

Korea's Judicial Interpretation and Application of International Law

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Abstract

As the number of Korea's conclusion of treaty has increased, stakeholders are more interested in how Korean courts incorporate and apply the treaty provisions in cases brought before the Korean judiciary. According to the Constitution in Korea, the international treaty has the same effect as domestic law; however, the court is reluctant to make a decision or reason on the basis of international treaty. In most cases, Korean courts ruled that the treaties do not accord with the individuals' or entities' rights to refer to the treaty provisions as the direct cause of action in Korean courts. Also, the prevailing view is that the treaties without ratification processes are considered to have the same status as the enforcement decrees or enforcement rules under the acts. This article reviews Republic of Korea's approach to interpretation and application of treaties in its domestic court system, and issues and challenges raised by stakeholders.

Key words: Korea's judicial review, international treaty, international agreement, direct applicability, treaty ratification, implementing legislation

I. Introduction

Since the establishment of the Korean Government in 1948 until 2018, 3291 treaties (2584 bilateral and 707 multilateral) were concluded by the Republic of Korea and entered into force.¹ The recent trend in concluding treaties in Korea is as follows: First, the number of the treaties has increased rapidly. In the first thirteen-year period from 1948 to 1960, only 102 treaties (66 bilateral and 36 multilateral) came into force, whereas in the eight-year period from 2011 to 2018, 544 treaties (451 bilateral and 93 multilateral) came into force. Second, regarding bilateral treaties, areas in which treaties are concluded have expanded and an increasing number of treaties related to economic matters, such as conventions for avoiding double taxation, the protection of investment, and air service have been concluded. Third, regarding multilateral treaties, treaties dealing with global matters such as trade, human rights, and disarmament have been more concluded in recent years, which reflect the fact that states have strengthened inter-dependent relations among themselves.²

The negotiation process for the conclusion of a treaty involves a very long and difficult process, but the more difficult problem arises at the stage when the treaty, once signed, is specifically implemented by the governments of the Contracting Parties. It is because how the treaty is implemented, once entered into force, actually depends on national interests and is a more realistic and direct issue.

Article 6 (1) of the Korean Constitution stipulates that ‘treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea,’ so it clearly provides that international treaties have the same effect as the domestic laws. In practice, however, it is not clear whether the international treaty to which Republic of Korea has joined has full domestic effect, or, moreover, full effect under the court practice. For example, domestic courts often recognize international human rights treaties as documents that simply provide rights and obligations between States, and often undermine the domestic effect of international human rights treaties by applying conflicting domestic laws first or interpreting similar domestic laws differently from the treaties.

1 See Ministry of Foreign Affairs, Treaty Making by the ROK, http://www.mofa.go.kr/eng/wpge/m_5439/contents.do#part3 (last visited Oct. 1, 2019).

2 *Id.*

This article will review what position Republic of Korea has taken in interpreting and applying the provisions of international treaties in cases brought before the Korean judiciary, focusing on the trade treaties and the human rights treaties.

II. The Domestic Effect of the International Treaties in Korea

The theory that explains the relationship between international law and domestic law is dualism and monism. The dualism is a view that emphasizes the difference between the order of international law and the order of domestic law. According to this approach, the international and domestic legal order exist separately from each other and do not affect or exclude each other. The validity of international law in a dualist domestic system is determined by a rule of domestic law authorizing the application of that international norm. Because of the variety of ways in which domestic systems incorporate international law, some scholars have preferred the term “pluralism” to “dualism.”³ Since international law does not automatically have a domestic effect, the State recognizes the domestic effect of international law through transformation into domestic law, if necessary, based on the principle of national sovereignty. In this view, it is sufficient for the domestic court to rule on specific matters by applying only domestic law.

In contrast, monism recognizes international and domestic laws as a legal system based on ethical or logical grounds such as human rights. According to this approach, international law is incorporated domestically without any particular procedure and takes effect. Therefore, the court will be able to make decisions by applying international law directly on specific matters.

Whether the court will apply domestic laws or the treaty provisions in cases of application of treaty at issue can result in significant differences in the outcome. However, the practices of States tend to draw valid conclusions on specific issues rather than solving them on the basis of abstract theories, and even a monism country does not recognize international law as valid domestically without any restrictions.

3 In-seop Chung, *International Law*, 84 (9th ed., Bakyounsa, 2019); Madelaine Chiam, *Monism and Dualism in International Law* (Oxford Bibliographies, 2018).

Article 6(1) of the Korean Constitution provides that the treaties promulgated by the Constitution and the generally approved international laws have the same effect as the domestic laws of the Republic of Korea. There is no interpretation clause or explanatory note on the meaning of this provision, but there is no doubt that the treaty will be accepted as a domestic law without any separate procedures and will be effective domestically in order to incorporate into the domestic law. Accordingly, the international treaties that Korea has signed and ratified can be applied to a domestic court case without implementing legislation. Therefore, Korea is taking the aforementioned monism approach regarding the application of international and domestic law under the Constitution.⁴

III. Korean Courts' Position on the Interpretation and Application of International Treaties

A. Impacts of the International Treaties on the Interpretation of Domestic Law

1. The Legal Status of Trade Agreement

The decision on the status of the trade agreement under domestic law is cited by the Supreme Court with regards to the Ordinances for School Food Service enacted by the local government in the Province of Jeollabukdo. The Supreme Court confirmed in its ruling on September 9, 2005 that the General Agreement on Tariff and Trade (GATT) 1994 and the Agreement on Government Procurement (AGP) have legal status under Korean domestic law. In particular, the Court stated the treaties have legal validity equivalent to the domestic law under Article 6(1) of the Constitution, and accordingly, the ordinances enacted by local governments are invalid if they violate the GATT or the Agreement on Government Procurement as follows:

As the GATT is an annex to the World Trade Organization (WTO) Agreement (Treaty No. 1265), a treaty promulgated on 30 December 1994 and implemented on 1 January 1995, with the consent of the National Assembly on 16 December 1994, and the Agreement

⁴ In-seop Chung, *supra* note 3, at 110-129. ; Nohyoung Park, *Application of International Law in Korean Courts*, 1 Asian L. Rev. 50 (2004).

on Government Procurement (AGP) is a treaty promulgated and implemented on 3 January, 1997 (Treaty No. 1363, plurilateral agreement), with the consent of the National Assembly on 16 December, 1994, since they were accorded legal validity equivalent to the domestic law under Article 6(1) of the Constitution, and accordingly, the ordinances enacted by local governments are invalid if they violate the GATT or the Agreement on Government Procurement.⁵

Furthermore, the Supreme Court held that the Ordinances for School Food Service of the Province of Jeollabukdo constitutes a violation of international agreements equivalent to the domestic law as follows:

Each provision in the Ordinance on this case shall be considered to be in violation of Article 3 paragraph 1 and paragraph 4 of the GATT stipulating the principle of national treatment, as it requires those who use domestic agricultural and livestock products to be prioritized, to select those who use them and to support the purchase of food or food materials in order to protect the production of domestic products, and to make sure that the grants are used in purchasing domestic agricultural and fishery products.

Meanwhile, the Supreme Court ruled to the same effect in a similar case filed against a school food services ordinance in the Province of Kyungsangnam-do on December 24, 2008 as follows:

Article 3 paragraph 1 of GATT provides that ‘the contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.’ and Article 3 paragraph 4 stipulates that ‘the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of

5 Supreme Court [S. Ct.], 2004chu10. Sep. 9, 2005 (S. Kor.) (Affirmation of Invalidity of Re-resolution of the Ordinances for School Food Service in the Province of Jeollabukdo).

national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.’ Under each of the above provisions, laws, rules and requirements that adversely affect the domestic sale of imported goods shall not be applied to imported products or domestic products to protect domestic production. And it is interpreted that the importing country should not give discriminatory treatment to the imported products that may adversely affect the competition than domestic like products according to the laws, rules and requirements.

Each provision of the ordinance in this case requires that schools use domestic agricultural, livestock, and fisheries products on the priority of the school food, and that those who use domestic agricultural, livestock and fisheries products shall be selected to grant support for the purchase of food or food materials. Since the recipients of the support are required to use the funds to purchase domestic agricultural, livestock and fisheries products, this is equivalent to treating the imported products at a disadvantage status than domestic products to protect the domestic products, which should be considered in violation of Article 3 paragraph 1 and paragraph 4 of the GATT, which stipulates the principle of national treatment.⁶

Through the judgment on the Ordinances for school food services, the Korean court clearly stated its position on the status of the trade agreement under the domestic legal system, which was approved by the National Assembly for ratification and consent.⁷ By this decision, WTO provisions may, in principle, be invoked in domestic courts, although there are still conflicting debates on whether the WTO rules have direct effect on domestic matters. WTO also recognized this court position in its periodic trade policy review report in 2012.⁸

6 Supreme Court [S. Ct.], 2004Chu72. Dec. 24, 2008 (S. Kor.) (The Confirmation on the Invalidity of Ordinances for School Food Services in the Province of Kyungsangnamdo).

7 Jae-min Lee, *Interpretation and Application of Trade Agreements by Korean Courts: Recent Developments and Remaining Questions*, 21 Seoul Int’l Study Book No 2, 94 (2014).

8 Trade Policy Review, *Report by the Secretariat, Republic of Korea, Revision*, WTO Doc. WT/TPR/S/268/Rev.1(Nov. 8, 2012).

2. The Legal Status of Human Rights Treaty

The international human rights treaty has been utilized as one of the persuasive means to improve human rights conditions in the country or to protect individual human rights directly. Since Korea became a party to the Convention on the Elimination of All Forms of Discrimination against Women in 1985, Korea acceded major human rights treaties including International Covenant on Civil and Political Rights⁹ and International Covenant on Economic, Social and Cultural Rights¹⁰ in 1990, Convention on the Rights of the Child in 1991, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1995, and Convention on the Rights of Persons with Disabilities in 2009.

It has been often argued that certain domestic laws violate the international human rights treaties in domestic court. However, there has been no decision by the Supreme Court or the Constitutional Court that certain domestic laws conflict with human rights treaties in domestic trials. International human rights treaties have been only used as a reference when interpreting domestic law.¹¹

When joining a human rights treaty, Korea sometimes gives a reservation on the specific provision of the treaty, but there is no case in which Korea has declared such treaty itself a non-self-executive treaty to exclude the domestic effect of the treaty.

In an ICCPR government report, the Korean government stated that, as the Covenant was ratified and promulgated by the Government in consent with the National Assembly, it has the authority of domestic law without requiring additional legislation.¹² Furthermore, in this report, the Korean government explained that the Administrative authority and the Court are obliged to observe the Covenant when exercising their authorities. In the event that a law enacted prior to the Covenant's ratification conflicts with its provisions, the Covenant has greater authority. No law enacted in Korea may infringe on the rights provided in the

9 International Covenant on Civil and Political Rights *adopted* Dec. 16, 1966 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter ICCPR].

10 International Covenant on Economic, Social and Cultural Rights *adopted* Dec. 16, 1966, 993 U.N.T.S. 3, *entered into force* 3 Jan. 1976 [hereinafter ICESCR].

11 In-seop Chung, *International Law Cases in Korean Courts*, 261 (Bakyoungsa, 2018).

12 United Nations International Covenant on Civil and Political Rights, Consideration of Reports submitted by States Parties under Article 40 of the Covenant – Second periodic reports of States parties due in 1996, Addendum, Republic of Korea, U.N. Doc. CCPR/C/114/Add.1, para. 9 (Aug. 1998).

Covenant; any such law would be viewed as unconstitutional.¹³

The government report in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, also mentioned that the Convention has the same effect as domestic laws following executive ratification and the promulgation of the Convention, with the consent of the National Assembly, and additional legislative measures are not necessary. Therefore, when conflicts between domestic laws and the Convention arise, the *lex posteriori* rule and the principle of the precedence of special law shall be applied.¹⁴ The government report in the International Convention on the Elimination of all Forms of Racial Discrimination referred that the Convention has become a part of domestic laws, and is directly applicable and can be invoked in the courts of the Republic of Korea.¹⁵

B. Direct Effect of the International Treaties

1. Direct Effect of Trade Agreement

It is a different matter as to what status of domestic legal system, the treaty Korea entered into has under Article 6 (1) of the Constitution, and whether the trade agreement can be directly invoked by private party in the domestic court, so-called 'direct effect.'¹⁶

When the Korea Trade Commission (KTC) took a measure to impose anti-dumping duties on ceramic tiles from China, and the Chinese exporter filed a lawsuit to cancel the imposition of anti-dumping duties, the Supreme Court held that private party could not file a complaint directly with the domestic court on the basis of the WTO Agreement. The investigation on whether Chinese ceramic tile exporters sold goods through dumping in the Korean domestic market,

13 *Id.*

14 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Consideration of Reports submitted by States parties under Article 19 of the Convention - Initial reports of States parties due in 1996, Addendum, Republic of Korea, U.N. Doc. CAT/C/32/Add.1, para. 20 (May 30, 1996).

15 United Nations International Convention on the Elimination of all Forms of Racial Discrimination, Reports submitted by States parties under Article 9 of the Convention - Eighth periodic report of States parties due in 1994, Addendum, Republic of Korea, U.N. Doc. CERD/C/258/Add.2, para. 9 (Nov. 23, 1995).

16 Jae-min Lee, *supra* note 7, at 95.

causing material damage to the domestic industry was conducted by the Korea Trade Commission under the Ministry of Knowledge and Economy at that time under the Customs Act and the Enforcement Decree of the Customs Act. The Korea Trade Commission decided on April 17, 2006 to impose 29.41 percent anti-dumping duties on the Chinese exporter above, and the Chinese exporter as a plaintiff filed a lawsuit with the Korean court to cancel the disposition of anti-dumping duties, based on the WTO anti-dumping agreement.¹⁷

The Seoul Administrative Court, which was in charge of this case as a lower court, confirmed that the Korea Trade Commission's imposition of anti-dumping duty measures were legitimate based on the WTO Agreement and Customs Act.¹⁸ The Supreme Court, however, acknowledged the legality of the Korea Trade Commission's anti-dumping duty measures, but held that the lower court's decision to accept a private party's cause of action on the basis of the WTO Agreement was inappropriate.¹⁹ The following are the main reasoning of the Supreme Court's decision on this matter:

Some of the reasons for the plaintiffs' appeal... are that the Agreement on the Implementation of Article 6 of the GATT contending the legality of the rules of the case on the basis of regulations related to the anti-dumping measures, but the said agreement is an international agreement that establishes rights and obligations between the member States, and in light of its contents and nature, the legal dispute in this regard is, in principle, dealt with the WTO Dispute Settlement Body, and shall not be regarded as having direct effect to the private party. There is no reason for the appeal to be made in this regard, as it is not appropriate that the private party would directly bring the lawsuit with a domestic court against WTO member states, although the cause of action would be the cancellation the disposal of the anti-dumping duties imposed by WTO member states under the said agreement or the reason for the cancellation by the breach of the said agreement.

The court denied the application of a WTO Agreement directly in the court proceedings, explaining that it is generally the governments who have the rights and obligations under the WTO Agreement rather than individuals.

17 *Id.*

18 Seoul Administrative Court [Seoul Admin. Ct.], '2006KuHab29782, Dec. 24, 2007'.

19 *Shanghai ASA Ceramic Co., Ltd. v. Ministry of Strategy and Finance*, Supreme Court [S. Ct.], 2008Du17936, Jan. 3, 2009 (S. Kor.).

In *Shanghai ASA*, the plaintiff claimed that the Korean government's imposition of an anti-dumping duty on its products was inconsistent with the WTO Anti-dumping Agreement (ADA). However, the court clearly indicated that individuals have no standing to argue whether the Korean government's measure in question is in compliance with the WTO Agreement at Korean courts. Therefore, it is clear that individuals cannot directly invoke the WTO Agreement at Korean courts. The reason for the court's decision in *Shanghai ASA* was based on the WTO Agreement being designed to deal with legal relationships between the WTO Member States.²⁰

The commentary to the above Supreme Court decision²¹ explained the meaning of this decision as follows:

From the perspective of comparative law or reciprocity, there is nothing to be surprised at in the court's decision. Indeed, Korea's main trading partners, such as the United States, the European Union, China and Japan also do not recognize the direct effect of the WTO Agreement. As, however, Korean lower courts have allowed a direct application of the WTO Agreement, the meaning of the *Shanghai ASA* case cannot be underestimated. Although the Korean Constitution reflects monism with regard to the relation between treaty and domestic law, the *Shanghai ASA* case is legitimated under the principle of reciprocity in international economic relations.²²

The Supreme Court's ruling on the restriction of operating hours at large retailers is also held in the same vein. Under the old Distribution Industry Development Act, which was amended on January 1, 2012, local governments were allowed to limit their business hours to large stores or order mandatory shutdowns within two days of each month. Thus, local governments amended the ordinance to include a restriction on business hours and designation of mandatory shutdown days. Large shopping malls raised the issue that the ordinance violates the WTO General Agreement on Trade in Services (GATS) and the Korea-EU Free

20 Dongwon Jung and Sungbum Lee, Korea, in Folkert Graafsma et al., *The Int'l Trade L. Rev.* 113 (4th ed., Law Business Research Ltd., 2018).

21 Jinyul Ju, *The Korean Supreme Court's First Denial of Direct Effect to the WTO Agreement: 2008 Shanghai ASA Ceramic Co Ltd v. Ministry of Strategy and Finance*, 'Seoul International Study Book 16. No.1, 231-235'

22 Dongwon Jung and Sungbum Lee, *supra* note 20.

Trade Agreement (FTA), and argued that the concerned local governments should abolish the measure of the business hours' limit. The lower court, the Seoul Administrative Court ruled that the ordinance of the local administrative body did not violate the obligation of the GATS.²³ However, the Seoul High Court, the appellate court of the ruling, stated that the ordinance itself cannot be considered a violation of the GATS, but acknowledged the special legal status of the GATS and found that administrative measures against large stores were illegal as they were an abuse of discretion.²⁴ Referring to the Supreme Court's ruling in 2009, the Supreme Court recalled that the agreement in this case is an international agreement that establishes rights and obligations between Member States, and that the agreement does not have direct effect on private parties unless special circumstances exist. The Supreme Court also noted that restrictions on the operation hours of large stores that are already allowed to enter the market are the same as those of domestic businesses in Korea, and do not contradict the purpose of the agreement. In addition, the Court dismissed the ruling, stating that the reasoning on abuse of discretion regarding administrative measures.²⁵ In the similar issues, the Suwon District Court decided that the GATS had no direct effect on the private parties, so there was no need to look further into the plaintiffs' claims regarding GATS.²⁶

This Supreme Court's position is in line with the basic purpose of the trade agreement. This is because the rights and obligations imposed by the agreement give rights and obligations to the governments of Contracting Parties, not private actors, unless there is a separate agreement between the Parties, and do not necessarily permit private actors to file a suit with the domestic courts of the Member States on this basis.

In this regards, Korea-U.S. FTA included the provision that the agreement does not grant private rights to individuals to prevent further such disputes.²⁷

23 Seoul Administrative Court [Seoul Admin. Ct.], 2012KuHab43345, Aug. 21, 2014 (S. Kor.).

24 Seoul High Court [Seoul High Ct.], 2013Nu29294, Dec. 12, 2014 (S. Kor.).

25 Supreme Court [S. Ct.], 2015Du295, Nov. 15, 2015 (S. Kor.).

26 Suwon District Court [Suwon Dist. Ct.], 2013Ku-Hab10671, Aug. 21, 2014 (S. Kor.).

27 Korea-U.S. FTA, General Provisions.

2. Direct Effect of Human Rights Treaty

The largest number of Korean court rulings that have been decided on the basis of international human rights treaties are cases involving conscientious objection. Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under human rights treaty. The parties' conscientious objections argument was made based on Article 18 of the International Covenant on Civil and Political Rights, which provides: '(1) everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching, (2) no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice, and (3) freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.'²⁸

The concerned laws in the Korean court decisions related to conscientious objection are mainly the Military Service Act²⁹ and the Reserve Forces Act.³⁰ Article 88(1) of the Military Service Act stipulates 'Any person who has received a notice of enlistment for active duty service or a notice of call (including a notice of enlistment through recruitment) and fails to enlist in the military or to comply with the call, even after the expiration of the following report period from the date of enlistment or call without justifiable grounds, shall be punished by imprisonment with labor for not more than three years: (1) Three days for enlistment for active duty service; (2) Three days for a call-up to social work personnel service; (3) Three days for a call for military education; (4) Two days for a call for military force mobilization and a call for wartime labor.' Furthermore, according to the Reserve Forces Act, 'A person who fails to receive drill under Article 6 (1) without any justifiable ground or who receives such drill on behalf of any other person subject thereto' shall be punished by imprisonment with labor for not more than one year, by a fine not exceeding 10 million won, by misdemeanor

28 ICCPR, art. 18(1)-(3).

29 Byeongyeokbeob [Military Service Act (hereinafter "Military Service Act")] Act No. 16356, *amended* Apr. 23, 2019(S. Kor.).

30 Yebigunbeob [Reserve Forces Act] Act No. 14839, *amended* Jul. 2017 (S. Kor.).

imprisonment, or by a minor fine.³¹

Most of the cases regarding conscientious objection were criminal cases of violating the Military Service Act and the Reserve Forces Act, but there were also cases involving appeals for unconstitutionality before the Constitutional Court and state compensation issues. However, the parties' conscientious objections based on Article 18 of the International Covenant on Civil and Political Rights have not been accepted until 2017.

The courts have not recognized conscientious objections mainly based on following grounds: (i) Article 18 of the ICCPR does not give rise to the right to conscientious objection or to be exempt from the application of the Military Service Act; (ii) Punishing a conscientious objector for violating the Military Service Act without granting him an exemption from military service or an opportunity for alternative service does not constitute a violation of the terms of his or her right to freedom provided in the ICPR; (iii) Conscientious objection is not a generally accepted international law; (iv) The recommendation of the Human Rights Committee cannot be regarded as having superior legal binding power than the court's statutory interpretation authority provided in Article 101 of the Constitution and the Constitutional Court's authority to adjudication on the constitutionality of statutes provided in Article 107(1) of the Constitution.³²

The Constitutional Court has dealt with cases involving conscientious objection several times. In the 2004 Constitutional Court decision, the majority said that punishment for conscientious objectors does not violate the Constitution in light of the constitutional provisions. The minority opinion, however, pointed out that conscientious objection should be recognized, citing ICCPR Article 18 ensuring freedom of thought, conscience and religion, the General Comment No. 22 on ICCPR Article 18 and the resolution of the Human Rights Commission.³³ Furthermore, the minority opinion stated that Korea joined the treaty without reservation, that Korea is already a member of the United Nations, that many countries recognize conscientious objection, and that laws and practices to punish conscientious objection cannot be reconciled with the above international human rights treaties.

31 *Id.*, art. 15(9).

32 Kwan-pyo Hong, *A Review on the Internal Implementation of International Human Rights Treaties: Focusing on Cases in which the Court Examined the Application of International Human Rights Treaties*, 32 *Hanyang L. Rev.* No.1 84 (2015).

33 Constitutional Court [Const. Ct.], 2002HunGa1, Aug. 26, 2004 (S. Kor.).

This tendency of the Constitutional Court decision is also reflected in the Supreme Court decision. In its 2004 decision, the Supreme Court stated that ‘Article 18 of the International Covenant on Civil and Political Rights (the so-called B Covenant), which our country is a signatory member, stipulates the same content of basic rights protected by Article 19, the freedom of conscience, and Article 20, the freedom of religion, of the Constitution when based on our viewpoint. For this reason, the defendant cannot be, as an exception, exempted from the application of the Article of this case based upon the above Article of the Covenant. Thus, this ground for appeal is without merit.’³⁴ The Supreme Court also stated that ‘since the exercise of fundamental rights, including the freedom of conscience has the general limitation in so far as constitutional fundamental rights should be exercised within the extent that they enable a communal life with others, in a state community, and should be realized within the limit of not endangering other constitutional values and legal order of the State, the realization of the freedom of conscience is ultimately a relative freedom which can be limited by law under Article 37(2) of the Constitution if the constitutional legal benefits exist which justify the restriction.’ In its 2004 decision, the Court denied the argument of unconstitutionality of Military Service Act which does not provide alternative military service for conscientious objector, stating that ‘Legislators have extensive discretion whether punishment shall be imposed on objectors or alternative military service shall be allowed in order to secure military duty compliance. Although a Military Service Act provision stipulates an exemption from military duty for those who cannot serve because of diseases or mental handicaps as well as provides a special military service system by allowing those qualified to serve as personnel for public interests service, personnel for special research, personnel for industrial technique, etc., and although it stipulates only punishment without any special treatment by a system of alternative military service for an objector who refuses active duty military service based on conscientious and religion, it cannot be viewed that the principle of prohibiting excessiveness, proportionality principle, or the principle of non-discrimination based on religion are breached. Thus, this ground for appeal is without merit.’³⁵

It is worth noting the Supreme Court Decision in 2007 on conscientious objection. The Court decided that Article 18 of the ICCPR does not recognize conscientious objection, and that punishment for conscientious objectors does not constitute violation of the ICCPR, stating that ‘Article 18 of the Covenant

34 Supreme Court [S. Ct.], 2004Do2965, Jul. 15, 2004 (S. Kor.).

35 *Id.*

or any other Articles of the Covenant do not elucidate the right of conscientious objection as a basic human right. It is true that there was a discussion on whether to include such a right in Article 18 of the Covenant in the process of making the Covenant. However, it seemed that the intention of the countries involved were negative.³⁶ On the other hand, the Court considered the possibility of future changes not to punish conscientious objectors in its reasoning, stating that ‘we cannot affirm that there is no room to exclude the application of “justifiable reason” of Article 88(1) of the Military Service Act, due to future circumstantial changes, when it is clear that we cannot approve the proportional relationship between the degree of infringement of the freedom of conscience and punishment by interpretation following the treaty or application of law favorable to conscience. For the present, we cannot judge it to be a violation of the Covenant that there is no alternative military obligation and that the government punishes conscientious objectors for the violation of Article 88(1) of the Military Service Act, which does not provide an exemption to military obligation or an alternative military obligation for the conscientious objector.’ Furthermore, the Court concluded that ‘however, given that we cannot find it violates the Covenant that there is no alternative military service system and that on whether to introduce the alternative military obligation, a wide range of discretion should be granted to the legislatures of each member country. For the present, a legislature’s decision to introduce an alternative military obligation may be difficult and cannot be deemed to be unreasonable or clearly wrong. It cannot be interpreted it is against the Covenant to punish the conscientious objector without providing him an opportunity to be exempted from such an obligation or to substitute it with alternative service under the Article 88(1) of the Military Service Act.’³⁷ This case did not acknowledge conscientious objection, but it was noted that the court may not punish conscientious objectors through interpretation or application of treaties in the future without additional domestic legislative procedures, and that it may deny the effectiveness of domestic laws that violate the human rights treaties.

In June 2018, the Constitutional Court held that the provision of Military Service Act, which stipulated only five types of military service such as active duty, reserve service, supplemental service, military service reserve and wartime service, and did not stipulate alternative service for conscientious objectors,³⁸

36 Supreme Court [S. Ct.], 2007Do7941, Dec. 27, 2007 (S. Kor.).

37 *Id.*

38 Military Service Act, art. 5(1).

violated the principle of proportionality, thus infringed on the freedom of conscience of conscientious objectors provided in Article 19 of the Constitution.³⁹ In light of international human rights law, the Court acknowledged the freedom of thought, conscientious or religion provided in Article 18 of International Covenant on Civil and Political Rights, and recalled the ICCPR General Comment No. 22 of Human Rights Committee (1993) stating ‘the Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from Article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief.’⁴⁰ The Court also noted that Human Rights Committee recommended Korean government to establish a legislative measure in conformity with Article 18 of the ICCPR and exempt conscientious objectors from military service in 2006 and 2015.

The Court further stated that ‘considering the fact that the Human Rights Commission’s hearing is closed to the public, it is difficult to conclude that the Committee’s views on individual communications are legally binding such as judicial rulings or decisions. In addition, since the views of the Committee may conflict with the domestic law of the parties to the Convention and its implementation requires full consideration of the historical, social and political situations of each party, it is not possible for those legislators to be bound by the specifics of the Committee’s views to assume an obligation to follow them all. Furthermore, lawmakers should be given a wide range of legislative discretion on whether to take remedy measures, such as the removal of criminal records, for conscientious objectors who have previously been convicted.’ Thus, although the Court held that the lack of alternative national service in the Military Service Act was inconsistent with the Constitution, the provision that punishes conscientious objectors was held constitutional.⁴¹ As a result, the Military Service Act was amended and the Act on Alternative Military Service was newly enacted.⁴²

39 Constitutional Court [Const. Ct.], 2011HunBa379·383, 2012HunBa15·32·86·129·181·182·193·227·228·250·271·281·282·283·287·324, 2013HunBa273, 2015HunBa73, 2016HunBa360, 2017HunBa225 (combined); 2012HunGa17, 2013HunGa5·23·27, 2014HunGa8, 2015HunGa5 (combined), Jun. 28, 2018 (S. Kor.).

40 UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), U.N. Doc. CCPR/C/21/Rev.1/Add.4, para. 11 (Jul. 30, 1993).

41 Jin Sook Yun, *A Study on the Conscientious Objection to Military Service: Focusing on laws and judgments*, 8 Sogang L. Rev. Issue 2, 69-70 (2018).

42 Daechaemyeongyeokbeob [Act on Alternative Military Service], Act No.16851, enacted Dec. 31, 2019, entered into force Jan. 1, 2020 (S. Kor.).

Following the Constitution Court decision in June 2018, the Supreme Court also held in favor of conscientious objection in November, 2018.⁴³ The main issue of this case was whether conscientious objection constitutes a 'justifiable grounds' under Article 88(1) of the Military Service Act. The Court referred the duty of national defense should be borne as provided by the law, citing the provisions of the Constitution Article 39(1), and stated that the problem should be solved through interpretation of the 'justifiable grounds' as the reason for failure to serve military service under Article 88(1) of the Military Service Act. The majority of the Supreme Court described that conscientious objectors do not reject the duty of national defense itself, but simply refuse to fulfill the duty of military service carrying out presenting arms or military exercises. Further, the Court found that if a refusal to serve in the military is based on a genuine conscientious objection, it constitutes the 'justifiable grounds' of Article 88 (1) of the Military Service Act, stating:

Even if the government allows conscientious objection, it is unlikely that the government will have much difficulty in achieving national security and national defense in light of the nation's economic and defense capabilities and the people's high level of consciousness about security. Therefore, forcing a genuine conscientious objector to fulfill his military duty involving a general and military training and punishing his default constitutes an excessive restriction on freedom of conscience or a threat to the essential contents of the freedom of conscientious. Liberal democracy operates on the principle of majority rule, but can only secure legitimacy if it is based on the premise of tolerance and acceptance of minorities. The nation cannot turn a blind eye to the existence of conscientious objectors who inevitably refuse to serve in the military in order to protect their personal values while risking criminal punishment for failing to obtain consent from the majority of the people. It has already been confirmed over many years that unilateral criminal punishment alone cannot solve the problem of norm conflict.'

As for the domestic application of the international treaty, although the majority did not mention about this issue, the concurring opinion stated that Article 18 of the ICCPR applies as a status of domestic law under Article 6 (1)

43 Supreme Court [S. Ct.], 2016Do10912, Nov. 1, 2018 (S. Kor.).

of the Constitution as follows:⁴⁴

In the case of international human rights treaties, such as ICCPR, the court shall endeavor to conform to the provisions when interpreting the basic ss018, which seriously considered human conscience, was a meaningful decision, reflecting the international societies' opinion on conscientious objection, changes in people's view, and consideration of more substantial national security.

C. Indirect Interpretation and Application of Trade Agreement

Since the Supreme Court's ruling on the Chinese ceramic tile anti-dumping case in 2009, the negative position on the direct application of the trade agreement to the private actors seems to have been resolved to some extent. However, the courts tend to continue to invoke the WTO Agreement in its ruling. For example, in a case where a Singaporean exporter filed a lawsuit against the Minister of Strategy and Finance to cancel an order to impose anti-dumping duties on Singapore's ethyl acetate, the plaintiff did not directly invoke the WTO Agreement. But the Court, referring to the main provisions of the Anti-dumping Agreement in its decision, reviewed the Customs Act and its Enforcement Decree to draw a final conclusion.⁴⁵ Aside from the question of whether the private parties may invoke the WTO agreement, these rulings imply that Korean courts have to rely substantially on the WTO Agreement. It is understood that this is due to the perception that it is inevitable to discuss the WTO Agreement, which is the starting point, to understand the exact meaning of the Customs Act and its Enforcement Decree and apply it to disputes. In other words, it is not a matter of direct application of the treaty, but rather of looking at the documents to clarify the meaning and concepts of domestic statutes.⁴⁶ This approach is also appeared in cases where the WTO Customs Evaluation Agreement is analyzed in relation to the implementation of the Customs Act, which is an important reference. In this ruling, the Supreme Court analyzed the issue by specifically referring to the provisions of the WTO Customs Evaluation Agreement, which shows that it relies heavily on WTO Agreements and practices for the interpretation of Korea's Customs Act.⁴⁷

44 *Id.*

45 Seoul Administrative Court [Seoul Admin. Ct.], 2008KuHab40363, Oct. 1, 2009 (S. Kor.).

46 Jae-min Lee, *supra* note 7, at.99.

47 Supreme Court [S. Ct.], 2007Du9303, May 28, 2009 (S. Kor.); Supreme Court [S. Ct.], 2010Du14565, Nov.

IV. Conclusion

In light of the provisions of the Constitution and the reports that Korea have submitted to international organizations, it is clear that international treaties signed by Korea have an equal status with domestic law and are directly applicable in domestic matters, including administration and judiciary. As for internal implementation of international treaties, it has a significant meaning whether the treaties concerned can be invoked before the courts in actual cases as much as whether they are incorporated into the domestic legal system. Many guidelines for preparing a country report in accordance with international human rights treaties stress the need of including cases where the courts have quoted the concerned treaties as a trial norm. It is also considered quite seriously in the process of reviewing such reports.

In addition, Korean courts have made considerable efforts to review the purpose of the international treaties and reflect them as faithfully as possible while hearing disputes concerning trade agreements and human rights treaties. When applying domestic laws that are closely related to international treaties, Korean courts were trying to interpret them in harmonized manner by looking at the international treaties as the starting points. This approach of domestic court is considered to play a positive role in the implementation of future trade agreements and human rights treaties.

On the other hand, the courts' cases of interpreting and applying trade agreements and human rights treaties may be insufficient or fail to accurately reflect the purpose of the treaty. Considering that international interest in the Korea's court rulings is steadily increasing, and that our courts themselves are continuously referring to international treaties, these gaps need to be narrowed to the utmost. In particular, in the case of trade agreements, it is necessary to logically resolve the issue of continuous invoking trade agreements in the ruling while denying their direct application. In the case of a human rights treaties, while the result is the same as the direct application, the majority does not directly invoke the human rights treaties in its reasoning.

In the domestic implementation of various international treaties, the court plays an essential role. For the implementation of the treaty and the court's ruling

29, 2012 (S. Kor.); Supreme Court [S. Ct.], 2010Du16998, Feb. 28, 2013 (S. Kor.); Supreme Court [S. Ct.], 2013Du14764 Feb. 26, 2015 (S.Kor.).

can be resolved in a manner consistent with international treaties and domestic laws, it is necessary to collaborate between academia and practitioners, as well as international law scholars and domestic law scholars, by continuing exchange of views and active joint research.

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