

【Special Features : Article】

Constitutional Court of Korea and its Contribution to Asian Network of Constitutional Justice*

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Abstract

This paper deals with the historic background that led to the foundation of the Constitutional Court of Korea and its major achievements so far. While faithfully fulfilling its prime duty to deliver constitutional justice at home within its capacity as the guardian of the Constitutional order and protector of basic rights of the people, Constitutional Court of Korea has been placing a particular emphasis on enhancing cooperation and discussing common issues with the Constitutional Courts and equivalent institutions in Asia and beyond. In this respect, the Court has been active in carrying out the activities of the Association of Asian Constitutional Courts and Equivalent Institutions and others through various international frameworks. Most notably, the Constitutional Court of Korea has proposed to explore the possibility of a human rights mechanism in Asia. This idea was well reflected in “Seoul Communique”, a final outcome of the World Conference on Constitutional Justice held on September 28 to October 1 in Seoul last year, which attracted 305 delegates from constitutional courts and equivalent institutions in 92 countries and international courts. The basic idea of the initiative is to start discussions on this issue in terms of necessity, feasibility as well as case studies of similar mechanisms already in existence in other regions. With this idea being in its infancy, research and discussions among interested researchers and judicial experts will be necessary to further develop it.

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I. Introduction

Let me begin by thanking Professor Obata Kaoru and the staff of CALE (Center for Asian Legal Assistance) for inviting me here and for the wonderful organization of this conference.

It is my true pleasure to be given this opportunity to address this distinguished audience today.

I will deliver my presentation in three parts: I will first briefly introduce the Constitutional Court of Korea, then about the efforts our Court has made for the development of constitutional justice in the Asian region, and lastly brief you on the background behind our Court's President Park Han-Chul's proposal for the Asian Courts to work together to lay the foundation for a Asian Court of Human Rights.

II. About Constitutional Court of Korea

The Constitutional Court of Korea¹ was founded in September 1, 1988 as a result of the constitutional amendment in 1987, which captured the Korean people's strong desire for a true democracy.

Our Court has nine Justices appointed by the President of the Republic; three are elected by the National Assembly, other three are nominated by the Chief Justice of the Supreme Court, and the remaining three are directly appointed by the President.

The President of the Court, who is appointed by the President of the Republic with the consent of the National Assembly, represents the Court and serves as the presiding Justice of the full bench.

All the Justices are appointed pending the approval of the National Assembly with the purpose of securing democratic legitimacy, and they hold their office for the term of six years. At present, Justice Park Han-Chul is leading the Court as its fifth President.

Our Court has jurisdiction in five areas as provided by the Constitutional Court Act. 1) judicial review of laws as to whether laws enacted by the legislature is

¹ <http://english.court.go.kr/cckhome/eng/introduction/aboutTheCourt/aboutTheCourt.do>

consistent with the constitution, which is done at the request of ordinary courts, 2) impeachment of high-ranking officials including the President of the Republic, 3) dissolution of political parties when the purpose or activities of a political party contradict the basic democratic order as provided in the Constitution, 4) competence disputes between government institutions or those between local governments, and 5) the constitutional complaint directly filed by individuals who claim that their fundamental rights guaranteed under the Constitution have been violated by governmental powers.

It is remarkable to see what our Court has accomplished over the past 27 years. First, judging by the figures, as of August 2015, the Court disposed of 27,300 cases out of the 28,000 cases filed, and in around 700 cases, the Court struck down statutes or government actions by ruling them unconstitutional or constitutionally incompatible. Furthermore, the Court upheld the constitutional complaints filed by individuals in around 530 cases, acknowledging that their fundamental rights had been infringed by public authority and thereby faithfully fulfilling its duty to safeguard the Constitution and protect peoples' fundamental rights.²

According to the recent opinion poll conducted on the occasion of the 26th anniversary of our Court, in some of the most prominent cases cited by the citizens, the Court struck down the "presidential emergency decrees based on the Yushin Constitution," "online real-name system," "minimum age requirement for holding public office," "male-oriented family head system," and "prohibition of communication restricting the freedom of expression in cyberspace."³

Besides, our Court has also handed down very important decisions that had a great impact on the society and are very rare and unprecedented even in international terms. A case involving the impeachment of an incumbent President of the Republic in 2004, a case where the Court ruled constitutionally incompatible the law allowing as much as three-fold population gap between electoral districts last year, and one in which the Court decided to dissolve a political party.

This shows that our Court is substantially exercising its powers over five areas

² <http://english.ccourt.go.kr/cckhome/eng/decisions/caseLoadStatic/caseLoadStatic.do>

³ <http://www.ccourt.go.kr/cckhome/kor/ccourt/news/selectNewNews.do?statusCRUD=R&searchClassCode=HPNOTICE&searchClassSeq=1351#>

vested by law, and that it stands as the final interpreter of the Constitution based on its decisions holding laws or actions unconstitutional, conditionally unconstitutional, and so forth. Consequently, our Court has enjoyed the honor of being voted by the public as the most trusted government institution for the past few years⁴.

Yet, there are a considerable number of people who warn about the possible dangers of readily handing over issues to the Constitutional Court instead of addressing them in the political arena, the issues that in fact should have been resolved through consensus between the ruling and opposition parties in the National Assembly.

III. International Cooperation and Activities of the Korean Constitutional Court

So far, I have focused on telling what the Korean Constitutional Court has done domestically to fulfill its duties, including safeguarding the Constitution and protecting the fundamental rights of individuals. Now, let me turn to the international activities our Court has been involved in.

Starting with our Court's activities within the Venice Commission⁵, the Republic of Korea joined the Venice Commission initially as an observer in 1999 and later became a member state in 2006. Currently, one member and one substitute member serve to represent Korea. Last year, we successfully hosted the 3rd Congress of the Word Conference⁶ on Constitutional Justice by working in close cooperation with the Venice Commission. And we believe that not just the existing activities within the Venice Commission, but this close cooperation with the Commission will also continue in many areas including the initiative to establish an Asian human rights court, which is reflected in the Seoul Communiqué⁷. In this context, it is very meaningful that Justice Kang Ilwon⁸ of our Court, who currently serves as an individual member of the Venice Commission, was elected as the Co-President of the Joint Council on Constitutional Justice in December last year.

Our Court considers the Venice Commission as a major avenue for sharing

⁴ <http://news.joins.com/article/12401877>, <http://news.joins.com/article/6855663>

⁵ <http://www.venice.coe.int/webforms/events/>

⁶ <http://en.wccj2014.kr/eng/index.do>

⁷ http://www.venice.coe.int/wccj/seoul/WCCJ_Seoul_Communique-E.pdf

⁸ <http://english.court.go.kr/cckhome/eng/introduction/organization/justices.do#none>

experience and wisdom between countries around the world on current constitutional issues, and we plan to reinforce our activities within the Commission through close cooperation.

Next, I will explain about our work in creating the Association of Asian Constitutional Courts and Equivalent Institutions⁹.

Starting from the 3rd Conference of Asian Constitutional Court Judges in 2005, the participants began discussing the need to establish an association composed of constitutional courts and other such courts exercising constitutional jurisdiction in Asia. From then on, the preparatory committee organized for the purpose of setting up such an association convened four meetings from 2008 to 2010, and the Korean Constitutional Court held the first three meetings except for the final one, playing a leading role in launching the association.

As a result of active work of participating members to the preparatory committee¹⁰ and continuing support from the Konrad-Adenauer-Stiftung, the member states, within three years of setting up the preparatory committee, specifically at its final meeting in July 2010, adopted the Jakarta Declaration that officially declared the establishment of the Association of Asian Constitutional Courts and Equivalent Institutions, also known as the AACC, and pledged to hold the Association's inaugural congress in Korea in two years. Thus, the historic Inaugural Congress of the AACC was held in Seoul in May 2012.

The foundation of the Association has a great significance in that it offers an official mechanism for mutual cooperation and permanent channel for cooperation between constitutional courts and equivalent institutions in the Asian region.

Our Court continued to build on this achievement, as we hosted the 3rd Congress of the World Conference on Constitutional Justice in Seoul, September last year. Under the topic of "Constitutional Justice and Social Integration," the Congress was attended by 306 participants representing 93 countries and 109 institutions. Not only the heads of constitutional courts, supreme courts, and constitutional councils around the world took part, but representatives of regional human rights courts as well as prominent leaders

⁹ <http://www.aaccei.org/ccourt?act=index>

¹⁰ <http://www.aaccei.org/ccourt?act=history>

from home and abroad including the Korean President¹¹ and UN Secretary-General Ban Ki-moon¹² showed great interest.

If there is one thing we regret, it is that the Chief Justice of the Japanese Supreme Court was unable to participate in that Congress due to inevitable circumstances, although the President of our Court had sent a special message through his letter extending a cordial invitation.

Maybe I could briefly go over the gist of what the participants intensely discussed at the Congress. As I mentioned, the main topic was "Constitutional Justice and Social Integration,"¹³ and the four sub-topics were: "Challenges of Social Integration in a Globalised World," "International Standards for Social Integration," "Constitutional Instruments Enhancing/Dealing with/for Social Integration," and "The Role of Constitutional Justice in Social Integration." Aside from the main topic, "Independence of Constitutional Courts-Stocktaking" was also extensively discussed, in a separate session, as a big challenge facing constitutional courts across the world.

In the sessions, the keynote speaker first presented a summary of replies submitted by the participating Courts to the previously distributed questionnaire, and this was followed by a general discussion.

Notably, in the second session, President Park Han-Chul¹⁴ proposed the need to work for establishing a human rights court in Asia in his keynote speech, and many Courts welcomed and expressed support for this idea.

After all the discussions following each session, rapporteurs of each session presented their respective summaries of discussions before closing of the Congress. The participants were very much impressed about the liveliness and high-level in which the discussion was conducted and expressed great satisfaction.

IV. Background on the Initiative to Lay the Foundation for Establish an Asian Human Rights Court

¹¹ http://www.venice.coe.int/WCCJ/Seoul/docs/WCCJ_opening_speech_ParkGeunHye_ENG.pdf

¹² http://www.venice.coe.int/WCCJ/Seoul/docs/WCCJ_opening_speech_Ban_ENG.pdf

¹³ <http://www.venice.coe.int/webforms/events/?id=1282>

¹⁴ http://www.venice.coe.int/WCCJ/Seoul/docs/WCCJ_key-note-session_2-Park_ENG.pdf

Now, I will turn to the last part of my speech, about the background behind our Court's initiative for the Asian Courts to engage in close cooperation and joint research to explore the possibility of a human rights court in the Asian region.

His proposal was welcomed by all participants of the 3rd Congress and was also reflected in the outcome document, the Seoul Communiqué.

It is known that human rights are soundly protected through various mechanisms, including national systems based on democratic constitutions, regional systems at the international level (by continent), and global systems such as the United Nations. As you may know well, continents such as Europe, America, and Africa already have regional human rights courts in operation, and Asia is the only region without one. In other words, this means that Asians still do not have a regional human rights system that goes beyond the national level.

We believe that it is time that Asia, as a region that has 60 percent of the world's population and is emerging as the center of world's production and consumption, get started with the talks to create a human rights system of its own.

As you know, the European Court of Human Rights was established on the basis of reflection on the Second World War. True, the UK, France and a few other major countries took the initiative, but it is also well known that post-war Germany was also actively involved in the establishment and operation of the European Human Rights Court.

The Inter-American Court of Human Rights¹⁵ runs somewhat loosely compared to the European Court of Human Rights, but it is to be noted that the American region also has established a regional implementation system to live up to international standards of protecting human rights.

In this respect, it is regrettable that Asia nevertheless has not yet developed its own human rights system. The Asian region still has causes for conflict attributable to the scars of war as well as ethnic and religious diversity. Establishing an international human rights court will provide an effective means to enhance the level of human rights protection based on the universal value of humanity, namely "human rights" and peacefully addressing potential conflicts in the region.

¹⁵ <http://www.corteidh.or.cr/index.php/en>

A number of countries are experiencing difficulties due to the recent economic slowdown and polarization. And this situation could be more dangerous for Asia where the state and people could easily come before human rights protection when seen from its past experience. For this reason, having national human rights issues linked and incorporated into the framework of international human rights system would be all the more important.

As part of the follow-up to the Seoul Communiqué, the Korean Constitutional Court is collecting information through interactions with human rights courts in other regions. It is very inspiring that the Venice Commission has expressed full support in this initiative, and many courts of constitutional jurisdiction in Asia have also shown positive response.

In fact, we at our Court are expecting the Japanese Supreme Court to also take interest and join in our initiative as well as the AACC. And we believe that the interest and attention of all of you here at this conference is crucial to that end. I hope to work together closely with you in the future and, with that, this concludes my presentation.