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

By *Jeong-In Yun**

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

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

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A. Introduction

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

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

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

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

B. International Law in the South Korean Constitutional Order

I. Constitutional Framework

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

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

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

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

Article 60(1): The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.

Article 73: The President shall conclude and ratify treaties; accredit, receive or dispatch diplomatic envoys; and declare war and conclude peace.

Article 89: The following matters shall be referred to the State Council for deliberation: ...
3. Draft amendments to the Constitution, proposals for national referendums, proposed treaties, legislative bills, and proposed presidential decrees.

Article 5 of Addenda: The laws and treaties in force at the time this Constitution enters into force shall remain valid unless they are contrary to this Constitution."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Ratification Status of Treaties

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

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

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

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

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

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

24 Ibid.

25 Ibid.

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

C. Judicial Application of International Human Rights Law

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

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

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

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

I. Theoretical Standpoints

1. Monism or Dualism

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

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

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

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

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

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

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

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

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

2. Internationalist or Constitutionalist Approaches

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

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

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

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

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

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

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

II. Normative Nature

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

1. IHRL as International Treaties

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

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

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

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

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

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

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

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

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

2. IHRL as Human Rights Norm

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

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

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

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

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

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

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

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

III. Judicial Context

1. Jurisdictional Challenge

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

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

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

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

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

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

45 Ibid., p. 217.

46 Ibid., pp. 219-20.

47 *Chug*, note 8.

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

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

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

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

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

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

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

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

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

2. Absence of Institutional Incentives and Pressures

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

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

56 Ibid., p. 622.

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

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

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

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

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

IV. Dualist Dilemma in Judicial Application of IHRL

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

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

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

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

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

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

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

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

D. Constitutional Court Cases Featuring Dualist Dilemma

I. Conscientious Objection Case

1. Background and Judgments

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

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

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

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

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

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

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

65 See note 63, p. 148.

66 See note 63, p. 161.

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

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

69 See note 63, p. 171.

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

71 Ibid.

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

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

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

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

73 See note 72, pp. 196-97.

74 See note 72, pp. 197-98.

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

76 See note 80, pp. 156-57.

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

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

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

2. Analysis

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

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

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

79 See note 78, pp. 408-409.

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

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

II. Death Penalty Case

1. Background and Judgments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

89 See note 88, p. 63.

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

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

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

2. Analysis

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

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

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

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

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

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

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

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

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

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

E. Addressing the Dualist Dilemma

I. Limits in Direct Application of the IHRL

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

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

II. Indirect Application of the IHRL

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

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

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

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

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

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

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

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

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

101 Ibid., p. 622.

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

103 *Park*, note 21, p. 121

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

F. Conclusion

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

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

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

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

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