

Article

From Monadic Sovereignty to Civitas Maxima: A Critical Perspective on the (Lack of) Interfaces Between International Human Rights Law and National Constitutions in East Asia

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ABSTRACT

In this article, I have looked at the present state of interfaces between international human rights law and national constitutions in East Asia. The persistence of the traditional monadic conception of sovereignty in the region has not been quite conducive to the securing and expansion of the interfaces between the two normative realms. This state of affairs is reflected in the dismissal or underuse of international human rights law in constitutional litigations, as I tried to show by analyzing the practice of the Korean Constitutional Court and some of the Japanese courts. In so doing, I pointed out the sui generis and “legislative” nature of human rights treaties and emphasized the need to reformulate the traditional conception of these treaties. After discussing some of the reasons why the East Asian nations have been reluctant to engage in the discourse of human rights on the international stage, I dealt with the benefits to be derived from the expansion of interfaces between international human rights law and national constitutions. Apart from some practical benefits, international human rights law provides a forum or arena where various human rights ideas interact with each other and reach a communicatively

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rational calibration. In that light, the East Asian nations are encouraged to engage in this “marketplace” or “clearing-house” of human rights ideas more actively and channel their normative experiences and expectations into a peaceful reconstruction of the human rights discourse as a polyphonic and diatopical system.

Keywords: *International Human Rights Law, Constitutions, East Asia, Sovereignty*

CONTENTS

I. INTRODUCTION 158

II. THE MONADIC CONCEPTION OF SOVEREIGNTY AND ITS
IMPLICATIONS FOR THE INTERFACE BETWEEN INTERNATIONAL
HUMAN RIGHTS LAW AND NATIONAL CONSTITUTIONS IN
EAST ASIA 160

 A. *The Monadic Conception of Sovereignty and Its Hegelian
 Origin* 160

 B. *International Human Rights Law as an Adjudicatory Norm
 in East Asia* 162

III. MUDDLING TOWARDS CIVITAS MAXIMA: HOW TO EXPAND THE
INTERFACE BETWEEN INTERNATIONAL HUMAN RIGHTS LAW AND
NATIONAL CONSTITUTIONS IN EAST ASIA 169

IV. CONCLUDING REMARKS 173

REFERENCES 175

I. INTRODUCTION

East Asia¹ is a region of great contrast. Throughout the region, one often hears the buzzword of our time, i.e., globalization, which can be defined as “a shift in the spatial form of human organization and activity to transcontinental or interregional patterns of activity, interaction, and the exercise of power.”² To employ the distinction often used by legal scholars, it is undeniable that globalization is taking place at the level of *corpus*, i.e., objective and material elements. However, one can raise the question whether the same is true of *animus*, i.e., the mindset and mentality of the peoples in the region.³

Let me adduce the example of Korea. In early April of 2007, a group of Korean diplomats and bureaucrats, who were fully conversant not only in English but also in the normative language of diplomacy, brought to a successful conclusion the convoluted negotiations for a Free Trade Agreement with the United States.⁴ In stark contrast to the days when it was a mere pawn of great-power politics played out by its powerful neighbors and America, Korea, now a major trading power whose dependency on international trade is over 70 percent, was able to conduct the negotiations on a more or less equal footing with the United States. Despite some hiccups such as the 1997 “IMF Crisis,” Korea has firmly consolidated its status as a dynamic industrial powerhouse whose national motto is globalization or internationalization.

However, one should not be deluded into believing that Korea has irrevocably anchored its fate on the “open-door policy” or internationalization. Adjectives such as “xenophobic” and “nationalistic” are often used when describing Korean society and its people.⁵ Some of the recent controversies over foreign investors such as the Lone Star incident

1. It is not easy to give the exact geographical extent of East Asia. In this article, the term “East Asia” mainly means China, Japan and Korea.

2. David Held, *Democracy and Globalization*, 3 GLOBAL GOVERNANCE 253 (1997).

3. A widely used law dictionary defines corpus as “a corporeal act of any kind (as distinguished from *animus* or mere intention), on the part of him who wishes to acquire a thing, whereby he obtains the physical ability to exercise his power over it whenever it pleases him.” BLACK’S LAW DICTIONARY 181 (5th ed. 1983).

4. Office of the United States Trade Representative, *Statement by U.S. Trade Representative Susan C. Schwab on ITC Analysis on the U.S.-Korea Free Trade Agreement*, Sept. 19, 2007, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta>; Sang-Hun Choe, *U.S. and South Korea Sign Free-Trade Agreement*, N.Y. TIMES, Apr. 2, 2007, <http://www.nytimes.com/2007/04/02/world/asia/02iht-fta.1.5110252.html>.

5. Sang-Hun Choe, *South Koreans Struggle with Race*, N.Y. TIMES, Nov. 2, 2009, http://www.nytimes.com/2009/11/02/world/asia/02race.html?pagewanted=1&_r=1 (“South Korea, country where until recently people were taught to take pride in their nation’s ‘ethnic homogeneity’ and where the words ‘skin color’ and ‘peach’ are synonymous, is struggling to embrace a new reality.”); Jeffrey Robertson, *Korean Xenophobia Faces New Challenge*, ASIA TIMES, June 13, 2006, <http://www.atimes.com/atimes/Korea/HF13Dg01.html>.

seem to reinforce this image of Korea as a “closed-minded” society.⁶ South Koreans’ attitude toward their brethren in the North, as it came to the fore during the North Korean nuclear crisis, also highlights the strong nationalistic tendency in Korea.⁷ How is one to understand this seemingly contradictory phenomenon, i.e., strong nationalistic undercurrents in a society which is fully incorporated into the world economy?

This seeming contradiction can be easily discerned in other East Asian nations. According to a keen participant-observer of Japanese society, Japan, the second biggest economy in the world that aspires to the seat of a permanent member of the United Nations Security Council, is described as still keeping to the historical consciousness of solitary isolation (*Kozetsu no Rekishi Ishiki*).⁸ The world’s second biggest economy in solitary isolation sounds as oxymoronic as “autistic empire.” Mainland China, which has a genuine global power by attaining the lofty status of one of the G2 (together with the United States of America), is often criticized by the western media for “stoking xenophobic nationalism.”⁹

This phenomenon of being “externally open, internally closed” is replicated in the subject-matter of this article, i.e., the lack of meaningful interfaces between international human rights law and national constitutions in East Asia. Given that China, Japan and Korea differ from each other in terms of democratic development and the protection of human rights, they cannot be treated as a monolithic entity in discussing the subject-matter of this article. However, it is also true that there is a gap between the ever-lengthening list of human rights treaties to which China, Japan and Korea adhere, on the one hand, and the effectiveness (or normative penetration) of these treaties in the constitutional discourse of human rights, on the other. This is particularly true of China.

In this article, I will try to delve into the reasons for the present state of affairs and will suggest ways for overcoming it through East Asia’s more active engagement in the discourse of human rights at the international level. In so doing, I will argue that securing and expanding the interfaces between international human rights law and national constitutions can work as a catalyst for an inter-subjective reconstruction of human rights law at the national level in East Asia and the discipline of international human rights law itself.

6. Anna Fifield, *Lone Star Sale of KEB Stake Rife with Politics*, FIN. TIMES, Feb. 23, 2006, http://www.ft.com/cms/s/0/eb4241b4-a45b-11da-897c-0000779e2340.html?nclick_check=1.

7. Peter Maass, *Radioactive Nationalism*, N.Y. TIMES, Oct. 22, 2006, http://www.nytimes.com/2006/10/22/magazine/22wwln_essay.html.

8. See generally KON-CHA YUN, *KOZETSU NO REKISHI ISHIKI: NIHON KOKKA TO NIHONJIN [AN ISOLATED VIEW OF HISTORY: THE JAPANESE STATE AND THE JAPANESE]* (1990).

9. David Shambaugh, *Insecure China is Stoking Xenophobic Nationalism*, INT’L HERALD TRIB., May 15, 1999, <http://www.taiwandc.org/ihl-9902.htm>.

II. THE MONADIC CONCEPTION OF SOVEREIGNTY AND ITS IMPLICATIONS FOR THE INTERFACE BETWEEN INTERNATIONAL HUMAN RIGHTS LAW AND NATIONAL CONSTITUTIONS IN EAST ASIA

A. *The Monadical Conception of Sovereignty and Its Hegelian Origin*

The axiomatic and self-evident premise of constitutional law thinking in this part of the world seems to be that the core or founding concept of constitutional law, i.e., sovereignty, is endowed with originality, autonomy, indivisibility and inalienability. For instance, a textbook of constitutional law by a leading Korean scholar points out that sovereignty in the form of constituent power (*le pouvoir constitutif*) does not derive from any other being, but constitutes itself, possessing autonomy in the sense that the power is not bound or restricted by any external legal norm or order. It is also indivisible as a unified whole. Monopolized by the holder of the constituent power, it cannot be alienated or delegated.¹⁰

The term “monadic” is quite appropriate for the conception of sovereignty just described.¹¹ As a self-constituting notion that is in need of no justification, whether ontological or normative, other than itself, sovereignty delineates itself from sovereignties by thick bright dividing lines. Such a conception of monadic and autistic sovereignty seems to be widely shared by the constitutional lawyers of the region.¹²

Transposed onto the international plane, the monadic conception of sovereignty leads to a world view under which states appear and act as impenetrable “billiard balls” in a state of anarchy that prevails in international society.¹³ Such a view founded on the sharp distinction and insulation between the international and domestic sphere permeates the very

10. JONG-SUP CHONG, HEONBEOPHAK WONRON [PRINCIPLES OF CONSTITUTIONAL LAW] 44-45 (2009).

11. Wikipedia offers the following explanation about the concept of “monad.” “The monads are ‘substantial forms of being’ with the following properties: they are eternal, indecomposable, individual, subject to their own laws, un-interacting, and each reflecting the entire universe in a pre-established harmony (a historically important example of panpsychism).” Wikipedia, Gottfried Leibniz, http://en.wikipedia.org/wiki/Gottfried_Leibniz (describing the theory of monads by Leibniz) (as of Mar. 10, 2010, 08:15 GMT). See also BERTRAND RUSSELL, HISTORY OF WESTERN PHILOSOPHY 606-07 (1946).

12. This statement is true as far as Korea is concerned. See NAK-IN SUNG, HEONBEOPHAK [CONSTITUTIONAL LAW] 123 (8th ed. 2008) (“Sovereignty [is characterized by] being an original, autonomous, supreme and independent power. Also, it is an indivisible, inalienable and permanent power.”); ZEWI YANG, ZHUQUANLUN [ON SOVEREIGNTY] 266-74 (2006).

13. Among international relations scholars, such an approach is called the “billiard ball model.” Josef Joffe, *Rethinking the Nation-State: Many Meanings of Sovereignty*, 78(6) FOREIGN AFF. 1999, at 123 (“If sovereignty is compromised in myriad ways, so is the conventional model that recalls G.W. Leibniz’s “windowless monads” by assuming that states are like billiard balls: hard-shelled, highly polished units without bonding surfaces, propelled only by their internal dynamics, and doomed to a life of perpetual collision.”).

subject dealing with the interfaces between international and national law. Under these circumstances, despite the accelerated internationalization or globalization of our every-day life, the normative impact of international law remains isolated and marginalized. Although much lip-service is paid to the importance of international law, states with the monadic conception of sovereignty are at pains to prevent international law from penetrating domestic legal life against their wishes. This problematic is discussed in international law under the rubric of the relationship of international and national (domestic) law.¹⁴ A number of states support the so-called “dualism” or its variant, according to which international law (in particular, treaties) acquires effectiveness and validity within the domestic sphere only after being “transformed” into national law in accordance with national legal procedures. Under this theory, the normative effectiveness of international law in the domestic field stands or falls depending on the will of the state concerned. This is redolent of international legal positivism of the 19th century which set great store by the *voluntas* of individual states in relation to the formation and application of international law.

The method of international legal education in leading western states, in particular the United States and Great Britain, reinforces the voluntarist or solipsistic conception of international law. In the United States and Great Britain, international law textbooks are based mainly on the court decisions, municipal legislations and executive practices of their own. One gets the impression that students are taught an international law as interpreted and understood by their countries. This is well shown by the alternative expression for international law which is in wide currency in the United States: foreign relations law of the United States.¹⁵ This expression gives one the impression that in the United States international law is a kind of domestic law applied in the external relations of that country. One is instantly reminded of the German expression for international law which was widely used in the 19th century: *das äußere Staatsrecht* (external state law, i.e., domestic law applied to the external relations of a state). It is evident that such an approach to international law education cannot be conducive to the attainment of inter-subjectively recognized and shared system of international legal norms.

In this connection, one needs to mention Hegel’s formative influence on the state-will-centered international legal positivism. Voluntarism seeks the

14. For a succinct explication of the subject, see IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 31-56, (5th ed. 1998); PATRICK DAILLIER ET AL., *DROIT INTERNATIONAL PUBLIC* 251-63 (8th ed. 2009).

15. For instance, a widely used book published by the American Law Institute is titled “Restatement of the Law (Third): The Foreign Relations Law of the United States.” See also THOMAS M. FRANK ET AL., *FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS* (2007).

ultimate foundation of international law in the state will. It is well-known that the introduction of the will, “self-determining universality,”¹⁶ as the system-building element into the science of international law by Hegel had hugely negative consequences at the practical level. According to a German commentator, Hegel’s world spirit (*Weltgeist*) stood in sharp opposition against the *Weltanschauung* of the natural law tradition, the universal legal concepts of which were geared to the ideal of national and international peace.¹⁷ A detailed discussion of the Hegelian conception of sovereignty and its impact on the subsequent development (or destruction according to some views) goes beyond the ambit of this article. Here it suffices just to point out the substantial influence of Hegel on the formation of the monadic conception of sovereignty that persists even in our days.

B. *International Human Rights Law as an Adjudicatory Norm in East Asia*

Now let us look into how the monadic notion of sovereignty plays out in connection with our subject, i.e., the interfaces between international human rights law and national constitutions in East Asia. I will carry out the discussion by focusing on the practice of the Korean and Japanese courts concerning litigations in which international human rights law, in particular, human rights treaties have been invoked. This will show whether there is a meaningful interaction between international human rights law and national constitutions and laws. More specifically, it will answer the question whether international human rights law has achieved positivity as an adjudicatory norm in East Asia.

Korea ratified the International Covenant on Civil and Political Rights (hereinafter, “ICCPR”) and the First Optional Protocol to the Covenant in

16. G. W. F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 51 (H.B. Nisbet trans., Cambridge Univ. Press 1991) (1820).

17. HERMANN HELLER, *HEGEL UND DER NATIONALE MACHTSTAATGEDANKE IN DEUTSCHLAND: EIN BEITRAG ZUR POLITISCHEN GEISTESGESCHICHTE* [HEGEL AND THE NATIONAL AUTHORITARIAN THINKING IN GERMANY: A CONTRIBUTION TO THE POLITICAL HISTORY OF SPIRITS] 119 (1921). Brierly criticized Hegel’s conception of international law as follows: “For him, too, international law, as we know, was merely a State’s ‘external public law’ (äußere Staatsrecht), and it is from him that its explanation in the doctrine of self-limitation was derived. It may have been a great service to banish contract once and for all from theories of the origin of the State; but Hegel left nothing but contract as a possible explanation of the relations of States to one another, and even for that he provided no foundation. Of all the writers on the State his influence on the theory of international law has probably been the most far-reaching, and certainly it is still the most devastating; for even cynicism may be refuted by argument and observation of the facts, but hardly mysticism.” L. Brierly, *The Basis of Obligation in International Law*, in *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW IN INTERNATIONAL LAW AND OTHER PAPERS* 36 (Hersch Lauterpacht & C.H.M. Waldock eds., 1958). However, one needs to heed Lauterpacht’s view that “it would serve no useful purpose to deny that the modern science of international law follows closely the Hegelian conception of State and sovereignty.” HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION* 49 (1927).

1990, i.e., three years after the turning point in the Korean history of democratization. The very act of ratifying the Convention and the Optional Protocol was intended as a demonstration of the newly democratizing Korea's commitment to the cause of human rights. The firmness of the commitment was put into high relief by the ratification not only of the Covenant but also of the Optional Protocol which provided for the mechanism of individual communication. Under the mechanism, a State party to the Covenant, by becoming party to the Optional Protocol, "recognizes the competence of the [Human Rights] Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant."¹⁸ In that sense, the Optional Protocol grants individuals a procedural means, if incomplete, for realizing the substantive rights provided for in the Covenant. It is exactly for this reason that a number of States, including Japan and China, have decided not to ratify the Optional Protocol even after becoming parties to the Covenant themselves. In this light, the Korean Government's decision to ratify the Optional Protocol was laudable enough. However, Korea has experienced a number of questions relating to the faithful implementation of the Protocol for the past twenty years with particular reference to the channeling of normative effects of "views" handed down by the Human Rights Committee. This specific question puts into high relief the precarious nature of the relationship between international human rights law and national constitutions in East Asia.

Until August 17, 2009, 124 individual communications from Korea have been lodged with the Human Rights Committee. Among the 124 cases, 112 cases are still awaiting action by the Committee; 1 case was found to be inadmissible; 1 case was discontinued; with respect to only 10 cases, the Committee issued its views. Among these 10 cases, the Committee found the Korean Government in violation of the Convention in 8 cases and found no violation in 2 cases.

In some cases where the Committee found the Korean Government in violation of the relevant provisions of the Convention, the petitioners instituted lawsuits based on the State Liability Act against the government for monetary compensation. The Korean court was confronted with a thorny question of how to bridge the gap between international human rights law and the relevant national legislation. In the lawsuit instituted by Mr. Sohn Jong-Kyu who had been punished for violating the National Security Law, he claimed, based on the view of the Human Rights Committee that the

18. The Optional Protocol to the International Covenant on Civil and Political Rights art. 1, *adopted and opened for signature* Dec. 13, 1966, 999 U.N.T.S. 302 (*entered into force* Mar. 23, 1976).

Korean Government was in violation of Article 19(2) of the ICCPR by punishing him under the Law, that the Korean Government was under a legal duty to pay compensation to him. The dilemma for the Korean court was that Mr. Sohn had been found guilty of the breach of the National Security Law through the normal judicial procedure. The court found it very difficult to act on the view of an international human rights body that is not formally binding. The court of the first instance held that “even if the Human Rights Committee found that the criminal punishment of the plaintiff [i.e., Mr. Sohn] is violative of the freedom of expression as provided for in Article 19(2) and that the defendant [i.e., the Korean Government] is under a legal duty to provide appropriate remedies including monetary compensation, this court is not bound by the finding.”¹⁹ The appellate court dismissed the plaintiff’s appeal by saying that “the view of the Human Rights Committee is only of a recommendatory nature and there is no ground for recognizing that it is legally binding on the court.”²⁰ The court of final instance, the Korean Supreme Court, did basically the same by endorsing the judgments of the lower courts. The Supreme Court provided additional reasoning by holding as follows:

Article 2(3) of the International Covenant merely obligates, on a State-to-State basis, the State parties to put in place legal mechanisms for providing effective remedies to the individuals whose rights or freedoms have been infringed. Therefore, remedies against the State such as compensation can only be sought based on the domestic legislation such as the State Compensation Act. The provision cannot be interpreted as creating special rights for the individuals to request remedies (including compensation) against the State parties independently of the relevant domestic legislation.²¹

It is true that the drafters of the ICCPR and the Optional Protocol did not intend the “views” of the Committee to be legally binding. It is also true that the Committee falls short of a strictly judicial organ and its views cannot be equated to judgments handed down by courts or other judicial tribunals. Therefore, it is understandable that the Korean courts found it hard to endow the views of the Committee with a legally binding quality in the absence of specific legislation to that effect. It is undeniable that *de lege lata* most states do not regard the views of the Committee as legally binding.²² However, in

19. Seoul D. Ct., 95 Gadan 185632 (S. Korea).

20. Seoul D. Ct., 4th Civil Division, 96 Na 27512 (S. Korea).

21. Panryegongbo [Precedent Gazette] 760 (May 1, 1999).

22. For detailed discussions of the subject, see DOMINIC MCGOLDRICK, THE HUMAN RIGHTS

the light of substantial practice accumulated after the adoption of the Optional Protocol pointing in the direction of granting legal effect to the views of the Committee and that the denial of the Committee's power to interpret the ICCPR and the Optional Protocol finally and authoritatively should render the mechanism of individual communication almost meaningless, the patently dismissive approach of the Korean courts needs a serious reconsideration.

This is all the more so considering that some states promulgated domestic legislation that enables individuals to claim compensation based on the view of the Committee finding the state party in violation of the Covenant. In the absence of such legislation, some states paid *ex gratia* payments. One can also find cases where the finding of violation by the Human Rights Committee led the state parties to amend the relevant domestic law. In *Hartikainen v. Finland*, the Finnish Government decided to amend the relevant domestic legislation even though the Committee found it not in violation of the Covenant.²³ These considerations compel one to, at least, treat the views as "a major source for interpretation of the ICCPR"²⁴ or accord it "considerable persuasive authority."²⁵

Let me now look at the practice of the Korean Constitutional Court. It is generally accepted that Korea has one of the most vibrant constitutional litigation cultures. The Korean Constitutional Court, which was established on September 14, 1988, is credited with sharply raising the awareness of human rights among Koreans. Now the question is whether the Court has been accommodating of international human rights in dealing with its cases. According to a leading scholar in the field,²⁶ the Korean Constitutional Court has been generally reluctant to invoke and employ international law in general and international human rights law in particular as an adjudicatory norm or standard. It has hardly ever handed down a decision of unconstitutionality by reason of the violation of international law. International law is resorted to merely as a supplementary means to confirm decisions of constitutionality. In cases where the petitioners argue that the specific provision of the Korean law is in violation of international human

COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 150-56 (1994); P. R. GHANDHI, THE HUMAN RIGHTS COMMITTEE AND THE RIGHT OF INDIVIDUAL COMMUNICATION: LAW AND PRACTICE, ch. 13 (1998). This issue is discussed in a detailed and comprehensive manner in the report produced by the ILA Committee on International Human Rights Law and Practice. The report was adopted at the Berlin Conference (2004). It is titled "Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies." For its content, see <http://www.ila-hq.org/en/committees/index.cfm/cid/20>.

23. MCGOLDRICK, *supra* note 22, at 203.

24. *Maria v. McEloy*, 68 F. Supp. 2d 206, 232 (E.D.N.Y. 1999).

25. *Nicholls v. Registrar of the Court of Appeal*, [1998] 1 N.Z.L.R. 405 (C.A.).

26. In-Seop Chung, *An Analysis of the Korean Constitutional Court's Jurisprudence from an International Law Perspective* (2004) (unpublished manuscript, on file with author).

rights law, the Court often avoids any discussion of the point and reaches its decision solely on the basis of Korean domestic law.

In a case where the prohibition of a prisoner's subscription to a certain publication was impeached before the Court allegedly in violation, among others, of Article 19 of the ICCPR, the Court, in finding the measure not infringing upon the petitioner's constitutional rights in an excessive manner, just said that "the petitioner's argument relating to the ICCPR violation is without ground," not offering any concrete reasoning. The same attitude of the Court is ascertained in cases relating to the unconstitutionality of the National Security Act. The Human Rights Committee had repeatedly pointed out the incompatibility of the Act with Article 7 of the ICCPR. In 2002, a petitioner argued for the unconstitutionality of the Act invoking, among others, the views of the Human Rights Committee. Again, the Court restricted its discussion to the questions arising from domestic law, in particular, its previous decision on the same question handed down in 1996. The invocation of the Human Rights Committee's views impugning the soundness of the Act was simply ignored.

That the Korean Constitutional Court does not highly evaluate the relevance of international human rights law as an adjudicatory norm is amply demonstrated by its cursory treatment of the arguments based on the 1948 Universal Declaration of Human Rights and the 1957 ILO Convention on Abolition of Forced Labor (No. 105). In a 1991 case, the majority of the Court held that the 1948 Declaration "has a merely declaratory effect and, as such, is not legally binding." In another case, the Court did not touch upon the petitioner's argument based on the ILO No. 105 Convention. In a 1998 case in which the ILO No. 10 Convention was invoked, the Court denied the Convention's customary law status by observing that "the Convention cannot serve as a rule for the review of constitutionality given that Korea did not ratify it and there is no ground to ascribe to it any constitutionally binding effect as a generally recognized rule of international law [i.e., customary international law]."

The situation seems to be not much different in Japan.²⁷ It is true that in a small number of cases the Japanese court invoked the relevant provisions of international human rights treaties, in particular, the ICCPR, to strike down domestic legislations or administrative actions or judicial decisions. For instance, in a criminal case involving a foreigner who could not understand the Japanese language, the Tokyo High Court revoked the district court's order for the foreigner to pay interpretation fees, relying on Article 14(3)(f) which provides for the duty of free-of-charge interpretation

27. Higashizawa Yasushi, *International Human Rights Law as an Adjudicatory Norm*, 13(1) *SEOUL INT'L L.J.* 69 (2006).

assistance.²⁸ Some of these courts recognized the general comments of the Human Rights Committee and even the judgment of the European Court of Human Rights and the Inter-American Court of Human Rights as “a supplementary means of interpretation” as provided for in Article 32 of the 1969 Vienna Convention on the Law of Treaties. However, the number of such cases is still very small and, more importantly, the highest court of the land, the Japanese Supreme Court, has yet to find a domestic law, statutory regulation or administrative action in violation of the ICCPR.

With regard to the International Covenant on Economic, Social and Cultural Rights, the Japanese courts have denied the direct applicability of the Covenant’s provisions. This contrasts sharply with their approach to the ICCPR the direct applicability of which is widely accepted by the Japanese courts. It needs to be mentioned that the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Racial Discrimination were also relied upon by Japanese courts.

In connection with the question at hand, one needs to be acutely aware of the difference between ordinary treaties and human rights treaties. The former usually deal with state-to-state relations, whereas the latter regulate the relationship between the state and individuals.²⁹ This difference accounts for the controversy over who is entitled to pass judgment on the (in)compatibility of reservations to human rights treaties.³⁰ Another important thing to remember is that human rights treaties such as the ICCPR, in most cases, merely confirms and declares those rights that are already recognized and implemented within domestic legal systems. They do not newly create the rights that do not exist and function within the domestic sphere. For this reason, the usual discourse on the relationship between international and national law has a limited relevance to human rights treaties. In other words, human rights treaties deal with the subject-matter that cuts across, and indeed, forms the common foundation of, different national legal systems. This argument is easily vindicated by the pre-1998 situation in the United Kingdom. Until the UK ratified and implemented the 1950 European Convention for the Protection of Human Rights and

28. “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court . . .”

29. This point is emphasized in the following document adopted by the Human Rights Committee in 1994. Human Rights Committee, *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocol thereto, or in Relation to Declarations under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Apr. 11, 1994). In paragraph 8 of the General Comment, it is averred that “Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.”

30. GHANDHI, *supra* note 22, at 356-65.

Fundamental Freedoms, the Convention was not effective within the UK's domestic sphere, given that the UK adheres to the strict dualist position. However, that does not mean that human rights as codified by the 1950 Convention were not respected by the UK government. Most of the Convention rights already formed part and parcel of the domestic human rights law in the UK. It is true that the official ratification and implementation of the Convention brought some changes to the UK human rights law domestically, for instance, the streamlining of the office of the Lord Chancellor in consideration of the principle of separation of powers. However, the fact remains that even in the pre-1998 period there was a substantial overlap between the 1950 Convention and the UK human rights law in terms of coverage and substantive content. Thus, it would be highly artificial and counterproductive to apply the dualist conception or approach to an already monist subject-matter, i.e., human rights to which universality is often attributed.

Let me elaborate on this. Treaties are often assimilated to contracts, as is well illustrated by the German term for treaty, i.e., *Staatsvertrag*. However, the contract-based understanding of human rights treaties runs the risk of distorting the *sui generis* character of the subject-matter being dealt with by the treaties. In this connection, one could raise the question whether the (now widely discredited)³¹ distinction between “Vertrag” and “Vereinbarung,” or “traité-contrat” and “traité-loi” could be dusted off and reutilized for our purposes. According to Triepel, the latter, “the fusion of various substantively similar wills (die Verschmelzung verschiedener inhaltlich gleicher Willen),”³² is different from the former, “the coming together of a plurality of persons possessing different, but corresponding interest for the purpose of expressing wills which are substantively opposed and directed toward the same external end (die Vereinigung mehrerer Personen von verschiedenem, aber korrespondirendem Interesse zu inhaltlich entgegengesetzten, auf denselben äusseren Zweck gerichteten Willenserklärungen).”³³ In the case of “Vereinbarungen,” the states would be “legislators (rechtbildende Faktoren)” and, as such, create through the “fusion” of individual wills a qualitatively different “mediated” will that works as a (self-imposed) rule of law *vis-à-vis* those states.

The collective will, which comes into existence through the fusion of various individual wills of similar content, returns to the individual wills as,

31. For instance, Ernst Radnitzky, *Dispositives Völkerrecht [Dispositive International Law]*, 1 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT [Austrian Journal for Public Law] 658 (1914).

32. HEINRICH TRIEPEL, VÖLKERRECHT UND LANDESRECHT [INTERNATIONAL LAW AND STATE LAW] 50 (1899).

33. *Id.* at 45.

as it were, an alterized self. In the transformation of the individual wills of states parties into a collective will in the form of “Vereinbarung” or “traité-loi” that binds the parties as a mediated, alterized and qualitatively different will.

In interpreting human rights treaties, one should pay more attention to the “legislative” nature of the treaties, rather than emphasizing the “contractual” aspect. Human rights treaties deal with a subject matter that arises largely in State-to-individual relationship, as compared to the contractual treaties that usually regulate state-to-state relationship. Human rights treaties do not create those rights for the first time, but confirms and expands on the rights to the protection of which the states parties already committed through their domestic legislation. It needs also to be noted that the usual dualist approach to the subject-matter of human rights is largely pointless given that there is substantial overlap between international and national law. These considerations highlight the *sui generis* nature of human rights treaties and call for an approach apposite to the characteristics of these treaties instead of an uncritical and mechanical application of the state-to-state contractual conception of treaties.

III. MUDDLING TOWARDS CIVITAS MAXIMA: HOW TO EXPAND THE INTERFACE BETWEEN INTERNATIONAL HUMAN RIGHTS LAW AND NATIONAL CONSTITUTIONS IN EAST ASIA

One needs to ask the question why the East Asian nations have been reluctant to locate and expand the interface between international human rights law and national constitutions. First of all, China and Korea were victimized by an instrumental (ab)use of modern international law in the pre-1945 period. It is true that Meiji Japan made an intrepid and strenuous effort to transform itself into a modern nation, including the “reception” of modern international law and achieved a spectacular success in that regard. In so doing, Japan dealt a serious blow to the Euro-centric world-view of the time. However, Japan did not succeed in winning the hearts and minds of other Asian people.

In the subjugation of Europe’s lesser others (or in the East Asian setting, the Japanese subjugation of other Asian nations), a normative system called “public law of Europe” whose local or parochial origin was hidden under the appellation of “international law,” was a conceptual and ideological tool or weapon *par excellence*. It is a matter of public knowledge that China and Korea were on the receiving end of such an instrumental and manipulative conception of international law throughout the 19th century and the early 20th centuries. Given the instrumental use of human rights policy or discourse in international diplomacy by western states, it is no wonder that

these nations have shown a defensive and guarded attitude to the discourse of international human rights law.

As far as China is concerned, another historical factor that needs to be taken into account is that at the latest since 1949 China has been a socialist state. Although China has now adapted the policy of socialist market economy, it still professes its faithful adherence to a Marxist-Leninist ideology as influenced and revised by Maoism. According to a highly instrumental understanding of law of Mao Zedong, law is “an instrument for the oppression of antagonistic classes; it is violence and not ‘benevolence.’”³⁴ Transposed onto the international plane, such an approach regarded bourgeois (or western) international law as “a theoretical instrument to defend the aggressive or colonial policy of the strong capitalist countries, to do its best to maintain the capitalist ‘world order’ and to oppose legal principles of socialism.”³⁵ The erstwhile policy of encircling mainland China by the Western powers, coupled with the territorial and ideological conflicts with the Soviet Union, deepened China’s sense of isolation and also its distrust of “bourgeois” international law, including international human rights law.

At a more fundamental level, the East Asians find themselves in an unenviable position of lacking in a vocabulary or lexicon with which to construct their own normative experiences and expectations in the realm of human rights. This is a serious question that pervades all the fields of international law study in East Asia. For instance, the thorny question of how to characterize the relationship between China and Korea in the “pre-modern” period is often answered with a term of art deeply rooted in and heavily burdened with European history, i.e., suzerainty. It is open to doubt whether the *sui generis* and highly convoluted relationship could be captured by such a term that has a strong European origin. Despite the meager family resemblance, *faute de mieux*, the term suzerainty is very often used. In this sense, East Asian can be described as a giant that cannot articulate its normative past with its own vocabulary. Their history is “translated” or mediated through European categories and concepts. The situation is the same with respect to their human rights conception and practice. One will have to wait for long to have a coherent theory and history of human rights written from their intrinsic perspective with a better lexicon

34. Tse-Tung Mao, *On the People’s Democratic Dictatorship*, in 4 SELECTED WORKS OF MAO TSE-TUNG 411, at 418 (1961), available at http://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4_65.htm. As cited in Hungdah Chiu, *Communist China’s Attitude toward International Law*, 60 AM. J. INT’L L. 245, 247 (1966).

35. Wu-Shuang Ho & Chün Ma, *A Criticism of the Reactionary Viewpoint of Chen TI-chiang on the Science of International Law*, 6 CHENGFA YENCHIU [STUDIES IN POLITICAL SCIENCE AND LAW] 35 (1957). As cited in Chiu, *supra* note 34, at 249.

apposite to the historical reality of the region, if ever this is possible.³⁶

I have discussed the reasons why the East Asian nations have been passive participants in the discourse of human rights on the international plane. However, it is true that they are showing an increasing willingness to engage in it with the growth of their power and status in international society. In that connection, one needs to look at the benefits to be gained by securing and expanding the interfaces between international human rights law and national constitutions.

First, international human rights law can provide a healthy corrective or antidote to the tendency of the current human rights discourse to focus on “classical” human rights or known as civil and political rights. As is often emphasized, human rights form a coherent whole and are closely interconnected. As the title of another Covenant that was adopted in the same year as the ICCPR, i.e., ICESCR, makes clear, international human rights law has a long and elaborate catalogue of economic, social and cultural rights. This fact has a particular significance for the human rights discourse in East Asia. For instance, China, which initially dismissed the American-led human rights diplomacy as a politically motivated gambit, now embraces the issue, but on their own terms. China criticizes the rather narrow conception of human rights held by western states and puts forth the importance of social and economic human rights, as is exemplified by the critical comment made by one of the next-generation leaders of China recently.³⁷ It is granted that there is some controversy over the positivity of social and economic rights at the international level. However, it is evident that the world needs to recalibrate the balance between “classical” human rights and socio-economic, cultural rights in the light of serious problems of “human security” of global proportions.

Second, at a more practical level, international human rights law can play a useful complementary or supplementary role in the interpretation and implementation of human rights in the domestic sphere. For instance, the UNESCO, as the international organization equipped with an expertise on the matters of culture, has articulated the concept of cultural rights,³⁸ while

36. See generally THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Joanne R. Bauer & Daniel A. Bell eds., 1999); HUMAN RIGHTS AND CHINESE VALUES (Michael C. Davis ed., 1995); CONFUCIANISM AND HUMAN RIGHTS (Wm. Theodore de Bary & Tu Weiming eds., 1998).

37. Malcom Moore, *China's "Next Leader" in Hardline Rant*, DAILY TELEGRAPH, Feb. 16, 2009, <http://www.telegraph.co.uk/news/worldnews/asia/china/4637039/Chinas-next-leader-in-hardline-rant.html>. According to this report, Vice-President Xi, Jinping lashed out at his Mexican hosts for siding with Britain and the United States at the Human Rights Council in calling for China to improve its human rights record. After proudly proclaiming that China has already made its contribution to the tackling of the financial crisis by making sure that its own 1.3 billion people are fed, he said that “there are a few foreigners, with full bellies, who have nothing better to do than try to point fingers at our country.”

38. See generally CULTURAL RIGHTS AND WRONGS (Halina Niec ed., 2001).

most constitutions do not have elaborate provisions on cultural rights. Within the ICCPR, one can find fairly detailed provisions that will be of assistance in interpreting the usually laconic provisions of national constitutions. It needs to be mentioned that general comments, recommendations and other opinions produced within the context of international human rights bodies such as the Human Rights Committee will help as well.

At a deeper level, international human rights law can work as an objective yardstick against which one compares a specific state's human rights legislation and practice. The conception of human rights founded on monadic sovereignty tends to justify a given state's legislation and practice relating to human rights in a self-referential manner. To use a jargon widely employed by human rights scholars, the margin of appreciation by individual states may end up being too wide, relapsing into the unhealthy form of cultural relativism. A sound human rights conception should strike a proper balance between the need to reflect and incorporate the local conditions, on the one hand, and the objectivity imposed by a transnational human rights standard, on the other. In that sense, international human rights law is an indispensable element in the construction and maintenance of a national human rights system equipped with inter-subjective viability.

Being alert to and actively participating in the discourse of human rights at the international level also implies the channeling of normative experiences and expectations of certain peoples into the existing international human rights law and the resultant "peaceful change" of it. Rather than dismissing international human rights law as something extrinsic and imposed from the outside, East Asians need to articulate its own conception of human rights and have it reflected in the ever-evolving corpus of international human rights. By so doing, they can regard international human rights law as a polyphonic system in which they can find their own voices and contributions and over which they can have a sense of ownership. If they succeed in proceeding to that stage, the universality of human rights, which had been criticized for overly privileging and generalizing a specific region (i.e., Europe's) normative experience, can be domesticated and internalized by East Asians. Thus looked at, an active engagement with international human rights law is a positive step towards a communicatively rational convergence of various conceptions of human rights held by national constitutions.

It is in this connection that one is compelled to contrast the brilliant success of Europe with the failure of East Asia in terms of constructing a region-wide idea and system of human rights. Actively participating in the "market-place" and "clearing-house" of various human rights ideas and thereby contributing to the reconstruction of the human rights discourse as a polyphonic system requires a great epistemological and intellectual courage.

As far as the East Asian nations are concerned, the first step should be to show and act upon this courage at the regional level, for instance, by putting in place a mechanism, if rudimentary, for the protection of human rights, say, along the lines of the Inter-American Commission of Human Rights. If they cannot articulate a viable and inclusive human rights system with their immediate neighbors with strong historical and cultural ties, it will be very difficult to imagine that they will be successful players on the global stage.

They also need to articulate a lexicon or vocabulary of human rights with which they can better channel their normative experiences and expectations, which remain unarticulated in the form of palimpsest, in the discourse of human rights at the international level. Let me hasten to add that this does not mean a “replacement” of the existing lexicon or vocabulary, but a gradual and peaceful change to it, or to use the expression I have already employed above, a reconstruction of the discourse of human rights as a polyphonic system.

IV. CONCLUDING REMARKS

In this article, I have looked at the present state of interfaces between international human rights law and national constitutions in East Asia. The persistence of the traditional monadic conception of sovereignty in the region has not been quite conducive to the securing and expansion of the interfaces between the two normative realms. This state of affairs is reflected in the dismissal or underuse of international human rights law in constitutional litigations, as I tried to show by analyzing the practice of the Korean Constitutional Court and some of the Japanese courts. In so doing, I pointed out the *sui generis* and “legislative” nature of human rights treaties and emphasized the need to reformulate the traditional conception of these treaties.

After discussing some of the reasons why the East Asian nations have been reluctant to engage in the discourse of human rights on the international stage, I dealt with the benefits to be derived from the expansion of interfaces between international human rights law and national constitutions. Apart from some practical benefits, international human rights law provides a forum or arena where various human rights ideas interact with each other and reach a communicatively rational calibration. In that light, the East Asian nations are encouraged to engage in this “marketplace” or “clearing-house” of human rights ideas more actively and channel their normative experiences and expectations into a peaceful reconstruction of the human rights discourse as a polyphonic and diatopical system.³⁹ Thus, I am

39. The term “diatopical” is borrowed from Raimundo Panikkar who proposed “diatopical

talking about at least two interfaces: one between international human rights law and national constitutions and the other between the East Asian conception of human rights, very much a work in progress, and the existing human rights discourse.

Recently, the rumor of an “Asian age” or “Asian century” is widespread. One comes across expressions such as “Eastphalia rising.” Personally, I do not embrace the self-congratulatory and triumphalist tone underlying such expressions, in particular, given that Asia or East Asia cannot be treated as a monolithic entity, lacking in normative and factual cohesiveness. No less importantly, Asia will be condemned to be a “giant without its voice” unless it can articulate its own normative vision at the international level. It is hoped that the Asian Forum for Constitutional Law will contribute to the tackling of this Herculean task.

hermeneutics.” According to him, “Diatopical hermeneutics is the required method of interpretation when the distance to overcome, needed for any understanding, is not just a distance within one single culture or a temporal one, but rather the distance between two (or more) cultures, which have independently developed in different spaces (*topoi*) their own modes of philosophizing and ways of reaching intelligibility along with their proper categories.” Raimundo Panikkar, *Eine unvollendete Symphonie [One Unfinished Symphony]*, in ERINNERUNG AN MARTIN HEIDEGGER [IN MEMORRY OF MARTIN HEIDEGGER] 175 (Günther Neske ed., 1977); Raimundo Panikkar, *What Is Comparative Philosophy Comparing?*, in INTERPRETING ACROSS BOUNDARIES: NEW ESSAYS IN COMPARATIVE PHILOSOPHY 116, 130 (Gerald J. Larson & Eliot Deutsch eds., 1988). As cited in *Fred Dallmayr, BEYOND ORIENTALISM: ESSAYS ON CROSS-CULTURAL ENCOUNTER* 61 (1996).

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