key background for future cases even if it largely follows the pointers set out in *Hatton*. The real significance, however, will be in relation to the forthcoming and remaining pending climate claims before the ECtHR.[63] On this, it is clear that procedure matters; domestic courts remain the key focal point for human rights and climate change adjudication, and this is perhaps where the real potential lies. It is equally clear that although states have a duty in human rights law to ensure that individuals are protected from climate change impacts, this is a due diligence obligation with a high degree of discretion afforded to the state. And as in *Hatton* and its environmental case law in general, the European Court of Human rights will supervise the implementation of this duty, securing a minimum baseline for climate change governance.

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Climate litigation—Paris Agreement—environmental rights—obligations of states to conserve the environment—protection of fundamental rights

2020Hun-Ma389, 2021Hun-Ma1264, 2022Hun-Ma854, 2023Hun-Ma846 (Consolidated). *At* https://www.ccourt.go.kr/site/kor/event/adjuList.do (available only in Korean). Constitutional Court of the Republic of Korea, August 29, 2024.

On August 29, 2024, the Constitutional Court of the Republic of Korea issued a landmark ruling finding that the National Assembly and president of the Republic of Korea (collectively, the Government) violated the obligation to protect the environmental rights of the complainants. This decision is the first high court ruling on climate change in both Korea and Asia, and among the few such cases beyond Western countries. Given the unprecedented number of interventions made by states and international organizations to the advisory proceeding on climate change at the International Court of Justice, this judgment provides insights into the global spread of human rights-based climate change litigation.

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This case arises out of a complaint filed by nineteen members of a youth-driven organization named "Youth 4 Climate Action" against the Government in 2020. The complaint caused a chain reaction involving 255 complainants and four separate cases, eventually reviewed and decided in consolidation by the Court. Notably, sixty-two complainants that filed a complaint in 2022 were children aged not more than ten years old, including one twenty-week fetus that the mother represented. Given the nationwide interest in this matter, the Court held two public hearings, which the Court does not normally do in constitutional cases. The core arguments of the complainants were that the legislation setting insufficient

[63] At present, six claims are pending before the Court. *See* Climate Case Chart, *at* https://climatecasechart.com/non-us-jurisdiction/european-court-of-human-rights.

greenhouse gas (GHG) reduction targets adopted by the Government led to the infringement of their fundamental rights in the Constitution, including their environmental rights provided in Article 35 of the Constitution.[1] They further alleged that the Government's measures severely burdened future generations when the current generation also bear the responsibility of reducing GHG emissions to achieve carbon neutrality (pp. 91–96).

The Framework Act on Carbon Neutrality and Green Growth for Coping with Climate Crisis (Carbon Neutrality Act) was the main piece of domestic legislation subject to review.[2] It provided a foundation for the Government to implement Korea's Nationally Determined Contributions (NDCs) under the Paris Agreement.[3] Whereas Article 8, paragraph 1 of the Carbon Neutrality Act stipulates the first milestone to be achieved by 2030, to reduce GHG emissions by no less than 35 percent compared to the emission level in 2018, the emission reduction goals were not specified beyond 2030. However, Korea declared in 2020 that it would achieve carbon neutrality by 2050, a goal that the parties to the Paris Agreement are also committed to meeting by setting respective NDCs. The specific targets were laid out in the Enforcement Decree of the Act, prescribing a 40 percent reduction of GHG emissions by 2030, and a national framework plan prepared by the Korean Government.

In reviewing the constitutionality of the Government's measures, the Court relied on the principle of excessively deficient protection to determine whether the Government adequately protected the environmental rights of the complainants. This standard of review is whether the state has done at least the minimum to provide adequate and efficient protection of such rights. Furthermore, the nature of the situation in which the fundamental rights are at risk of infringement shall be reviewed objectively based on scientific facts and international standards when the situation falls either under a professional and technical area or of an international character. Given that climate change is a common problem of humanity that requires professional and scientific knowledge, the adopted measures to protect the complainants' environmental rights require careful, holistic examination, considering the said factors (pp. 19–22).

As the Court identified environmental rights as the core rights of this case, it recognized that such rights are third-generation rights that demand international solidarity for individuals to enjoy them fully. Accordingly, international standards established as part of the global commitment to reduce GHG emissions were also reviewed. The setting of NDCs by countries is part of the wider efforts to tackle climate crisis, and the goals suggested by Korea will need to contribute toward the common interest. For this reason, the Court actively assessed how the measures in question met the goal of the Paris Agreement to keep the global average

[1] Daehanminguk Hunbeob [Hunbeob] (Constitution), amended by Constitution No. 10, Art. 35 (Oct. 29, 1987) (S. Kor.) [hereinafter Korea Const.]. The full text is as follows: "(1) All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment. (2) The substance of the environmental right shall be determined by Act."

[2] Gihuwigi Daeeungeul Wihan Tansojunglib Nogsaegseongjang Gibonbeob [Framework Act on Carbon Neutrality and Green Growth for Coping with Climate Crisis] (S. Kor.) [hereinafter Carbon Neutrality Act].

[3] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec.12, 2015, 3156 UNTS 79 (entered into force in Korea on Dec. 3, 2016 as Treaty No. 2315) [hereinafter Paris Agreement]. In addition to the Paris Agreement, the Court recognized the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol to be considered as international norms to which Korea is a party.

temperature increase well below 2°C above pre-industrial levels, and to strive to limit it to 1.5°C (pp. 31–34).

The claims advanced by the complainants can be separated into two broad groupings: the first relating to goals that the Government set for itself in the Carbon Neutrality Act; the second concerning the detailed plans and methodology that it used in modeling its policies to achieve carbon neutrality by 2050.

First, the Court rejected the claim that the mid-to-long-term goals expected to be met by 2030 were insufficient and that the standard should be revised and raised. It found that an agreed legal or objective standard for the judiciary to rely on to evaluate the sufficiency of the goals set by the Government seems to be absent. Although the Court reserved its view on what measures can be construed as ideal as a median goal, it held that there was no evidence that the Government's measures to reduce carbon emissions were inadequate. Overall, the Court did not find the target for 2030 as burdening future generations and, therefore, conformed to the Constitution (pp. 35–41).

On the second point, the Court held that the Carbon Neutrality Act and its Enforcement Decree not specifying the determined goals beyond 2030 violated the Government's constitutional obligations. The Court determined that the vacuum led to an infringement of the environmental rights of the complainants. Indeed, the Act prescribes that carbon neutrality shall be achieved by 2050, and the Government shall reexamine the mid-to-long-term targets every five years and make necessary modifications to reflect the spirit of the Paris Agreement that requests the efforts of all parties to represent progression over time.[4] The Court, however, decided that these procedural measures are on their own insufficient to prevent future generations from being excessively burdened (pp. 41–48).

The Court particularly interpreted the five-year cycle of reviewing the NDCs over the next ten years as very lenient, given its basis neither in the Paris Agreement nor the Carbon Neutrality Act but in Decision 6/CMA.3, adopted at the Twenty-Sixth Conference of Parties (COP) (pp. 43–46). Decision 6/CMA.3 *reaffirms* the nationally determined nature of states' contributions. It also *encourages* state parties to communicate the reviewed targets of a ten-year forward-looking plan to be submitted every five years from 2025.[5] The commitment was reaffirmed in a decision adopted at the COP28 without change.[6] Because the language of these decisions is more exhortatory than imposing a strict legal obligation to the state parties, the Court found that the Government would have the discretion to modify the NDCs if circumstances change. As a practical matter, this would mean that the lack of any plan beyond 2030 could result in the Government relying on short-term plans, without reasonable targets for the desired *progression* (p. 44, emphasis by the Court). The lack of a quantitatively set target post-2030 would burden

[4] *Id.* Art.3.

[5] UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on Its Third Session, Held in Glasgow from 31 October to 13 November 2021, Decision 6/CMA.3, Common Time Frames for Nationally Determined Contributions Referred to in Article 4, Paragraph 10, of the Paris Agreement, FCCC/PA/CMA/2021/10/Add.3 (2022) (emphasis by the Court).

[6] UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on Its Fifth Session, Held in the United Arab Emirates from 30 November to 13 December 2023, Decision 1/CMA.5, Outcome of the First Global Stocktake, para.170, FCCC/PA/CMA/2023/16/Add.1 (2023).

future generations, which cannot be said to provide a minimum protective measure to mitigate the risk exposed by them (pp. 54–55).

From a constitutional law perspective, setting targets to reduce GHG emissions and the trajectory is an obligation of the state to protect the environment, which emanates from Article 35, paragraph 1 of the Constitution.[7] More importantly, it brings about a comprehensive restriction on the enjoyment of fundamental rights, such as but not limited to the rights to property affected by the plans provided to reach the goals. Given that the reduction efforts should progress as time passes, the restriction is likely to persist and eventually affect the interest of multi-stakeholders in achieving carbon neutrality. In this regard, enacting legislation of this kind is forward-looking in that the restriction would be paid off by ensuring fundamental rights in the future. However, future generations will likely be limited in their participation in the democratic decision-making process even though the climate crisis will affect them more seriously. There is also a structural risk of being unable to tackle these problems responsively, which requires a long-term response since legislative power is granted to a body constituted via election. In the end, the Court found that the Government should provide a target after 2030, at least in vague terms, in the Act. Accordingly, the legislature is in the position to be fully responsible and obliged to establish clear and specific mid-to-long-term GHG emission reduction targets (pp. 56–58).

Finally, the complainants argued that the Carbon Neutrality Act and its Enforcement Decree did not address the consequences attributed to the Government should it fail to meet the target. The Court expounded that overseeing and implementing mechanisms emanating from the Paris Agreement and the internal inspection procedure in Korea, or means made available, such as national emission trading schemes, can be considered at least to be providing a minimum protective measure to tackle the climate crisis. It emphasized, however, that such measures would not be able to mitigate the regulatory gap beyond 2030, which is in line with the Court's previous reasoning that the lack of a quantified target was unconstitutional. Based on these observations, the Court concluded that the environmental rights of the complainants have been infringed due to a regulatory gap in the Carbon Neutrality Act provided to achieve its target by 2050. Instead of declaring the provision unconstitutional, resulting in an immediate nullification of the law, the Court found them unconformable to the Constitution and asked the legislature to revise the law by February 28, 2026. Until then, the current law remains in effect since the absence of a law providing a target to achieve carbon neutrality will aggravate the circumstance and affect the goals set to be met by 2030 in entirety (pp. 48–55).

However, five justices found that interpreting the term *national GHG emissions* in Article 8, paragraph 1 of the Carbon Neutrality Act[8] differently depending on the timeframe was problematic (pp. 75–83). For instance, they held that it is deceptive to state that the total amount of absorbed carbons is forecast to decrease from -41.3 million tons in 2018 to -26.7 million tons in 2030. When the amount of absorbed carbon would only be reflected in the calculation for the year 2030, it could be assessed that the emission rate decreased when it was actually

[7] Korea Const., *supra* note 1.

[8] Carbon Neutrality Act, *supra* note 2. The full text is as follows: "The 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" (emphasis added).

because of the inclusion of the absorbed amount (pp. 78–79). The justices even warned that setting the emission rates differently in interpreting the same term in the provision would negatively impact global efforts to tackle the climate crisis through scientific administration of emission reduction trajectories and even go against the spirit of the Paris Agreement that values transparency (p. 79). Nevertheless, the Court could not decide the set targets as unconformable to the Constitution since it requires a favorable vote from a two-thirds majority, or six justices or more.[9]

In a nutshell, the Korean Constitutional Court found that although the set target to be achieved by 2030 may not be sufficient, it did provide at least a minimum protective measure to the complainants. However, the Court upheld that there is a regulatory gap beyond 2030. The consistent and coherent policy implementation would be hindered unless there is at least an abstract quantified goal to achieve carbon neutrality by 2050. It results in transferring the burdens to future generations, eventually infringing their environmental rights. It, therefore, ordered the relevant provisions to be applied until adequate revisions are made to the provision, given that there is a risk of even removing the median target, which is set pursuant to Article 8, paragraph 1 of the Carbon Neutrality Act.

* * * *

Four takeaway points can be highlighted from this case, focusing on the implications of climate change on individual human rights. First, the Court decided that environmental rights are fundamental rights, and the Constitution obligate the state to conserve the environment. It is rare for the Court to rely on this constitutional provision to find that the state acted unconstitutionally, because the right to the environment has been understood as an abstract right that had to be actualized through further legislation. The treatment of such a right can be found in the Court's decision to apply the principle of excessively deficient protection, which reviews whether the protection provided by the state is at least providing minimum protection to ensure the alleged right is not infringed. However, the failure of the Government to provide at least a quantified target, even in the abstract, could not be justified and led the Court to decide that the achievement of carbon neutrality by 2050 was concerning. Instead, the Court assessed that the regulatory gap resulted in overburdening future generations when the responsibility needed to be progressively and consistently shared in approaching the aimed target, further joining the global efforts to tackle the common problem.

Second, the Constitutional Court was serious about protecting the rights of future generations by not only taking account of scientific facts but also reviewing international standards. The Court has positively interpreted the provisions of the laws to guarantee the fundamental rights of the people by actively incorporating constitutional values.[10] The Court confirmed such a view in its decision by declaring: "When the State is setting targets and implement measures in response to the climate crisis, it is requested by the Constitution to foster the environmental conditions of the future" (p. 33).

[9] Heonbeobjaepansobeob [Const. Ct. Act], Art. 23, para. 2(1) (S. Kor.).

[10] Korea Const., *supra* note 1. It is stipulated in Article 10 of the Constitution, which provides: "It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals."

Third, while the Constitutional Court ruling is commendable, it is necessary for the Court to consider environmental rights as a specific and materialized right in reviewing future cases. In this respect, rather than focusing on the rights of future generations, the Constitutional Court should have looked first at how the current generation, especially the most vulnerable, may have their fundamental human rights violated by climate change. The litigation exposed the limitations in reasoning that can easily be found, for instance, from an appeal for ensuring the rights of future generations, which can hardly be said to be materialized in the current international human rights regime. Although such a reasoning can be appealing, evidencing a sufficient causality between the climate crisis and infringement of rights would be difficult. The *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* case recently rendered by the European Court on Human Rights[11] is evaluated as having directly reviewed what are the current legal obligations of the state regarding the climate crisis, instead of looking forward to the prospects. Furthermore, the case was commended for expansively interpreting the scope of admissibility for those representing the socially vulnerable groups in the litigation process.

Lastly, a fundamental question arises regarding human rights-based climate litigation: to what extent can the judiciary intervene in the decision-making process to address climate change, when that process is driven largely by the legislature and the administration? The impact of this kind of judicial intervention is questionable. For instance, the degree to which carbon emission reduction is adequate is given significant discretion and within the remit of the legislature and the administrative bodies. However, if the targets set by the Government give rise to a serious breach of fundamental rights guaranteed by the Constitution and various international human rights treaties, the Court should play the important role to review in the same manner as it reviews a human rights infringement case. Recent climate cases reflect such a complexity, particularly in the sense that causality is often difficult to find, and the Korean Constitutional Court decision can be one of those examples. In fact, the cautious approach of the Court can be seen in its examination of the goals to be reached by 2030, as it reserved to substantively review whether the target set by the Government was sufficient for Korea to do its part in responding to the climate crisis. Be that as it may, it stated that deciding the intended goals provided in both the Carbon Neutrality Act and its Decree thereof as conforming to the Constitution did not mean that it was the best choice of action. For example, the Court noted that the GHG emissions reduction trajectory in a concave shape is ideal, as contended by the complainant, when the contested trajectory, in this case, was convexed (pp. 63–64).

Admittedly, the boundary of what constitutes a legal question is often a thorny matter. Environmental policymaking is one of the areas that requires individual states to exert a degree of discretion as they will have to adopt necessary measures step-by-step based on their respective circumstances. It can also be approached from the perspective of democratic legitimacy. Nevertheless, this case reveals that when a policy can severely impact fundamental rights, it cannot be dismissed simply as a political or policy question. It can comprise a legal question on which the judiciary has to decide. In other words, the discretionary power granted to a state is not unlimited. The policies resulting from exerting such a power should be compatible, at least with the Constitution and the

[11] Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, App. No. 53600/20 (ECtHR Apr. 2024).

individual human rights arising thereof, which is required for the Constitutional Court to step in to decide the constitutionality. At least for the Korean courts, it is hoped that they focus more on the "how" question rather than whether the courts are competent to address a highly, but not exclusively, political question when the policy can risk the full enjoyment of the fundamental rights.

Regardless of the limitations and questions remaining, the Constitutional Court of Korea taking the step to assess the NDCs from a rights-based approach in Asia for the first time is commendable. As the number of contentious climate litigation cases suggest, especially in the context of challenging the responses of states against the climate crisis to secure their human rights, are soaring in various countries,[12] it would serve as a meaningful precedent that would provide food for thought to other courts.

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Supreme Court of India (SCI)—Great Indian Bustard—International Union for Conservation of Nature (IUCN)—climate change—United Nations Framework Convention on Climate Change (UNFCCC)—International Solar Alliance (ISA)—right to be free from adverse effects of climate change

M.K. Ranjitsinh and Others v. Union of India and Others. 2024 INSC 280. *At* https://climatecasechart.com/non-us-case/mk-ranjitsinh-ors-v-union-of-india-ors.
Supreme Court of India, March 21, 2024.

On March 21, 2024, the Supreme Court of India (SCI) rendered its decision on a dispute regarding the protection of the Great Indian Bustard (GIB). The SCI's decision related to a case that was first brought before it in 2019 when M.K. Ranjitsinh and other environmentalists invoked its writ jurisdiction under Article 32 of the Indian constitution. The petitioners wanted to protect the GIB, a native bird of western India and Lesser Florican, especially in the states of Gujarat and Rajasthan. They attributed the dwindling population of these birds to pollution, climate change, loss of habitat, and the expansion of human activities. They argued that due to the constant decline in the GIBs' population in the last few decades, the species' status has been downgraded by the International Union for Conservation of Nature (IUCN) from "threatened" (1988) to "endangered" (until 2008) to "critically endangered" (current status).[1]

[12] Columbia Law School Sabin Center for Climate Change Law, *Climate Change Litigation Database*, *at* https://climatecasechart.com.

[1] IUCN, *Red List of Threatened Species, Great Indian Bustard (*Ardeotis Nigriceps*), at* https://www.iucnredlist.org/species/22691932/134188105.