Global Constitutionalism (2021), 10: 2, 256–274
doi:10.1017/S2045381721000010

CAMBRIDGE
UNIVERSITY PRESS

RESEARCH ARTICLE

Transnational constitutional engagement: A contextualization of global constitutionalism by the Constitutional Court of South Korea

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Abstract

Through the analytical framework of 'transnational constitutional engagement', this article examines the dynamically developing practices of the South Korean Constitutional Court as it engages with international and foreign elements, both within and beyond constitutional adjudication processes. Diverse underlying factors and orientations in varied contexts, and the complex interactions between them, are responsible for shaping the modes of a local constitutional actor's engagement with the transnational. In the vertical aspect, the court adopts international human rights law as a substantive standard of constitutional review through a version of cosmopolitan constitutional interpretation, while it has nevertheless exhibited ambiguity and incoherency in concrete applications. The horizontal aspects of transnational engagement include the court's practice of referencing foreign law and cases in constitutional adjudication. The vibrancy and the evolving patterns of its citation practice reflect the court's growing self-perception vis-à-vis the world – although limitations remain, such as geographical asymmetries among referenced jurisdictions. The court has also been enthusiastic in interacting with various transnational counterparts beyond adjudication processes, demonstrating eminent leadership in regional network-building among constitutional courts in Asia. With both cosmopolitan aspirations and nationalist ambitions playing a role in their shaping, the modes of transnational constitutional engagement are not to be generalized, but require contextualization, and the relevant practices should be subject to constant evaluations for their contribution in producing sound and effective concretizations of the values of global constitutionalism.

Keywords: constitutional adjudication; international human rights law; foreign law citation; AACC; Constitutional Court of Korea; transnational constitutional engagement

I. Introduction

This article examines the dynamically developing practices of global constitutionalism in South Korea through the analytical framework of 'transnational constitutional engagement'. Even though South Korea possesses one of the most vibrantly functioning constitutional courts in Asia and globally, it has ironically received very limited academic attention thus far, possibly on account of the language barriers facing many researchers in global constitutionalism scholarship. The Constitutional Court of Korea (hereinafter

'the South Korean Constitutional Court', 'the Constitutional Court' or 'the court') was created by the 1987 Amendment of the South Korean Constitution, which ended three decades of military dictatorship in the country and marked a new era of democracy. Since the start of its operations in September 1988, the court has received 41,407 cases and decided on 40,131 cases (as of 8 December 2020), delivering 1,800 unconstitutionality decisions. Over the last five years, the court has received an average of 215 cases and decided on 206 cases per month.[1]

Along with the highly active rights claims made by mobilized individuals and civil society in South Korea, there have been an increasing number of cases where the Constitutional Court has interacted with the transnational – in the form of either international or foreign law or institutional exchanges. This research conducts a detailed case study of the transnational engagement of the South Korean Constitutional Court, a local constitutional actor, within and beyond its constitutional adjudication process, and examines the diverse underlying factors that have shaped the modes of such engagement, and the ways in which they interact. Transnationalization of constitutional practice can assume multiple orientations, including nationalist and cosmopolitan, and may take place in varied contexts that require nuanced understanding. These concrete postures, contextualizing transnational legal sources and agendas in constitutional settings, are subject to evaluation on account of the challenges they have encountered and the contributions they have made towards advancing global constitutionalism practices in Asia.

In Part II, the concept of transnational constitutional engagement is defined, and its multiple aspects are analysed. Part III focuses on the vertical aspect of transnational constitutional engagement: how international law (in particular, international human rights law) and its various sources appear in constitutional rights adjudication processes, and how they are understood and engaged with by the court. A close examination of a series of decisions made by the court on cases of *conscientious objectors* reveals manifold contributing factors, including the court's multifaceted mindsets in its engagement with international human rights law, which have resulted in complex and ambiguous manifestations. The horizontal dimensions of transnational engagement are illuminated in Part IV. The first aspect is the South Korean Constitutional Court's comparative practice of referencing foreign law and legal practices. The evolving patterns of the court's citing practice, and the geographical asymmetries in referenced jurisdictions, are critically analysed in light of their background factors and implications. The second point of inquiry concerns the court's engagement outside its adjudication practice: how it relates itself to its various counterparts around the globe and its prominent leadership role in the regional network of constitutional courts in Asia. The research indicates that both the cosmopolitan vision and the nationalist ambitions of the court have contributed to its enthusiastic transnational developments over the last decade. Part V concludes by assessing the broader implications of this case study in the context of the localized practice of global constitutionalism. The article concludes that the modes of transnational constitutional engagement by local constitutional actors should not be generalized, but rather need to be contextualized, and the relevant practices should be subject to constant evaluations for their role in producing sound and effective concretizations of human rights from global perspectives.

[1] <https://www.ccourt.go.kr/cckhome/kor/newinfo/newEventStaticBoard1.do>.

II. Transnational constitutional engagement: An analytical framework

In closely examining local manifestations of global constitutionalism in practice, this article adopts the concept of 'transnational constitutional engagement' as its analytical framework. From among the diverse dimensions in which global constitutionalism has been discussed, including at the levels *beyond, across*, and *within a state*, the current research investigates the practice as it occurs *within* a state, focusing on the modes of engagement with the transnational by domestic constitutional actors.[2] While the 'transnationalization of constitutional law' has generally been regarded as a positive demonstration of the progress of global constitutionalism,[3] a more detailed and nuanced inquiry into its underlying orientations, factors and contexts, and the complex dynamics between them, is required in order to comprehensively understand the nature of the phenomenon and its implications. This research understands both *transnational* and *engagement* as neutral concepts that await normative evaluation.

First, the term 'transnational' needs clarification. One aspect of transnational constitutional engagement examined in this research – that is, the vertical but not hierarchal aspect of the transnational – concerns the interactions between constitutional and international law, especially international human rights law, in constitutional rights adjudication processes. The other point of inquiry is the horizontal aspect, which relates to the ways in which a domestic constitutional court engages with the legal practices of other states and interacts with its counterparts across jurisdictions. These two dimensions of the transnational – the *international* and the *foreign* – should be distinguished in theoretical as well as practical means of inquiry and in assessment of the relevant practices by local actors. Both international human rights treaties ratified by the state and customary international law have binding force on the individual state. If a domestic court, such as a constitutional court, interprets domestic law in a way that contradicts the mandates of binding international law, such practice would constitute a violation not only of the state's international legal obligation, but also of the general principle of the rule of law.[4] Foreign law, on the other hand, may never possess such binding effect, but can raise the question of effectiveness or desirability with regard to domestic actors' comparative adjudication practice.

In addition, the domestic status and effect of international law need further specification according to the types of international legal materials concerned and the contexts in which they appear in constitutional adjudication processes. For example, many states,

[2]Studies on the *beyond states* aspect of global constitutionalism include: A Peters 'The Merits of Global Constitutionalism' (2009) 16 *Indiana Journal of Global Legal Studies* 397. Regarding the *across states* dimension, see for example, S Choudhry (ed) *The Migration of Constitutional Ideas* (Cambridge University Press, Cambridge, 2006) and A Slaughter 'Judicial Globalization' (2000) 40 *Virginia Journal of International Law* 1103. Among the literature on the *within a state* level, see W Chang and J Yeh 'Internationalization of Constitutional Law' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012); C Saunders 'The Impact of Internationalisation on National Constitutions' in A Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press, Cambridge, 2014).

[3]See, for example, Slaughter (n 2).

[4]This relational understanding of the rule of law principle that interconnects international and constitutional law is observable in a decision by the German Constitutional Court, *Görgülü v Germany* (2004) 2 BvR 1481/04, and the Spanish Supreme Court Judgment No. 1263/2018, 17 July 2018, acknowledging the binding effect of the view of the UN Committee on the Elimination of Discrimination against Women, on the basis of the Spanish Constitution's rule of law principle. See also Vienna Convention on the Law of Treaties art 27 (Internal law and observance of treaties): 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

through their constitutions, treat international human rights law (IHRL) qualitatively differently from other types of international law and treaties by granting IHRL higher status than domestic statutes or by obligating domestic courts to interpret domestic law in accordance with binding IHRL.[5] It is also necessary to distinguish the *text* of an international treaty from the issue of its *interpretation*. While it would constitute a clearer violation of IHRL if a domestic court interpreted state practice or a rights provision in a way that ran directly counter to the text of binding international human rights treaties, the case becomes less obvious when a treaty provision is abstract, requiring further interpretation, and when there is no clear global consensus on its exact meaning and scope, or if the provision explicitly allows room for state discretion. In such cases, how much weight is and ought to be given by a domestic court to the views of the relevant treaty body becomes an important question in interpreting the rights concerned.

It is therefore neither plausible nor desirable for a domestic actor to have a unitary attitude toward the different sources of transnational law that appear in diverse contexts in rights interpretation and constitutional adjudication. The strength and patterns of constitutional engagement with the transnational are expected to be varied, complex and nuanced, ranging from negative to neutral and positive modes of engagement, manifested in different contexts and affected by manifold factors and orientations. The idea of *engagement* adopted in this research is thus distinct from the one in the typology suggested by Vicki Jackson,[6] who identifies three different postures taken by domestic constitutional adjudication bodies toward transnational sources of law – resistance, engagement and convergence – and argues that engagement, as opposed to resistance or convergence, is a desirable general attitude for a state, such as the United States, to have toward the transnational.[7] However, an attempt to determine a single posture as the most suitable for addressing any type or case of transnational law would be an ineffectual effort, considering the different status and normative strength of each source and the varied contexts in which they appear in constitutional settings. The difference in context may also demand a change in the mode of engagement, even when the category of transnational sources remains the same. A seemingly identical posture can be reached through dissimilar factors and orientations, such as nationalist anxiety, cosmopolitan aspirations, the institutional interests of the court itself, or a combination of any of them, whether accidental or deliberate. It is not a rare case where a domestic body relates itself to transnational sources in constitutional adjudication in a way that is ambiguous, multifaceted, and therefore hard to plainly identify as one type of posture over the other. Being indifferent to or only partially converging with transnational legal sources are among the various possible modes of constitutional engagement.

Accordingly, the concept of engagement as understood in this research covers a wide range of possible modes in which domestic constitutional actors may relate themselves to transnational sources of law, including international law and documents (binding and non-binding), and foreign law and practices. The research also sheds light on a domestic constitutional court's engagement with its counterparts and other transnational actors around the globe, illuminating the ways in which the constitutional court goes transnational

[5]For comprehensive comparative studies on such constitutional practices, see International Law Association Study Group Report *Principles on the Engagement of Domestic Courts with International Law* (International Law Association, 2016); European Commission for Democracy Through Law (Venice Commission) *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts* (2014).

[6]V Jackson *Constitutional Engagement in a Transnational Era* (Oxford University Press, Oxford, 2013).

[7]See (n 6) 13, 17.

outside the courtroom. Transnational constitutional engagement can thus be observed in multiple dimensions: in the state's constitutional text and framework; in the process of constitutional interpretation and adjudication; and in the court's institutional relations. Varied levels and patterns of interactions with numerous types of the transnational and its different contexts together shape the modes of transnational constitutional engagement, a contextualized practice of global constitutionalism by a local constitutional body. Identifying the diverse and occasionally (seemingly) contradictory underlying factors, driving forces and their interactions, which constitute the evolving transnational engagement of domestic constitutional actors, is essential for understanding the fuller scope of the complexity of such practices and making an effective normative assessment of them. Such an inquiry, as opposed to singling out one general posture towards the transnational and designating it as a cure-all, will lead to the development of more fine-tuned suggestions for adequately contextualized modes of transnational engagement to fulfil the promise of global constitutionalism by local actors.

Through this analytical framework, equipped with a broader and multifaceted conception of engagement and a more systemized understanding of the transnational, the next part begins by examining and evaluating the modes of transnational constitutional engagement in a vertical dimension, as undertaken by the South Korean Constitutional Court.

III. Engagement with the international

Textual framework of the constitution

The Constitution of the Republic of Korea (the South Korean Constitution) contains a provision on international law, but also leaves room for disagreement in its concrete interpretation. Article 6 paragraph 1 of the Constitution provides: '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' (emphasis added). This provision is understood to express the Constitution's basic understanding that ratified international treaties and customary international law constitute a part of domestic law without the need for further internalization procedures. A point of interpretive disagreement, however, lies with the term 'domestic laws'. The dominant majority of public law scholars in South Korea read this phrase to mean *statutes*, without differentiating IHRL from other types of international law in their domestic legal status; instead, they view the Constitution as a categorically supreme law over any types of international law.[8] However, the practice of the South Korean Constitutional Court in the last three decades demonstrates a notable departure from such a constitutional interpretation.[9] As illustrated in the next section, the Constitutional Court, by interpreting Article 6 paragraph 1 from a more cosmopolitan perspective, adopts IHRL as a substantive standard of constitutional rights review, while also exhibiting limitations and incoherency to a certain degree in its practice. The following case study closely

[8]For an overview of the positions of public law scholars in South Korea, see J Chon 'Heonbeobjaepansoui gukjeingwonjoyak jeogyong [Application of the Constitutional Court's International Human Rights Treaty]' (2019) 170 *The Justice* 507, 511–14 [in Korean].

[9]See (n 8) for a survey of Constitutional Court decisions that have cited international human rights treaties. See also YJ Shin 'Gukjeingwongyubeomgwa heonbeob: tonghapjeok gwangye guseongeul wihan ironjeok-silcheonjeok gochal [International Human Rights Norms and the Constitution: Constructing an Integrated Relationship]' (2020) 61 *Seoul Law Journal* 207, 219–22 [in Korean].

examines recent decisions by the Korean courts (the Constitutional Court and the Supreme Court) on a high-profile human rights issue, where IHRL was invoked by the claimants as one of the major grounds for their arguments, and assesses the modes of the courts' engagement with IHRL.

Case study: Conscientious objectors

In June 2018, the South Korean Constitutional Court delivered a landmark decision on the right to conscientious objection. Reversing its earlier decision of 2011, the court held that the Military Service Act in South Korea that criminalizes those who refuse conscription, without providing conscientious objectors with the option of alternative service, is unconstitutional as it violates the right to conscience of those individuals.[10] Over the past years, hundreds of conscientious objectors who were imprisoned in South Korea under this Act filed petitions to the United Nations Human Rights Committee (HRC) through the individual communication procedure after their domestic-level appeals to the Supreme Court and the Constitutional Court had failed. In a series of individual communication cases, the HRC persisted in deciding that the South Korean military law infringed on the right to conscience and the right to religion under Article 18 of the International Covenant on Civil and Political Rights (ICCPR).[11] However, the South Korean government reacted to these decisions with resistance and disregard, emphasizing the 'unique national security situation' in South Korea and the need to operate a mandatory conscription system based on equal treatment of all without creating an exception for conscientious objectors.[12]

In its 2011 decision on the constitutional claims of conscientious objectors, the Constitutional Court had upheld the Military Service Act, holding that the Act satisfied the proportionality test even though the law imposed, to a certain extent, a restriction on the claimants' right to conscience.[13] Largely accepting the government's argument, the court stressed the unique circumstances faced by South Korea in terms of national security and the need for an equal and fair conscription system for all. In the 7:2 decision, the court opinion designated a separate section in its reasoning, titled 'Examining whether [the Act] violates the principle of respecting international law'. In this section, the court demonstrated an attitude towards international law that evidently deviates from the view predominant in South Korean public law scholarship. Unlike those scholars who see no difference between IHRL and other types of international law with respect to their domestic status – which, in their view, is equal to that of statutes – the court adopted IHRL as a *standard* of constitutional review. In this, as in multiple other cases where IHRL was invoked as grounds for unconstitutionality claims by individuals, the court took a distinctive interpretive approach, reading Article 6 paragraph 1 of the Constitution as embodying the *constitutional principle of respecting international law*. If a domestic statute contradicts the norms under IHRL (either in the form of customary international law or treaties), the court considers it not only a violation of international law, but also a violation of the *constitutional principle* of respecting international law underlying Article

[10]Constitutional Court of Korea, 2011Hun-Ba379 etc. (28 June 2018).

[11]For example, *Yeo-Bum Yoon et al. v Republic of Korea*, Communications Nos. 1321/2004 and 1322/2004, U.N. Doc. CCPR/C/88/D/1321-1322/2004 (2006); *Jong-nam Kim et al. v Republic of Korea*, Communication No. 1786/2008, U.N. Doc. CCPR/C/106/D/1786/2008 (2012); *Young-kwan Kim et al. v Republic of Korea*, Communication No. 2179/2012, U.N. Doc. CCPR/C/112/D/2179/2012 (2014).

[12]See (n 11).

[13]Constitutional Court of Korea, 2008Hun-Ka22 etc. (30 August 2011).

6. Through this interpretive bridge, the court enables itself to incorporate international human rights norms as substantive standards of constitutional rights review, along with specific rights provisions under the Constitution.[14] This notable interpretive method of the court appears only in cases involving IHRL. In cases concerning other fields of international law, such as economic treaties and agreements, the court has made it clear that those international treaties cannot serve as a standard of constitutional review, but can only be an object of the court's review.[15]

However, a closer look at the court's reasoning in the 2011 decision reveals a more complex picture of constitutional engagement with international law. While it did examine the compatibility of the Military Service Act with multiple sources of IHRL, at the same time the court conducted the review in a rather formalistic manner. The justices first pointed out that the text of Article 18 of the ICCPR itself does not specifically mention the right to conscientious objection. They then laid out an opinion that nor does customary international law guarantee this right, asserting that the fact that 'a few European countries' recognize this right is not sufficient to constitute customary international law. Regarding the views of the HRC expressed in the series of individual communication cases, the court chose to dismiss them with the brief statement, 'Those views are not legally binding but are mere recommendations.' After discussing, as noted above, the relevant human rights treaty, customary international law and the treaty body's interpretation of the rights concerned, the court concluded that the Military Service Act did not violate either the Constitution or the existing IHRL, and upheld the conscription system that criminalized conscientious objectors.

In 2018, the court reversed this decision and held that the Military Service Act indeed infringed on the right to conscience of conscientious objectors. Before undertaking a detailed proportionality review, the court designated a separate section entitled 'Conscientious Objection as Reflected in International Human Rights Norms'. In this section, the court listed in detail a wide range of international law and documents and relevant information, including the following: Article 18 of the ICCPR; General Comment No. 22 of the HRC, which elucidated that the right to conscientious objection is derived from Article 18 of the Covenant; the fact that South Korea had ratified the ICCPR without any reservations to Article 18; a series of resolutions by the UN Commission on Human Rights recognizing the right to conscientious objection; the UN Human Rights Council resolution of 2013 (urging states to cease punishing conscientious objectors, release them from custody and adopt alternative service systems); Article 10 paragraph 2 of the Charter of Fundamental Rights of the European Union (providing for the right to conscientious objection) and the Treaty on European Union; the *Bayatyan v Armenia* case, decided by the European Court of Human Rights;[16] and detailed content of the views and decisions that the HRC issued against South Korea. Interestingly, after listing the above transnational legal sources at length, the court chose not to proceed further with the review of the compatibility of the Military Service Act with existing international human rights norms

[14]See YJ Shin 'Cosmopolitanising Rights Practice: The Case of South Korea' in T Suami, A Peters, D Vanoverbeke and M Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, Cambridge, 2018) 253.

[15]Exemplary cases include decisions on the Marrakesh Agreement Establishing the World Trade Organization; Articles of Agreement of the International Monetary Fund; Agreement of Fisheries between the Government of the Republic of Korea and the Government of Japan. (n 14) 252.

[16]*Bayatyan v Armenia*, Application no. 23459/03, European Court of Human Rights, 7 July 2011 (holding that the right to conscientious objection is guaranteed under the European Convention on Human Rights Art 9).

in the main reasoning part of the decision. The majority opinion avoided answering this question on the merits, stating that:

> The claimants argue that the current military law is against Article 6 paragraph 1 of the Constitution prescribing the principle of respecting international law. However, since the court already examined and decided that the law is in violation of the Constitution [as it infringes on the right to conscience], we will not separately conduct a review on this part of the claim.[17]

The court was of the opinion that it is unnecessary to decide on the domestic law's violation of international law if the challenged statute is found to be unconstitutional in light of the rights provisions contained in the Constitution alone.

Shortly after the above decision, the Constitutional Court issued another judgment that is particularly worthy of attention.[18] Upon receiving an individual communication decision from the HRC, which found rights violations by South Korea and recommended effective remedies for the claimants, formerly convicted conscientious objectors filed a constitutional complaint arguing that *inaction* by the South Korean government – that is, its failure to take any measures in response to the HRC's decision – was unconstitutional. The Constitutional Court, in this case, took a meaningful step forward, outwardly recognizing that 'the view of the HRC is an important reference standard in interpreting the ICCPR, and a member state must respect the Committee's view and make sufficient effort to implement it'. Nevertheless, the court eventually dismissed the case, providing the explanation that, while the national legislature must respect the views of the HRC, it does not bear the obligation to enact a law that automatically implements all the details of those views. Further evaluation of this decision is conducted in the next section.

Responding to the Constitutional Court's decision of the unconstitutionality of the Military Service Act, the Supreme Court of Korea delivered its very first judgment of acquittal of a conscientious objector in November 2018.[19] In this decision, several justices, in their supplementary opinions, showed particularly active engagement with contemporary international human rights norms, acknowledging a duty of domestic courts to respect the view of human rights treaty bodies to the fullest possible extent when interpreting domestic law. The justices importantly noted that 'a narrow view that only recognizes the rights explicitly stipulated in the ICCPR disrespects a member state's substantive international legal obligation of observing the Covenant' and that the views and recommendations of the HRC and UN human rights bodies constitute 'strong normative grounds' in interpreting the provisions of the Military Service Act and 'an attitude to respect the decisions of international human rights bodies and to interpret domestic law according to those views as much as possible accords with the constitutional principle of respecting international law'.[20]

Assessment

There has been a rise in cases where the South Korean Constitutional Court directly encounters international law in rights adjudication, mainly because individual claimants

[17]Constitutional Court of Korea, 2011Hun-Ba379 etc. (28 June 2018).
[18]Constitutional Court of Korea, 2011Hun-Ma306 etc. (26 July 2018).
[19]Supreme Court of Korea, 2016Do10912 (1 November 2018).
[20](n 19).

have actively been invoking IHRL as one of the grounds for their constitutional challenges. Those occasions reveal the constitutional actors' orientations toward the international legal system, and facilitate interactions between the different understandings and sentiments regarding international law, which are often in tension and contradiction with each other. Increasing opportunities for engagement with international legal sources not only reflect but also constitute the domestic polity's self-understanding, which is constantly evolving in the globalizing legal and political sphere.[21] The cases examined above exemplify the diversity and complexity of underlying factors and their interactions that shape the mode of the South Korean Constitutional Court's engagement with the international. The 2011 decision, on the one hand, illustrates the ability of the court's interpretive structure to activate the cosmopolitan orientation of the South Korean Constitution as reflected in Article 6 and its Preamble.[22] By discovering a constitutional principle of respecting international law from within Article 6 paragraph 1, the court lays a normative bridge that brings IHRL into the constitutional universe as a substantive standard of rights review, while enabling the court to preserve the format of constitutional adjudication.[23] The court thus exhibits a much more open and cosmopolitan attitude towards IHRL than the predominant majority of public law scholarship in South Korea, which – being of a nationalist constitutionalist mindset – asserts the categorical superiority of the domestic constitution over all types of international law.[24] The court has made a substantive effort to show that the challenged domestic statute was not in violation of existing IHRL, an effort that would not have been necessary had the court taken a purely nationalist approach.

On the other hand, the specific approach taken by the court in this case to identify 'what is existing IHRL' is questionable. In reaching a conclusion directly opposed to the consistent view of the HRC and a wide global consensus on the right to conscientious objection, the court adopted a narrow and formalistic stance composed of over-dependence on the textual surface of the treaty, a lack of seriousness in investigating the existence of customary international law and a simple dismissal of the normative weight of official rights interpretations by a UN human rights treaty body. This posture may well arouse suspicion that the court's reasoning process in examining the compatibility of the domestic statute with IHRL (as understood by the court), despite its general appearance of harmonization or convergence with international law, did not in fact affect the conclusion of the court, and that such a review process functioned primarily as a procedural justificatory step for the court's independently reached conclusion of

[21]On constitutional identity as reflected in and driving constitutional globalization, see BN Son 'Globalization of Constitutional Identity' (2017) 26(3) *Washington International Law Journal* 463. See also M Kumm 'Constitutional Democracy Encounters International Law: Terms of Engagement' in S Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, Cambridge, 2006).

[22]Constitution of the Republic of Korea, Preamble: 'We, the people of Korea, proud of a resplendent history and traditions … To elevate the quality of life for all citizens and *contribute to lasting world peace and the common prosperity of mankind* and thereby to ensure security, liberty and happiness for ourselves and our posterity forever, Do hereby amend …' (emphasis added). Art 6 para 2 of the Constitution also reflects cosmopolitan orientation, providing, 'The status of aliens shall be guaranteed as prescribed by international law and treaties.'

[23]Shin (n 9) 221.

[24]Mattias Kumm describes these conventional nationalist scholars' position with the term 'Big C constitutionalist'. M Kumm 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law' (2013) 20(2) *Indiana Journal of Global Legal Studies* 605. See also (n 6) 8, 21–28, discussing a posture of resistance in the context of exclusive popular sovereignty, nationalist constitutionalism, and US exceptionalism.

constitutionality.[25] This practice, then, is far from a sincere and deliberative mode of engagement with international law, and in particular with the relevant human rights treaty body's view, which should be acknowledged by domestic actors as having at least persuasive authority in interpreting the concrete meanings of treaty provisions and the rights concerned.[26] The modes of the court's engagement with IHRL in the 2011 decision are thus shaped by both cosmopolitan and nationalist elements. While its basic reasoning structure establishes an effective mechanism for integrating international human rights norms into the constitutional legal order, its interpretive practice in concrete cases nevertheless reveal limitations with respect to its full implementation, exhibiting stubbornness toward international sources in cases where conservative social sentiment is strong, such as those closely related to national security and the national conscription system.

Meaningful changes can be observed in the 2018 decision, as this time the court embraced a much broader scope of international human rights norms and documents, including those lacking formally binding effect, such as resolutions by the Human Rights Council or the views of the HRC. A separate section of the judgment, providing a lengthy list of the relevant international and regional human rights treaties, documents and cases, showed the court's awareness of a wide range of transnational legal sources on the subject and made explicit that the justices had considered these materials in their deliberation process. The active and continuous transnational rights advocacy by numerous convicted objectors in South Korea and their supporting network of human rights groups and lawyers, and the increasing pressure of criticism from the international community in answer to these efforts by civil society, have certainly contributed to the historic change in the court's view on the constitutionality of the national conscription system. However, sceptical observers may argue that the court's more inclusive attitude towards IHRL, as compared to the previous decision, is mainly due to the fact that, this time around, the majority of justices reached a conclusion that coincided with the international understanding.[27] The justices may have gained enough confidence to reverse its earlier decision, on the basis of recent poll results that indicated increasing public support in the country for the idea of providing conscientious objectors with the option of alternative service. Since the court avoided answering the question of whether or not the Military Service Act violated existing international human rights norms and the constitutional principle of respecting international law, it is not certain how much of a role IHRL actually played in the court's deliberation process when reaching a conclusion. The decision reflects the court's complex mindset, on the one hand, possessing an aspiration to outwardly display its acquaintance with a variety of relevant transnational legal sources and norms, and on the other exhibiting hesitation and concern over publicly pronouncing that a domestic statute had violated existing international human rights norms.[28]

[25]See (n 6) 18 (on 'decorative citations' of foreign and international law).

[26]On a mode of deliberative engagement with and the persuasive authority of human rights treaty bodies' interpretation, see B Çalı 'The Legitimacy of Human Rights Treaty Bodies: An Indirect Instrumentalist Defense' in A Føllesdal, JK Schaffer and G Ulfstein (eds), *The Legitimacy of Human Rights Regimes* (Cambridge University Press, Cambridge, 2013); Kumm (n 21); R van Alebeek and A Nollkaemper 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in H Keller and G Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, Cambridge, 2012). See also Shin (n 9) 226–32.

[27]Shin (n 9) 222–24.

[28]There has not yet been a case where the court has explicitly acknowledged a domestic statute's violation of IHRL.

Ambiguity and complexity in the mode of engagement with international law are also notable in the court's later decision dismissing a claim of unconstitutionality with regard to the government's inaction despite the HRC's recommendation to provide remedies for convicted conscientious objectors. It is indeed remarkable progress that, for the first time, the court has recognized a general duty of a member state of the ICCPR Optional Protocol to respect the views of the HRC and to make sufficient efforts to implement them. The government must therefore take at least *some serious action* to respect the HRC's recommendations, even if it is not required to *obey* every detail of the prescriptions.[29] A logical step for the Constitutional Court would then be to decide on the merits with regard to the constitutionality of the government's complete ignorance of the HRC's views. The court revealed an incomplete understanding of IHRL by simply dismissing the case from an *all or nothing* mindset, and asserting that the HRC's view did not oblige the domestic legislature to straightforwardly implement all its recommendations.[30] In contrast, the most recent decision by the Supreme Court of Korea to acquit conscientious objectors exemplifies an effective way of internalizing the persuasive authority of an international treaty body's rights interpretation through the process of the court's own interpretation of domestic law.[31] The justices who wrote the supplementary opinions cited the views of UN human rights bodies as important grounds for interpreting the domestic statute in a way that reflects the contemporary global understanding of the right to conscience, and emphasized that the domestic court should not simply rely on national particularity (such as national security situations) as a justificatory reason for denying this right. These justices concretized a mode of engagement with international law that is far removed from submissive convergence, but rather represents deliberative self-reflection, equipped with a sense of responsibility toward effectively performing treaty obligations through domestic adjudicative functions, as well as a readiness to give due consideration to rights interpretations provided by international bodies.

To summarize, it is neither possible nor desirable to generalize about a mode of engagement with international law for domestic courts. As an empirical matter, the modes of engagement with the international as observed in South Korean cases are not at all simple and have been shaped by a combination of diverse and even seemingly contradictory factors. Both nationalist and cosmopolitan elements and concerns have played a role in constituting the reasoning structure of court decisions and their ambivalent posture toward various sources of IHRL. Ways of engaging with international law in constitutional settings should be principled, but also need to be contextualized according to the type of relevant sources and the context of their application.[32]

[29]See Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women art 7 para 4: 'The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee'; Shin (n 9) 236–38.

[30]This posture is contrasted with the Spanish Supreme Court Judgment No. 1263/2018 (n 4).

[31]See also Shin (n 9) 238–39.

[32]This contextualized approach is thus distinguished from Vicki Jackson's positioning that rejects the posture of convergence, while partly recognizing its merits, for the reason that convergence is inappropriate to serve as a general relational mode with the transnational (a term that, in her research, often inadvertently conflates international and foreign law) and from the view that a convergence mode disregards national identity or particularity. (n 6) 12–13, 44–49, 65, 71–72, 174–75.

The postures assumed by the court in individual cases and their overall patterns are subject to normative evaluation in terms of their contributions toward a better understanding and realization of human rights from a global perspective. The current practice of the South Korean Constitutional Court reveals an awareness of, and willingness to closely engage with, diverse components of the international norm system, but it also betrays the confusion, anxieties, and struggles it has experienced in the course of making sense of the status and roles of IHRL in constitutional rights adjudication. The coexistence of these underlying forces and orientations appears at times in the form of incoherency or ambiguity. The evolving modes of engagement also demonstrate the court's aspiration to answer to individuals' cosmopolitan rights demands as well as to attain international recognition by producing globally sound judgments while preserving a degree of autonomy in relation to the perspectives of international bodies. Increasing transnational rights practices by mobilized individuals and a vibrant civil society in South Korea bring constant challenges and opportunities for the domestic constitutional rights adjudication body. With respect to contextualized engagement with the international, especially in human rights cases, this research recommends that a domestic constitutional court aspires to harmonization between IHRL and domestic law, faithfully performs international human rights obligations through constitutional adjudication, and undertakes sincere and deliberative engagement with international treaty bodies' rights interpretation.[33]

IV. Horizontal transnational engagement

Horizontal transnational engagement by the South Korean Constitutional Court has been noticeably active both within and beyond its adjudication processes. Major points of inquiry include how the court engages with foreign law and legal practices in other states, especially when conducting constitutional rights review. In addition, transnational engagement outside the courtroom indicates how the court aspires to relate itself to a wider world through various channels, including networking with constitutional courts in other jurisdictions, building a regional association and organizing a series of international events and exchanges.

Comparative law practice

Over 30 years of adjudication practice, it has become a routine task for the court to conduct comparative surveys of other jurisdictions' relevant law and practice, especially in cases that involve important rights issues or require careful deliberation. Diligent research of foreign law is carried out by the nearly 70 research judges, who work full time at the court and hold the same official status as ordinary judges.[34] Junior lawyers and recent law school graduates are appointed research judges through highly selective processes (with a competition rate as high as 1:100), and are assigned the task of assisting nine justices with their deliberation and adjudication processes, mainly by conducting thorough research on relevant legal issues and drafting a detailed research report on each pending case. Information on foreign law and judicial cases (in addition to international

[33]Shin (n 9) 226–32.

[34]For an introduction of this position, see DS Law 'Judicial Comparativism and Judicial Diplomacy' (2015) 163(4) *University of Pennsylvania Law Review* 927, 967–69.

law) concerning the same or similar issues constitutes a major part of their research reports. Research judges are expected to be fluent in one or more foreign languages and are granted, after a few years of work at the court, the chance to take a year-long leave to study abroad, funded by the court. The court also employs several research officers who do not have a lawyer's licence but hold foreign doctorates in law across different jurisdictions.

Since foreign legal practices are regularly cited by the court as informative reference points and have appeared in hundreds of decisions, it is not easy to provide a full analysis of the relevant cases here. To introduce just a few recent examples: in a long-awaited landmark decision in 2019, which held that the general abortion ban under South Korean criminal law is unconstitutional as it violates women's right to self-determination, the court designated a separate section, 'Law of Other States', within a chapter titled 'Grounds for Judgment'.[35] The section discussed various legislative approaches to abortion, including those adopted by European countries that belong to the continental law family, the United Kingdom and the United States, as well as *Roe v Wade*. The United Nations' 2013 survey of abortion practices in Europe, North America, Australia, New Zealand and Japan, and its 1996 survey of countries in developing regions, were also cited as important background information for the court in determining that the South Korean abortion law was too strict and excessively restricted women's right to self-determination. In the above-discussed 2018 *Conscientious Objectors* case, the court emphasized that the 'unique national security situation' asserted by the government cannot serve as a justificatory reason for the absence of an alternative service system for conscientious objectors. As supporting evidence, the court discussed the examples of the United States, Germany, Armenia and Taiwan, countries that adopted an alternative service system during war or a national security crisis.[36] In a decision delivered in 2015, the court held to be unconstitutional the criminal law provision that penalized adultery with an imprisonment sentence, citing cases of decriminalization in Argentina, Austria, Denmark, France, Germany, Japan, Spain, Sweden and Switzerland.[37] In 2014, in a case where the court invalidated the election law provision that deprived prison inmates and those whose imprisonment sentences had been suspended of their voting rights, relevant legislation and case law of Australia, Canada, the United States, Germany, France, Italy, Sweden, Israel, Japan, South Africa and the European Court of Human Rights were discussed in detail.[38]

For more comprehensive, long-term research on constitutional issues with global and comparative perspectives, the court founded the Constitutional Research Institute in 2011.[39] The Institute hosts about 25 full-time researchers and research officers and eight foreign correspondents, who major in the study of constitutional law or have expertise in foreign legal research. They are employed to reflect a geographical balance so that a wide range of comparative constitutional studies can be conducted. The Institute has produced numerous publications on general and specific topics of constitutional law, and 'Developments in Constitutional Adjudication in Foreign Countries', a periodic research report series that introduces recent decisions by constitutional courts in other states and regional human rights courts, a survey of foreign constitutional law and adjudication systems and

[35]Constitutional Court of Korea, 2017Hun-Ba127 (11 April 2019).
[36]Constitutional Court of Korea, 2011Hun-Ba379 etc. (28 June 2018).
[37]Constitutional Court of Korea, 2011Hun-Ka31 etc. (26 February 2015).
[38]Constitutional Court of Korea, 2012Hun-Ma409 etc. (28 January 2014).
[39]See <http://ri.ccourt.go.kr/eng/ccourt/main/index.jsp> (an English-language webpage of the Institute).

recent news on constitutional developments around the world, and it also runs organized webpages that provide bimonthly updates on the 'Latest Constitutional Decisions of the World' and a world map visualizing accessible constitutional information of individual countries.[40]

While the court's comparative practice of referencing foreign law for constitutional adjudication is certainly one of the most vibrant in the world, there are distinctive features that require further evaluation. One is the expanding scope of reference in the court's practice over the years. During the earlier period of its operations, the court demonstrated heavy reliance on the constitutional practices of a small number of countries, predominantly Germany as a major role model and the United States as an important reference point.[41] As the court's own jurisprudence matures, it is seeking to refer to a much broader range of jurisdictions with an aim to understand global trends on important human rights and constitutional issues, as shown in the above cases. However, geographical asymmetries in the court's comparative practice remain observable. Cases in Western states are much more frequently referenced in court decisions than those in non-Western jurisdictions. For example, while the court has cited the practice of Sweden multiple times,[42] it has yet to refer to the Supreme Court of India, despite the latter's rich jurisprudence on various human rights issues. Even though the South Korean Constitutional Court interacts vigorously with other Asian courts in largely diplomatic settings (as discussed in the next section), rarely is there a case where the legislations or court decisions of Asian or other non-Western states appear in the court's reasoning as substantive references.

Transnational networking and regional initiatives

For the last ten years, the transnational engagement of the South Korean Constitutional Court outside the courtroom has been pre-eminently vibrant. Its leadership role in the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), established in 2010 as a permanent associative body among constitutional courts in Asia, is one of its major achievements.[43] The Association stipulates that its objectives are: to promote (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 exchanges of experiences and information among members, demonstrating that its members share the core values of global constitutionalism.[44] With these aims, the Association holds regular meetings, organizes interactive events in the form of symposiums, workshops and seminars, and facilitates the sharing of adjudicative information and constitutional case law of each jurisdiction, in addition to various other activities aimed at enhancing cooperation and mutual understanding among member courts.[45] Currently, its eighteen members include the constitutional courts of Azerbaijan, Indonesia, Kazakhstan, South Korea, Mongolia, Russia, Tajikistan, Thailand, Turkey and

[40]See <https://ri.ccourt.go.kr/cckri/cri/world/selectTrendConstitutionCaseList.do> and <https://ri.ccourt.go.kr/cckri/cri/world/selectCountryList.do>.

[41]For further discussion, see (n 14) 256.

[42]For example, Constitutional Court of Korea, 2012Hun-Ma409 etc. (n 38); Constitutional Court of Korea, 2013Hun-Ka2 (31 March 2016) (reviewing the constitutionality of criminal law penalizing prostitution).

[43]See <http://aacc-asia.org>.

[44]The Statute of the Association of Asian Constitutional Courts and Equivalent Institutions [AACC Statute] art 3, available at <http://aacc-asia.org/content/statute/8_Statute%20AACC.pdf>.

[45]AACC Statute art 4.

Uzbekistan, the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, the Federal Court of Malaysia, the Constitutional Tribunal of Myanmar, the Supreme Courts of India, the Maldives, Pakistan and the Philippines, and the Independent Commission for Overseeing the Implementation of Constitution of Afghanistan.[46]

The South Korean Constitutional Court has played a pivotal role since the planning stages of the AACC and has led many of the Association's major activities. Seoul hosted the Inaugural Congress of the AACC in 2012 and two main symposiums among justices of the member courts in 2017 (held under the theme of 'The Constitutionalism in Asia: Past, Present and Future') and in 2019 ('Subjects, Standards and Effects of Constitutional Review').[47] At the same time, a kind of rivalry emerged between a few member courts, particularly with respect to leadership positions, as the AACC decided to establish its permanent secretariat. Contrary to the Korean Court's assumption that it would host the secretariat office in Seoul, the Constitutional Court of Indonesia was eager to get involved, creating a hosting competition, to the irritation of South Korea. To avoid conflict between the members, a compromise was reached, resulting in the secretariat being split into halves, with South Korea to host the Secretariat for Research and Development (SRD, in charge of research) and Indonesia to run the Secretariat for Planning and Coordination (in charge of administration). Overall, the arrangement has satisfied both parties: Indonesia was pleased to take on a concrete role in the running of the organization, while South Korea was happy to provide the substance of the organization. Later, the Constitutional Court of Turkey ambitiously joined in the leadership race, successfully hosting the Center for Training and Human Resources Development (in charge of education). Leading the research division, the South Korean Constitutional Court initiated a project to compile and organize information about the constitutional adjudication system and notable case law of each AACC member court. The effort aims to enhance deeper mutual understanding and to develop each member court's own system and jurisprudence through the sharing of rich comparative knowledge.[48] In June 2018, the AACC SRD in Seoul held the first Research Conference for research judges and officers from each member court under the theme 'Jurisdiction and Organization of AACC Members' to discuss the jurisdictional and structural aspects of each institution.[49] Its second conference was held in September 2020, with a more substantive focus under the theme of 'Freedom of Expression: Experience of AACC Members'.

[46]The Constitutional Court of Taiwan, among the most active constitutional courts in Asia, has yet to attain membership. The reason for the omission, at least partly, would be the constraint placed by the Statute provision, 'Only one institution from a sovereign country in Asia can become a member of the Association.' (AACC Statute art 6 para 1), although the following provision states that, 'Membership of the Association is open to Asian constitutional courts and equivalent institutions which exercise constitutional jurisdiction.' (AACC Statute art 6 para 2). However, the real hurdle is the diplomatic and political relationship that each country of member courts has with China, which does not recognize Taiwan as a sovereign state, despite the fact that a Chinese court is not a member of the Association.

[47]See <http://aacc-asia.org/en/2/5/activities.aacc>.

[48]See F Duessel 'Getting to Know AACC Members', available at <https://blog-iacl-aidc.org/2019-posts/2019/1/31/getting-to-know-aacc-members> and M de Visser 'The AACC – and Not Only its Members – as an Object of Constitutional Research', available at <https://blog-iacl-aidc.org/2019-posts/2019/2/20/the-aacc-and-not-only-its-members-as-an-object-of-constitutional-research>.

[49]The conference led to its first publication, *Jurisdictions and Organization of AACC Members* by AACC SRD (2018), available at <http://www.aaccsrd.org/en/pubsDtl.do>.

In addition to its energetic role in the AACC, the Constitutional Court has shown great enthusiasm in pursuing transnational engagement through various other channels. South Korea is one of the few non-European states that hold regular membership in the Venice Commission.[50] Seoul hosted the third Congress of the World Conference on Constitutional Justice in 2014 and the World Congress of Constitutional Law in 2018. The International Conference in Commemoration of the 30th Anniversary of the Constitutional Court of Korea, held in September 2018, was attended by nearly one hundred delegates from constitutional courts in 34 countries, including their chief justices. The court has also been highly active in bilateral interactions. It has signed MOUs not only with AACC member courts but also with constitutional courts in other regions, the recent ones including constitutional courts in the Dominican Republic, Guatemala, Georgia and Spain. The court's well-organized English-language website posts lively updates on various interactional activities it has held with numerous transnational counterparts, with recent participants including the constitutional courts and adjudication bodies of Thailand, Mongolia, Azerbaijan, Kyrgyzstan, Georgia, Turkey, Russia, Germany, France, Italy, Peru and Bolivia, and transnational bodies such as the European Court of Human Rights, the Venice Commission and the Global Network on Electoral Justice.[51] On its website, the court provides English summaries of most of its decisions and full translations of a great number of them.[52] The translated decisions have been made easily searchable on the court's comprehensive English-language online database, not only by dates and case numbers but also by keywords in English.[53]

Behind these passionate transnational activities apparently lies the court's ambition to enhance its regional leadership, international reputation and global influence. On its English-language webpage, in a post about the international symposium among constitutional justices that the AACC SRD hosted in June 2019, the court announces that, 'The Korean Constitutional Court is expected to solidify its international standing as a leading constitutional court by continuing to build the venue for cooperation and discussion among the Asian constitutional courts and also taking initiatives for promoting democracy, the rule of law and human rights through AACC SRD activities.'[54] Similarly, a news post about the international conference celebrating the court's 30th Anniversary states that, 'Many prominent figures of the constitutional institutes in the world participated in the International Conference, which reflects the global standing of the court.'[55] The way South Korea, as a state, perceives the court's engagement with the AACC and its members is rather bluntly expressed in a news article entitled 'Asian constitutional judges are coming to Korea to learn Korea's advanced constitutional adjudication system'.[56] In the same vein, the Constitutional Court regularly hosts young research judges and officers

[50]South Korean constitutional justices have served as the co-president of the Joint Council on Constitutional Justice and a Bureau Member of the Venice Commission.

[51]These are examples of the court's transnational interactions between December 2017 and November 2019, available at <http://english.ccourt.go.kr/cckhome/eng/introduction/news/newsDetail.do>.

[52]See (n 6) 102, noting, 'The increased practice of translating domestic constitutional court decisions (or summaries thereof) into English by the constitutional courts themselves is an indicator that the judges see some value to making their decisions more widely accessible to other jurists and lawyers.'

[53]<http://english.ccourt.go.kr/cckhome/engNew/decisions/casesearch/caseSearch.do>.

[54]<http://english.ccourt.go.kr/cckhome/eng/introduction/news/newsDetail.do>.

[55](n 54).

[56]<https://www.yna.co.kr/view/AKR20171024120000004?input=1195m>. See also <https://www.hankookilbo.com/News/Read/201710311130811182>.

from constitutional courts in other Asian states on a long-term basis.[57] The main purpose of this program is to assist visiting officers to learn about the Korean constitutional adjudication system and practice so they may use them as terms of reference for their own countries. The court, on the other hand, has despatched its research judges mostly to European countries and the United States.[58] A similar pattern can be observed in the custom of having a newly appointed president of the court pay a courtesy visit to the German Constitutional Court not long after their appointment.

Assessment

Since foreign law and legal practice, unlike international law, do not contain a binding component, domestic constitutional actors are able to more freely engage with them for various reasons and purposes, and thus express their understanding of diverse outside legal sources and jurisdictions. The way domestic actors construct relationships with the foreign in constitutional adjudication processes also reflects the actors' understanding of their own constitution and constitutional identity vis-à-vis the wider world.[59] The evolving pattern of the South Korean Constitutional Court's engagement with foreign legal sources mirrors the court's changing attitude towards conducting comparative tasks and its own growing self-perception. While, in its earlier years, the court relied on a handful of role model states, mainly with the intention of emulating their standards and jurisprudence, the court's comparative practice has gradually developed into an expansive, earnest and genuinely answer-seeking process aimed at ascertaining global trends regarding important or intricate rights issues and forming sounder judgements based on such research.[60]

However, as the court seeks to attain greater persuasiveness of its decisions to domestic as well as global audiences, the general reputation of the relevant state to the public at large in South Korea (often affected by the state's relative political and economic power) seems to matter when engaging with less traditionally sought-out foreign jurisdictions, regardless of the substantive quality of the judgments available for reference. The average South Korean audience, for example, would care more about what the High Court of Australia had to say than the reasoning structure of the Constitutional Court of Taiwan, and this disparity is likely to affect the court's citing practice. A contrast can be observed between the court's mode of engagement – resembling convergence – with German jurisprudence and its mode of engagement with Asian jurisdictions, which has generally been rather close to an attitude of indifference. This asymmetry suggests invisible hierarchies for states in the court's reference list and indicates that, even though the court actively interacts with other Asian courts in its regional networking, it has yet to take them seriously as counterparts who merit citation in a substantive sense.

[57]During 2018–19, the court hosted one research officer from Indonesia (for two years – the officer was also enrolled at Seoul National University Law School's graduate program) and one from the Mongolian Constitutional Court.

[58]One research judge has been dispatched to the Constitutional Court of South Africa.

[59]See M Tushnet *Weak Court, Strong Rights* (Princeton University Press, Princeton, NJ, 2008) 3–17, discussing an expressivist understanding of constitutional law; (n 6) 3–5, 84–85.

[60](n 14) 258. See also (n 6) 97, pointing out that, 'Particularly where courts are relatively new and fragile, reliance on the views of other, better established courts … may contribute to the reputation and independent adjudicatory capacity of the court within its own country.'

Active extra-judicial transnational activities of the court in the Asian region and beyond have been remarkable, but may also raise some concern or scepticism. A critical view would maintain that the court's external engagement has mainly been *diplomatic*, motivated primarily by a 'nationalist' ambition to establish leadership status in the region and to boost its weight and reputation in the global sphere.[61] The level of information exchange and comparative survey conducted by the AACC SRD thus far has been focused mainly on technical and operational aspects.[62] In contrast with the court's institution-wise respect and courtesy paid to the German Constitutional Court and other European judicial bodies, it seems to regard other Asian courts as latecomers who must be taught, helped or inspired, rather than as partners of equal standing. The ambition to solidify its status as a frontrunner in Asia with regard to constitutional adjudication (if not to political or economic power, as compared with China or Japan), and the self-pride it acquires from such an empowered position, are some of the core motivations of the court's extra-judicial transnational engagement in the last decade.

As illustrated, the modes of transnational engagement of the South Korean Constitutional Court at the horizontal level are not simple in their patterns and orientations, and are shaped by diverse underlying factors and their combinations in varied contexts. The modes have also evolved over the years with the development of the court's own system, jurisprudence and international standing. These dynamic manifestations reflect the court's growing self-understanding in the global context, enlarged on the basis of multiple coexisting mindsets, including nationalist ambitions and cosmopolitan aspirations. A remaining challenge for the court would be to further develop its active transnational engagement in a direction that more effectively fulfils the promise of global constitutionalism, contextualizing a cosmopolitan vision of human rights by subjecting nationalist anxieties and resulting local variations to constitutional justificatory standards that are transnationally informed.

V. Conclusion

The case study of the South Korean Constitutional Court's transnational constitutional engagement in vertical and horizontal aspects exemplifies the multiple contexts in which those engagements are triggered and pursued, both within and beyond the domestic constitutional adjudication process. The engagement modes have been shaped by the coexistence and dynamic combinations of various underlying factors, including the nationalist and the cosmopolitan, and the local and the global. Both nationalist drive and cosmopolitan vision are real and have been influential in the growth of the court since its creation in 1988 in a newly democratized society with increasing impetus for transnational engagement. The nuanced, complex and even incoherent modes of its transnational engagement reflect the challenges as well as new opportunities faced by the court.

The case of South Korea demonstrates that the mode of transnational constitutional engagement is something that must be contextualized, not generalized, and constantly subjected to normative evaluation for its global implications and contributions. The focuses of assessment should include whether those transnationalizing developments,

[61]See (n 34) 1003–09, 1020–28, discussing aspects of judicial diplomacy.

[62]For a similar observation, see M de Visser 'We All Stand Together: The Role of the Association of Asian Constitutional Courts and Equivalent Institutions in Promoting Constitutionalism' (2016) 3(1) *Asian Journal of Law and Society* 105.

through globally better-informed and sounder adjudication practice, serve the rights of individuals, rather than the court's own institutional interests. The practice of the South Korean Constitutional Court should invite both recognition and constructive criticism in this regard. While the transnationalization of constitutional practice can also be triggered by nationalist motivations, the generally active interactive postures taken by the court towards the globe provide individuals with wider platforms and more dynamic horizons, allowing them to more effectively pursue cosmopolitan rights projects and transnationally informed rights contestations in and through domestic constitutional settings. Such mobilization and empowerment of individual rights holders can, in turn, deepen the local contextualization of global constitutionalism by demanding a more integrative relationship between international and constitutional law and by urging the court's horizontal engagement and regional leadership to be established on more substantive qualities and thereby live up to its promised values.

Cite this article: Shin YJ. 2021. Transnational constitutional engagement: A contextualization of global constitutionalism by the Constitutional Court of South Korea. *Global Constitutionalism* 10: 256–274, doi:10.1017/S2045381721000010