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ARTICLE

# The Two Modes of Foreign Engagement by the Constitutional Court of Korea

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**Abstract**

The Constitutional Court of Korea (CCK) has engaged with foreign law and practices in two distinct manners. While the CCK has interacted with foreign constitutional adjudicatory organs outside the courtroom, it has also developed comparative law practices inside the courtroom. This article aims to examine the interaction between the CCK's two modes of foreign engagement. The chronological inquiry, substantiated by the interviews with former and current legal practitioners of the CCK, demonstrates the gap between the CCK's two modes of foreign engagement. The CCK's evolving extrajudicial activities have provided the repositories of information adequate for the deliberation of individual cases. However, the CCK's rigid structure for comparative law practices, which was established in its initial years to learn from traditionally influential jurisdictions, restricts these repositories from being fully utilised inside the courtroom. The CCK's failure to fully incorporate its developments in its extrajudicial activities into comparative law practices disallows the CCK to grasp an evolving picture of foreign constitutional adjudicatory organs.

This article presents an evolution of foreign engagement of the Constitutional Court of Korea (CCK). The empirical approach of this article focuses on the CCK's voluntary use of foreign law, as opposed to its obligatory application of international human rights law. Since its establishment in 1988, the CCK has engaged with foreign law and practices in two distinct manners. Inside the courtroom, it has developed comparative law practices to improve the deliberation of individual cases. Outside the courtroom, it has interacted with foreign constitutional adjudicatory organs by participating in transnational judicial networks, hosting international conferences, and building bilateral relations.

While the CCK's two modes of foreign engagement are addressed by a few scholars, the interplay between the two attracts less attention. At a theoretical level, it is supposed that personal encounters with foreign justices might encourage the use of foreign law and practices in the deliberative process.[1] Cross-fertilisation depends on factors such as how face-to-face meetings are organised and how willing their participants are.[2] A case study on the CCK implies that its diplomatic activities are unlikely to contribute to foreign engagement inside the courtroom.[3] Instead, the CCK's internal

*Constitutional Rapporteur Judge, Constitutional Court of Korea. An earlier version of this paper was submitted in partial fulfilment of the requirements for the LLM degree at the London School of Economics. I would like to thank Jo Eric Murkens, Yoon Jin Shin, and Fabian Duessel for their valuable comments.

[1]Maartje De Visser, 'We All Stand Together: The Role of the Association of Asian Constitutional Courts and Equivalent Institutions in Promoting Constitutionalism' (2016) 3 Asian Journal of Law and Society 105, 106; Maartje De Visser, 'Patterns and Cultures of Intra-Asian Judicial Cooperation', in David S Law, Holning Lau & Alex Schwartz (eds), *Oxford Handbook of Constitutional Law in Asia* (Oxford University Press, forthcoming).

[2]ibid De Visser, 'Patterns and Cultures of Intra-Asian Judicial Cooperation'.

[3]David S Law, 'Judicial Comparativism and Judicial Diplomacy' (2015) 163 University of Pennsylvania Law Review 927, 1011.

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deliberative mechanisms, operated by its legal practitioners with foreign law expertise, play a decisive role in creating vibrant comparative law practices.[4] This finding is consistent with a more recent case study suggesting that the CCK's extrajudicial interactions with other constitutional adjudicatory organs in Asia do not necessarily motivate it to use foreign decisions delivered by them.[5] These case studies successfully spotlight the existing gap between the CCK's two modes of foreign engagement. At the same time, they have yet to fully explore the possibility that the CCK's foreign engagement outside the courtroom could have been evolving in a manner to impact its internal deliberative mechanisms and thus invigorate comparative law practices. To fill this literature gap, this article proposes a chronological approach. The chronological approach reveals how the CCK has expanded its global reach outside the courtroom, gained access to information depositories adequate for the deliberation of cases, and struggled to incorporate them into its comparative law practices.

The remainder of this article is organised as follows. First, it discusses foreign influences on the development of constitutional adjudicatory systems in South Korea. Second, it chronologically examines the interaction between the two modes of foreign engagement of the CCK. The inquiry, substantiated by the interviews with former and current legal practitioners of the CCK, suggests that although the CCK's orientations in foreign engagement outside its adjudicatory practices have evolved from passive reception to mutual interaction, its patterns in comparative law practices have mainly remained receptive of traditionally influential jurisdictions. The CCK's rigid structure for comparative law practices deters its developments in foreign engagement outside the courtroom from being fully incorporated into foreign engagement inside the courtroom. Accordingly, this article concludes by suggesting a structural change to foster the dynamic interplay between the two modes of foreign engagement.

## Foreign Influences of The Development of Constitutional Adjudicatory Systems in South Korea

Japan and the United States directly influenced the modern Korean legal system.[6] Korea was saturated with the Japanese adaptation of civil law during its colonisation from 1910 to 1945. It was also affected by the United States Military Government in Korea, which ruled South Korea from 1945 to 1948. Since the Republic of Korea was established with the promulgation of the first Constitution in 1948, six republics have existed. These six republics resorted to the experiences of constitutional adjudicatory organs in the United States and Germany and adopted three different types of constitutional adjudication mechanisms: a constitutional committee, a constitutional court, and ordinary courts.

The First Republic (from 1948 to 1960) established a Constitutional Committee based on the critical understanding of the American model of judicial review. Drafters of the first Constitution were aware that heightened public trust in the judiciary contributed to judicial review in the United States.[7] However, in the post-colonial society of Korea, public hostility against judges who had collaborated with the Japanese colonisers resulted in the exclusion of ordinary courts in the review of constitutional matters.[8] Instead, the Constitutional Committee was empowered to adjudicate the constitutionality of statutes upon the request of ordinary courts.

[4]ibid 1011–1015.

[5]Yoon Jin Shin, 'Transnational Constitutional Engagement: A Contextualization of Global Constitutionalism by the Constitutional Court of South Korea' (2021) 10 Global Constitutionalism 256, 272–273.

[6]Tom Ginsburg, 'Rule by Law or Rule of Law? The Constitutional Court of Korea', in Tom Ginsburg (ed), *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003) 208.

[7]Constitutional Court of Korea, *Thirty Years of the Constitutional Court of Korea* (Constitutional Court of Korea 2018) 69–70.

[8]ibid.

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A democratic movement in 1960 put an end to an increasingly authoritarian rule of the First Republic and created the Second Republic (from 1960 to 1963). The Second Republic intended to establish a constitutional court on the grounds that the German model of constitutional review could effectively deal with highly politicised issues in South Korea.[9] Due to the subsequent coup by General Chung-Hee Park in 1961, a constitutional court was never established. However, its institutional design became a significant reference point for establishing the CCK under the Sixth Republic.[10]

The Third Republic (from 1963 to 1972), which began with the inauguration of General Park as President, followed the American model of judicial review and authorised ordinary courts to review the constitutionality of statutes. Several American law professors advised the military junta of General Park while formulating the 1963 Constitution.[11] Many Korean constitutional law scholars were disposed to import the American model of judicial review, through which an active judiciary could play a substantial role in protecting human rights.[12] However, the political environment surrounding the Third Republic was not mature enough to appreciate dynamic constitutional practices. At the end of the Third Republic, the Supreme Court struck down the *State Compensation Act*, which disallowed soldiers who died or were injured during their public service to seek damages from the government. This decision of unconstitutionality provoked a strong reaction from the military government and led to the end of this decentralised model of constitutional review.[13] The subsequent authoritarian regimes under the Fourth Republic (1972 to 1980) and the Fifth Republic (from 1980 to 1988) deprived ordinary courts of the authority to review the constitutionality of statutes and re-established the Constitutional Committee.[14]

The Sixth Republic (from 1988 to the present) marked an end to almost three decades of dictatorship and facilitated a transition to democracy. The current Constitution resulted from a nationwide democratic movement and subsequent negotiations among three political parties in 1987. The ruling party purported to establish an independent institution, either a court or a committee, on the grounds that ordinary courts should remain silent on political issues. The opposition parties expected that the introduction of constitutional complaints could lead to better protection of human rights and argued that the German model of constitutional review was adequate to deal with constitutional complaints. Thus, they agreed to establish a constitutional court with jurisdiction over constitutional complaints.[15] To concretise this agreement, drafters of the current Constitution used Chapter IX of the *Basic Law of the Federal Republic of Germany* on the Federal Constitutional Court as a significant reference point.[16]

The development of constitutional adjudicatory systems in South Korea reflects the influences of both American and German constitutional laws. The authority to adjudicate the constitutionality of statutes was assigned to ordinary courts under the Third Republic and a constitutional court under the Second and Sixth Republics. The American model of judicial review was not easily incorporated into the Korean legal system because both the public and politicians were unamenable to the idea that judges could resolve highly politicised questions. In contrast, the successful practices of the German Federal Constitutional Court reinforced politicians' proposition that an institution, separate

[9]ibid 75–76.

[10]ibid 77–78.

[11]Kyong Whan Ahn, 'The Influence of American Constitutionalism on South Korea' (1997) 22 Southern Illinois University Law Journal 71, 86–87.

[12]ibid.

[13]Constitutional Court of Korea (n 7) 82–83.

[14]Constitutional Court of Korea (n 7) 87–89.

[15]Constitutional Court of Korea, *The First Ten Years of the Korean Constitutional Court* (Constitutional Court of Korea 2001) 16–17.

[16]James M West & Dae-Kyu Yoon, 'The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex' (1992) 40 American Journal of Comparative Law 73, 77.

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from ordinary courts, was better equipped to deal with constitutional issues. The creation of the CCK under the Sixth Republic with jurisdiction over constitutional complaints demonstrates that the institutional design of the CCK was influenced more by German than by American constitutional law and practices.

## Foreign Engagement of The Constitutional Court of Korea

### *Overview*

This section examines how foreign engagement outside the courtroom influences foreign engagement inside the courtroom by elucidating the former's epistemic impacts on legal practitioners of the CCK. The CCK's three distinct modes of foreign engagement outside the courtroom are participating in transnational judicial networks, holding international conferences, and building bilateral relations. Their impacts on foreign engagement inside the courtroom are reviewed through these two questions: (1) Are legal practitioners of the CCK given access to information depositories adequate for the deliberation of individual cases? (2) If so, what are the factors that cause them to use such databases? Before answering these questions, this section describes the profiles of the CCK's legal practitioners and explains the methodologies of the two modes of foreign engagement. Lastly, this section sketches the development of the CCK's extrajudicial activities and their effects on comparative law practices over thirty years. It concludes that the CCK's rigid structure for comparative law practices disallows its evolution in foreign engagement outside the courtroom to be fully translated into foreign engagement inside the courtroom.

### *Profiles of Participants in Foreign Engagement*

Legal practitioners who participate in the two modes of foreign engagement of the CCK include justices, constitutional rapporteur judges (CRJ), and constitutional researchers. As of December 2020, nine justices, eighty-two CRJs, and six constitutional researchers serve in the CCK.

Justices are appointed from among those who have practised law in Korea for more than fifteen years. Seven justices served as career judges, one justice practised as a human rights lawyer, and one justice served as a career judge and then practised as a corporate lawyer before being appointed as justices. Justices hold office until they complete a non-renewable term of six years or reach the retirement age of seventy years. Six justices have studied law abroad in the middle of their career: three studied in the United States (one completed an LLM from Duke University, and two researched as visiting scholars at University of California, Berkeley and Harvard University), two were visiting scholars at Tokyo University, Japan, and one studied as a visiting scholar at University of Bonn, Germany.

CRJs conduct legal research concerning the deliberation of individual cases under the order of the President of the CCK. In this sense, they are 'most analogous to law clerks of the American variety'.[17] As of December 2020, out of eighty-two CRJs, sixty-seven work permanently, while fifteen work for two years or less as seconded officers from the Supreme Court, the Ministry of Justice, the Ministry of Legislation, and the National Tax Service. Permanent CRJs hold office for a renewable term of ten years until they reach the retirement age of sixty years. Permanent CRJs are appointed from among persons who (1) are qualified to practise law in Korea, (2) have been an academic of the rank of assistant professor or higher, (3) have dealt with legal issues as a public servant of secretary rank or higher for more than five years, or (4) have obtained a doctorate in law with five or more years of research experience. Among sixty-seven permanent CRJs, sixty-five belong to the first category, while two are qualified under the fourth category. Concerning the first category, Korean legal professionals can be qualified through two different tracks: the national judicial exam scheme and the law school scheme. Under the national judicial exam scheme from 1963 to 2017, they were

[17]Law (n 3) 967.

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qualified through an exam accompanied by post-exam obligatory training at the Judicial Research and Training Institute. Applicants for the national judicial exam were required to pass a recognised foreign language test at an appropriate level. While they were free to choose from English, German, French, Russian, Japanese, Chinese and Spanish foreign language tests before 2003, they were required to take an English language test from 2003 onwards. With the introduction of the law school scheme in 2009, legal professionals can be qualified by completing a JD programme and passing a bar exam. Law schools select applicants based on their undergraduate academic record, foreign language proficiency, score on the Legal Education Eligibility Test, and relevant work and community service experience. Twenty-four out of twenty-five Korean law schools require their applicants to submit the results of an English language test. Among sixty-five permanent CRJs belonging to the first category, fifty are qualified under the national judicial exam scheme, while fifteen are qualified under the law school scheme.

The CCK provides permanent CRJs with opportunities to study abroad by either completing an academic programme or conducting independent research as a visiting scholar. As of December 2020, out of sixty-seven permanent CRJs, forty-one have already completed their foreign legal training through sponsorship by either the CCK or other institutions to which they belonged before. The United States is their favourite destination, as twenty-four CRJs have studied there. Germany (six) and Austria (two) are also preferred. Other destinations include France, Spain, Canada, Italy, the United Kingdom, and the Netherlands. Their preference for the United States is primarily attributable to their lack of language skills in foreign languages other than English.[18] Most of the current CRJs did not learn German or French in high school and college. Furthermore, to obtain a license to practice law, only English language proficiency is required for the national judicial exam or law school admissions. In this context, the duration of overseas training is one year in English-speaking countries and one year and six months in non-English speaking countries, as it takes more time for CRJs to be fluent in foreign languages other than English.

Constitutional researchers inquire into specific constitutional or statutory issues from comparative law perspectives based on their expertise in foreign law. They either hold advanced degrees from other jurisdictions or have relevant research experience. They are appointed for a maximum of ten years. Two constitutional researchers hold doctoral degrees from German universities, one holds a doctorate from a Japanese university, one possesses an LLM from an American university, and two have JDs from Korean universities. Two constitutional researchers focus on German-speaking jurisdictions, mainly Germany; one focuses on Japan; and three focus on English-speaking jurisdictions, primarily the United States.

## *Methodologies of Foreign Engagement*

Justices, CRJs, and constitutional researchers engage with foreign law and practices collaboratively. As far as foreign engagement outside the courtroom is concerned, a Korean delegation interacting with foreign constitutional adjudicatory organs or participates in international conferences typically consists of one justice along with either one CRJ or one constitutional researcher.[19] Outcome reports on their extrajudicial activities are posted in the internal database.

Concerning foreign engagement inside the courtroom, CRJs and constitutional researchers mainly research foreign law and practices under the current structure for comparative law practices. The internal deliberative process proceeds as follows. When a case is lodged, it is allocated to one

[18]Interview with Official C, former or current constitutional researcher with the CCK (Seoul, 10 Dec 2020); Interview with Official D, former or current CRJ with the CCK (Seoul, 15 Jun 2021).

[19]For the list of justices, CRJs, and constitutional researchers who have gone overseas for foreign engagement outside the courtroom, see Constitutional Court of Korea, 'History of the Constitutional Court of Korea' (Constitutional Court of Korea) <https://history.ccourt.go.kr/site/history/05/10506000000002020101203.jpg> accessed 16 Aug 2021 (in Korean).

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reporting justice and one reporting CRJ. A CRJ prepares a report including a part on how a pending issue has been dealt with in foreign jurisdictions, mainly German, American, and Japanese jurisdictions. A CRJ can either conduct comparative law research independently or request constitutional researchers to prepare a memorandum. After team discussions with peer CRJs, a reporting CRJ revises and submits their report to a reporting justice. A reporting justice usually leads the deliberation of each case based upon the report prepared by a reporting CRJ. A reporting justice may ask CRJs or constitutional researchers to provide additional information on foreign law and practices before or after deliberation. After deliberation, a CRJ drafts a decision, and a reporting justice puts it into final form. A report and a memorandum are uploaded to the internal database for future reference when each case is closed.

When CRJs and constitutional researchers conduct comparative law research, they have three different focuses. First, they refer to substantive provisions of foreign constitutions to illuminate the meanings of corresponding provisions of the *Constitution of the Republic of Korea* (Korean Constitution). Recourse to comparative constitutional law concerns constitutional rights and principles assessing whether the infringement of such rights is justified. Second, they undertake comparative constitutional law work to tackle procedural issues derived from the Korean Constitution and the *Constitutional Court Act*. In this context, they are more prone to consider foreign constitutional adjudicatory organs that have adopted the centralised model of constitutional review and confronted similar procedural issues. For instance, they explore legal techniques foreign constitutional courts employ when finding a statute unconstitutional with the intention of requesting the legislature or ordinary courts to eliminate its unconstitutionality. Variational decisions are one of these legal techniques. Thirdly, they research foreign statutes to have a holistic understanding of the Korean statutes under review. They conduct the comparative analysis of foreign statutes to identify a global consensus on a particular issue or to clarify the legal history of the Korean statutes under review. The multiple contexts under which the CCK's legal practitioners develop comparative law practices make some constitutional adjudicatory organs more relevant than others, as illustrated in the following subsection.

## Chronological Examination of Foreign Engagement

### First phase (from 1988 to 1999)

*Foreign engagement outside the courtroom.* As a fledgling court established in September 1988, the CCK aimed to settle its internal deliberative process. Expanding its global reach through active foreign engagement outside the courtroom could not be the priority of the CCK during the initial years. Still, some efforts were made. The following are a few examples of the CCK's foreign engagement outside the courtroom. First, the CCK was briefly engaged with the Biennial Conference of Supreme Court Chief Justices from the Asia Pacific region, which was co-organised by the Law Association of Asia and the Pacific and supreme courts in the region. The CCK participated in the Conference in 1989, 1991, and 1993. It discontinued its engagement with the Conference because its activities focused on ordinary courts rather than constitutional courts.[20] Second, it held a seminar in 1999 to celebrate its tenth anniversary and invited two foreign dignitaries, President Jutta Limbach of the German Federal Constitutional Court and President Jose da Costa of the Portuguese Constitutional Court. Bilateral relations with Germany and Portugal facilitated their invitations. The CCK also built diplomatic relations with constitutional adjudicatory organs in Russia, Gabon, Israel, Hungary, China, and Japan.

*Foreign engagement inside the courtroom.* Foreign engagement outside the courtroom was not active enough to function as a source for comparative law practices. Instead, the CCK had to build its database on its own initiative.

[20]Email from Official A, former or current CRJ with the CCK, to author (14 Jan 2021).

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Legal practitioners of the CCK chose Germany, the United States, and Japan as main reference points. German constitutional theories and cases were most frequently relied upon because they were relevant to substantive and procedural issues. One CRJ admitted that almost every legal practitioner of the CCK had the following three books and resorted to them: (1) *Das Bundesverfassungsgericht: Stellung·Verfahren·Entscheidungen* (The Federal Constitutional Court: Status, Procedure, and Decisions) by Klaus Schlaich and its Korean translation by Tae Ho Chung (who served as a secretary and constitutional researcher in the CCK from 1996 to 1998); (2) *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Basic Themes of the Constitutional Law of the Federal Republic of Germany) by Konrad Hesse and its Korean translation by Hee-Yol Kay; and (3) Decisions of the German Federal Constitutional Court (BVerfGE).[21] The United States and Japan were less applicable than Germany. The jurisprudence of the United States Supreme Court provided inspiration in interpreting substantive provisions articulating freedom of speech and due process.[22] The Supreme Court of Japan tended to refuse to strike down statutes and offered few cases of constitutional significance. Japanese law was researched to interpret the Korean statutes under review because of the similarity between Japanese and Korean legal frameworks.[23]

The CCK endeavoured to empower its employees to increase their knowledge of these jurisdictions, especially Germany. During the first term (15 September 1988 to 14 September 1994), justices themselves were committed to conducting comparative constitutional law research. They made several unofficial visits to Karlsruhe, collected relevant materials, consulted constitutional experts, and published articles. Their efforts to comprehend the borrowed system of constitutional adjudication were crystallised in a series of articles written by Justice Shi-yoon Lee under the title 'Personal Views on Constitutional Justice'.[24] Permanent CRJs were encouraged to learn German, for instance, by enrolling in language courses in Goethe-Institut Korea. The Supreme Court of Korea and the Ministry of Justice dispatched career judges and prosecutors with foreign law expertise to the CCK.[25] The CCK also employed constitutional researchers among young scholars who had recently received advanced degrees abroad, mainly from German universities. During the first decade, the CCK slowly formulated a structure through which justices, CRJs, and constitutional researchers conducted comparative law research, as described in the previous subsection.

The primary motivation of the CCK in conducting comparative law research was to fill the vacuum left by the absence of domestic constitutional adjudicatory practices. As outlined in the first section, Korea had never experienced an operating constitutional court until the establishment of the CCK. Other constitutional adjudicatory organs under previous Republics left only a limited number of precedents. The Constitutional Committee under the First Republic and the Supreme Court under the Third Republic delivered two declarations of unconstitutionality each. The Constitutional Committee under the Fourth and Fifth Republics did not hear any case. The lack of constitutional adjudicatory practices meant that Korean legal practitioners had few opportunities to approach the Constitution as a binding norm. Most legal practitioners studied law according to a curriculum focusing on civil and criminal law. They practised law under authoritarian regimes and thus did not dare to imagine invoking the Constitution to nullify governmental actions. Justice Shi-yoon Lee encapsulated the change in the mindset of Korean legal practitioners, commenting that the establishment of a Constitutional Court transformed the Constitution from a rhetorical, programmatic, and political declaration into a living norm whose binding force is guaranteed by

[21]Interview with Official A (Seoul, 8 Jan 2021).

[22]ibid.

[23]ibid; Interview with Official D (n 18).

[24]See Shi-yoon Lee, 'Personal Views on Consitutional Adjudication (1)' (1990) 1 Constitutional Law Review 57; Shi-yoon Lee, 'Personal Views on Consitutional Adjudication (2)' (1991) 2 Constitutional Law Review 111; Shi-yoon Lee, 'Personal Views on Consitutional Adjudication (3)' (1992) 3 Constitutional Law Review 101 (in Korean).

[25]Interview with Official A (n 21).

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its judicial authority.[26] In this context, relying on the jurisprudence of constitutional adjudicatory organs in more mature democracies was inevitable until the CCK's legal practitioners conceived the normative force of the Constitution and produced their own indigenous jurisprudence.

The temporary lack of indigenous precedents alone does not explain the CCK's German preference. The CCK's legal practitioners were conscious that a constitutional adjudicatory organ could be subject to backlashes from democratically elected branches when resolving highly controversial issues. They must have thought that borrowing doctrines from globally respected constitutional adjudicatory organs could be an efficient strategy to defend the fragile status of the CCK in domestic politics.[27] As exemplified in the debate on the establishment of the CCK during the constitutional convention in 1987, the German Federal Constitutional Court was already considered the most authoritative constitutional adjudicatory organ by politicians and drafters of the Constitution.

Early decisions of the CCK relied on the jurisprudence of the German Federal Constitutional Court in dealing with substantive and procedural matters that might have provoked other branches of the government. One of the most representative examples concerns the standard of review for social rights. The CCK made a distinction between a behavioural norm and a review norm when examining the constitutionality of social policies. While social rights as a behavioural norm require the legislature to realise them fully, social rights as a review norm ask the CCK to review whether legislative measures are evidently insufficient. This dual standard resulted from the CCK's borrowing of the German conception of the social state principle to provide a broader leeway for the legislature concerning the protection of social rights.[28] Another example deals with the plausibility of introducing variational decisions. According to the Constitution and the *Constitutional Court Act*, the CCK shall decide only whether a statute concerned is unconstitutional. The CCK, however, referred to German constitutional practices and introduced other categories of decisions despite the absence of constitutional and statutory grounds. A nonconformity decision was rendered when the CCK found a statute unconstitutional but asked the legislature to eliminate its unconstitutionality within a limited period. A decision of conditional constitutionality ('not unconstitutional as long as it is interpreted to mean…') and a decision of conditional unconstitutionality ('unconstitutional as long as it is interpreted to mean…') were delivered when the CCK maintained that specific applications of a statute could be either constitutional or unconstitutional. In the first decision to render a nonconformity decision,[29] the majority opinion explicitly depended on the experiences of more mature constitutional adjudicatory organs like the German Federal Constitutional Court to support the necessity of introducing variational decisions. Importing certain constitutional practices from the German Federal Constitutional Court turned out to be effective for the CCK to show respect to the legislature, reduce risks arising from any failure to secure compliance from other branches, and consolidate its precarious status in the domestic sphere.

### *Second phase (from 1999 to 2008)*

*Foreign engagement outside the courtroom.* The second phase spans from 1999, when South Korea joined the European Commission for Democracy through Law (Venice Commission), to 2008, when the CCK held an international conference in celebration of its twentieth anniversary. The CCK diversified its modes of foreign engagement outside the courtroom by joining a transnational judicial network, hosting international conferences, and creating bilateral relations with foreign constitutional adjudicatory organs for multiple purposes.

[26]Lee, 'Personal Views on Consitutional Adjudication (1)' (n 24) 60.
[27]Interview with Official A (n 21).
[28]ibid.
[29]88 Hun-Ka 6, 1 KCCR 199 (8 Sep 1989).

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Firstly, South Korea joined the Venice Commission as an observer in 1999 and a Member State in 2006.[30] Since 2006, the CCK has dispatched one justice as an official member and one CRJ as a liaison officer.[31] The motivations for the CCK to participate in the Venice Commission are multifaceted. It aspires to enhance its understanding of the international trend of constitutionalism, introduce its constitutional adjudicatory system to a global audience, and contribute to the development of constitutional orders in emerging democracies.[32] The strong drive from the CCK corresponds with the attempt of the Venice Commission to expand its reach outside Europe. In 2002, the Committee of Ministers of the Council of Europe converted a partial agreement into an enlarged agreement to give non-Member States of the Council of Europe 'the possibility to take part in the work of the Commission on equal footing'.[33] South Korea became the third non-European Member State of the Venice Commission.[34]

Joining the Venice Commission enabled legal practitioners of the CCK to be familiar with the Venice Commission's resources. The Joint Council on Constitutional Justice provided them with tools, such as 'the Bulletin on Constitutional Case-Law', CODICES database, and the Venice Forum and facilitated the exchange of information on human rights cases in constitutional adjudication. Interacting with the Venice Commission also helped legal practitioners of the CCK have a growing awareness of the European Court of Human Rights. Justice Kong-hyun Lee, an official member from 2006 to 2010 and a Bureau member from 2009 and 2011 in the Venice Commission, introduced the jurisprudence of the European Court of Human Rights to the rest of the CCK. Upon his recommendation, the CCK hired a part-time researcher from 2009 to 2010 to translate its significant judgments for future reference.[35] Under the scheme of the CCK to sponsor its employees to study abroad, one CRJ received legal training in the Constitutional Division of the Venice Commission and the Research Division of the European Court of Human Rights from 2011 to 2012 and published a series of op-ed articles on the latter's jurisprudence in a Korean newspaper dedicated to legal professionals. His writings dealt with prisoners' right to vote,[36] positive obligations of Member States under the European Convention on Human Rights,[37] and the relationship between the European Court of Human Rights and European constitutional adjudicatory organs.[38] Through the initiatives of a few justices and CRJs, legal practitioners of the CCK were exposed to more diverse albeit Euro-centric sources of foreign law and practices.

Next, the CCK hosted two major international conferences. The Fifth Conference of the Asian Constitutional Court Judges was held in Seoul in 2007 within the context of constant efforts by constitutional courts in Asia and the Konrad-Adenauer-Stiftung to institutionalise a transnational judicial network in Asia. The Konrad-Adenauer-Stiftung, a political foundation closely related to the Christian Democratic Union of Germany, launched the 'Rule of Law Programme Asia' from its regional office in Singapore in 2005. This programme organised and sponsored the Annual

[30]For the status of Member States and observers, see Council of Europe Committee of Ministers, Resolution (2002) 3 adopting the revised Statute of the European Commission for Democracy through Law (adopted by the Committee of Ministers on 21 Feb 2002 at the 784th meeting of the Ministers' Deputies) (henceforth 'Res (2002) 3'), art 2.

[31]For the list of members and liaison officers from the CCK, see Constitutional Court of Korea, 'History of the Constitutional Court of Korea' (n 19).

[32]Constitutional Court of Korea, *Thirty Years of the Constitutional Court of Korea* (n 7) 153.

[33]Res (2002) 3, preamble.

[34]As of December 2020, non-European Member States included Algeria, Brazil, Canada, Chile, Costa Rica, Israel, Kazakhstan, South Korea, Kosovo, Kyrgyzstan, Mexico, Morocco, Peru, Tunisia, and the United States.

[35]Interview with Official B, former or current CRJ with the CCK (Seoul, 18 Dec 2020).

[36]Sung-jin Kim, 'Special Protection for Europeans: European Court of Human Rights' *Law Times* (16 Feb 2012) <https://www.lawtimes.co.kr/Legal-Opinion/Legal-Opinion-View?serial=62356> accessed 16 Jan 2021 (in Korean).

[37]Sung-jin Kim, 'Positive Obligations of the State to Protect Human Rights' *Law Times* (7 May 2012) <https://www.lawtimes.co.kr/Legal-Opinion/Legal-Opinion-View?serial=64214&kind=BA09&key=> accessed 16 Jan 2021 (in Korean).

[38]Sung-jin Kim, 'European Court of Human Rights and Constitutional Complaints' *Law Times* (20 Sep 2012) <https://www.lawtimes.co.kr/Legal-Opinion/Legal-Opinion-View?serial=67323> accessed 16 Aug 2021 (in Korean).

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Conferences of the Asian Constitutional Court Judges to provide a regional avenue for constitutional courts to discuss matters of common interest.[39] One of the motivations of the Konrad-Adenauer-Stiftung in initiating the Annual Conferences was to disseminate the German model of constitutional review among fledgling constitutional adjudicatory organs in Asia. Colin Durkop, its regional representative for Southeast Asia from 2002 to 2009, announced this mandate in a rather outright manner, declaring that '[c]onstitutionalism is well developed in Germany, and the German Federal Constitutional Court is considered among the best in the world. The knowledge and expertise of the German Federal Constitutional Court can be considered an important element of the dialogue, which will benefit our Asian colleagues'.[40] Simultaneously, the Annual Conferences intend to encourage their participants to create a more permanent form of transnational judicial networking through their own initiative. During the Third Conference in Ulaanbaatar in 2005, justices discussed creating an association of constitutional courts in Asia.[41] As a result, the Fifth Conference was convened in Seoul in 2007 to sign the Memorandum of Understanding on creating a preparatory committee to establish an association of constitutional courts in Asia.[42]

The International Conference in celebration of the twentieth anniversary of the CCK in 2008 exemplified the CCK's efforts to enhance its international reputation. Its participants included constitutional justices from thirty countries and delegations from five regional and language-based groups of constitutional judiciaries (Association of Constitutional Courts using the French Language, Conference of Constitutional Control Organs of the Countries of New Democracy, Conference of European Constitutional Courts, Southern African Chief Justices Forum, and Union of the Arab Constitutional Councils and Courts). Delivering his keynote speech, Justice Kang-kook Lee, the then-President of the CCK, declared in a self-congratulatory tone that the CCK was 'globally recognized for having successfully entrenched the constitutional adjudicatory system within a short period of time'.[43]

Lastly, the CCK expanded its geographical reach by building diplomatic relations with constitutional adjudicatory organs from political regimes created in response to political changes in Eastern Europe and the Soviet Union (Azerbaijan, Bulgaria, the Czech Republic, Kazakhstan, and Romania). The CCK consulted delegations from Indonesia and Thailand in constitutional adjudicatory matters. The delegation of Indonesian lawmakers visited the CCK to gather information necessary to establish a constitutional court in Indonesia in 2004.[44] Legal practitioners of the Constitutional Court of Thailand paid a visit to discuss strategies to entrench constitutional adjudication in 2006.[45]

*Foreign engagement inside the courtroom.* Three modes of foreign engagement outside the courtroom had varying degrees of influence on comparative law practices. Participating in the Venice Commission allowed legal practitioners of the CCK to have access to databases adequate for the deliberation of individual cases. In contrast, international conferences with conventional *modi operandi* have negligible impacts on the CCK's deliberative process. The international meetings adopted broad themes, such as 'Standards of Review for Protecting Civil, Political, Social, and Economic Rights' (the Fifth Conference of Asian Constitutional Court Judges) and 'Separation of Powers

[39]Konrad Adenauer Stiftung, *Supporting the Rule of Law Worldwide: The Konrad-Adenauer-Stiftung Rule of Law Programme* (Konrad Adenauer Stiftung 2019) 14–15.

[40]Colin Durkop, 'Preface', in Umbach Dieter (ed), *Present Status and Future Development of Constitutional Jurisdiction in Asia* (Konrad Adenauer Stiftung 2004) 5.

[41]AACC, 'The History of AACC' <http://aacc-asia.org/en/2/1/profile.aacc> accessed 1 Jan 2021.

[42]ibid.

[43]Kang-kook Lee, 'Keynote Speech' (International Symposium in celebration of the twentieth anniversary of the Constitutional Court of Korea, Seoul, 1–4 Sep 2008).

[44]Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea* (Constitutional Court of Korea 2008) 143.

[45]ibid.

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and Constitutional Adjudication in the Twenty-first Century' (the International Symposium in celebration of the twentieth anniversary). Within a generally defined framework, presentations by foreign delegations contained introductory descriptions of their respective jurisdictions that were accessible otherwise.[46] Adopting such a general approach was inevitable because these conferences served rather diplomatic purposes, such as the signing of the Memorandum of Understanding or commemorating the development of the CCK for the past twenty years.[47] Lastly, the bilateral relations during this period were developed irrespective of the improvement of the CCK's judicial reasoning. Diplomatic meetings, conducted in an ad hoc manner, were unequipped to give their participants enough opportunities for mutual learning. The bilateral interactions with delegations from Indonesia and Thailand concentrated on enhancing their relatively new constitutional adjudicatory systems.[48]

Although the Venice Commission and the European Court of Human Rights provided legal practitioners of the CCK with varied sources of foreign law and practices, these sources remained subsidiary in the internal deliberative process for the following reasons. First, the institutional difference between the European Court of Human Rights, as a supranational human rights court, and the CCK, as a domestic court, made the former's jurisprudence applicable to the Korean environment in a limited scope.[49] Legal practitioners of the CCK referred to its case law to interpret substantive provisions of the Constitution in high-profile human rights cases. It was regarded futile for them to refer to it when delving into procedural issues derived from the Constitution and the *Constitutional Court Act* and interpreting the Korean statutes under review. Indeed, in the entire history of the CCK, the citation of the European Court of Human Rights appears only in the following five cases, all of which deal with substantive human rights issues: legal aid (*Golder v the United Kingdom*; *Feldbrugge v the Netherlands*; and *Airey v Ireland*),[50] life-sustaining treatment (*Pretty v the United Kingdom*),[51] prisoners' right to vote (*Hirst v the United Kingdom*),[52] prison overcrowding (*Mandic and Jovic v Slovenia* and *Strucl and Others v Slovenia*),[53] and conscientious objection (*Bayatyan v Armenia*).[54]

Most legal practitioners of the CCK were less competent in utilising the resources of the Venice Commission and the European Court of Human Rights than in researching a few influential jurisdictions. Right after the CCK acceded to the Venice Commission, very few justices and CRJs – for instance, one justice as a member and one CRJ as a liaison officer – participated in the Venice Commission. Thus, the rest of the CCK lacked enough exposure to be convinced that referring to these European sources could lead to more persuasive judgments. Next, the CCK's structure for comparative law practices remained incompatible with the extrajudicial activities through the Venice Commission.[55] Without constitutional researchers charged with researching the Venice Commission and the European Court of Human Rights, individual CRJs had to conduct additional research to obtain information from these sources, which was improbable concerning their usual workload and relative lack of expertise in these sources. It contrasted with how CRJs researched German, American, and Japanese jurisdictions. The CCK's structure for comparative law practices enabled CRJs to request constitutional researchers to conduct a focused inquiry into how a pending

[46]Interview with Official B (n 35).

[47]ibid. For the CCK's strategic reasons in taking initiatives in the creation of an association of constitutional courts in Asia, see Law (n 3) 975; De Visser, 'We All Stand Together' (n 1) 115–116.

[48]Interview with Official B (n 35).

[49]ibid; Interview with Official C (n 18).

[50]99 Hun-Ba 74, 13-1 KCCR 250, 266 (22 Feb 2001).

[51]2008 Hun-Ma 385, 21-2(B) KCCR 647, 662 (26 Nov 2009).

[52]2012 Hun-Ma 409, 2012 Hun-Ma 510, 2013 Hun-Ma 167 (consolidated), 26-1(A) KCCR 136, 144 (28 Jan 2014).

[53]2013 Hun-Ma 142, 28-2(B) KCCR 652, 663 (29 Dec 2016).

[54]2011 Hun-Ba 379 and 27 other cases (consolidated), 30-1(B) KCCR 370, 409 (28 Jun 2018).

[55]Interview with Official B (n 35).

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issue was handled in these jurisdictions. Lastly, CRJs collaboratively translated the following books to improve their understanding of the technical legal aspects of German and American jurisdictions: *Staatrecht II: Grundrechte* (Constitutional Law II: Fundamental Rights) by Gerrit Manssen and *Constitutional Law: Principles and Politics* by Erwin Chemerinsky. Under this circumstance, CRJs were more prone to continue to use the jurisprudence of traditionally influential jurisdictions than to venture to explore information depositories provided by the Venice Commission and the European Court of Human Rights.

### *Third phase (2008 to the present)*

*Foreign engagement outside the courtroom.* During the third decade, the CCK's foreign engagement outside of the courtroom increased exponentially. It played a growing role in multiple transnational judicial networks, hosted large-scale international symposia, and diversified bilateral relations.

Firstly, the CCK started to be engaged with various transnational judicial networks. Justices and CRJs participated jointly in the Venice Commission and the Association of Asian Constitutional Courts and Equivalent Institutions (AACC). Justices participated in the Yale Law Global Constitutionalism Seminar and Global Network on Electoral Justice. At the same time, CRJs and constitutional researchers interacted with their peers through the International Summer School organised by the Constitutional Court of Turkey and the International Short Course organised by the Constitutional Court of Indonesia.

The CCK successfully pursued leadership opportunities in the Venice Commission. Justice Il-won Kang, an official member from 2013 to 2018, served as the first Asian co-president of the Joint Council on Constitutional Justice from 2014 to 2015 and a Bureau member for two consecutive terms from 2015 to 2019. Based on the latest engagement in the Venice Commission, the CCK aimed to present itself as a representative of Asia and an intermediary between Asian constitutional courts and their non-Asian equivalents. Considering that the Venice Commission aspired to be a global advisory body, the relation between the CCK and the Venice Commission became an 'informal "win-win" arrangement'.[56]

The CCK's interest in consolidating transnational judicial networks also centred on the creation of the AACC. The preparatory committee convened four times in Seoul between 2008 and 2010.[57] The AACC was subsequently established by constitutional courts and equivalent institutions in Indonesia, Malaysia, Mongolia, the Philippines, South Korea, Thailand, and Uzbekistan in 2010. The mandates of the AACC include (1) the protection of human rights, (2) the guarantee of democracy, (3) the implementation of the rule of law, (4) the independence of constitutional courts and equivalent institutions, and (5) the cooperation and exchange of experience and information among the members.[58] The CCK's initiatives during the preparatory process made the CCK elected as the first president of the AACC. As of December 2020, members of the AACC were constitutional adjudicatory organs in Afghanistan, Azerbaijan, Bangladesh, India, Indonesia, Kazakhstan, Kyrgyzstan, Malaysia, Maldives, Mongolia, Myanmar, Pakistan, Russia, South Korea, Tajikistan, Thailand, the Philippines, Turkey, and Uzbekistan.

Among the activities of the AACC, biannual congresses and permanent secretariats were essential in shaping the epistemes of legal practitioners of the CCK. Biannual congresses provided conduits for justices to share their views on constitutional matters.[59] In 2016, permanent secretariats were set up to strengthen the activities of the AACC under the auspices of three constitutional courts: the Secretariat for Planning and Coordination in Indonesia, the Secretariat for Research

[56]De Visser, 'Patterns and Cultures of Intra-Asian Judicial Cooperation' (n 1). See also Law (n 3) 974.

[57]AACC, 'The History of AACC' (n 41).

[58]AACC, The Statute of the Association of Asian Constitutional Courts and Equivalent Institutions, art 3.

[59]For agendas of the previous congresses in 2012, 2014, 2016, and 2020, see AACC, 'Congress' <http://aacc-asia.org/en/2/3/congress.aacc> accessed 27 Dec 2020.

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and Development (AACC SRD) in Korea, and the Centre for Training and Human Resources and Development in Turkey.[60] These permanent secretariats concentrated on the provision of resources tailored for legal practitioners of the AACC members. The AACC SRD, for instance, held annual conferences to elucidate the profiles of members comparatively and published reports on their jurisdictions,[61] constitutional review systems,[62] and roles in protecting freedom of expression.[63] To better conduct comparative law research, the AACC SRD launched the secondment programme through which legal practitioners from the other AACC members collaborate with those from the CCK and publish research papers.[64]

Next, Seoul hosted the Third Congress of the World Conference on Constitutional Justice in 2014 and the International Symposium to celebrate the thirtieth anniversary of the CCK in 2018. The Third Congress of the World Conference on Constitutional Justice allowed the CCK to declare its self-conception as an aspiring regional leader to a global audience.[65] The CCK received delegations from ninety-two constitutional adjudicatory organs and nine regional and language-based groups of constitutional judiciaries (AACC, Association of Constitutional Courts using the French Language, Conference of Constitutional Control Organs of the Countries of New Democracy, Conference of Constitutional Jurisdictions of Africa, Conference of Constitutional Jurisdictions of the Portuguese-Speaking Countries, Conference of European Constitutional Courts, Ibero-American Conference of Constitutional Justice, Southern African Chief Justices Forum, and Union of the Arab Constitutional Councils and Courts). Delivering his keynote speech, Justice Hanchul Park, the then-President of the CCK, initiated a discussion on the creation of a regional human rights court in Asia. His proposal was based on the awareness that existing transnational judicial networks were not effective enough to tackle common human rights challenges in Asia.[66] The Seoul Communiqué, adopted as a result of the Congress, acknowledged the CCK's proposal in a paragraph reading '[r]ecognizing the great contribution by existing international human rights courts in Europe, the Americas and Africa to the protection of human rights in the respective regions through the effective implementation of international human rights norms, the participants encourage participating Asian Courts to promote such discussions'.[67] The International Symposium in celebration of the thirtieth anniversary of the CCK in 2018 represented another chance for the CCK to seek to improve its global standing.[68] Its participants included constitutional justices from thirty-four countries and delegations from four international organisations.

Lastly, the CCK established diplomatic relations with constitutional adjudicatory organs in several states in Latin America and three regional human rights courts. The CCK invited delegations from the European Court of Human Rights (Judge Mark Villiger) in 2015, the Inter-American Court of Human Rights (President Roberto Caldas) in 2016, and the African Court on Human and Peoples' Rights (President Sylvain Ore) in 2017.[69] The invitation of three delegations from regional human rights courts exemplified the CCK's effort to concretise its previous suggestion

[60]For the mandates and structures of each permanent secretariat, see AACC, Amendment of Article 5 on Working Language and Article 22 on Secretariat of the Statute of the Association of Asian Constitutional Court and Equivalent Institutions, art 5, item 5.

[61]AACC SRD, *Jurisdictions and Organization of AACC Members* (Constitutional Court of Korea 2018).

[62]AACC SRD, *Constitutional Review at AACC Members* (Constitutional Court of Korea 2019).

[63]AACC SRD, *Freedom of Expression: Experience of AACC Members* (Constitutional Court of Korea 2020).

[64]AACC SRD, 'Secondment Program' <http://www.aaccsrd.org/en/secondment.do> accessed 26 Dec 2020.

[65]Law (n 3) 976; De Visser, 'We All Stand Together' (n 1) 118; Shin (n 5).

[66]Hanchul Park, 'Keynote Speech on International Standards for Social Integration' (The Third Congress of the World Congress on Constitutional Justice, Seoul, 28 Sep to 1 Oct 2014).

[67]The Third Congress of the World Conference on Constitutional Justice, 'Seoul Communiqué' (The Third Congress of the World Conference on Constitutional Justice, Seoul, 28 Sep to 1 Oct 2014).

[68]Shin (n 5) 271.

[69]Constitutional Court of Korea, 'Visits by Foreign Dignitaries' <https://english.ccourt.go.kr/site/eng/ex/bbs/List.do?cbIdx=1083> accessed 16 Aug 2021.

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to create a human rights court in Asia during the Third Congress of the World Conference on Constitutional Justice.

The CCK also varied their modes of bilateral interactions for consultative purposes. First, with the establishment of the Constitutional Research Institute in 2010, whose mandate is to provide long-term research and education irrespective of the deliberation of individual cases, the CCK started providing more systematic assistance to newly established constitutional adjudicatory organs.[70] The education programmes for foreign legal practitioners aimed to promote the Korean model of constitutional review. The CCK also launched working sessions with the German Federal Constitutional Court in 2010. Delegations comprising justices from the two constitutional courts convened in Karlsruhe or Seoul and discussed specific topics mutually agreed upon in advance. Topics for the past working sessions included (1) the rigour of the standard of review and the use of technology in the fight against crime in 2010;[71] (2) the dissolution of political parties and the protection of social rights in 2015;[72] (3) institutional guarantees for the integration of Western and Eastern Germany during unification in 2016;[73] and (4) the right to informational self-determination, fundamental rights protection among private actors, and the standard of review for equality in 2019.[74]

*Foreign engagement inside the courtroom.* Participation in multiple venues for transnational judicial networking improved the deliberative process by making more credible information depositories available. Repetitive and intensive working sessions with the German Federal Constitutional Court allowed the CCK's legal practitioners to understand German constitutional law and practices in an interactive manner. In contrast, hosting international conferences, expanding diplomatic relations with foreign courts, and introducing the Korean model of constitutional justice to fledgling constitutional adjudicatory organs were conducted irrespective of comparative law practices; rather, these extrajudicial activities purported to seek regional and international recognition.[75] In this sense, one interviewee admitted that they could only indirectly impact the deliberative process by making legal practitioners more attentive to the CCK's institutional aspiration to improve its international standing and the subsequent reactions from a global audience.[76]

The overview of the CCK's comparative law practices demonstrates that it was more prone to rely upon previously referred sources than to explore the jurisprudence of the AACC members. The Venice Commission and the European Court of Human Rights became more important sources during the last decade than during the second phase.[77] For instance, the CCK resorted to the Venice Commission's Guideline on the prohibition of political parties in the 2014 *Case on the*

[70]Constitutional Research Institute of the Constitutional Court of Korea, 'Programs' <http://ri.ccourt.go.kr/eng/ccourt/instruction/programs.html> accessed 6 Feb 2021.

[71]Federal Constitutional Court of Germany, 'Constitutional Court of the Republic of Korea visits the Federal Constitutional Court' (10 May 2010) <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2010/bvg10-031.html> accessed 27 Dec 2020 (in German).

[72]Federal Constitutional Court of Germany, 'Visit of the Constitutional Court of the Republic of Korea to the Federal Constitutional Court' (30 Oct 2015) <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2015/bvg15-079.html> accessed 27 Dec 2020 (in German).

[73]Federal Constitutional Court of Germany, 'Visit of the Federal Constitutional Court to the Constitutional Court of the Republic of Korea' (6 Dec 2016) <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2016/bvg16-089.html> accessed 27 Dec 2020 (in German).

[74]Federal Constitutional Court of Germany, 'Delegation from the Constitutional Court of the Republic of Korea visits the Federal Constitutional Court' (30 Oct 2019) <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2019/bvg19-071.html> accessed 27 Dec 2020 (in German).

[75]See Law (n 3) 1007; De Visser, 'Patterns and Cultures of Intra-Asian Judicial Cooperation' (n 1).

[76]Interview with Official C (n 18).

[77]See Ilwon Kang, 'The Constitutional Globalization in Korea', in Seoul National University Asia-Pacific Law Institute (ed), *Global Constitutionalism and Multi-layered Protection of Human Rights* (Constitutional Court of Korea 2016) 250.

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*Dissolution of the Unified Progressive Party*.[78] The Guideline provided inspiration for the CCK in its interpretation of Article 8(4) of the Constitution reading that '[i]f the purpose or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court'.[79] However, the CCK's legal practitioners still retained less judicial competencies in analysing these sources than traditionally influential jurisdictions, making these sources remain secondary in most cases.

The likelihood of the AACC members' being referred to hinged on the legal practitioners' shared judgment concerning whether their constitutional adjudicatory organs were independent enough to realise their mandates. Through various activities of the AACC, legal practitioners of the CCK obtained information alluding that the independence of some AACC members could have been in danger. For instance, during the First Research Conference of the AACC SRD, held under the theme of 'Jurisdiction and Organization of AACC members', participants became aware that several constitutional adjudicatory organs went through institutional changes provoked by political conflicts. The Constitutional Court of the Kyrgyz Republic was abolished in 2010, and its role was assigned to a newly established Constitutional Chamber under the Supreme Court. Kazakhstan underwent a similar process in 1995, when the authority to adjudicate constitutional matters was transferred from a Constitutional Court to a non-judicial body of the Constitutional Council. The politically motivated institutional changes of the constitutional adjudicatory organs in the Kyrgyz Republic and Kazakhstan made legal practitioners of the CCK take a more nuanced approach toward their jurisprudence. Based on such observations, legal practitioners of the CCK concluded that some political regimes, in which the AACC members delivered their decisions, would not be democratic enough to function as reference points.

The perceived level of judicial independence was related to the possibility that referring to some AACC members could help the CCK's legal practitioners convince their audiences. The audiences included other legal practitioners of the CCK, the domestic population, and foreign constitutional adjudicatory organs. Within their adjudicatory practices, CRJs and constitutional researchers bore an additional burden of demonstrating, before their colleagues, that political regimes in which the AACC members functioned were democratic enough and investigating their jurisdictions beyond the conventionally referred countries led to a more meaningful outcome.[80] In most cases, it was demanding for them to conduct additional research and persuade their colleagues to update their shared perceptions on some AACC members. Outside the courtroom, citing the jurisprudence of some AACC members was regarded as less effective in persuading the domestic population than citing Germany, the United States, and Japan.[81] The CCK's legal practitioners were also concerned that citing extensive case-laws, without examining the level of independence of cited judiciaries, could impair the CCK's reputation among foreign courts.[82]

Legal practitioners of the CCK were less resistant to learning from the working sessions with the German Federal Constitutional Court than from interactions with the Venice Commission and the AACC. Since they resorted to the German Federal Constitutional Court's decisions to tackle both substantive and procedural issues from the initial years of the CCK, they could research German constitutional law without being too cautious of differences between the two courts. During the working session in 2019, for instance, the delegations of the CCK and the German Federal Constitutional Court exchanged their strategies in dealing with human rights challenges arising from telecommunication surveillance. Both jurisdictions shared a framework through which

[78]2013 Hun-Da 1, 26-2(B) KCCR 1 (19 Dec 2014).
[79]Kang (n 77) 249.
[80]Interview with Official A (n 21).
[81]Interview with Official B (n 35). For similar observations concerning the domestic population, see Shin (n 5) 272.
[82]Interview with Official C (n 18).

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interference with constitutional rights, including the right to informational self-determination, was subject to justification through the proportionality test. Moreover, both courts would consider the option of delivering variational decisions when finding the unconstitutionality of a relevant policy. Based on such similarities in constitutional doctrines and procedures, one participant of the working session claimed that both delegations could discuss 'on equal footing' and convey ideas in a way that directly fertilised their respective comparative law practices.[83]

### *Evaluation*

The chronological inquiry demonstrates that the CCK has been increasingly involved in an institutionalised mode of foreign engagement outside the courtroom. During the first decade, the CCK built ad hoc relations with foreign constitutional adjudicatory organs. From the second phase, the CCK's foreign engagement outside its adjudicatory practices started to centre on transnational judicial networks, which enabled it to interact systematically with foreign courts, regional and language-based groups of constitutional adjudicatory organs, non-governmental organisations, and academics. The CCK also contributed to the institutionalisation of direct interactions among constitutional justices, for instance, by taking initiatives in transforming the Annual Conferences of the Asian Constitutional Court Judges into the AACC and hosting the AACC SRD in Seoul.

The institutionalisation of foreign engagement outside the courtroom provided an infrastructure for the CCK to participate in interactive dialogues with foreign courts in a substantive sense. Let us examine how the CCK conducted comparative law research during the first phase and compare it with the second and third phases. During its initial years, the CCK's comparative law practices developed, apart from its foreign engagement outside the courtroom. The CCK's legal practitioners selected Germany, the United States, and Japan as primary references because they were most influential on the modern Korean legal system. They acquired foreign language skills, translated relevant materials into Korean, and built their internal database to learn from these jurisdictions. The identity of the CCK remained that of a borrower. In contrast, during the second and third phases, the CCK gained access to the information depositories operated by the Venice Commission and the AACC, where it disseminated its jurisprudence and simultaneously acquired the case-laws of various countries. Annual working sessions with the German Federal Constitutional Court encouraged their participants to consider different approaches to a common constitutional issue and reflect on their solutions. These extrajudicial activities allowed the CCK to identify itself as both a borrower and a lender. As the mode of foreign engagement outside the courtroom became more systematic, legal practitioners of the CCK were supposed to continue their mutual interactions inside the courtroom.

However, the overview of the CCK's comparative law practices suggests that it was particular about from whom it borrowed and to whom it lent. Legal practitioners regarded the working sessions with the German Federal Constitutional Court as an opportunity to deepen their German expertise and share with its principal donor, the German Federal Constitutional Court, how they recontextualised the borrowed system of constitutional adjudication. Although in a limited scope, they were willing to learn from the Venice Commission and the European Court of Human Rights and disseminate its jurisprudence through the CODICES database. Interactions with the AACC, however, reflect a different orientation. The CCK was disinclined to borrow the jurisprudence of some AACC members, but eager to export its constitutional adjudicatory system to them. The legal practitioners interviewed by the author opined that the level of independence of the judiciary functioned as one criterion according to which they decided which AACC members to refer to. They recognised that Korea, a relatively older democracy in Asia, had already undergone a laborious democratisation process that other Asian countries had yet to experience. Based on their knowledge of fragile statuses of ordinary courts or the Constitutional Committee under the authoritarian regimes in Korea, they seemed to assume that some Asian courts remained susceptible to

[83] ibid.

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political interventions and unequipped to deliver decisions that deserved comparison. The comparison between the CCK's contrasting attitudes toward the German Federal Constitutional Court and some AACC members allude to 'invisible hierarchies for states in the [CCK's] reference list'.[84]

The priority in the reference list is mainly attributable to the CCK's structure for comparative law practices, which has remained unaltered throughout its history. During the emerging stage, the CCK's structure for passive reception of German, American, and Japanese laws served its aim to establish a new constitutional adjudicatory system. This structure is so entrenched that it continues to prescribe comparative law practices even after the CCK built a sophisticated body of precedents and gained access to additional information repositories through its vibrant extrajudicial activities. For instance, seventy-three percent of the CRJs who completed their overseas training chose the United States and Germany as their destinations. Constitutional researchers are still employed almost exclusively among graduates from Germany, the United States, and Japan. Without prior exposure to less conventional jurisdictions and systematic support from constitutional researchers, CRJs are disinclined to undertake an inquiry into jurisdictions other than Germany, the United States, and Japan. Without such systematic approaches, they can miss out on chances to navigate previously unexplored jurisdictions. The case study on the European Court of Human Rights evinces that legal practitioners had limited judicial competencies in understanding its jurisprudence and were reluctant to expand its use to tackle procedural issues. The case study on AACC members implies that legal practitioners considered them unfit for comparison, based on a static perception of their level of judicial independence. As a result of retaining the deliberative structure for passive reception, the CCK has yet to utilise the above information depositories inside the courtroom to a full extent.

The most significant loss from the gap between the CCK's two modes of foreign engagement is how it can limit the CCK's capacity to grasp an evolving picture of foreign constitutional systems. Individual constitutional adjudicatory organs now operate in a more complex environment where they deliver their judgments in constant interaction with foreign courts, regional human rights courts, and transnational judicial networks. Fledgling courts can empower themselves by making their jurisprudence more in line with global standards. In contrast, the reluctance to consult foreign courts can impair the authority of once-influential courts. Thus, focusing on traditionally influential jurisdictions without appreciating a broader context makes the CCK observe only a partial, if not erroneous, picture. Instead, filling the gap between its extrajudicial activities and comparative law practices by adopting a more open-ended approach to the latter can enable it to understand foreign constitutional adjudicatory organs accurately.

## Conclusion

The chronological approach of this article reveals that the CCK has expanded its global reach outside the courtroom and simultaneously developed its comparative law practices. The CCK's foreign engagement outside the courtroom does not always aim to enhance the deliberation of individual cases. Participating in the Venice Commission and the AACC and holding working sessions with the German Federal Constitutional Court enrich judicial reasoning by providing the repositories of information adequate for its deliberative processes. The CCK's structure for comparative law practices, which was established in its initial years to learn from traditionally influential jurisdictions, exerts prescriptive effects on the epistemes of its legal practitioners and restricts these repositories from being fully utilised inside the courtroom. The gap between the two modes of foreign engagement of the CCK disallows its legal practitioners to comprehend the evolving identities of foreign constitutional adjudicatory organs.

The empirical results of this research should be considered considering the following limitation. As described in this article's earlier discussion on methodologies of foreign engagement, a reporting

[84]Shin (n 5) 272.

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justice and a reporting CRJ prepare a thoroughly written report before deliberation and a team discussion under the internal deliberative process. It means that they can exercise considerable discretion in the use of foreign law and practices. Thus, they can choose to refer to the jurisprudence of less explored jurisdictions, despite the general tendency to focus on Germany, the United States, and Japan. Their motivations for more comprehensive comparative law research can be shaped through their individual exposure to foreign law and practices, which are not thoroughly identified by this article. For instance, most CRJs and constitutional researchers have graduated from or are concurrently enrolled in domestic graduate programmes whose public law faculty are predominantly German-trained. Their educational backgrounds, formulated irrespective of the CCK, can be more decisive in impacting their epistemes than CCK-sponsored foreign legal training.[85] In this sense, this research's description of several contexts, with emphasis attached to the CCK's official activities, can involve the risk of over-generalisation. More in-depth case studies, possibly on a specific term of the CCK or a particular cohort of CRJs, can elucidate more factors that encourage its legal practitioners to explore previously unfamiliar jurisdictions.

Despite its limitations, the findings of this research can be meaningful in examining the CCK's two modes of foreign engagement, thus suggesting that institutional change can foster dynamic interplay between the two. Making the structure for comparative law practices more aligned with extrajudicial activities should be a priority. For instance, the CCK can mandate constitutional researchers focusing on German jurisdictions to automatically refer to the European Court of Human Rights or ask seconded officers from AACC members to submit a memorandum on their jurisdictions. These measures can bridge the gap between the CCK's two modes of foreign engagement without much difficulty.

[85]Interview with Official D (n 18).

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