

Notable Constitutional Court Decisions: 2022

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I. Unconstitutionality of the Measures to Completely Suspend the Kaesong Industrial Complex (Constitutional Court Decision 2016Hunma364 of Jan. 27, 2022)

A. Background of the Case

The Claimants are 1) investment companies (hereinafter “investment companies”) that established and operated companies in the Kaesong Industrial Complex under the approval of the cooperation project from the Respondent, the Minister of Unification, in accordance with the Inter-Korean Exchange and Cooperation Act, and 2) domestic companies (hereinafter “cooperative agencies”) whose main business activities are transactions with investment companies or their subsidiaries.

In early 2016, shortly after North Korea conducted a nuclear test and fired a long-range missile, the President ordered the Minister of Unification to take measures to withdraw companies from the Kaesong Industrial Complex. The Minister of Unification notified the investment companies of the suspension of the factories and business offices in the complex, the return of South Koreans, and the ban on future visits to the complex to the companies. Later on, the Minister of Unification released an official statement that led to the suspension of the complex (hereinafter

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“suspension measure”). Contending that the suspension measure infringed on their basic rights, the Claimants filed a constitutional complaint against the President and the Minister of Unification under Article 68, paragraph 1 of the Constitutional Court Act.

B. The Constitutional Court’s Decision

The Constitutional Court dismissed the cooperative agencies’ claim, as they lacked self-relatedness. As for the investment companies’ claim, although the court held that it may be subject to judicial review, it should be rejected on the grounds that the suspension measure was based on the Constitution and relevant laws, did not violate the due process principle, the principle of protection of confidence in law, the principle of proportionality, or the requirement of just compensation for expropriation, use, or restriction of property under Article 23, paragraph 3 of the Constitution.

C. Comments

The Kaesong Industrial Complex project aimed to promote an atmosphere of reconciliation and exchange between the two Koreas in the 2000s. As an economic cooperation project, it planned to build an industrial zone in Kaesong, an hour away from the ceasefire line and had South Korean companies move in to engage in business activities. About 120 companies moved into the complex in 2007, and despite the occurrence of events that evoked hostility, such as the Geumgangsan tourist shooting incident in 2008 and the battleship Cheonanham sinking incident in 2010, the cooperation project continued. It was temporarily suspended in 2013 due to North Korea’s third nuclear test and the subsequent United Nations Security Council’s resolution to sanction North Korea, but resumed its operation shortly after. However, with the suspension measure of 2016 discussed above, the shutdown of the Kaesong Industrial Complex project entered an irreversible phase and has not resumed to this day.

Hereinafter, we will look at the investment companies’ claims, on which the Constitutional Court decided the merits. The preliminary issue of the case was whether the suspension measure was subject to judicial review or

should be dismissed as a non-judicial political question. The Constitutional Court reaffirmed its precedent by ruling that even a decision involving a highly political consideration can be subject to judicial review as long as it is directly related to the violation of the people's basic rights.¹⁾ The Constitutional Court ruled that the suspension measure was relevant to the Claimants' constitutional rights and was indeed subject to judicial review.

Regarding the merits of the case, that is whether the Claimants' basic rights were actually violated, the Constitutional Court unanimously decided that there was no such violation, albeit conceding that the suspension measure did impose restrictions on companies' freedom to conduct business and property rights. The main standards of review were the existence of the constitutional and statutory basis of the suspension measure, the due process principle, the principle of protection of confidence in law, the proportionality principle, as well as the requirement of just compensation for the expropriation, use, or restriction of property (Article 23, paragraph 3 of the Constitution).

As for the constitutional and statutory basis of the suspension measure, the Claimants argued that the case's suspension measure was not based on the Inter-Korean Exchange and Cooperation Act. Rather, it was a financial and economic emergency order and a disposition under Article 76, paragraph 1 of the Constitution (conferring the president with emergency powers), without adherence to the due process principle, as it did not undergo *ex ante* deliberation by the State Council required by Article 89 of the Constitution. However, the Constitutional Court held that the suspension measure was based on the President's general status and authority based on Article 66 of the Constitution and the Government Organization Act, and therefore not in need of the State Council's *ex ante* deliberation. The measure was not issued as an exercise of emergency power but merely an order for the adjustment of the contents, conditions, and validity period of approval of cooperative projects based on the Inter-Korean Exchange and Cooperation Act. Therefore, the Court concluded that the measure had a legitimate constitutional and statutory basis, and no violation of the due process principle had occurred.

1) Hunbeobjaepanso [Const. Ct.], Feb. 29, 1996, 93Hunma186 (S. Kor.).

Next, regarding the principle of protection of confidence in law, what was at issue was whether the interests of Claimants who trusted the content of the agreement between the two Koreas, namely the portion about “guaranteeing the normal operation of the industrial complex” in 2013, should be protected. However, the Constitutional Court did not declare violation of the principle, as the agreement was made without authorization from the National Assembly, rendering it not legally binding and was not to be construed to build confidence deserving protection for the Claimants regarding its validity and continued existence. Finally, it was questioned whether the suspension measure violated property rights by denying just compensation, as it did impose restrictions on property rights due to public needs. However, the Constitutional Court ruled that the suspension measure mainly aimed at stopping business activities and did not levy restrictions on concrete properties such as land and buildings in the Kaesong Industrial Complex, therefore not constituting a restriction in requirement of just compensation *per se*.

Despite the Constitutional Court’s decision that the suspension measure was not unconstitutional, questions remain as to how far the general provisions of the Constitution can justify quasi-emergency measures regarding citizens. It was also left uncertain what the criteria should be for determining whether a government action directed towards special circumstances constitute an official emergency measure under the Constitution, and how should the prospect of compensation for confidence in the continuance of inter-Korean cooperation projects be dealt with. The outlooks for inter-Korean relations are nothing but bright at the moment, but a close inspection will be needed on the necessity of follow-up measures, including the long-term improvement of exchange and cooperation policies towards the North within the boundaries of the Constitution.

II. Unconstitutionality of the Ordinary Court’s Decision Against Binding Force of the Constitutional Court’s Decision of Limited Unconstitutionality (Constitutional Court Decision 2014Hunma760 et al. of June 30, 2022)

A. Background of the Case

Claimant A was one of the appointed members of the Jeju Province Integrated Impact Assessment Deliberation Committee. The Claimant, in the process of a criminal trial in the appellate court regarding a charge of bribery in the Criminal Act, filed a constitutional complaint pursuant to Article 68, paragraph 2 of the Constitutional Court Act. In this complaint, the Claimant argued that an appointed member of the committee could not be the perpetrator of bribery, as his motion requesting referral to the Constitutional Court regarding the constitutionality of a statute was rejected by the appellate court.²⁾ The criminal trial proceeded, and Claimant A was sentenced to two years in prison. His subsequent appeal to the Supreme Court was also rejected. However, after the Supreme Court’s decision, the Constitutional Court made a decision of limited unconstitutionality by ruling, “As long as government officials stipulated in the bribery clause of the Criminal Act is interpreted to include the appointed member of the Jeju Province Integrated Impact Assessment Deliberation Committee pursuant to former Special Act on the Establishment of Jeju Special Self-governing Province and the Development of Free International City, it violates the constitution.”³⁾ Claimant A filed a claim for a retrial, but the claim was rejected and the reappeal to the Supreme Court was also rejected.

Likewise, Claimant B, who was also an appointed member, was convicted of bribery and sentenced to five years in prison. Claimant B did

2) Article 68 paragraph 2 of the Constitutional Court Act stipulates that “if the motion made under Article 41 (1) for adjudication on the constitutionality of statutes is denied, the party may request adjudication on a constitutional complaint with the Constitutional Court.”

3) Hunbeobjaepanso [Const. Ct.], Dec. 27, 2012, 2011Hunba117 (S. Kor.), hereinafter referred to as the ‘decision of limited unconstitutionality’.

not file a constitutional complaint pursuant to Article 68, paragraph 2 of the Constitutional Court Act. However, after the above decision of limited unconstitutionality, Claimant B filed a claim for a retrial. The claim for retrial was rejected, and subsequent reappeal to the Supreme Court was also rejected.

Both Claimants A and B filed constitutional complaint to the Constitutional Court after the rejections by the Supreme Court.

B. The Constitutional Court's Decision

- 1) Among the “decision of the courts” in Article 68, paragraph 1 of the Constitutional Court Act, the part “decisions against the binding force of the decision of limited unconstitutionality of a statute” violates the Constitution.
- 2) The Constitutional Court revokes all the courts’ decisions to reject the claim for retrial and reappeal after making a “decision of limited unconstitutionality” as they infringe upon the Claimants’ right to request a trial.
- 3) The Constitutional Court dismisses all claims related to the original criminal court decisions made prior to the “decision of limited unconstitutionality”.

C. Comments

Article 111, paragraph 1 of the Constitution stipulates that the Constitutional Court shall have jurisdiction over constitutional complaints under the Constitutional Court Act, and Article 68, paragraph 1 of the same Act places court decisions beyond the reach of constitutional complaints. The dispute between the Supreme Court and the Constitutional Court over the above article emerged as a central issue for both academics and law practitioners in Korea. The crux of the dispute was the decision of limited unconstitutionality, a type of the Constitutional Court’s decision. A decision of limited unconstitutionality is a ruling which states that an Act is “...unconstitutional as long as it is interpreted as...”. The Constitutional Court has allowed this type of decision although there are no explicit statutory grounds for it. The Supreme Court, on the other hand, regards the

authority to interpret provisions, including constitution-conforming interpretation of statutes, as within its exclusive authority. Seen merely as an opinion that has no binding force, the Supreme Court does not allow retrial, even when a decision of limited unconstitutionality of the provisions in the Criminal Act has been declared.⁴⁾ The Supreme Court based its rejection of the retrial in this case on the same grounds.

The jurisdictional dispute between the two courts came to the forefront of the legal scene in the 1990s. The Supreme Court rejected an appeal against the decision of limited unconstitutionality delivered by the Constitutional Court regarding the statute that was the legal ground for the administrative action imposing taxation. The party upon whom the disposition was imposed requested a constitutional complaint pursuant to Article 68, paragraph 1 of the Constitutional Court Act. The Constitutional Court, for the first time, ruled that “as long as the ‘decision of the courts’ in Article 68, paragraph 1 is interpreted to include decisions infringing upon a person’s fundamental rights by applying provisions that were struck down as unconstitutional by the Constitutional Court, Article 68, paragraph 1 violates the Constitution and thus the Constitutional Court revokes the Supreme Court’s decision rejecting the appeal and the disposition of taxation, as they infringe upon the Claimants’ right to property.”⁵⁾

The present case, a full-fledged second round of dispute on the same issue, reaffirmed the Constitutional Court’s established stance, even on criminal cases. However, there is a noteworthy difference. That is, the Constitutional Court extended the range of the exceptional admissibility of constitutional complaints against “court decisions” from “decisions infringing upon a person’s fundamental rights by applying provisions that have been decided unconstitutional by the Constitutional Court” to “decisions against the binding force of the decision of unconstitutionality on provisions”. This decision has a significant meaning, as it expands and clarifies the range of objects of constitutional complaints regarding the “decision of the courts”. Furthermore, it should not be overlooked that the

4) E.g., Daebeobwon [S. Ct.], Mar. 28, 2013, 2012Jaedu299 (S. Kor.).

5) Hunbeobjaepanso [Const. Ct.], Dec. 24, 1997, 96Hunma172 (S. Kor.) and other decisions; Hunbeobjaepanso [Const. Ct.], Apr. 28, 2016, 2016Hunma33 (S. Kor.) is an important decision reaffirming this decision.

Constitutional Court made clear that the range of “decisions against the binding force of the decision of unconstitutionality” includes the rejection of claims for retrial and reappeal after a decision of unconstitutionality, including a decision of limited unconstitutionality. However, it does not include original decisions made before a decision of limited unconstitutionality. This corresponds to the fact that Article 75, paragraph 7 of the Constitutional Court Act stipulates retrial as a means of remedy for a conclusive decision. It is also noteworthy that subsequent decisions that are consistent with the decision in question were made consecutively in July 2022.⁶⁾

III. The Unconstitutionality of the Prohibition Clause Regarding the Installation of Facilities, etc. and the Prohibition Clause Regarding the Distribution of Printed Materials, etc. under the Public Official Election Act (Constitutional Court Decision 2017Hunba100 et al. of July 21, 2022)

A. Background of the Case

The Public Official Election Act prohibits the installation of posting placards and other advertising materials or wearing indicative materials in an effort to influence the election from 180 days before the election day until the election day (hereinafter “prohibition clause regarding installing of facilities, etc.” and “prohibition clause regarding distribution of printed materials, etc.” respectively). It also prohibits election campaigns from using loudspeaker systems even during legally designated periods for election campaigning (hereinafter “prohibition clause of the usage of loudspeaker systems”). The involved parties were those who filed a motion on the constitutionality of aforementioned statutes while in the process of a criminal trial for violating such regulations and received the court decision

6) Hunbeobjaepanso [Const. Ct.], July 21, 2022, 2013Hunma242 (S. Kor.); Hunbeobjaepanso [Const. Ct.], July 21, 2022, 2013Hunma496 (S. Kor.); Hunbeobjaepanso [Const. Ct.], July 21, 2022, 2013Hunma497 (S. Kor.).

requesting the Constitutional Court's adjudication under Article 41, paragraph 1 of the Constitutional Court Act. Those who filed the motions but was rejected by the trial court requested constitutional complaints under Article 68, paragraph 2 of the Constitutional Court Act.

B. The Constitutional Court's Decision

The Constitutional Court decided that the prohibition clause regarding the installation of facilities, etc. and the prohibition clause regarding the distribution of printed materials, etc. do not conform with the Constitution. It also decided that the clauses shall remain effective until July 31, 2023 and that the provision regarding the prohibition of loudspeaker system use does not violate the Constitution.

C. Comments

The Public Official Election Act is an election act centered heavily on regulating in detail and imposing criminal punishment for various activities related to elections. This act prohibits election campaigns prior to the statutory campaign period, specifies permissible methods for conducting election campaigns, and prohibits various types of actions that may affect an election, even if they do not amount to an election campaign, for a certain period of time before the election day. Since the establishment of the Constitutional Court, numerous constitutional litigations have been conducted against the provisions of the Public Official Election Act concerning election campaigns or political expressions related to elections. This abundance of litigations reflects the unique aspect of the Election Act that inevitably produces violations requiring criminal punishment. It is true that significant changes have been made due to the rulings of the Constitutional Court over the last 30 years. Important cases include the decision declaring the unconstitutionality of the provision restricting election campaigns to only a small number of election-related personnel⁷⁾; the decision declaring the unconstitutionality of interpreting 'acts that may

7) Hunbeobjaepanso [Const. Ct.], July 29, 1994, 93Hunga4 (S. Kor.) and other decisions.

influence an election' during the 180-day-period leading up to an election to include political expressions or election campaigning on the Internet⁸); the decision declaring the unconstitutionality of prohibiting journalists from conducting an election campaign⁹); the decision declaring the unconstitutionality of requiring internet media agencies to operate a real-name system during election campaign periods¹⁰); and the decision declaring the unconstitutionality in prohibiting election campaigns conducted verbally through individual face-to-face interactions before an election campaign period.¹¹)

In line with these precedents, the case in question, decided in July 2022, held that the prohibition clause regarding the installation of facilities, etc. and the prohibition clause regarding the distribution of printed materials, etc. fall in the category of the regulations restricting the freedom of political expression, involving the right to support and oppose elections, parties, and candidates, and thus should be under strict examination regarding its conformity with the Constitution. The Constitutional Court went on to examine whether the provisions violated the proportionality principle. First regarding the legislative purpose of the provisions, the Court identified "maintaining the fairness of elections" as a legitimate purpose. The Court also held that imposing such legal regulations qualify as an appropriate means. However, the Constitutional Court ruled that prohibiting both election candidates and ordinary voters from making such expressions on elections made the restriction too broad. In addition, it ruled that a 6-month restriction period was too long to satisfy the principle of least restrictive means. Other duly considered factors were that fairness in elections could be achieved by other means (i.e., limiting election expenses), that the criminal punishment for violating the provisions was too heavy, that these prohibition provisions could restrain new politicians from entering the political arena and, in turn, harm the fairness of elections, and that the

8) Hunbeobjaepanso [Const. Ct.], Dec. 29, 2011, 2007Hunma1001 (S. Kor.) and other decisions.

9) Hunbeobjaepanso [Const. Ct.], June 30, 2016, 2013Hunga1 (S. Kor.).

10) Hunbeobjaepanso [Const. Ct.], Jan. 28, 2021, 2018Hunma456 (S. Kor.) and other decisions.

11) Hunbeobjaepanso [Const. Ct.], Feb. 24, 2022, 2018Hunba146 (S. Kor.).

Public Official Election Act had separate articles for preventing black propaganda or the spread of false information as a result of excessive competition. Finally, the Court held that the public good that the above prohibition provisions aim to achieve was no superior to the freedom of voters' political expression, and thus the principle of balance of interests was not satisfied.

In sum, the abovementioned provisions violated the freedom of political expression disregarding the proportionality principle and therefore were declared unconstitutional. Considering the fact that the unconstitutionality of the provisions is in the length and broadness of the regulations, the Constitutional Court reached a "nonconforming to the Constitution" decision, as legislators should amend the provisions in a way that conforms to the Constitution. However, the Constitutional Court ruled that the prohibition provision regarding the usage of loudspeaker systems was not an excessive restriction on the freedom of political expression and within the bounds of the Constitution.

It should be noted that on the same day as the decision in question, the Constitutional Court decided that the provision prohibiting the use of shoulder belts, hats, clothes, or other indicative materials as a means of conducting election campaigning violated the Constitution.¹²⁾ It also decided that the provision prohibiting meetings or other assemblies with the aim of influencing an election during the election period is unconstitutional.¹³⁾

12) Hunbeobjaepanso [Const. Ct.], July 21, 2022, 2017Hunga4 (S. Kor.).

13) Hunbeobjaepanso [Const. Ct.], July 21, 2022, 2018Hunba357 (S. Kor.) and other decisions; Hunbeobjaepanso [Const. Ct.], July 21, 2022, 2018Hunba164 (S. Kor.). Amongst the decisions, the subject matter of review of 2018Hunba357 decision included clauses that prohibit installing facilities, posting documents/drawings, etc., using loudspeaker systems similar to the decision in question, and the Constitutional Court reached the same conclusion. It should be added that 2017Hunga1 and other decisions also reached the same conclusion on the clause prohibiting installing facilities regarding a different type of action.

