

# **International Cooperation in Constitutional Justice for the Protection of Universal Human Rights**

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## **I. Introduction**

Let me first congratulate the Constitutional Court of the Russian Federation on its 25th anniversary and express my respect for what it has achieved over the years. It is my great pleasure to share my views with you on the challenges and prospects of modern constitutional justice on this very meaningful occasion.

For the past 25 years, the Russian Constitutional Court, as the guardian of the fundamental rights of the Russian people and the Constitution, has been actively engaging in the exchange with the Constitutional Court of Korea by sharing experiences and wisdom and is contributing to the advancement of democracy in the Asian region. President Valery Zorkin visited the Korean Constitutional Court to attend the 3rd Congress of the World Conference on Constitutional Justice in 2014 as well as on many other occasions, while former Presidents of the Korean Constitutional Court, Kim Yong-Joon and Lee Kang-Kook, also visited St. Petersburg to discuss issues of constitutional justice and strengthen friendship with the Russian Constitutional Court.

This robust exchange between our two Courts has, in fact, been very beneficial for the promotion of fundamental rights and the development of constitutional justice in both Russia and Korea.

It is to be noted that it was only after World War II that discussions about how to strengthen the international networks of constitutional justice and human rights began. After the Second World War, a number of new institutions came into being and developed as a result of remorseful reflection on the atrocities of human rights violations committed in the past.

Under those circumstances, constitutional justice evolved as the most concrete and direct form of human rights protection at the national level. And more recently, the world has moved in the direction of reinforcing international networks for human rights protection, under the idea that a human rights violation is not just a matter of one country but can pose a major threat to regional and international peace.

Thanks to such remarkable progress in human rights awareness, we have witnessed the development of international human rights instruments led by the United Nations, which are designed to protect human rights at the global level, as well as some regional human rights systems that represent joint efforts for human rights protection at the regional level. The most prominent example of the latter is Europe's regional system for the protection of human rights, including the European Court of Human Rights.

In this regard, let me mention here that I asserted the necessity and importance of a regional human rights mechanism for Asia to promote the freedom and human rights of the Asian people at the 2nd Congress of the Association of Asian Constitutional Courts and Equivalent Institutions, or AACC, in Istanbul, Turkey in April 2014. I also proposed an initiative to establish an Asian court of human rights at the second session of the 3rd Congress of the World Conference on Constitutional Justice held in Seoul, Korea in September 2014, which was in turn reflected in the Seoul Communiqué, an outcome document of the Congress unanimously adopted by the participants.

Today, here in my presentation, I would like to talk about the need for international networks or cooperative frameworks to protect human rights and ways to make this possible. More specifically, I will elaborate on "concrete action plans" to establish a regional human rights system for Asia.

## **II. Constitutional Justice and International Networks**

### **A. Remedies against human rights violations by national constitutional courts**

A constitutional state has to provide judicial remedies to individuals when their rights have

been violated. Otherwise, the human rights enumerated in the Constitution will be nothing but a text with no normative force.

Many constitutional courts around the world, including those of Russia and Korea, have been upholding, in many decisions, the fact that it is the duty of the state to protect the people when their fundamental rights have been violated and offer them appropriate remedies.

#### B. Importance of networking between constitutional courts

However, a judgment by a national constitutional court has some limitations given its limited jurisdiction. This is where the international networks and partnership need to come into play.

The Vienna Declaration, which was adopted on June 25, 1993 following the World Conference on Human Rights, states on the universal aspect of human rights derived from human dignity, the need for taking joint action or cooperation among states for effective guarantee thereof, as well as the necessity to conclude international instruments and establish international systems for human rights protection.

In particular, national borders should not serve as obstacles when addressing issues which require respect for universal human rights, such as serious violations against humanity. It is imperative that the international community develop a fundamental solution to eradicate and prevent serious violations against humanity and thereby prevent the recurrence of tragedies caused by crimes against humanity. In other words, this is a common challenge for humanity.

We may think of two options for dealing with this challenge.

First is the networking among courts of constitutional jurisdiction around the world, as the guardians of the rights of individuals. Constitutional courts serve as the last resort for the protection of human rights at the national level, and the networking among them will not only offer valuable opportunities to share experiences and wisdom on human rights protection but will also reduce the risk of countries losing objectivity and universality by being preoccupied with their own circumstances and cultures.

There are already a number of platforms of cooperation among constitutional courts, such as the Conference of European Constitutional Courts, the Association of Constitutional Courts using the French Language, the Union of Arab Constitutional Courts and Councils, and in Asia, the AACC, which was established in May 2012 with the Korean Constitutional Court playing a leading role. The AACC started off with seven member states, but now it has as many as 16 member states. There is also the World Conference on Constitutional Justice, which brings together all these regional and linguistic groups of constitutional courts.

Based on these cooperative frameworks of constitutional courts and with the compilation of case-laws of countries around the world, we will be able to discuss issues of universal human rights, including the establishment of a mechanism to provide remedies to victims of serious human rights violations and ways to improve relevant systems, and continue to build consensus on the importance of international human rights standards.

Nevertheless, the regional or linguistic groups of constitutional courts have limitations in that they, in themselves, lack legal binding force.

### C. Regional human rights mechanisms

This shortcoming can be mitigated by regional human rights mechanisms. The regional human rights mechanisms established by multilateral international treaties have an advantage in that the states have consensus on the specifics of human rights guarantees, and in that they are operated according to enforceable agreements even on issues such as the investigation, judgment, and execution regarding the acts of violation. In addition, mutual supervision and pressure among the states can ensure the implementation of decisions taken by regional human rights bodies, which is likely to promote social cohesion and effective protection of human rights.

These regional human rights systems that may reflect regional characteristics can function in a mutually complementary manner with universal human rights systems, such as the UN Human Rights Council and the Office of the UN High Commissioner for Human Rights.

At present, we have regional systems in place in Europe, America, and Africa, namely the European Court of Human Rights (1959), the Inter-American Court of Human Rights (1979), and the African Court on Human and Peoples' Rights (2006), respectively. They have binding international instruments as their basis, and the states will be held legally responsible for any violation of their international commitments.

One of the key elements behind Europe's success in protecting human rights, advancing democracy and implementing the rule of law, thereby bringing peace and integration to the region after World War II was, in fact, the existence of the European Court of Human Rights. As demonstrated in the case of Europe, a regional human rights system can improve the human rights situation of the entire region through constant communication with the region's constitutional courts and broaden the consensus on human rights, democracy, and the rule of law throughout the region.

Yet, it should be noted with regret that Asia, where 60 percent of the world's population resides and where Russia and Korea belong, is the only region in the world that has no regional human rights court. This is truly unfortunate if we consider the disturbing human rights situations in some parts of the region and its tragic history, as, unlike Europe, reflections and apologies are still needed, in order to resolve the issues related to human rights violations in the past including the violations during World War II.

### **III. Ways to Pursue the Initiative for an Asian Court of Human Rights**

#### **A. General agreement on human rights protection**

By adopting the "Seoul Communiqué" at the 3rd Congress of the World Conference on Constitutional Justice held in Seoul in 2014, the constitutional courts of countries across the world expressed general support and appreciation for the proposal of the Korean Constitutional Court to create a human rights court in Asia.

The goal of this initiative is to prevent the recurrence of so many human rights abuses that

occurred in Asia in the past century and resolve this issue from a future-oriented perspective.

As a matter of fact, the constitutional courts in Asia have also engaged in the exchange of experiences and wisdom on constitutional law and constitutional justice under the framework of the AACC. It is already generally agreed among Asian countries that the inviolable rights of individuals have to be guaranteed. If the Asian countries can see eye to eye on the need for human rights protection at the regional level and agree on concrete action plans to that end, I believe the historical and cultural differences of the region will not be a major issue.

#### B. Starting with limited jurisdiction and its gradual expansion

1. Still, we have to admit that the differences in politics, religion, culture, economy, and history among Asian countries imply limitations in creating a human rights court that matches the level of the European Court of Human Rights right from the start. Enforcing an extensive list of human rights from the beginning may backfire, and the execution and implementation of the court's judgments may become irrelevant as a result.

Under the circumstances, it would be most feasible and practical to begin with a human rights court that safeguards a short list of human rights with a set of minimum standards that would hardly be opposed by any state despite the numerous differences that they may have. The court could evolve over time and have a more inclusive and expansive list of universal human rights later on.

We may take an incremental approach, by initially starting with some countries that may agree to a common mechanism for human rights protection and gradually expanding the membership moving forward. It took quite a while even for Europe or America to see their regional human rights systems take root.

2. The ultimate role of the Asian Court of Human Rights would be to promote human rights and establish peace in the region based upon self-reflection on the atrocities of human rights violations.

Then it would be necessary to start from the most pressing issues—the most serious and damaging violations. We may first think of providing special protection to the most vulnerable groups in society and regulating the most serious and cruel violations of human rights.

More specifically, we may give particular attention to genocide, women, and children. If possible, establishing more specific standards would be a way to encourage more countries to join in, as it would be easier for them to agree on and, at the same time, understand and be ready for what they are subject to.

3. First, the prohibition of genocide was set forth in the first-ever international convention on human rights after the Second World War, namely the Convention on the Prevention and Punishment of the Crime of Genocide, which stands as the most prominent *jus cogens* that binds all countries throughout the world regardless of whether they are parties to the instrument or not.

In this civilized 21st century, we can never, under any circumstances, tolerate the acts committed with the intention to partially or entirely destroy national, racial, ethnic, or religious groups, murders of group members, acts causing major physical or psychological harms, intentional measures to prevent child birth in certain groups, and forced transfer of children in certain groups.

4. Second, the Asian Court of Human Rights should regulate the violence against women, which has been witnessed repeatedly in the history of humanity.

Violence against women should not just be understood in the physical sense of the word, but should include all forms of violence that may cause sexual, mental, and financial harms. In particular, the prevention of violence against women in wars or regional military disputes is a common challenge faced by humanity that should be given top priority.

5. Third, children, the other most vulnerable group, should be protected. Considering the nature of children, the most pressing issues that require special protection and thus should be addressed by the Asian Court of Human Rights are, among others, trafficking and sex

trafficking of children, employment of child labor, and military use of children.

6. This proposition of prompt establishment of an Asian human rights mechanism is very important. That is why I have proposed three forms of violations against humanity that require the most urgent attention and intervention from the regional system. I have mentioned them as an example, so any other human rights that are subject to such serious violations should be added to the list.

If there are any other human rights accepted by all member states, a more inclusive list could be made in the human rights charter from the early stage. The number of human rights on the charter will gradually grow over time with follow-up agreements.

7. Furthermore, if some states are willing to accept “discretionary jurisdiction” of the Asian Court of Human Rights as to certain human rights protections derived from international human rights conventions to which they are already a party, the Court would be given the power to hear a larger scope of cases with regard to those countries.

8. In fact, there are many examples in history that tell us it takes a very long time to finalize the list of human rights to be included in the human rights charter. For this reason, I propose that we launch a regional human rights mechanism first and then develop an Asian human rights charter that is more inclusive.

While this is in the making, ways to provide stronger, more seamless protection might be considered. For example, we may include additional rights by taking into account the uniqueness of the Asian region, certain rights can be fine-tuned, or procedural flexibility may be sought for circumstantial changes.

In the beginning, we may allow the states to choose the provisions of the charter they are willing to accept as binding international obligations, like the European Social Charter (in which the states must accept at least six out of nine so-called “core” provisions and 16 articles out of 31 in total). In other words, some provisions can be reserved for later ratification. However, we can also have a procedure to regularly confirm the ratification

status of the remaining provisions.

In this process, it would be preferable that constitutional courts, government institutions with powers to sign and ratify treaties, major human rights groups, and human rights commissions all get involved and engage in a comprehensive dialogue.

### C. Limitation on applications

As in the case of Europe, the Asian Court of Human Rights, in its early stage, can make its jurisdiction, including jurisdiction over individual applications, optional and take this further after the system is stabilized.

In fact, it has to be discussed with flexibility as to whether the court will exercise mandatory jurisdiction over the acts of violating human rights conventions from the start, whether a human rights commission will be set up as an interim body, or whether the court will deal with individual applications.

In the initial stage, introducing the jurisdiction over individual applications can be put off until later as a long-term task, and the Court may begin by hearing the cases referred to it by the human rights commission or other international human rights bodies. Over time, we will be able to enhance the level of human rights protection and the effectiveness of its guarantees.

### D. Effective remedies

Yet, while being able to limit the list of rights and methods of applications, the states should still take on legal obligations to comply with the rulings of the Asian Court of Human Rights and offer effective remedies such as financial compensation to the parties concerned. The Court is also required to supervise whether its rulings are properly enforced in the states in question, and secure indirect measures to enforce the implementation of those obligations. If the Court decides that there has been a violation of human rights, the state in question should amend the laws to meet the standards set forth by the Court and improve its relevant practice accordingly.

One of the initial tasks that can be performed by the Asian Court of Human Rights or the human rights commission would be to collect and review the reports on human rights situations of the states, conduct field studies on human rights conditions, identify, document, and research materials related to human rights violations, and to carry out training for public officials. This way, the member states can go beyond just fulfilling their passive obligations to avoid violations of rights laid out in the convention but also provide guarantees more proactively.

#### E. Composition of the Asian Court of Human Rights

Of course, the precise composition of the Asian Court of Human Rights should be defined in an international treaty, but we may refer to the organization of the European Court of Human Rights, where the number of judges is the same as that of member states and only one judge represents each state.

For instance, the judges of the European Court of Human Rights are elected by the Parliamentary Assembly of the Council of Europe by a majority vote from among the three candidates nominated by the respective states. The candidates must be a person of high morality with qualifications to be appointed to high-level judicial posts or accredited jurists. For the purpose of reinforcing the independence and impartiality of judges, the term of a judge is fixed at nine years and is not renewable.

When there are not so many cases to deal with in the early stage of the Court's establishment, the judges may also work on a non-permanent basis.

#### F. Involvement of constitutional courts

It is imperative that national constitutional courts, as the guardian of human rights, democracy, and the rule of law in their respective countries, involve themselves in the course of creating the Asian Court of Human Rights. The AACC, which covers major countries from East Asia and Southeast Asia to Southwest Asia and Central Asia, is an appropriate body that

can play a huge role in adopting a human rights convention, as well as establishing a human rights commission and a human rights court in the Asian region.

Admittedly, it should be the governments and parliaments of each country that should be responsible for the ratification and approval of the finalized treaty. However, in order to develop a shared understanding and momentum throughout Asia for the initiative to create a human rights court for regional human rights protection, it is preferable that the AACC and its member constitutional courts take the lead, as they are the ones that have played critical roles in advancing democracy, protecting human rights, and establishing the rule of law.

#### **IV. Conclusion**

In the last century, Asian countries experienced wars and serious violations of human rights, and one of the main reasons for this was the disrespect for the human dignity and human rights of individuals.

Just as the European Court of Human Rights founded on respect for human rights brought integration and peace to the region, the activities of the Asian Court of Human Rights will bring the region under the common goal of protecting universal human rights. Above all, creating the Asian Court of Human Rights will present us with a significant opportunity to learn lessons from history.

By overcoming regional disputes under the framework of the Asian Court of Human Rights, we will be able to benefit from a mechanism that will prevent the recurrence of wars and massive violations of human rights and secure, in the long-term perspective, the enhancement of universal human rights and peace in the Asian region. This will offer a foundation for historical reflection on the human rights violations that are yet to be resolved fully, unlike Europe, and a good starting point for regional harmony, headed for a bright future.

At the same time, the Asian Court of Human Rights will establish a framework for international cooperation to provide guarantees for the respect of human rights and human

life and secure, at the regional level, the prevention of violations against humanity and the implementation of remedies for victims. By doing so, the Court will enable the promotion of human rights and a remarkable progress in world peace. I believe it will make a tremendous contribution to the promotion of universal human rights, advancement of democracy and the rule of law, as well as regional peace.

Again, I would like to take this opportunity to express my respect and compliments to the Russian Constitutional Court for its magnificent role in protecting the Constitution and the fundamental rights of the Russian people for the past 25 years.

I hope that the Constitutional Courts of Russia and Korea will continue to work together towards building an international platform of cooperation in order to confirm and protect universal human rights in Asia.

Thank you for your attention.