

**PRESENTATION AT THE WORLD CONFERENCE
ON CONSTITUTIONAL JUSTICE
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CONSTITUTIONAL REVIEW AND REGIONAL COOPERATION AMONG ASIAN COUNTRIES

Dear colleagues and distinguished guests from around the world,

It is a great pleasure to speak before you at this important conference. In this presentation, I would like to first briefly explain the current status of establishing the Association of Asian Constitutional Courts, which I believe would be essential for the cooperation among Asian constitutional courts and development of constitutional jurisprudence in Asian countries.

Then, to the best of my knowledge, I will explore the issues of constitutional review of social and economic rights and the influence of international human rights instruments on Asian constitutional review institutions.

It is to be noted that, due to the relatively short history of constitutional review and lack of permanent regional organizations of constitutional

review bodies in Asian countries, there have not been enough opportunities for Asian constitutional review institutions to share their experience and develop common jurisprudence with regard to the topics of this Conference.

I. Establishment of Association of Asian Constitutional Courts

When it comes to discussing constitutional justice in Asia, I am confronted with a difficult question; which countries belong to Asia? According to Wikipedia, a free online encyclopedia, Asia is defined as the world's largest and most populous continent. The region covers 8.6% of the Earth's total surface area and, with over 4 billion people, assumes more than 60% of the world's current human population. This means that it is not clear exactly what "Asia" consists of.

History, culture and political and economic environments differ from country to country in Asia, and such individual characteristics unique to countries also appear in constitutional review systems. After World War II, with the rise of modern constitutionalism, the system of constitutional

review spread worldwide to protect human rights. Some Asian countries joined such trend in the late 20th and early 21st centuries. For example, Korea, Indonesia, Mongolia and Thailand established independent constitutional courts while Japan, the Philippines, India and Malaysia adopted the American style of judicial review system under which judicial review authority is vested in courts. Meanwhile, in some countries such as Cambodia, the constitutional council performs judicial review. Yet, it should be pointed out that a considerable number of Asian countries still do not have any judicial review system.

National differences in constitutional review system and insufficient diffusion of judicial review resulted in the difficulty of establishing a permanent regional organization of constitutional review bodies among Asian countries, also leading to lack of resources to develop common jurisprudence in constitutional justice by exchanging ideas and experiences.

However, circumstances have changed with accumulation of experience among constitutional review bodies in some countries. As an increasing

number of cases were brought before the constitutional review bodies, they began to feel the necessity to refer to other countries' constitutional justice, especially when they faced unprecedented cases.

Against this background, the Conference of Asian Constitutional Court Judges, sponsored by the Konrad-Adenauer-Stiftung of Germany, has been held in Asian countries every year since 2003. This Conference was launched with the objective of promoting exchanges and cooperation among Asian constitutional courts and other equivalent institutions, as well as to facilitate experience sharing for deeper understanding of constitutional adjudication systems.

At the 5th Conference, which was held in Korea in 2007, the participating countries agreed on the need for an official regional organization of constitutional courts or its equivalent institutions in Asia, such as the Conference of European Constitutional Courts, in order to regularize their exchange of experiences in constitutional adjudication. As a result, they signed a memorandum of understanding geared to establish the Preparatory

Committee for the Association of Asian Constitutional Courts.

In April 2008, representatives of Korea, Mongolia, the Philippines, Indonesia and the Konrad-Adenauer-Stiftung attended the first meeting of the Preparatory Committee to discuss the details of establishing the Association. However, such efforts were put on hold as the second Preparatory Committee meeting and the 6th Conference of Asian Constitutional Court Judges in 2008 were canceled due to domestic circumstances of Indonesia, which was to host the meetings.

Notwithstanding the temporary discontinuance, however, our efforts to establish the Association of the Asian Constitutional Courts have not ceased. To expand the members of the Association, the Korean Constitutional Court, as the chair country of the Preparatory Committee, is trying to contact other Asian constitutional courts or its equivalent institutions which have not participated in the Conference of Asian Constitutional Court Judges. Furthermore, member countries are making efforts to hold the second meeting of the Preparatory Committee in Korea within this year to expedite the process of establishing the Association.

We all know from the significant achievements of the Venice Commission how important the role of international or regional organizations of constitutional review bodies is in disseminating constitutional justice and promoting the principle of the rule of law. In this regard, this World Conference on Constitutional Justice serves as a good momentum to remind us of the necessity to create a regional organization of constitutional justice and as a stimulus for active participation of Asian countries in such organizations. I sincerely hope that the aspiration and endeavors of the Asian countries to create the Association will come to fruition in the near future.

II. Constitutional Jurisprudence in Asian Countries

As I mentioned earlier, due to cultural diversity rooted in each country with individual histories and lack of a regional organization of constitutional review bodies in Asia, there is not much information available on constitutional jurisprudence of Asian countries with constitutional review

systems. And this situation is not much different from the issues to be covered at this Conference. Therefore, I will briefly touch on some of the topics of this Conference below with regard only to those countries which have participated in the Conference of Asian Constitutional Court Judges.

1. Social and Economic Rights

It seems that most Asian countries have some sort of social and economic rights in their constitutions. For example, the Constitution of Korea provides for the right to education (Art. 31), the right to labor (Art. 32), the right to collective bargaining and action (Article 33), the right to a life worthy of human being (Art. 34) and the right to healthy and pleasant environment (Art. 35). The Constitution of Mongolia incorporates the right to health and safe environment, the right to free choice of employment, the right to protection of health and medical care and the right to education (Art. 16).

Meanwhile, the Constitution of Indonesia stipulates the right to develop

oneself through fulfillment of basic needs, the right to obtain education (Art. 28C Para. (1) of the 1945 Constitution), the right to live a physically and mentally prosperous life, the right to obtain proper and healthy environment (Article 28H Para. (1) of the 1945 Constitution) and the right to social security (Art. 28H Para. (3) of the 1945 Constitution).

In fact, the extent to which such social rights are protected would vary between countries according to their social, economic, and political circumstances. Unlike civil and political rights, social rights have not been given much constitutional protection. The rule of law in a modern welfare state requires more than protecting the freedom of individuals by passively restraining the government power; it demands the state to affirmatively guarantee people the minimum level of living. Without the fulfillment of the basic level of living, civil and political rights under the Constitution would not be effectively exercised. In this sense, the constitutional review institutions face a new challenge of realizing social rights within the constraints of available resources.

2. Influence of International Human Rights Instruments on Asian Constitutional Review Institutions

In general, Asian constitutional courts or its equivalent institutions seem to recognize the normative power of the international human rights instruments in constitutional adjudication.

In the case of Korea, the Constitutional Court has cited international instruments as well as foreign laws in many cases, and such instruments serve as very useful references in resolving cases. Yet the Korean Constitutional Court seems cautious about utilizing the international instruments as a standard of reviewing the constitutionality of statutes.

In the Philippines, customary international law has been incorporated into its law of the land as demonstrated in Section 2, Article II of the Philippine Constitution, which provides that the Philippines adopt the generally accepted principles of international law as part of the law of the land and

adhere to the policy of peace, equality, justice, freedom, cooperation and amity with all nations. In a case where at issue was the legality of search and seizure while no Constitution was in effect in the country, the Supreme Court of the Philippines said that, even in the absence of the Constitution, the right against unlawful seizure was maintained under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.¹

The Indonesian Constitutional Court has employed international law several times, though not as the main law source, in deciding upon cases by carefully studying international law sources and practices of constitutional courts in other countries. With respect to former members of the now-defunct Indonesian Communist Party, the Indonesian Constitutional Court declared that every citizen shall have the equal right to elect and to be elected and to participate in voicing his or her aspiration by referring to Article 25 of the International Covenant on Civil and Political Rights.

¹ Excerpts from the presentation paper of Hon. Justice Adolfo S. Azcuna of the Supreme Court of the Philippines, “Constitutional Standard for Civil, Political & Socio-Economic Rights,” presented at the 5th Conference of Asian Constitutional Judges on October 10, 2007 in Seoul, Korea (hereinafter “the 5th Conference of ACJ”).

Furthermore, the Universal Declaration of Human Rights has been repeatedly used as a reference by Justices in considering their cases.²

To conclude, constitutional review is designed to protect the fundamental values of a society, and those values are the basic rights and freedoms to which all humans are entitled. In this regard, despite the differences in constitutional review institutions among countries, the ultimate goal to be accomplished through constitutional review would be the very same. Therefore, a constitutional jurisprudence developed in one country is universal in content and thus might be transplanted to other countries. There is no doubt that such exchange of theories and experiences will contribute to the construction of common norms in basic rights and freedoms.

And I personally wish that despite all the national and cultural differences, regional human rights instruments and even a regional court, such as the

² Excerpts from the presentation paper of Hon. Justice Dr. Harjono of the Constitutional Court of the Republic of Indonesia, “The Indonesian Constitutional Court,” presented at the 5th Conference of ACJ.

European Court of Human Rights, would come into place in the near future through mutual understanding of universal values embodied in human rights and accumulation of constitutional theories. That said, I would like to conclude my presentation by saying that this World Conference on Constitutional Justice does, as I speak, and will make great contributions to the advancement of global constitutional jurisprudence.

Thank you very much for your kind attention.