SYMPOSIUM

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

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

A. Asia in World Comparative Constitutional Law

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

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

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

2 Ibid.

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

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

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

B. The Project on International Law in Asian Constitutional Courts

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

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

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

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

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

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

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

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

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

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

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

10 Ibid.

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

12 The institution commenced its work in June 1998.

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

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

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

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

D. Comparative Lessons and Insights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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