HUMAN RIGHTS COMMITTEE

Sohn v. Republic of Korea

Communication No. 518/1992

18 March 1994

CCPR/C/50/D/518/1992*

ADMISSIBILITY

Submitted by: Jong-Kyu Sohn (represented by counsel)

Alleged victim: The author

State party: Republic of Korea

Date of communication: 7 July 1992 (initial submission)

Documentation references: Prior decisions - Special Rapporteur's rule 91 decision, transmitted to the State party on 4 January 1993 (not issued in document form)

Date of present decision: 18 March 1994

The Human Rights Committee, acting through its Working Group pursuant to rule 87, paragraph 2, of the Committee's rules of procedure, adopts the following decision on admissibility.

Decision on admissibility

1. The author of the communication is Mr. Jong Kyu Sohn, a citizen of the Republic of Korea, residing at Kwangju, Republic of Korea. He claims to be a victim of a violation by the Republic of Korea of article 19, paragraph 2, of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 The author has been president of the Kumbo Company Trade Union since 27 September 1990 and is a founding member of the Solidarity Forum of Large Company Trade Unions. On 8 February 1991, a strike was called at the Daewoo Shipyard Company at Guhjae Island in the province of Kyungsang-Nam- Do. The Government announced that it would send in police troops to break the

strike. Following that announcement, the author had a meeting, on 9 February 1991, with other members of the Solidarity Forum, at Seoul, 400 kilometres from the place where the strike took place. At the end of the meeting they issued a statement supporting the strike and condemning the Government's threat to send in troops. That statement was transmitted to the workers at the Daewoo Shipyard by facsimile.

2.2 On 10 February 1991, the author, together with some 60 other members of the Solidarity Forum, was arrested by the police when leaving the premises where the meeting had been held. On 12 February 1991, he and six others were charged with contravening article 13-2 of the Labour Disputes Adjustment Act (Law No. 1327 of 13 April 1963, amended by Law No. 3967 of 28 November 1987), which prohibits others than the concerned employer, employees or trade union, or persons having legitimate authority attributed to them by law, to intervene in a labour dispute for the purpose of manipulating or influencing the parties concerned. He was also charged with contravening the Act on Assembly and Demonstration (Law No. 4095 of 29 March 1989), but notes that his communication relates only to the Labour Disputes Adjustment Act. One of the author's co-accused later died in detention, according to the author under suspicious circumstances.

2.3 On 9 August 1991, a single judge of the Seoul Criminal District Court found the author guilty as charged and sentenced him to one and a half years' imprisonment and three years' probation. The author's appeal against his conviction was dismissed by the Appeal Section of the same court on 20 December 1991. The Supreme Court rejected his further appeal on 14 April 1992. The author submits that, since the Constitutional Court had declared, on 15 January 1990, that article 13-2 of the Labour Disputes Adjustment Act was compatible with the Constitution, he has exhausted domestic remedies.

2.4 The author states that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

Complaint

3.1 The author argues that article 13-2 of the Labour Disputes Adjustment Act is used to punish support for the labour movement and to isolate the workers. He argues that the provision has never been used to charge those who take the side of management in a labour dispute. He further claims that the vagueness of the provision, which prohibits any act to influence the parties, violates the principle of legality (nullum crimen, nulla poena sine lege).

3.2 The author further argues that the provision was incorporated into the law to deny the right to freedom of expression to supporters of labourers or trade unions. In this respect, he makes reference to the Labour Union Act, which prohibits third party support for the organization of a trade union. He concludes that any support to labourers or trade unions may thus be punished, by the Labour Disputes Adjustment Act at the time of strikes and by the Labour Union Act at other times.

3.3 The author claims that his conviction violates article 19, paragraph 2, of the Covenant. He emphasizes that the way he exercised his freedom of expression did not infringe the rights or reputations of others, nor did it threaten national security or public order, or public health or morals.

State party's observations and author's comments thereon

4.1 By its submission of 9 June 1993, the State party argues that the communication is inadmissible on the grounds of failure to exhaust domestic remedies. The State party submits that available domestic remedies in a criminal case are exhausted only when the Supreme Court has issued a judgement on appeal and when the Constitutional Court has reached a decision on the constitutionality of the law on which the judgement is based.

4.2 The State party explains that when the Constitutional Court declares a law or a provision thereof unconstitutional, that law or provision shall be considered null and void from the date of the decision. However, laws or provisions relating to criminal sanctions shall be considered null and void retroactively, and retrial may be requested of cases in which the conviction was based upon unconstitutional laws or provisions.

4.3 As regards the author's argument that he has exhausted domestic remedies because the Constitutional Court has already declared that article 13-2 of the Labour Disputes Adjustment Act, on which his conviction was based, is constitutional, the State party contends that the prior decision of the Constitutional Court only examined the compatibility of the provision with the right to work, the right to equality and the principle of legality, as protected by the Constitution. It did not address the question of whether the article was in compliance with the right to freedom of expression.

4.4 The State party argues, therefore, that the author should have requested a review of the law in the light of the right to freedom of expression, as protected by the Constitution. Since he failed to do so, the State party argues that he has not exhausted domestic remedies.

4.5 The State party submits, in addition, that the author's sentence was revoked on 6 March 1993, under a general amnesty granted by the President of the Republic of Korea.

5.1 In his comments on the State party's submission, the author maintains that he has exhausted all domestic remedies and that it would be futile to request the Constitutional Court to pronounce itself on the constitutionality of the Labour Disputes Adjustment Act when it has done so in the recent past.

5.2 The author submits that the procedure before the Constitutional Court is not a domestic remedy normally available. He contends that the issue of the unconstitutionality of legal provisions can be raised only in exceptional circumstances, since it is generally assumed that laws are constitutional. The author explains that the Constitutional Court can pronounce itself on the constitutionality of a law, either upon request of a court or upon request of a party in a case. It is submitted that, if a defendant in a criminal case wishes to question the constitutionality of a law or provision, he first has to petition the court before which he is tried to request the Constitutional Court to adjudicate upon the issue. If the court rejects his request, the party is allowed to file a constitutional petition directly with the Constitutional Court.

5.3 It is further submitted that the Constitutional Court retains full discretion to examine all grounds which could lead to the conclusion that the law in question is unconstitutional. In fact, according to the author, the Constitutional Court is legally obliged to take into account all possible

grounds that may invalidate the law. As a result, the author argues that it is futile to bring the same question to the Court again.

5.4 In this context, the author notes that, although the majority opinion in the judgement of the Constitutional Court of 15 January 1990 did not refer to the right to freedom of expression, two concurring opinions and one dissenting opinion did. He submits that it is clear therefore that the Court did in fact consider all the grounds for possible unconstitutionality of the Labour Disputes Adjustment Act, including a possible violation of the constitutional right to freedom of expression.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party argues that the communication is inadmissible, since the author has not requested the Constitutional Court to review the compatibility of article 13-2 of the Labour Disputes Adjustment Act with the constitutional right to freedom of expression. The Committee also notes that the author has argued that a request for review would be futile, since the Constitutional Court, on 15 January 1990, declared article 13-2 of the Act compatible with the Korean Constitution, and individual opinions appended to that judgement specifically referred to the right to freedom of expression. The Committee further notes that the author was convicted on 9 August 1991, that his appeal was rejected on 20 December 1991, and that his further appeal was dismissed by the Supreme Court on 14 April 1992. On the basis of the information before it, the Committee finds that the compatibility of article 13-2 of the Labour Disputes Adjustment Act with the Constitution, including the constitutional right to freedom of expression, was necessarily before the Constitutional Court in January 1990, even though the majority judgement chose not to refer to the right to freedom of expression. In the circumstances, the Committee considers that a further request to the Constitutional Court to review article 13-2 of the Act, by reference to freedom of expression, does not constitute a remedy which the author still needs to exhaust under article 5, paragraph 2, of the Optional Protocol.

6.3 The Committee notes that the author was arrested, charged and convicted not for any physical support for the strike in progress but for participating in a meeting in which verbal expressions of support were given. In the circumstances, the Committee considers that the facts as submitted by the author may raise issues under article 19 of the Covenant that need to be examined on the merits.

7. The Human Rights Committee therefore decides:

(a) That the communication is admissible in as much as it appears to raise issues under article 19 of the Covenant;

(b) That, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the measures, if any, that may have been taken by it;

(c) That any explanations or statements received from the State party shall be communicated by the Secretary-General, under rule 93, paragraph 3, of the rules of procedure, to the author, with the request that any comments which he may wish to make should reach the Human Rights Committee, in care of the Centre for Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

(d) That this decision shall be communicated to the State party, to the author and to his counsel.

(Done in English, French, and Spanish, the English text being the original version.)

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*/ All persons handling this document are requested to respect and observe its confidential nature.