of asking where the essential practices doctrine originates or whether it is a sound technique for the constitutional adjudication of religion, we need to explain why judges keep relying on it even seventy-five years after the inception of the republic. The book attributes the persistent hold of the doctrine to the internalization of the colonial attitude towards religion by Indian reformers and nationalist leaders, a mindset subsequently perpetuated by the courts in later years.[9] By reducing the interpretive work of the judiciary into a somewhat straightforward narrative on the casting of the people in a "communal image", it misses the opportunity to utilize these materials for a fresh theorization of the place of religion in India's political modernity.

At the risk of a broad generalization, in Western liberal democracies, where religious freedom is largely a private affair and, at most a cultural phenomenon, courts can afford to provide secular and public justifications for its curtailment in the interest of other social goods and values. By contrast, religion remains integral to the public sphere in India, and the state has not succeeded in displacing it as the exclusive site of political sovereignty.

5 *Karl Marx*, On the Jewish Question, Marxists Internet Archive (2000/1844), https://www.marxists.org/archive/marx/works/1844/jewish-question (last accessed on 28 December 2024).

6 *Carl Schmitt*, Political Theology: Four Chapters on the Concept of Sovereignty, Chicago 2005.

7 *Cécile Laborde*, Minimal Secularism: Lessons for, and from, India, American Political Science Review 115 (2021), pp. 1–13.

8 *John*, note 2, p. 6.

9 Ibid., pp. 26-30.

Consequently, the judiciary often finds it expedient to assume a theological position, providing internal justifications drawn from religious traditions themselves to garner support for the secular reform of community practices. On a wider note, following its sacralization of the constitution in the 1970s, a religious logic has also shaped the story of the Supreme Court's rise to political prominence—depending less on the authority of law and more on the power of persuasion to capture the imagination of the people.[10]

D. Hindu, Muslim, Dalit

The obvious difficulty with religion entering and occupying the constitutional field, in John's view, is the fear of a "lurking majoritarianism"—a concern that has materialized with the political triumph of Hindutva, or Hindu nationalism, in the last decade.[11] What has contributed to this moment, he suggests, is the use of minority and caste in constitutional discourse for the construction and consolidation of an entrenched Hindu identity. While religious minorities are invariably defined in contrast to a Hindu majority, Scheduled Caste Dalits are deemed to have an intrinsic connection with the Hindu religion. To decenter Hinduism from constitutional practice, he advocates for a plural, rather than majoritarian, conception of minority which can accommodate heterodox Hindu groups, as well as a sociological, rather than theological, conception of caste to include Muslim and Christian Dalits.[12]

John's view is commendable in our polarized times, but the syncretic language of cultural pluralism is not robust enough as a political response to the challenge of Hindutva. Hindu nationalists are not as averse to the idea of India as a unity in diversity as they are to secularism and minority rights. We have seen earlier that the constitutional desire of the founding generation was to establish a secular national unity within the social context of enormous religious and cultural diversity. Under Hindutva, this imagination is reinterpreted to produce a highly charged ethno-cultural unity, amid a tamed sectarian and caste-based diversity. It can absorb and even celebrate the plurality of India's indigenous traditions, without relinquishing the political primacy of Hindu culture. The real hostility is directed at Muslims as a religious minority, recast by proponents of Hindutva as foreign invaders and cultural outsiders, despite their profound intimacy with India for over a millennium.[13] Thus, because its ideology is both capacious and exclusive at the same time, pluralism alone cannot counter the hegemony of Hindu nationalism, unless supported by some form of political and constitutional secularism.

10 *Moiz Tundawala*, In the Shadow of Swaraj: Constituent Power and the Indian Political, PhD Thesis, London School of Economics and Political Science (2018)

11 *John*, note 2, p. 71.

12 Ibid., pp. 71-97.

13 *Vinayak Damodar Savarkar*, Hindutva: Who Is a Hindu?, Bombay 1969/1923.

Complicating matters further is the triangulation of the Hindu-Muslim relationship by the caste question throughout India's modern history. The book accurately depicts how Dalits have come to be identified with Hinduism in official understanding, even though caste is a pervasive social institution that cuts across religious divides in the South Asian region. However, differing from John's narrative, there is more to this problem than the constitutional preference for a sacral model of caste over its sectarian and associational variations.

Dalits belonging to the Muslim community and other religious minorities have not yet been recognized as Scheduled Castes for reasons which are not theological but political. Despite their common historical struggle against Hindu majoritarianism, Dalit and Muslim politics have pursued divergent paths to freedom and sovereignty. In late colonial India, Dalit untouchables modelled themselves after the more influential Muslim minority to seek greater political rights in respect of upper caste Hindus. With partition however, the space left vacant after the migration of Muslim politics to Pakistan was filled in India by Dalits and other lower castes, as minority status was displaced by untouchability and backwardness as the new categories of political mobilization under the Constitution.[14] Although Muslim groups have been included in the Other Backward Classes list, the Scheduled Caste list remains elusive, possibly because the structural position they once occupied before independence is now held by the Dalits in postcolonial India. Curiously, in recent years, the Hindu nationalist government has begun courting Dalit Muslims with a view to isolate upper caste Muslims and target them with exclusionary policies. But if Dalit Muslims do eventually get recognition as Scheduled Castes in the process, where would this leave the sacral model of caste in particular, and the "Communal Constitution" thesis more generally?

E. What is Communalism Against?

As an integral part of India's political vocabulary, albeit in a negative light, the term "communal" has served as the pejorative "other" to the "national" and the "secular". While the nation is itself an "imagined community", during the anticolonial movement and extending into India's founding, the unifying force of nationalism was employed to forge a collective solidarity, in contrast to the divisive force of communalism, which was perceived as a corrupting element for the body politic. This, undoubtedly, resulted in the depoliticization of the minority question, limiting it to the narrow guarantee of religious and cultural rights. Nevertheless, tied to nationalism was the promise of secularism, which did not oppose religion in public life, but rather the communalism of a Hindu supremacist worldview.

In the contemporary moment, a secular nationalist might construe Hindutva's success as a victory of regressive communal politics over the progressive ideals of the Constitution. However, even Hindutva rejects the communal label for self-identification, while managing

14 *Faisal Devji*, Muslim Zion: Pakistan as a Political Idea, Cambridge MA 2013, pp. 163–200.

to undo the founding compact by privileging nationalism over secularism, and linking it to an ethno-cultural imagination of political unity. The Muslim minority, for its part, is shifting away from a cultural defence of personal law to a political struggle for equal citizenship by invoking the secular preamble of the Constitution, as witnessed in the unprecedented public protests following the introduction of a discriminatory religious criteria for the determination of national membership in 2019.

With all sides distancing themselves from the use of the term, what explanatory purchase does communalism have in making sense of the primary political clash between secular nationalism and Hindu nationalism in India today? John's work is mostly silent on this crucial question, as he opts to position the "Communal Constitution" against an unappealing version of liberal constitutionalism centred around the individual. Had he framed the project in the backdrop of the richer Indian and global debates on nationalism and secularism, the outcome of his theoretical reflections might have been very different.

Review Essay

By *Theunis Roux*[*]

If the central thesis of Mathew John's important new book, *India's Communal Constitution*, is correct, it has profound implications for the future of Indian constitutionalism.[1] The fact that these implications are mostly consequential on his argument, rather than explicitly stated, does not detract from the significance of his achievement.

For the bulk of its 147 pages, John provides us with a richly observed, but not obviously actionable account, of the colonial construction of the categories "Hindu" and "Muslim" and their ongoing influence on contemporary constitutional practice in India. The emphasis in this part of the book falls on the stubborn persistence of these identity markers in a polity whose founders had desired a very different outcome—a transformation away from communalism towards a more liberal-secular basis for citizenship and belonging. To this extent, as John himself puts it, his book is "primarily descriptive diagnostic and explanatory" (p. 130). Its point is not to critique but simply to lay bare the respects in which the 1950 Indian Constitution has failed to live up to its much-vaunted ambitions. At the very end of his book, however, John briefly gestures towards a more normative dimension to his argument, viz. that if liberal constitutionalism is to be rehabilitated, India needs to address the respects in which the Constitution failed to make a clean (enough) break from its colonial past. The future of liberal constitutionalism in India, John implies, lies not in a return to some idealised past, but in more fully embracing the idea of India as a complex society of intersecting, fluid and plural identities (pp. 127-131).

At the start of Chapter 1, John vacillates slightly between two different versions of his central thesis. He writes, first, that his book as a whole "makes salient the forms in which colonial state practice communally inflects contemporary constitutional design and practice" (p. 17). In the very next sentence, however, he introduces the aim of this particular chapter, on religious freedom, as being to reveal "the form in which the government of religion by the Indian Constitution communally inflects the identity of the Indian people" (p. 17). Those are two slightly different ways of articulating his project (even though one of them is meant to be the general aim and the other its particularisation in Chapter 1). In the first, the endurance of communalism is attributed to "colonial state practice" in so far as colonial habits of mind continued to influence, after 1950, the interpretation and implementation of what was, textually, a document with numerous liberal features. In the second, it is the Constitution qua institutional and political project that is doing the

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1 *Mathew John*, India's Communal Constitution: Law, Religion, and the Making of a People, New Delhi 2023.

communal inflecting. As we read on, however, it becomes clear that it is the former version of his thesis that John really wants us to be persuaded by. As pure text, the Communal Constitution is an almost non-existent document, with no single provision pointing conclusively to that conception of national identity. As an enduring ideational construct, on the other hand, the Communal Constitution comprises all the myriad ways in which the colonial view of the Indian people as composed of distinct religious communities made its way into post-colonial constitutional practice.

Chapter 1 supports this preferred version of John's thesis by showing how the Indian Supreme Court's (in)famous "essential practices" test can be traced back to approaches to the regulation of religious freedom that first emerged under colonial rule. Just as the colonial state's decision whether to tolerate practices sanctioned by Hindu and Muslim religious communities (such as the practice of Sati) was based on a determination as to whether the practice was essential to the community concerned, so too, the Supreme Court, in *Shirur Mutt*,[2] made essentialness the litmus test for whether a particular religious practice should enjoy immunity from governmental regulation. In this way, John argues, post-colonial constitutional-law doctrine perpetuated the distorted colonial idea of Hinduism as a coherent religion with authoritative written sources rather than a highly regionalised and varied set of religious-cum-cultural practices. Compounding the error, from the 1960s, the Supreme Court arrogated to itself the power to identify what these essential practices were (as opposed to leaving them to determination by the community concerned).[3] It thereby stepped into the shoes of the colonial administrator, and in so doing gave a communal inflection to a Constitution that, textually at least, espoused a classic liberal conception of religious freedom.

In similar vein, Chapters 2, 3 and 4 describe the enduring influence of colonial state practice on the post-colonial regulation of religious personal laws, minority rights and caste inequality respectively. In all three of these domains, John argues, the full realisation of India's liberal-secular constitutional project has been hindered by the lag effect of colonial-era thinking. As far as religious personal laws are concerned, this is evidenced by the ongoing deferral of the Constitution's commitment to the enactment of a uniform civil code (Chapter 2). In relation to minority rights, communalism has been expressed in the form of an artificially coherent conception of the majority Hindu community against which the minority status of other groups has been assessed (Chapter 3). And with respect to caste, communalism consists in the "sacralisation" of social markers that in their original form transcended differences in religion (Chapter 4). In all these ways, John argues, the Communal Constitution exerts a drag on the liberal-secular constitutional project, inhibiting its realisation and, worse, providing the basis for contemporary ethno-nationalist politics.

2 Commissioner, Hindu Religious Endowments, Madras v Sri Laxmindra Thirtha Swamiar of Sri Shirur Mutt 1954 AIR 282.

3 Sastri Yagnapurushadji And Others vs Muldas Brudardas Vaishya And Another 1966 AIR 1119, 1966 SCR (3) 242.

In arguing thus, John's book makes an important contribution to the emerging revisionist literature on the liberal character of Indian constitutionalism. In reaction to what are said to be Madhav Khosla's and Gautam Bhatia's overly idealistic accounts,[4] scholars like Anuj Bhuwania, Arghya Sengupta and Sandipto Dasgupta have in the last few years pointed to the illiberal features of the original Indian constitutional design. Thus, Bhuwania has shown how the Indian Constitution has never completely conformed to its global reputation as a rights-friendly document.[5] Sengupta, for his part, has pointed to the well-known textual overlap between the 1935 Government of India Act and the text of the 1950 Constitution.[6] In the most recent contribution to this literature, Dasgupta has demonstrated how the Congress party's conception of itself as a government in waiting gave a decidedly administrative cast to the Constitution that it later drafted.[7]

Of these three, the closest analogue to John's book might appear to be Sengupta's *The Colonial Constitution.*[8] That book's title, too, seeks to capture, in a single adjective, the continuities between India's colonial past and its post-colonial present. But John's book is altogether more sophisticated than Sengupta's descriptively truncated and normatively ambiguous offering.[9] Whereas the latter leaves both its diagnosis of the causes of India's current slide into illiberalism and its prognosis of what to do about it unspecified, John offers us a powerful explanation for the endurance of colonial ideational constructs. Unlike Sengupta, John is also not content to leave it to others to draw their own inferences about the constitutional-reform implications of his argument.[10] Rather, in his short but significant conclusion, John clearly commits himself to the full realisation of the Indian Constitution's liberal-secular ideals, albeit with a greater awareness of the broader social and political 'force-field' in which these ideals are being promoted and defended (p. 131).

4 *Madhav Khosla*, India's Founding Moment: The Constitution of a Most Surprising Democracy, Harvard 2020; *Gautam Bhatia*, The Transformative Constitution: A Radical Biography in Nine Acts, Gurgaon 2019.

5 *Anuj Bhuwania*, Judicial review and India's statist transformative constitutionalism in: Aparna Chandra / Gautam Bhatia / Niraja Gopal Jayal (eds), Cambridge Companion to the Indian Constitution, Cambridge (forthcoming).

6 *Arghya Sengupta*, The Colonial Constitution, Juggernaut 2023.

7 *Sandipto Dasgupta*, Legalizing the Revolution: India & the Constitution of the Postcolony, Cambridge 2024.

8 *Sengupta*, note 6.

9 These limitations were exposed in a devastating interview by Karan Thapar on the Wire, *Karan Thaper*, Watch Does India Have a Colonial Constitution Or is That a Mistaken View?, The Wire, 29 September 2023, https://thewire.in/video/watch-does-india-have-a-colonial-consitituion-or-is-that-a-mistaken-view (last accessed on 15 September 2025).

10 In a curious passage in *The Colonial Constitution* Sengupta pulls back from advocating the repeal of the current Indian Constitution on the basis that, in "polarized times", any substitute Constitution would not be "long-lasting", *Sengputa,* note 6, p. 172,

Though less ambitious in scope, John's book is somewhat similar in style and sentiment to Dasgupta's *Legalizing the Revolution*.[11] Like John, Dasgupta frames the 1946-49 constitution-making process against the background of the early twentieth-century anti-colonial movement. In Dasgupta's more detailed treatment of this issue, there were three main "forms of anticolonial resistance" corresponding to "three distinct images of postcolonial freedom: liberal, popular and administrative".[12] Rather than a sequential ordering, Dasgupta argues that all three of these "images" were notionally available to the Constituent Assembly as it began its work in December 1946. From this vantage point, it is possible to analyse the Constitution adopted as a function of the possibilities it closed down as much as those it opened up.[13] While different in emphasis, John's account supplements Dasgupta's in showing how the liberal-secular ambitions of the Constitution were from the very beginning frustrated by a contending communal conception of the Indian people.

In summary, *The Communal Constitution* is essential reading for anyone interested in the long-run trajectory of constitutionalist thought and governance in India. In skilfully refracting contemporary doctrinal debates through the prism of colonial and post-colonial state practices, John illustrates the interpenetration of law, society and politics in the development of Indian constitutionalism. In so doing, he provides a more realistic account of the possibilities and limits of the liberal variant of that ideal.

11 *Dasgupta*, note 7.

12 Ibid., p. 49.

13 Ibid.

Author Response to Book Symposium

By *Mathew John**

This essay responds to the critical scrutiny I have received from Roux, Srikantan and Tundawala in their reviews of my book *India's Communal Constitution*.[1] Sharply spotlighting key issues and questions that arise from my efforts to identify a "communal tendency" in Indian constitutional imagination, they offer me the opportunity to revisit and reflect on the central themes of my book for which I am extremely grateful.

To start, it is useful to draw on Srikantan and Roux to emphasise that my book is organised to make apparent the landscape of conceptual themes and that have been put to use in Indian constitutional practice to inflect the identity of the Indian people in communal or ethno-national terms.[2] To quote Roux to clarify this part of my argument, "as pure text, the Communal Constitution is an almost non-existent document, with no single provision pointing conclusively to that conception of national identity."[3] This quote is important to note as the book has also mentioned on many occasions that the dominant orientation of the constitutional text was to establish something akin to a liberal constitutional identity where the people were to be understood as a community of free and equal citizens. Against that broadly liberal background, the case for the Communal Constitution and its foregrounding of religious identity was always going to be a counterintuitive form of characterising Indian constitutional imagination. Even so, it is against this liberal background that I have tried to demonstrate a colonially inspired religious or communal identification of the people in the Indian Constitution's interpretation and practice of religious freedom, personal law, minority rights and caste identification.

The characterisation of Indian constitutionalism as displaying a communal tendency is an important concern of all three essays. For Tundawala, the very presentation of the Communal Constitution as a pathological expression of the constituent power of the people was unconvincing.[4] As he argues, the Indian Constitution embodied the best of the democratic and revolutionary traditions of the modern world where liberalism was to be supplemented if not supplanted by a people giving themselves a constitution. That is, the people in the Indian Constitution were best understood not merely as the "symbolic unity of free and equal citizens […] but […] also in reality a diverse plurality of groups and

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1 *Mathew John*, India's Communal Constitution: Law, Religion and the Making of a People, Cambridge 2023.

2 *Geetanjali Srikantan,* Review Essay, World Comparative Law 58 (2025), see also *Theunis Roux,* Review Essay, World Comparative Law 58 (2025), in this issue.

3 *Roux*, note 2.

4 *Moiz Tundawala*, Review Essay, World Comparative Law 58 (2025), in this issue.

communities […]" governed by that very unity of the people.[5] To rephrase, the people in modern constitutionalism, and especially in the Indian Constitution, is to be understood as an entity capacious enough to absorb even communal tendencies as a dimension of social plurality from which the polity as a whole sought to fashion political and constitutional unity.

I do not contest the spirit of deep and even revolutionary democratic change that animated the Independence Constitution. The Constitution did envision bringing together the social and cultural diversity of India under the banner of the political unity of the Indian people. However, as a form of imagining the state, any route towards "national" unity would only be one among other contenders. Among these contenders for national solidarity, I might mention the colonial-national model of the Indian people, the federal model of the people, the Gandhian model of the people and so on in addition to the dominant liberal vision of the people as a community of free and equal citizens. Of these my book has emphasised the colonial-national model of the people which foregrounded religious identity and goes on to show that it is a model that continues to resonate in contemporary constitutional practice. Thus, even if the Constitution was designed to surpass the communal vision of the people by foregrounding a liberal vision of the people, it was less than successful in enveloping and absorbing within itself rival claims that identified the Indian people through the axes of communal identity.

A related conceptual criticism arises from Srikantan's distinction of the Communal Constitution from what she calls the Hindutva Constitution.[6] Drawing on the work of Hilal Ahmed she identifies the Hindutva Constitution as one that fully accepts the Constitution adopted at independence but is disposed to playing up technical discussions in disputes such as Article 370 in a manner that accentuates Hindu grievance about asymmetric federal rights only to resolve this sense of hurt through the assertion of a national political community over its recalcitrant parts. Significantly, since the underlying constitutional issue in relation to disputes like Article 370 is resolved entirely through the facially neutral technical detail of legal doctrine, Srikantan thinks that Hindutva inflected conception of a national political community does not accord with what I identify as the Communal Constitution. To draw from my book, the Hindutva Constitution problem would be akin to the discussions over personal law and the uniform civil code (UCC). The demand for the UCC is undoubtedly a secular political demand that seeks to decentre or sweep away the communal identities foregrounded by personal law. However, driven by an animus against "Muslim" minorities, the UCC decisions of the Indian Supreme Court were tied to a nationalist constitutional imagination in which the people understood as broadly and implicitly Hindu were unable to bring themselves into dialogue with the anxieties of various Muslims groups for personal law practices. Thus, the problems of the UCC or Article 370, even if facially neutral and secular, are framed in colonially derived communal conceptions of India as a

5 Ibid.

6 *Srikantan,* note 2.

people identified by a Hindu majority against which other religious regional or particular identities and their constitutional recognition and demands are deemed illegitimate. Once the problem is framed in this manner, the identities recognised by the Constitution are given the go by for an implicit communal majority with whom the Indian people as a whole are identified. That is, facial neutrality of these debates does not decisively distance them from what I identify as the communal tendency in Indian constitutional practice.

Beyond questions that pertain to conceptual framing there are other downstream and specific questions that were raised by these reviews. For instance, Tundawala argues that my treatment of the Supreme Court devised "essential practices test" on religious freedom missed a chance to theorise the place of religion in Indian public law.[7] His line of questioning centres around the need to explain why judges rely on this test that demands that religions produce their essential truths (which truths alone are protected as their right to religious freedom in the Indian Constitution). At this level, the book does indeed provide an answer which ties the essential practices test to colonial attitudes and conceptualisation of religion in India which were internalised first by social reform processes and more recently by courts as custodians of social reform in the Constitution. However, this answer is insufficient for Tundawala as he points out that religion occupies a special place in Indian public life and that unlike western liberal democracies where religion has been socially privatised for centuries, religion remains a central part of the Indian public sphere.[8] As a result, he argues that an internal form of justifying secular intrusions and reform of religious practice, like the essential practices test, was inevitable. While Tundawala's assertion may be true, it is also true that of the numerous ways of characterising Indian religiosity, legal and constitutional practice have more often than not reinforced what I have called axiomatic religious truths that identify religious truths or axioms with a people as a whole. This form of identifying religion and its bond to a people or politics is a choice made at the expense of other and more readily available forms of Indian religiosity characterised by the plurality of diverse practices. Thus, even if justifying intervention through internal arguments is deemed to be necessary for constitutional practice, the book notes that such forms of internal justification do not often employ forms of justification appropriate to the tradition being reformed. But more importantly, such forms of interventions reinforce a communal conceptualisation of the Indian people.

Tundawala's also objects to the manner in which pluralism (in the context of the book's discussion on minority rights and caste identity) is drawn on to decentre the communal imagination of the Indian people.[9] His principal concern with plural forms of social identification is that it is not robust enough to counter Hindutva/communal majoritarianism which has shown itself as being able to provide a capacious cover to all forms of plural identities as long those identities could be mobilised under a Hindutva banner. In turn, this

7 *Tundawala,* note 4.

8 Ibid.

9 Ibid.

broader Hindutva identity is organised through its hostility to minority identities, primarily Muslims. This is of course an entirely legitimate line of criticism to take against the manner in which Hindutva nationalist ambition has operated, but this precisely what the book has sought to demonstrate. That is, the book (chapters 3 and 4) presents its efforts as a diagnosis of the manner in which minority identities, be they religious or caste groups, (and not just prominent minorities like Muslims) are pushed to the margins by communal constitutional imagination and practice. Thus, as the book demonstrates, constitutional practice prevented minorities from self-identifying as minorities and were identified instead against the background of a deemed Hindu majority. That is, even when social groups commonly understood as Hindu tried to cast themselves as minorities against an understanding of the entirety of the Indian people as a collection of minorities, constitutional practice actively intervened to scuttle their attempts to self-identify. Similarly, caste was identified primarily as a Hindu problem even when it was clear that some version of caste was ubiquitous to all religious groups in India.

This form of analysis that the book presents is of course a diagnosis of the working of a communal constitutional practice as it mobilised its version of the (Hindu) people who author the constitutional community. However, as a diagnostic account of the Communal Constitution it is one that draws on the way in which the body politic is carved up by preferring the communal over plural conceptualisations of the people. That is, the book's diagnosis is, perforce, implicit critique of communal constitutional practice, but more importantly, critique that draws on and foregrounds Indian social pluralism as the ground that communal constitutionalism has to redraw to defend its account of the communal people. It is in this manner that Tundwala comes to his critique of the book on grounds of its reliance on Indian pluralism.

Tundawala, and even Roux, are therefore right to examine and evaluate social pluralism as the potential ground on which the Indian people might pull together in their diversity.[10] They are also right to go one step further to argue that pluralism could not anchor political unity without offering some version of political and constitutional secularism or principled ground for holding together social diversity. However, my book's principal purpose was to demonstrate the possibility that the communal as "the pejorative other" to the "national" and "secular" (Tundawala) threatens the very vitals of the constitutional project adopted at Indian independence. And to this end, even as intuitive experience suggests to me that the possibilities of pluralism towards pulling together political unity are worth exploring, the book does not outline an intellectual path from pluralism that clearly cuts through the dangers of communal constitutionalism.

Therefore, as I understand it, pluralism is a promissory note towards future research. It is a curious aspect of Indian constitutional theory that social pluralism has not been the self-standing ground on which constitutional imagination has been anchored. Tundawala is of course sceptical of the possibilities that pluralism offers while Srikantan goes so far to

10 *Tundawala*, note 4, *Roux*, note 2.

suggest exploring emerging and contentious legal debates around the regulation of family and same sex relationships as forms of taking forward the book's discussion of pluralism.[11] The prospects of this work on pluralism therefore awaits further inquiry. However, all three reviews have foregrounded with considerable clarity what I believe to be the challenge arising from a communal constitutional imagination and have offered me a chance to engage their questions while presenting my central ideas. Equally their reviews have also allowed me the opportunity to retrospectively and prospectively reflect on my work for which I once again express my thanks.

11 *Tundawala*, note 4, *Srikantan*, note 2.

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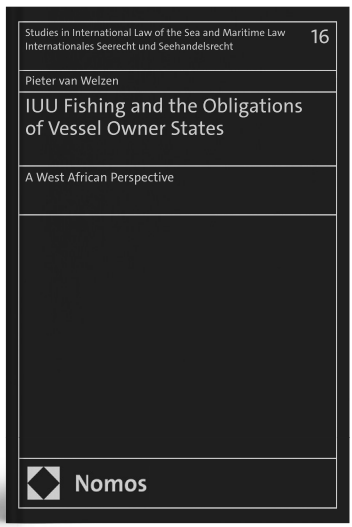

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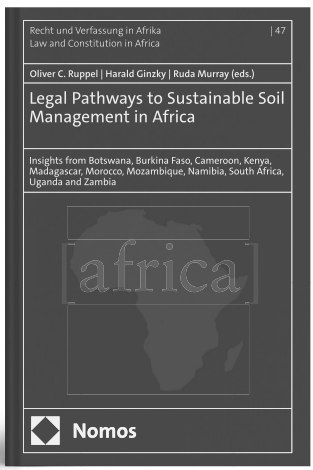
This book analyses the question whether states whose nationals are beneficial owners or operators of vessels engaged in illegal fishing (vessel owner states) in a foreign Exclusive Economic Zone (EEZ) have an obligation to act against such nationals, with a focus on the situation in West Africa, one of the worst affected regions. It reviews the international legal regime that applies to fisheries in an EEZ and considers various sources of international law as well as state practice, including the rules of the European Union and the USA, that support the argument that there is such an obligation. Suggestions are given as to how vessel owner, coastal and flag states can give effect to this obligation.

The Fight against Soil Degradation



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Legal Pathways to Sustainable Soil Management in Africa

Insights from Botswana, Burkina Faso, Cameroon, Kenya, Madagascar, Morocco, Mozambique, Namibia, South Africa, Uganda and Zambia

Edited by Prof. Dr. Oliver C. Ruppel, LL.M., Dr. Harald Ginzky and Ruda Murray

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This publication is based on a project funded by the German Federal Ministry for Economic Cooperation and Development (BMZ) on a 'Model Law for Sustainable Soil Management in Africa'. One of the key findings of the research underscores the urgent need for more comprehensive soil protection laws and coordinated efforts to tackle the root causes of soil degradation in Africa. It highlights legal pathways to improve soil management and ensure the long-term sustainability of Africa's soil resources. The book provides an in-depth analysis of soil protection efforts across various African countries, including Botswana, Burkina Faso, Cameroon, Kenya, Madagascar, Morocco, Mozambique, Namibia, South Africa, Uganda, and Zambia.

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