



## **Key-note Speech**

### **5<sup>th</sup> Congress of the World Conference on Constitutional Justice**

#### **Session D**

### **“Fundamental Principles: the Protection of Human Rights, Democracy, and the Rule of Law as a Precondition to Peace”**

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#### **Introduction**

His Excellency Gianni Buquicchio, President Emeritus, Special Representative of the Venice Commission, His Excellency Anwar Usman, Chief Justice of the Constitutional Court of Indonesia, Distinguished Presidents of Constitutional Courts, Presidents of Constitutional Councils, Chief Justices of Supreme Courts, and Ladies and Gentlemen,

It's a distinct pleasure for me to address you today. I would like to extend my sincere congratulations and gratitude to those who thoroughly prepared for the success of this Congress, as well as the previous ones, and to all the participants who are here today.

I am most honored to be the keynote speaker for Session D of the 5<sup>th</sup> Congress, representing the Constitutional Court of Korea, which had the honor of hosting the 3<sup>rd</sup>

Congress of the World Conference on Constitutional Justice.

As is known, this Congress is split into five sessions under the theme of “Constitutional Justice and Peace.” Previously, we discussed the source of law in peace deriving from the Constitution and law, its realization, and the roles of constitutional adjudicatory bodies during the realization process. The topic of this session is “Fundamental Principles: the Protection of Human Rights, Democracy, and the Rule of Law as a Precondition to Peace.”

This session presents us with a valuable opportunity to define the concrete relationship between peace and constitutional principles such as the protection of human rights, democracy, and the rule of law. If we examine the case law of each country for the same matter, we are able to better understand constitutional systems and practices in maintaining peace in different countries. I would like to add some of my points of view on this appropriate and essential topic based on the submitted replies.

According to Johan Galtung, the pioneer of peace studies, “peace” encompasses negative peace, meaning the absence of direct violence, and positive peace, meaning the absence of all forms of violence, including the structural one. *Declaration on the Right of Peoples to Peace* (UN Doc. A/RES/39/11), adopted at the UN General Assembly in 1984, includes the values of “passive peace,” which holds in high regard life without war or the use of force, and “active peace,” which places an importance on improving the quality of life based on the passive peace.<sup>1</sup>

“Peace” in constitutional states, too, in a positive sense, refers to the one formed through

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<sup>1</sup> “Convinced that life without war serves as the primary international prerequisite for the material well-being, development and progress of countries, and for the full implementation of the rights and fundamental human freedoms proclaimed by the United Nations...Recognizing that the maintenance of a peaceful life for peoples is the sacred duty of each State...Emphasizes that ensuring the exercise of the right of peoples to peace demands that the policies of States be directed towards the elimination of the threat of war, particularly nuclear war, the renunciation of the use of force in international relations and the settlement of international disputes by peaceful means on the basis of the Charter of the United Nations.”

the basic principles of the Constitution, such as freedom, fundamental rights, democracy, and the rule of law, and the fundamental value. As we've seen in the previous sessions, most countries today relate peace to these constitutional values. In this presumed peace, human beings go beyond enjoying economic and social conditions to meet the essential needs for survival; the Constitutional Court of Korea suggests human beings, for example, not as *Monade*, who are "subjective individuals being isolated from the society or simple constituents of a community," but as "democratized citizens who responsibly lead their own lives within the social community based on their views on life and society."<sup>2</sup>

In constitutional states today, national systems are essential in realizing constitutional values and maintaining peace. The Constitutional Courts, Constitutional Councils, or Supreme Courts (hereinafter referred to as "constitutional adjudicatory bodies"), which attempt to render constitutional interpretation and jurisdiction to resolve social conflicts, are part of vital systems in realizing sustainable peace. These institutions do not just resolve legal disputes between individual parties, but conduct a comprehensive review to protect human rights and ensure democracy and the rule of law more broadly at the constitutional level. As constitutional legitimacy is given to the activities of these institutions, safety, integration, and social peace that people are longing for can be achieved. Though there are certain differences, the replies from the Member States agree on the idea that the role of constitutional adjudicatory bodies in protecting human rights and ensuring democracy and the rule of law contributes to social peace.

Based on the replies, I shall proceed in three parts. Each part is in the same order as the questions in the questionnaire. All three parts are about the presence and content of case law contributing to peace of Member States; they elaborate on case laws of human rights, democracy, and the rule of law, respectively. Now I will present the replies from the Member States to these three orderly.

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<sup>2</sup> Constitutional Court of Korea's ruling of 98Hun-Ka16 et al., April 27, 2000; 2002Hun-Ma518, October 30, 2003; 2018Hun-Ma551, April 23, 2020.

**1. Do you have case law showing that the protection of human rights contributed to peace?**

The constitutional adjudicatory body of each country prioritizes protecting human rights, releasing a number of related case laws. The countries that referred to case law, which shows that the protection of human rights contributed to peace, mainly introduce case law and constitutional adjudicatory systems for the protection of human rights, which they believe might resolve conflicts and stabilize the society, thereby bringing about positive effects of achieving social peace.

Finding the death penalty and the criminal punishment for conscientious objectors of military service unconstitutional is part of that case law which stresses the absolute value of human dignity.<sup>3</sup> In ensuring humane life, an emphasis is placed on the right to access not only necessities and water for physical survival, but also social infrastructures such as electricity and gas.<sup>4</sup> Moreover, there is also case law that holds that minimum quality of life should be guaranteed the possibility of social participation, such as in social, cultural, and political life. Also, in order to realize such social justice, it is recognized that countries should take active measures to ensure a certain standard of living for citizens.<sup>5</sup> There is also a case in which the Court provided certain conditions for the exercise of the right to strike, which contributed to the peaceful settlement of labor disputes.<sup>6</sup> What was noticeable were the cases that highlight

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<sup>3</sup> The Constitutional Court of the **Republic of Lithuania**'s ruling of 9 December 1998 et al., which rendered its opinion of unconstitutionality on the death penalty; The Constitutional Court of the **Republic of Indonesia**'s Decision, which emphasized the importance of suggesting objective standards for the execution of the death penalty: Number 21/PUU-VI/2008 about Judicial Review of Law Number 2/Pnps/1964; Constitutional Court of **Korea**'s ruling of 2011Hun-Ba379 et al., June 28, 2018, which rendered its opinion of unconstitutionality on the provisions of Military Service Act that punishes conscientious objectors of military service, urging for the adoption of an alternative service system.

<sup>4</sup> Constitutional Court of the **Dominican Republic**, Judgments TC/0289/16 and TC/0482/16; Supreme Court of **Pakistan**, Suo Motu Case No. 19 of 2016 and Iqbal Zafar Jhagra v. Federation of Pakistan (PTD 2014 Supreme Court 243).

<sup>5</sup> Federal Constitutional Court of **Germany**, BVerfGE 125, 175 [Hartz IV basic rate, 2010] = GER-2010-1-003; BVerfGE 152, 68 [Sanctions imposed under social law, 2019] = GER-2019-3-022.

<sup>6</sup> Federal Supreme Court of **Switzerland**, BGE 125 III 277, para. 2 and recital 3b.

the basic procedural rights<sup>7</sup> and the realization of transitional justice. Declaring draconian measures against human rights under the non-democratic government in the past unconstitutional or resolving social conflicts and later achieving social integration by presenting standards for damage recovery such as the process of restitution and compensation of property, is a case in point.<sup>8</sup>

The most prominent feature of the replies is that case laws that prohibit discrimination against minorities and stress the importance of the principle of equality occupy the largest proportion. Many countries have suggested various case laws that ban discrimination against religion, sex, disability, nationality, language, sexual orientation, and socially vulnerable groups. Simply put, these include cases that prohibit discrimination against women<sup>9</sup>, persons with disabilities<sup>10</sup>, foreigners<sup>11</sup>, persons infected with HIV/AIDS<sup>12</sup>, transgender people<sup>13</sup>, homosexuals<sup>14</sup>, religious minorities<sup>15</sup>, and ethnic minorities who use a specific language<sup>16</sup>. Considering that it is taken for granted nowadays that everyone feels that their dignity is ensured by being treated the same as others, it is not surprising that different countries, which

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<sup>7</sup> Constitutional Court of the **Dominican Republic**, Decision TC/0058/13, etc.; Decision of the Constitutional Court of **Romania** (to the same effect the judgment of the ECtHR of 7 March 2017 in *Cerovsek and Bozicnik v. Slovenia*, application No 233/2021).

<sup>8</sup> Constitutional Court of **Albania**, Decision no.27/2010., Federal Constitutional Court of **Germany**, BverfGE 95, 96 [Border guards, 1996] = GER-1994-3-029.

<sup>9</sup> Constitutional Council of **Cambodia**, Decision no. 09 CC.D. of 28 May 1999; Federal Supreme Court of **Switzerland**, ATF 116 Ia 359; Constitutional Court of the **Kingdom of Thailand**, Ruling No. 21/2546 (2003) Dated 5th June B.E.2546 (2003).

<sup>10</sup> Supreme Court of **Cyprus**, *Costas Tsikkas et al v. The Republic of Cyprus through the Educational Service Committee*, Case Nos. 1519/2010 and 1520/10, dated 3/9/2015; Constitutional Court of **Moldova**, MDA-2018-3-008.

<sup>11</sup> Constitutional Court of **Italy**, Judgment No. 252 of 2001.

<sup>12</sup> Decision of the Constitutional Court of **Mongolia**.

<sup>13</sup> Constitutional Council of **Cambodia**, Decision No. 107/003/2009 CC.D of 3 December 2009; Supreme Court of **Pakistan**, *Muhammad Aslam Khaki v. SSP (Operations) Rawalpindi* (PLD 2013 Supreme Court 188).

<sup>14</sup> Judgment of the Constitutional Court of **Georgia** # 2/1/536 of 4 February, 2014 in the case of “*Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. Ministry of Labour, Health and Social Affairs.*”

<sup>15</sup> Supreme Court of **Pakistan**, *Asia Bibi v. State* (PLD 2019 Supreme Court 64).

<sup>16</sup> Constitutional Council of **Kazakhstan**, Normative resolution №3 dated 23 February 2007; Constitutional Court of the **Russian Federation**, Decision of 9 March 2017 No. 462-O; Federal Supreme Court of **Switzerland**, ATF 91 I 480.

have different cultures and social structures, all have similar case laws. As a precondition to social peace, ensuring diversity contributes to building a pluralist and tolerant society.<sup>17</sup>

Generally, each country's constitutional adjudicatory body makes continuous efforts to protect human rights and realize peace through the application of constitutional provisions. Some countries believe that the scope of protecting human rights can be enlarged through constitutional interpretation even when there is no explicit constitutional provision.<sup>18</sup> This means that constitutional adjudicatory bodies are entrusted with the important tasks of concretizing concepts such as the protection of human rights and realization of peace when neither of these concepts is explicitly prescribed in the Constitution, or the provisions of human rights in the Constitution are insufficient.

We can reach the following conclusion from the overlapping consensus in the replies. Constitutional adjudicatory bodies play a pivotal role in creating a safety net for maintaining and realizing social peace by guiding and encouraging citizens, the legislative, the executive, and other government agencies to protect human rights guaranteed by the Constitution. In many countries, a party whose fundamental rights are infringed by law or state power can directly request relief procedures such as the adjudication on the constitutionality of statutes or constitutional complaints, showing that citizens can directly participate in the process of settling conflicts and disputes.<sup>19</sup> This indicates that citizens can contribute directly to maintaining and restoring social peace and reminds them that they can play a part in protecting human rights. In particular, these rights are also granted to those deemed minorities among citizens, so those who think that their legal interests have been overlooked

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<sup>17</sup> Ruling of the Constitutional Court of **Portugal**.

<sup>18</sup> Case law of the Constitutional Court of **Italy** (e.g. the right to privacy: Judgment No. 38 of 1973; the right to sexual freedom: Judgment No. 561 of 1987; the right to housing: Judgment No. 404 of 1988; the right to self-determination in the private sphere: Judgment No. 332 of 2000; the right of homosexual persons to live freely as couples: Judgment No. 138 of 2010; the right to one's gender identity: Judgment No. 118 of 2015; the principle of informed consent: Order No. 207 of 2018).

<sup>19</sup> Constitutional Court of **Gabon**, Decision No. 022/CC of 26 May 2015; Constitutional Court of **Lithuania**, ruling of 29 December 2004.

or undervalued in the political process can use the courts to resolve their disputes with the majority peacefully rather than resort to force, thereby preventing physical conflict and contributing to the realization of peace.<sup>20</sup>

Ensuring human rights and human dignity through constitutional adjudication is a crucial precondition to the realization of peace, but certain balancing is necessary to maintain social peace in cases where the rights and interests of different parties are conflicted. There are also many case laws showing that restrictions on some of the fundamental rights of individuals, such as freedom of expression, may be allowed to protect the rights of others.<sup>21</sup> That is, even if the fundamental rights of either party are partially restricted, constitutional adjudicatory bodies should comprehensively examine all circumstances and maintain balance so that social peace as a whole, not dispute resolution only for some, can be maintained. Ultimately, it is approved in many countries that in the process of comprehensive review, the principle of proportionality matters.<sup>22</sup>

Let me conclude the first part of my speech. As seen in a majority of replies, case laws on the protection of human rights through direct application of constitutional provisions or constitutional interpretation directly or indirectly contribute to the realization of peace.

## **2. Do you have case law showing that the protection of democracy contributed to peace?**

Let me move on to the second point. The fact that democracy and peace are closely related has been studied in many ways, especially in international politics. The topic we will cover today is how constitutional states relate to and shape the two concepts of democracy and

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<sup>20</sup> Replies of the Supreme Court of **Canada**.

<sup>21</sup> Constitutional Council of **France**, Decision No. 2011-131 QPC of 20 May 2011; Constitutional Court of **Spain**, STC 140/1986 of 11th November.

<sup>22</sup> Constitutional Court of **Albania**, Decision no.27/2010; Constitutional Court of **Lithuania**, ruling of 29 December 2004; Constitutional Court of **Indonesia**, Decision number 065/PUU-II/2004; Cases of the Constitutional Court of **Moldova**; Constitutional Court of **Ukraine**, Decision No. 2-rp/2016 dated June 1, 2016.

peace in their own legal order.

Although constitutional adjudication rarely defines the relationship between democracy and peace clearly, most countries recognized their interdependence. According to the submitted replies, constitutional adjudicatory bodies have contributed to protecting the fundamental rights essential to the political decision-making of people, such as freedom of expression<sup>23</sup>, freedom of the media<sup>24</sup>, the right to vote<sup>25</sup>, and the right to serve in public offices<sup>26</sup>, and ensuring freedom of election campaigns.<sup>27</sup> When these basic political rights are protected, better functioning democracies have a better capacity to respond to the needs of the public, and thus various social conflicts are better managed in the political process.

In many countries, constitutional adjudicatory bodies have the authority to examine elections. Therefore, a considerable amount of the replies focus on the cases of election examination.<sup>28</sup> They emphasize the realization of the fundamental principles of the election to ensure the equal value of the vote through the correction of institutional deficiencies in the election process<sup>29</sup> and adjustment of electoral districts<sup>30</sup> and unhindered expression of the

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<sup>23</sup> Constitutional Court of **Albania**, Decision no.16 of 11 November 2004; Constitutional Council of **France**, V. Cons. const., décision n° 2019-780 DC of 4 April 2019, Loi visant à renforcer et garantir le maintien de l'ordre public lors des manifestations, paragr. 8.

<sup>24</sup> Replies of the Constitutional Court of **Albania**.

<sup>25</sup> Supreme Court of **Canada**, ruling in favor of the right to vote of prisoners (Sauvé c. Canada (Directeur général des élections), [2002] 3 R.C.S. 519, 2002 CSC 68) and of Canadians living abroad for more than 5 years (Frank c. Canada (Procureur général), 2019 CSC 1); Constitutional Court of **Indonesia**, case on voter registration (Decision Number 102/PUU-VII/2009).

<sup>26</sup> Replies of the Constitutional Court of **Benin**; Constitutional Court of **Mongolia**, Resolution No. 06 of 14 May 2008.

<sup>27</sup> Constitutional Court of **Gabon**, decision on equal access for all candidates in a political election to the state media during the election campaign (Decision No. 14/91 of 28 February 1992).

<sup>28</sup> Constitutional Council of **Algeria**, Decision No. 20/D.CC/19 of 1 June 2019; Constitutional Court of **Austria**, which explained the authority to examine election results (e.g. election for the Federal President, elections to parliamentary bodies as well as to local government bodies and ruled that the run-off election of the Federal President had to be repeated: VfSlg. 20.071/2016; Constitutional Court of the **Dominican Republic**, Decision TC/0375/19; Replies of the Electoral Court of the Federal Judiciary of **Mexico**.

<sup>29</sup> Replies of the Constitutional Court of **Lithuania**.

<sup>30</sup> Constitutional Court of **Georgia**, Judgement #1/3/547, 28 May, 2015 in the case of "Ucha Nanuashvili and Mikheil Sharashidze v. The Parliament of Georgia"; Constitutional Court of **Korea**, 2012Hun-Ma190 etc., 30 October 2014.



will of the voters in a representative democracy.<sup>31</sup> Even in countries where constitutional adjudicatory bodies do not have the authority to examine elections, the gaps are filled by a *priori* review of the constitutionality of laws or systems related to the electoral process<sup>32</sup>, or of consultative referenda.<sup>33</sup> Cases of impeachment and no-confidence that hold an elected public official responsible for violating the Constitution in the course of performing his or her duties were also mentioned.<sup>34</sup> In addition, it is worth noting that the precedents of political parties, which are the direct agents in the decision-making process of people, have significant importance.<sup>35</sup> In particular, examples related to ensuring political pluralism, a multi-party system<sup>36</sup>, internal democracy in political parties,<sup>37</sup> and examples of prohibiting or dissolving parties that are against the core constitutional values from the perspective of defensive democracy<sup>38</sup>, or restricting their state subsidies<sup>39</sup> were all discussed as well. Interpretation of the authority between the Parliament and the President according to the principle of separation of powers<sup>40</sup>, and the decision to adopt the language of minorities as the official language of the Parliament for the protection of minorities<sup>41</sup>, can also be seen as an example of constitutional adjudication contributing to the realization of parliamentary democracy. In this way, constitutional adjudicatory bodies contribute to the rational formation of people's political will, the building of peaceful relations between the majority and the minority, and the peaceful regime change through elections by ensuring the principles of democracy.

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<sup>31</sup> Constitutional Court of **Ukraine**, Decision No. 3-zp/1997 of 11 July 1997; Decision No. 3-r/2017 of 21 December 2017; Decision No. 5-rp/2016 of 8 July 2016.

<sup>32</sup> Replies of the Constitutional Court of **Belarus**.

<sup>33</sup> Replies of the Constitutional Court of **Belgium**.

<sup>34</sup> Constitutional Court of **Italy**, Judgment No. 7 of 1996 on the individual no-confidence motions against single Ministers; Constitutional Court of **Lithuania**, Ruling of 25 May 2004 on the Law on Presidential Elections.

<sup>35</sup> Replies of the Constitutional Court of **Angola**.

<sup>36</sup> Replies of the Constitutional Court of **Mauritania**.

<sup>37</sup> Constitutional Court of the **Dominican Republic**, Decision TC/0441/19.

<sup>38</sup> Federal Constitutional Court of **Germany**, BVerfGE 2, 1 [Prohibition of SRP, 1952]; BVerfGE 5, 85 [Prohibition of KPD, 1956] = GER-1957-S-001); (BVerfGE 144, 20 [Prohibition of NPD, 2017] = GER-2017-1-003); Constitutional Court of **Serbia**, which ruled that the activity of Civic Association aimed at a violent overthrow of constitutional order: Decision VIIU-249/2009 of 12 June 2019.

<sup>39</sup> Constitutional Court of **Belgium**, Cons. 7 February 2001, no. 10/2001, B.4.7.2-B.4.8.3; Replies of the Federal Constitutional Court of **Germany**.

<sup>40</sup> Replies of the Constitutional Court of **Moldova**.

<sup>41</sup> Replies of the Constitutional Court of **Kosovo**.

As I mentioned earlier in my speech, the concept of peace envisioned by constitutional states includes a variety of social and legal procedures and institutions that induce the settlement of social conflict by harmonizing diverse values that members of the social community pursue. What was reaffirmed through this topic was that the peaceful social coexistence of citizens would become possible only when such procedures and institutions are democratically formed and operated.

### **3. Do you have case law showing that safeguarding the rule of law contributed to peace?**

Next, the replies from the Member States on the rule of law and peace are summarized as follows. In the Constitutions of most countries, the rule of law and its core elements were identified to be the fundamental constitutional principles that bind all kinds of state power. Depending on the case, the Constitution directly specifies the rule of law and its concrete forms of expression or they have been developed through case laws. The replies also emphasize that realizing the principles of the rule of law, such as separation of powers, administration based on the rule of law, and legal stability through constitutional adjudication, contributes to social peace.

According to the replies, legal certainty is a core element when it comes to the rule of law, and in some cases, it is referred to as an original constitutional principle.<sup>42</sup> Commonly referred to are the rule of clarity and the ban on retroactive effect, the principle of due process, the principle of fair process, legal hearings, and the right to procedural defense. Since these rights are usually controversial when determining the scope and content of protecting an individual's fundamental rights from the exercise of the State's authority to punish crime, many countries have mentioned criminal law cases. But as the rule of law is a principle that applies not only to criminal law but to all legal areas, we can see that the cases have been

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<sup>42</sup> The following information is commonly listed as the decisions of constitutional adjudicatory bodies or the Constitutions in most countries, so no particular case law is indicated.

accumulated in other governmental agencies and diverse areas of fundamental rights.

Most notably, the rule of law should be embodied and ensured not only in the procedural aspect but in the substantive aspect. Accordingly, it was revealed that the concept of the substantive rule of law that pursues the supreme values of human rights and fundamental rights is commonly emphasized in each country. At this point, we can cite the conclusion drawn from the first topic of this session, which is the relationship between human rights and peace. In other words, case laws that aim to realize the rule of law through the application of constitutional provisions or constitutional interpretation contribute to achieving social peace in the end.

## **Conclusion**

Please allow me to conclude my speech with several points.

Through this session, we looked into how human rights, democracy, and the rule of law contributed to social peace. We once again learned that in the modern constitutional states, the concept of peace includes not only so-called “negative peace,” but also “positive peace,” both of which interact with each other, and that such peace is solidified through multi-layered foundations and layers and that the Constitution and constitutional adjudication play an important role at the center.

However, each country’s efforts toward peace must also be made within a multilateral framework. Take, the Constitution of the Republic of Korea, as an example. The Constitution of the Republic of Korea firmly declares its orientation towards pacifism by referring to the word “peace” many times. In other words, it expresses its willingness to contribute to the order of peaceful coexistence in the world as a member of the international community, by mentioning that it is to “contribute to lasting world peace and the common prosperity of mankind,” (Preamble) and “The Republic of Korea shall endeavor to maintain international

peace and shall renounce all aggressive wars.” (Article 5 Section 1)<sup>43</sup>

I believe this shows that all countries have a responsibility to strive to maintain world as well as domestic peace. Historically, domestic and international issues have been interlinked, and domestic peace has been inseparable from international peace. Domestic conflicts in a country usually arise from a confrontation between the minority and the majority. In the resolution of such disputes, the protection of human rights and the guarantees of democracy and the rule of law become the core criteria and a procedure. Constitutional adjudicatory bodies achieve domestic peace by harmoniously resolving domestic disputes with ensuring human rights, democracy, and the rule of law, thus contributing to international peace eventually. It is important for us to think deeply about common and universal standards on human rights, democracy, and the rule of law, all of which are preconditions to peace, by sharing the experience with different constitutional adjudicatory bodies through regional institutions such as the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) and the Venice Commission, and the World Conference on Constitutional Justice (WCCJ) today.

Violations of human rights, democracy, and the rule of law in a country no longer remain as an issue of any particular country, but can rather be a serious threat to international peace. At the 3rd Congress of the World Conference on Constitutional Justice in Seoul in 2014, the Constitutional Court of Korea suggested the establishment of the Asian Human Rights Court after finding that the regional human rights courts in Europe, America, and Africa significantly contribute not only to the protection of human rights but peace in those regions. With the hopes that such discussions will be more active in the future, I will close my speech.

Thank you.

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<sup>43</sup> Constitutional Court of **Korea**'s ruling of 2011Hun-Ba379 et al., June 28, 2018; **Korean** Constitutional Court Report of 30-1(B), 370, 434.