The Constitution Does Not Sleep

On the South Korean Debate to Restrict the Freedom of Assembly After Midnight

Josephina Lee

02.10.2023 doi: 10.17176/20231002-233555-0

The South Korean government is embarking on a process to amend the current Assembly Act with the aim of enforcing stricter regulations on assemblies and demonstrations. Among other things, demonstrations at night are to be generally prohibited. I argue that the legislator's plans disregard the jurisprudence of the Constitutional Court and fail to comply with standards of international law.

Tensions between Labor Unions and the Government as Catalyst

On September 21, 2023, the South Korean National Police Agency announced that a draft bill to revise the Assembly Act is in the legislative pipeline. According to press reports, this draft bill will contain a general ban on assemblies conducted during rush hours and between midnight and 6 a.m. The potential for such measures to significantly erode fundamental freedoms does not seem to be a primary concern for advocates of the reform. The announcement of the Police Agency was a direct response to the recommendations of the Presidential Office on July 21 to implement specific measures and propose amendments to address societal issues arising from late-night demonstrations.

The tension between the government and civil actors exercising their right to freedom of assembly was underscored by a large overnight protest held by the Korean Metal Workers' Union. The protest, initially planned as an overnight sit-in, commenced in the early afternoon in front of the Supreme Court on May 25, 2023, and continued until it was forcibly dispersed by police. Article 11 Section 2 of the South Korean Assembly Act prohibits assemblies within 100m of the court, with exceptions for assemblies or demonstrations that are unlikely to influence judicial independence or escalate into a large-scale assembly. The police authorities justified their dispersal action by alleging that the protesters intended to influence court decisions. Critics point out that the harsh reaction of police authorities was triggered by official statements of President Yoon on May 23 in favor of stronger counter-measures against 'illegal protests', in response to several previous assemblies by the Metal Workers' Union. In reaction to the political controversy stirred up by the Metal Workers' Union's demonstrations, the ruling conservative party (People Power Party) submitted a draft bill for revision of the Assembly Act on June 12, 2023, proposing a complete ban on assemblies from 11 p.m. until 7 a.m.

Supporters of the government's reaction defend the increased restrictions on assembly rights by highlighting the inconvenience caused to the general public by participants' behavior. Numerous media reports on the overnight protests noted that participants were drinking, smoking in public, and littering in adjacent areas, potentially contributing to a negative image of protesters.

While some might argue that it is too early to be overly concerned, it is indeed a fact that the draft bill has not yet been submitted to the Ministry of Government Legislation. Furthermore, since the ruling party does not hold a parliamentary majority, it is unlikely that the bill will pass in the National Assembly during upcoming legislative sessions. Nevertheless, the current trend of expansive restrictions on freedom of assembly cannot be overseen and warrants a thorough examination for its compliance with the Constitution.

Challenged authority of the Constitutional Court

Regardless of the outcome of parliament's approval of the draft bill, the current efforts of the government and the National Police Agency are highly problematic

because they deviate from some pioneering, fundamental rights-friendly decisions of the South Korean Constitutional Court.

In 2009, the Court ruled that a blanket ban on 'outdoor assemblies' from sunset to sunrise violates the freedom of assembly. However, the Court allowed lawmakers to provide reasonable regulation until June 30, 2010.[1] The first challenge to the Constitutional Court was raised when the legislature failed to enact an amendment by the specified date, resulting in a legal void on this issue. Due to the absence of effective legislation, the standards for intervening in assemblies were not clearly determined. Contributing to confusion among civil actors was the fact that the legal definition of Assembly in Act Par. 2 differentiates between 'outdoor assembly' and 'demonstration' and regulates the two forms of action separately.

This ambiguity naturally led to another case in 2014, culminating in a decision by the Constitutional Court. This time, the Constitutional Court declared Article 10 of the Assembly Act as partially unconstitutional, arguing that a total ban on outdoor demonstrations from sunset to sunrise violated the fundamental right to peaceful assembly.[2] Holding demonstrations after sunrise until midnight must be allowed, in the view of the Court, considering this timeframe as a regular part of normal social activities. The Court further reasoned that other provisions of the Assembly Act already provide effective means of intervention in cases where demonstrations could seriously infringe upon residents' privacy or their right against excessive noise disturbance. Indeed, the current Assembly Act already contains numerous provisions enabling police intervention in cases of assembly or demonstration which pose a direct, clear threat to public peace by inciting violence and in cases where an assembly or demonstration causes serious inconvenience to traffic flow. Just as in the previous decision from 2008, the Court obligated the legislature to propose amended legal regulations for demonstrations occurring from midnight until sunrise. The reasoning of the Court clearly indicates that assembly regulations for specific time periods should result from a careful balance of conflicting interests such as privacy rights, demonstration practices within a specific national context, and general public opinion on the issue. The current attempts to amend the Assembly Act, however, rather challenge the authority of the Constitutional Court than comply with its decisions. Although the Court explicitly stated in its ruling that demonstrations at nighttime fall under the general protection of freedom of assembly and that restrictions must be imposed only to the necessary extent, the draft bills of the National Police Agency and People Power Party contain a complete ban on demonstrations at certain times. This leaves ample room for criticism, suggesting that the government may not be taking the Constitutional Court's final interpretation of fundamental rights as seriously as they are obliged to.

Deviation from international human rights law

Since 1980, South Korea has been a State Party to the International Covenant on Civil and Political Rights. As such, it is obligated to enact laws or other measures that are necessary to give effect to the rights recognized in the Covenant, provided they are not already covered by existing laws. The amendments proposed by the ruling party and National Police Agency, however, may not conform to the recognized standards of the treaty based on pronouncements of the Human Rights Committee. Although these pronouncements do not constitute binding interpretations for State Parties, they are more than mere recommendations and should be duly considered.[3]

The Committee has already expressed concern in its observations about the severe restrictions imposed by South Korean authorities on the right to peaceful assembly, including the operation of a de facto system of authorization for peaceful assemblies by the police and the restriction on demonstrations held past

[1] Decision of the South Korean Constitutional Court from 2009.09.24 (2008[illegible]25).
[2] Decision of the South Korean Constitutional Court from 2014.03.27 (2010[illegible]2, 2012[illegible]3).
[3] ILA, International Human Rights Law and Practice, Final Report on the Impact of the Findings of the United Nations Human Rights Treaty Bodies, Berlin Conference (2004), para. 15.

midnight.[4] Restrictions on the specific time of day or date when assemblies can or cannot be held pose compatibility issues with the Covenant since the freedom to choose the time, place and manner of assemblies falls under the protection of the treaty.[5] Although this right may be subject to justified restrictions under some circumstances, it should be kept in mind that State Parties have a positive duty to enable participants to conduct assemblies while directly addressing their target of protest.

Assembly Act as an institutional framework for participation

Current political developments in South Korea illustrate that the right to freedom of assembly can be disproportionally restricted based on the interests of political actors. As of now, the legislature has not succeeded in proposing an alternative regulatory model for nighttime assemblies that adequately aligns with constitutional standards. Regulatory measures should be implemented and executed with the goal to balance the freedom of assembly and public interests, and should only be as restrictive as necessary. When oppressive elements predominate and legal measures fail to facilitate active political participation, the state impairs its own grounds of legitimacy, on which representative democracy lives.

The state has a duty to promote and enable an environment conducive to exercising the right to peaceful assembly by providing a legal and institutional framework within which this right can be exercised effectively.[6] A blanket ban on assemblies at specific times cannot be deemed a suitable measure for safeguarding freedom of assembly. The Korean civil society awaits a reform of the Assembly Act, where political participation is not perceived as a risk, but rather as an opportunity to bolster the legitimacy of representative democracy.

ABOUT THE AUTHOR

Josephina Lee
Josephina Lee is a Research Assistant at the Institute of International and Comparative Public Law at the University of Münster.

SUGGESTED CITATION
Lee, Josephina: The Constitution Does Not Sleep: On the South Korean Debate to Restrict the Freedom of Assembly After Midnight, Verfassungsblog, 02.10.2023, doi: 10.17176/20231002-233555-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20231002-233555-0.

[4] Concluding observations on the 4th periodic report of the Republic of Korea, CCPR/C/KOR/CO/4, para. 52.
[5] General Comment No. 37 (2020), CCPR/C/GC/37, para. 54.
[6] General Comment No. 37 (2020), CCPR/C/GC/37, para. 24.