

Korean Climate Litigation Decision Analysis Memo

Korean Constitutional Court Decision Case No. 2020Huma389

This memorandum summarizes the decision of the Korean Constitutional Court (“Court”) in the case of Do-Hyun Kim et al. v. South Korea (Case No. 2020Hunma389), issued on August 29, 2024.

The key points of the decision are:

1. **First “framework litigation” victory outside Europe** : The Korean Constitutional Court ruled that the State has violated its constitutional obligation to protect the fundamental rights of the people in relation to the national GHG reduction target. This decision joins the ‘framework litigation’ wins in Netherlands, Germany, and the European Court of Human Rights, and marks the first win outside Europe confirming that the judicial intervention on climate crisis is a global trend.
2. **Rights of the Future Generation is Recognized** : The rights of the future generation is expressly recognized and was referred as the core reason for unconstitutionality of the legal framework around GHG reduction target. The Constitutional Court ruled that absence of any quantitative targets post-2030 up to 2050 carbon neutrality target inevitably shifts excessive burden to the future and is therefore impermissible.
3. **“Share of Contribution based on Scientific Facts and International Standards”** : The Court has set a substantive standard for the State’s action on climate mitigation demanding ‘fair share’ based on science and international standards, which will serve as a clear directive for legal and administrative measures going forward.

1. Case History

On March 13, 2020, 19 activists of *Youth4Climate Action* filed a petition to the Korean Constitutional Court claiming that the GHG reduction target set by the *Low Carbon Green Growth Act* and its *Enforcement Decree* violated their fundamental rights including right to healthy environment, right to life, right to health, and right to intergenerational equality. This case, Case No. 2020Hunma389, also labelled *Korean Youth Climate Litigation* is the first framework litigation brought in South Korea.

The GHG reduction target under the *Low Carbon Green Growth Act* at the time of the filing was 24.4% reduction from 2017 levels by 2030. In October 2020, South Korean Government pledged to achieve carbon neutrality by 2050. Subsequently in September 2021, the National Assembly passed *Carbon Neutrality and Green Growth Act* (“Act”) as

the new legal framework for climate change. The Government announced a revision of the NDC in October 2021, enhancing the target to 40% reduction from 2018 levels by 2030. The new NDC was reflected in the Enforcement Decree of the Act (“Decree”) in March 2022. In May 2023, the Government announced the First Carbon Neutrality Basic Plan (“Plan”)

Following the legislation of the Act, the plaintiffs of the Youth Climate Litigation revised their claim to address the new NDC and its legal framework, arguing the revised target still falls short of the constitutionally required protection of their fundamental rights.

On October 21, 2021, 123 plaintiffs from various civil society organizations and political parties filed a constitutional complaint against the Act, arguing the law violated the fundamental rights of the plaintiffs (“Citizen Climate Litigation”, Case No. 2021Hunma1264). On June 13, 2022, 60 children and infant plaintiffs filed a constitutional complaint against the Enforcement decree, arguing the 40% reduction target violated the fundamental rights of the plaintiffs (“Infant Climate Litigation”, Case No. 2022Hunma864). On July 6, 2023, 51 activists and citizens filed a constitutional complaint against the Plan, arguing the annual and sectoral targets set by the Plan violates their fundamental rights (“Carbon Neutrality Plan Litigation”, Case No. 2023Hunma846).

On August 22, 2023, the National Human Rights Commission submitted a formal opinion to the Constitutional Court supporting the plaintiffs’ argument on the unconstitutionality of the Act and the Decree, stating that the GHG reduction target is insufficient to provide the necessary protection of the people’s fundamental rights.

On 19 February 2024, the Constitutional Court notified the plaintiffs of the four pending climate litigations that public hearings will be convened, and the four cases will be merged. Two public hearings were held on April 23 and May 21, 2024.

The final decision was rendered on August 29, 2024. On the issue of the Act, the Court ruled unanimously in favor of the plaintiffs stating that the Act is unconstitutional on the grounds that the State has violated its obligation to protect the right to healthy environment of the plaintiffs because the Act does not provide reduction targets after 2030 up to 2050, thereby imposing excessive burden to the future. However, the claim against the Decree and the Plan was dismissed.

2. Summary of Claim

The arguments submitted by the plaintiffs in the four cases largely overlap, and it was coordinated into single argument after the merging of the cases. Following is the key argument on the Act, the Decree, and the Plan.

A. The Act

Article 8 (National Mid- and Long-Term Greenhouse Gas Reduction Targets) ① The
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Government shall set a national medium- and long-term greenhouse gas emission reduction target (hereinafter referred to as "mid-to long-term reduction target") to reduce national greenhouse gas emissions by a ratio prescribed by Presidential Decree to the extent of not less than 35 percent from the 2018 levels by 2030.

- a. The Act is in violation of the State's obligation to protect fundamental rights because the minimum reduction level set by the Act is insufficient, which is reflected in the insufficient target in the Decree.
- b. The Act is in violation of the State's obligation to protect fundamental rights and also the principle of statutory reservation because it does not provide any targets between the period 2031 - 2049.
- c. The Act is in violation of the State's obligation to protect fundamental rights because the Act does not have any mechanism that ensures the planned reductions actually take place.

B. The Decree

Article 3 (National Mid- and Long-Term Greenhouse Gas Reduction Targets) (2) The Minister of Environment shall exercise general supervision over and coordinate the affairs regarding the setting and modification of the national mid- to long-term greenhouse gas reduction targets, sectoral greenhouse gas reduction targets, and annual greenhouse gas reduction targets under Article 8 (1) through (3) of the Act (hereinafter referred to as "mid- to long-term greenhouse gas reduction targets, etc.").

- a. The Decree is in violation of the State's obligation to protect fundamental rights because the 40% reduction from 2018 levels is insufficient to limiting temperature increase to 1.5 degrees based on (i) the IPCC 1.5 degree (50%) global reduction pathway (ii) UNEP Emission Gap Report (iii) Climate Action Tracker Analysis on South Korea's NDC (iv) carbon budget analysis based on per-capita distribution (v) comparison of NDCs from OECD nations and (vi) Climate Change Performance Index rankings.
- b. The Decree infringes upon the right to equality of the young plaintiffs because the current target will inevitably impose excessive burden of GHG reduction to post-2030 period making it more implausible to achieve meaningful limitation of temperature increase and also harmful and irreversible impacts of climate.

C. The Plan

- a. The Plan is in violation of the State's obligation to protect fundamental rights because it fails to meet the 40% reduction by using total emission for the base year and net emission for the target year.

- b. The Plan is in violation of the State's obligation to protect fundamental rights because most of the reduction is planned on the last few years of the planned period, increasing the total cumulative emission by more than 500MtCO₂e compared to linear reduction initially presented by the Government.
- c. The Plan is in violation of the State's obligation to protect fundamental rights because it excessively relies on technologically and/or institutionally immature means including overseas credits and CCUS.

3. Legal Test : Relevant Constitutional Right and State's Obligation

A. Relevant Right : Right to Healthy Environment

The starting point of the Court is identification of the relevant rights. The Court ruled that right to healthy environment under Art. 35 of the Constitution is the most relevant right, and therefore analysis on other rights claimed by the plaintiffs, e.g. right to life, right to various freedom, right to equality, would not be necessary.

Article 35 of the Constitution ① All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment.

"The risks of the climate crisis that the State seeks to address by setting GHG reduction targets through laws and administrative plans encompass the harm resulting from phenomena caused by climate change including extreme weather events, water scarcity, food shortages, ocean acidification, sea level rise, and ecosystem collapse. These risks threaten not only the life, physical safety, and health of citizens but also the natural and living environments, either in whole or in part. Therefore, the fundamental right most closely related to these provisions and plans, and the right citizens must be protected from such risks, is the right to healthy environment. In this case, the key issue is whether the GHG reduction targets set by the aforementioned provisions and plans infringe upon Complainants' right to healthy environment."

Recognition of climate crisis as a matter of right to healthy environment holds significant importance in the Korean context because the right to healthy environment has been scarcely recognized by the Courts as substantive basis for legal claims. Now that the Constitutional Court has unequivocally accepted the right to healthy environment as the most relevant right to climate crisis, this decision would open new possibilities in relying on right to healthy environment in the context of civil and administrative claims going forward.

B. State's Obligation and Legal Test

a. Prohibition Against Insufficient Protection Test

The key question of the case is whether the State has violated its obligation to protect the fundamental rights, *i.e.* the right to healthy environment in relation to the harms of climate crisis. The Court first defines the nature of the risk presented by climate change, and then analyzes the State's protective measures to see if it has "at least taken minimum protective measures" according to the "principle of prohibition against insufficient protection."

"Although the State has the obligation to protect citizens' right to live in a healthy and pleasant environment, the manner in which this obligation to protect fundamental rights is fulfilled by the Legislature, or the Executive delegated by the Legislature, falls under the responsibility of the Legislature or the Executive. This is because they derive direct democratic legitimacy from citizens and bear political responsibility for their decisions, in line with the principle of separation of powers and democracy. The Constitutional Court can only review the fulfillment of this protective duty by the Legislature or the Executive in a limited capacity.

Therefore, when the Constitutional Court reviews whether the State has failed to fulfill its duty to protect the right to live in a healthy and pleasant environment, it must assess whether the State has at least taken minimum protective measures that are appropriate and effective, in accordance with the 'principle of prohibition against insufficient protection'."

"Whether the principle of prohibition against insufficient protection is violated in a specific case is determined by whether the substance of the 'protective measure' responding to the 'risk situation' calling for protection due to foreseeable infringement of fundamental rights has the required minimum characteristics as a protective measure that appropriately correspond to the characteristics of the risk situation at issue. When such determination falls within a technical field of expertise or has an international aspect, the characteristics of the risk situation, etc., shall be objectively examined based on 'scientific facts' and 'international standards'."

b. Defining Climate Change as Risk Situation

In the analysis of the 'risk situation', the Court addresses key elements of the scientific facts around climate crisis including (i) anthropogenic emission of GHG as the cause of climate change (ii) harmful impacts of climate change on natural and social environment (iii) risk of tipping points (iv) irreversibility of climate change and urgent need for action and (v) global carbon budget.

The Court also addressed the so-called "drop in the ocean" argument and recognized the "common but differentiated responsibilities and respective capabilities" principle of the Paris Agreement as the standard for determining the responsibility of an individual nation.

"Climate change is a global issue in both its causes and impacts. As no nation can claim to bear absolutely no responsibility for contributing to the climate crisis, no nation can avoid its own

share of responsibility merely by pointing out other countries' GHG emissions."

"The Paris Agreement establishes a framework in which both developed and developing countries alike participate in efforts to reduce GHG emissions. Article 2(2) of the Paris Agreement sets forth the principle that 'this Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.'"

On the temperature target, the Court referred to both temperature targets when quoting the Art. 2 of the Paris Agreement, and the Court also quoted the Decision of the COP28 (Decision 1/CMA.5) on the 1.5 degrees pathway as "international consensus." Further, the Court also notes that the Article 3, item 8 of the Act stipulates "participating in the global efforts to limit the temperature increase to 1.5 degrees" as one of the principles of the Act.

"Meanwhile, based on the scientific facts reported by the IPCC and other relevant bodies, a global consensus on the direction of global actions or standards for addressing the climate crisis can be shaped through multilateral treaties such as the UNFCCC and the Paris Agreement, as well as their specific implementation mechanisms like the Conferences of the Parties (COP). For instance, paragraph 27 of Decision 1/CMA.5 from the 28th Conference of the Parties to the UNFCCC in 2023, concerning the 'Global Stocktake,' acknowledges that "limiting global warming to 1.5°C without or with limited overshoot requires deep, rapid, and sustained reductions in global GHG emissions, reducing emissions by 43% by 2030 relative to 2019 levels, 60% by 2035, and achieving net-zero CO2 emissions by 2050."

"As described above, based on a common understanding of global GHG reduction pathways formed through international consensus – grounded in scientifically estimated global carbon budgets and scientific research findings – individual countries must set their own GHG reduction targets, thereby determining their fair share of contributing to global reduction targets, and develop and implement policies to achieve these targets."

Based on the foregoing, one can reasonably state that the Court considered 1.5 degree as the internationally agreed standard although the Court did not expressly exclude the 'well below 2 degrees' target. The interpretation of the Paris Agreement temperature goal did not become a critical issue in the decision because the Court eventually chose not to examine the adequacy of 2030 GHG reduction target.

c. Standard for State's Climate Action

To determine whether the State's GHG reduction target satisfies the required minimum level of protection that conforms to the nature of the risk situation, the Court has set the following standard.

"[i]t should be assessed, based on scientific facts and international standards, whether the specific reduction targets align with Korea's share of contribution it ought to bear in light of

the global reduction efforts; whether the framework for setting these reduction targets is designed to prevent excessive burdens from being shifted to the future in terms of the effects of climate change and the restrictions on GHG emissions; and whether the system is institutionalized in a way that can effectively guarantee GHG reductions."

The standard provides both substantive standard for the level of reduction and formal standard for the legal framework. For the former, the Court effectively requires that the reduction target should reflect South Korea's "fair share." It is further supported by the fact that the Court has referred to and accepted the most recent findings of the IPCC report for scientific facts and has referred to "common but differentiated responsibilities and respective capabilities" principle as international standard. For the latter, the Court demands such target should be implemented in a way that does not push excessive burden to the future and ensures effective reduction, which should be reflected in the annual and sectoral targets, and/or enforcement mechanisms.

This standard is the most important ruling of the decision because it provides substantive and practical guide for the State's climate action not only for the purpose of judicial or constitutional review, but also for all legislative and administrative actions on climate mitigation going forward.

4. Issue 1 : Absence of Post-2030 targets in the Law

A. Violation of State's Obligation to Protect Fundamental Rights

The Court ruled that Art 8 of the Act has violated the State's obligation to protect fundamental rights because it failed to provide any quantified standard for the targets for the period between 2031 and 2049. The Court stated that such framework of the Act cannot ensure continuous reduction or prevent imposition of excessive burden to the future and therefore fails to meet the standard for State's obligation.

Particularly, the Court pointed out that the current framework around GHG reduction target is insufficient to prevent short-termism.

- Although South Korea has set its first GHG reduction target in 2009, its emissions continuously increased until 2018, which calls for urgent need for rapid reduction.
- Simply updating the reduction target every five years is not enough because some reduction measures require significant lead time and long-term planning.
- The "principle of progression" under the Paris Agreement is not enough because it does not guarantee the "degree of progression" and the Government's decisions are prone to be influenced by short-term interests for slower action.
- The current framework of the Act only defines emission level of the target year and has no control over cumulative emissions throughout the planned period nor does it provide any basis for the nation's carbon budget.

The Court added that having “quantified reduction targets” all the way up to 2050 net zero target will ensure continuous and consistent reduction while allowing sufficient room for discretion for the Government on the choice of reduction measures.

“[i]f the long-term national reduction targets leading up to the 2050 carbon neutrality goal are entirely dependent on the government’s comprehensive consideration of the characteristics of individual reduction measures and the circumstances at each point in time, the reduction targets for specific years and the reduction pathway over certain periods may vary significantly depending on which sectors or characteristics the government prioritizes in its policy efforts. This could also make it difficult to ensure consistency in GHG reduction policies.”

“On the other hand, if reduction targets are based on figures that are quantified to a certain degree for each timeframe of a specified period leading up to the 2050 carbon neutrality goal, the government can comprehensively consider the characteristics of individual reduction measures and circumstances within that range. It can then set specific reduction targets through coordination and integration of sector-specific measures. This approach would respect the government’s discretion in setting reduction policies while also ensuring a certain level of consistency in GHG reduction policies.”

“Even when setting intermediate reduction targets for the period between 2031 and 2049 in advance, the intervals between these targets and specific figures fall within the realm of legislative decision-making. A certain degree of flexibility can be maintained by setting a minimum reduction rate, as with the 2030 reduction target, while delegating the determination of the final figure to a Presidential Decree or similar authority.”

B. Violation of Statutory Reservation

The Court also ruled that the Act violated the principle of statutory reservation by failing to set any targets between the period 2031 to 2049 because such targets have significant impact on the fundamental rights of the people and therefore should be determined by the Legislature in the form of law.

“Setting GHG reduction targets and planning corresponding reduction pathways impose extensive and continuous restrictions on the fundamental rights of the current population. However, given the nature of the climate crisis as risk situation, the most ambitious reduction target must be set and continuously be advanced to avoid exacerbating future burdens. As various interests may cause sharp conflict around the issue of specific reduction measures, planning mid- to long-term GHG reduction targets and pathways requires a high level of social consensus. Therefore, the general framework for the period after 2031 should be directly prescribed in ‘law,’ the highest form of social consensus following the Constitution.”

The Court emphasizes that the elected representatives of the Legislature are better positioned to address this issue through democratic process compared to the technocrats of the Executive, and democratic process is particularly important for climate crisis because the future generation has limited access to the process.

“In particular, legislation that sets GHG reduction targets inherently restricts the fundamental rights of the current population to safeguard the future population’s fundamental rights. Since future generations have even more limited participation in the democratic political process, judicial review of the fulfillment of the legislative duty in this area must be much stricter. This point is symbolically highlighted by a statement made by Ms. Han (12 years old), a Complainant in this case, during a hearing: ‘Grown-ups can elect members of the National Assembly or the President through voting, but children do not have that opportunity. Participating in this lawsuit was the only action I could take, and had to take, for the future.’”

C. Decision of Non-Conformity

The Court declared Art 8 Paragraph 1 of the Act unconstitutional and ordered that the provision must be amended by 28 Feb, 2026. This means the provision will tentatively maintain its effect until the amendment.

5. Issue 2 : Adequacy of the 2030 target in the Decree

The issue of the adequacy of the 2030 target in the Decree was the most intensively disputed issue throughout the case. Plaintiffs focused on the “gap” between the Paris Agreement climate target and the current target based on various standards including IPCC pathway, carbon budget, emission gap, comparison with OECD nations, Climate Action Tracker analysis and climate action performance indices. The Government argued that determination of specific target falls beyond the scope of judicial review based on executive discretion and that further reduction would be technologically and economically unfeasible. The Court concluded that there is no agreement on how global efforts should be distributed to individual nation, which is a logically necessary element to determine the adequacy of the 2030 target. The Court recognized that the existence of such standard by referring to “various researches” conducted on the topic, but stated that it was not able to identify a single standard that can be used as a legal standard.

“While the numerical value of the GHG reduction target percentage is derived from various statistical evaluation methods, formulas, and estimative methodologies that inherently include significant uncertainty in each stage of assessment, there is no indisputable international consensus on the derivation method, nor is there a published calculation procedure conducted by a domestic institution that is widely accepted enough to be cited by judicial authorities. Moreover, determining the specific numerical value of a GHG reduction target percentage inevitably involves socioeconomic, or even diplomatic, policy considerations.”

“Therefore, with respect to the ‘specific numerical value’ of the reduction target percentage for a ‘specific year,’ which has been comprehensively determined by the Legislature or their delegated Executives after considering various factors, it is difficult for the Constitutional Court to apply the principle of prohibition against insufficient protection – which is premised on the authority and responsibility of the Legislature and their delegated Executives – to conclude that the figure fails to align with the share of contribution Korea ought to bear in light of the global GHG reduction efforts simply because it does not conform to the result derived

from specifically chosen set of estimative method or set of assessment factors."

In short, the Court avoided the question of adequacy of specific reduction target figure of a specific year and ruled that it falls into the legislative and/or administrative discretion. It is quite regrettable that the Court deemed the entire question to be out of the scope of judicial review because many Courts have directly addressed this question instead of avoiding it. For example, the German Constitutional Court ruled in *Neubauer* that determination of Germany's equitable share from the global efforts can be done using international law principles such as "common but differentiated responsibility," and the Dutch Supreme Court relied on the IPCC reduction pathways to determine the minimum standard to be applied on national level stating that the equitable sharing of the global efforts must reflect the capabilities and responsibilities of each nation.

The Court, however, added that such conclusion does not mean the State is doing its best to clarify that the Court's conclusion on the matter is not a substantive justification of the current target.

6. Issue 3 : Implementation Plan

Out of the many issues argued on the Plan, the Court focused on the "total-net emission" issue. The 40% reduction target of the Plan is based on the 'total emission' of 2018(727.6MtCO₂e) which excludes LULUCF(-41.3MtCO₂e), and 'net emission' of 2030(436.6MtCO₂e) which includes LULUCF (-26.7MtCO₂e). In this way, the removal by LULUCF sector is treated as if no removal occurs in the base year and all removal by LULUCF is achieved through efforts up to the target year. The plaintiffs argued this is essentially an 'accounting fraud', and the Government argued that this does not expressly violate any international guidelines and many other countries, in fact, have adopted the same approach.

The majority, five out of nine justices, ruled that the Plan is unconstitutional on the grounds that the actual reduction under the Plan falls short of the 40% reduction mandated by the Act and the Decree, and therefore fails to meet the obligation of the State.

The minority, four justices, rejected the claim and ruled that the issue does not amount to unconstitutionality because the language of the Act and the Decree only states "emission" without specifying whether the emission should be total or net, and therefore choice of standard falls into the margin of discretion of the Executive.

Because the decision of unconstitutionality requires supermajority, six out of nine justices, the claims on the Plan were eventually dismissed.

7. Next Steps and Implications

Pursuant to Art. 47 of the Constitutional Court Act, the decision of unconstitutionality has binding effect. Because the Act is ruled unconstitutional, the National Assembly must

rectify the unconstitutionality by the deadline set by the Court, 28 Feb 2026. The amended Act must set quantified standard for the period 2031 – 2049, in accordance with Korea's share of contribution based on scientific facts and international standards, and in way that does not impose excessive burden to the future and ensure continuous reduction of GHG.

The decision does not order the Government to take specific action because the claims on the Decree and the Plan were rejected. However, the substantive standard for State's action on climate mitigation applies to the 2035 NDC that the Government is currently preparing and will be submitting to the UNFCCC Secretariat in 2025. Also, the decision provides firm grounds to argue that when 2035 NDC is determined on the basis of Korea's fair share based on scientific facts and international standards, it would be reasonable, if not inevitable, to enhance the 2030 NDC. This demand is further supported by the majority opinion of the Court that the current 2030 target of the Plan falls short of the 40% reduction mandated by the Act and the Decree and promised to the international community.