

## HUMAN RIGHTS COMMITTEE

### Park v. Republic of Korea

Communication No 628/1995

20 October 1998

CCPR/C/64/D/628/1995\*

### VIEWS

*Submitted by: Tae Hoon Park (represented by Mr. Yong-Whan Cho of Duksu Law Offices in Seoul)*

*Victim: The author*

*State party: Republic of Korea*

*Date of communication: 11 August 1994*

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 October 1998,

Having concluded its consideration of communication No.628/1995 submitted to the Human Rights Committee by Tae Hoon Park, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

#### **Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Mr. Tae-Hoon Park, a Korean citizen, born on 3 November 1963. He claims to be a victim of a violation by the Republic of Korea of articles 18, paragraph 1, 19, paragraphs 1 and 2, and 26 of the Covenant. He is represented by Mr. Yong-Whan Cho of Duksu Law Offices in Seoul. The Covenant and the Optional Protocol

thereto entered into force for the Republic of Korea on 10 July 1990.

The facts as submitted by the author

2.1 On 22 December 1989, the Seoul Criminal District Court found the author guilty of breaching paragraphs 1 and 3 of article 7 of the 1980 National Security Law<sup>1</sup> and sentenced him to one year's suspended imprisonment and one year's suspension of exercising his profession. The author appealed to the Seoul High Court, but in the meantime was conscripted into the Korean Army under the Military Service Act, following which the Seoul High Court transferred the case to the High Military Court of Army. The High Military Court, on 11 May 1993, dismissed the author's appeal. The author then appealed to the Supreme Court, which, on 24 December 1993, confirmed the author's conviction. With this, it is argued, all available domestic remedies have been exhausted. In this context, it is stated that the Constitutional Court, on 2 April 1990, declared that paragraphs 1 and 5 of article 7 of the National Security Law were constitutional. The author argues that, although the Court did not mention paragraph 3 of article 7, it follows from its decision that paragraph 3 is likewise constitutional, since this paragraph is intrinsically woven with paragraphs 1 and 5 of the article.

2.2 The author's conviction was based on his membership and participation in the activities of the Young Koreans United (YKU), during his study at the University of Illinois in Chicago, USA, in the period 1983 to 1989. The YKU is an American organization, composed of young Koreans, and has as its aim to discuss issues of peace and unification between North and South Korea. The organization was highly critical of the then military government of the Republic of Korea and of the US support for that government. The author emphasizes that all YKU's activities were peaceful and in accordance with the US laws.

2.3 The Court found that the YKU was an organization which had as its purpose the commission of the crimes of siding with and furthering the activities of the North Korean Government and thus an "enemy-benefiting organization". The author's membership in this organization constituted therefore a crime under article 7, paragraph 3, of the National Security Law. Moreover, the author's participation in demonstrations in the USA calling for the end of US' intervention constituted siding with North Korea, in violation of article 7, paragraph 1, of the National Security Law. The author points out that on the basis of the judgment against him, any member of the YKU can be brought to trial for belonging to an "enemy-benefiting organization".

2.4 From the translations of the court judgments in the author's case, submitted by counsel, it appears that the conviction and sentence were based on the fact that the author had, by participating in certain peaceful demonstrations and other gatherings in the United States, expressed his support or sympathy to certain political slogans and positions.

2.5 It is stated that the author's conviction was based on his forced confession. The author was arrested at the end of August 1989 without a warrant and was interrogated during 20 days by the Agency for National Security Planning and then kept in detention for another 30 days before the indictment. The author states that, although he does not wish to raise the

issue of fair trial in his communication, it should be noted that the Korean courts showed bad faith in considering his case.

2.6 Counsel submits that, although the activities for which the author was convicted took place before the entry into force of the Covenant for the Republic of Korea, the High Military Court and the Supreme Court considered the case after the entry into force. It is therefore argued that the Covenant did apply and that the Courts should have taken the relevant articles of the Covenant into account. In this connection, the author states that, in his appeal to the Supreme Court, he referred to the Human Rights Committee's Comments after consideration of the initial report submitted by the Republic of Korea under article 40 of the Covenant (CCPR/C/79/Add.6), in which the Committee voiced concern about the continued operation of the National Security Law; he argued that the Supreme Court should apply and interpret the National Security Law in accordance with the recommendations made by the Committee. However, the Supreme Court, in its judgment of 24 December 1993, stated:

"Even though the Human Rights Committee established by the International Covenant on Civil and Political Rights has pointed out problems in the National Security Law as mentioned, it should be said that NSL does not lose its validity simply due to that. ... Therefore, it can not be said that punishment against the defendant for violating of NSL violates international human rights regulation or is contradictory application of law without equity." (translation by author)

### The complaint

3.1 The author states that he has been convicted for having opinions critical of the situation in and the policy of South Korea, which are deemed by the South Korean authorities to have been for the purpose of siding with North Korea only on the basis of the fact that North Korea is also critical of South Korean policies. The author argues that these presumptions are absurd and that they prevent any freedom of expression critical of government policy.

3.2 The author claims that his conviction and sentence constitute a violation of articles 18, paragraph 1, 19, paragraphs 1 and 2, and 26, of the Covenant. He argues that although he was convicted for joining an organization, the real reason for his conviction was that the opinions expressed by himself and other YKU members were critical of the official policy of the South Korean Government. He further contends that, although freedom of association is guaranteed under the Constitution, the National Security Law restricts the freedom of association of those whose opinions differ from the official government policy. This is said to amount to discrimination in violation of article 26 of the Covenant. Because of the reservation made by the Republic of Korea, the author does not invoke article 22 of the Covenant.

3.3 The author requests the Committee to declare that his freedom of thought, his freedom of opinion and expression and his right to equal treatment before the law in exercising freedom of association have been violated by the Republic of Korea. He further requests the Committee to instruct the Republic of Korea to repeal paragraphs 1, 3 and 5, of article 7 of

the National Security Law, and to suspend the application of the said articles while their repeal is before the National Assembly. He further asks to be granted a retrial and to be pronounced innocent, and to be granted compensation for the violations suffered.

#### State party's observations and counsel's comments

4.1 By submission of 8 August 1995, the State party recalls that the facts of crime in the author's case were, inter alia, that he sympathized with the view that the United States is controlling South Korea through the military dictatorship in Korea, along with other anti-state views.

4.2 The State party argues that the communication is inadmissible for failure to exhaust domestic remedies. In this context, the State party notes that the author has claimed that he was arrested without a warrant and arbitrarily detained, matters for which he could have sought remedy through an emergency relief procedure or through an appeal to the Constitutional Court. Further, the State party argues that the author could demand a retrial if he has clear evidence proving him innocent or if those involved in his prosecution committed crimes while handling the case.

4.3 The State party further argues that the communication is inadmissible since it deals with events that took place before the entry into force of the Covenant and the Optional Protocol.

4.4 Finally, the State party notes that on 11 January 1992 an application was made by a third party to the Constitutional Court concerning the constitutionality of article 7, paragraphs 1 and 3, of the National Security Law. The Constitutional Court is at present reviewing the matter.

5.1 In his comments on the State party's submission, counsel for the author notes that the State party has misunderstood the author's claims. He emphasizes that the possible violations of the author's rights during the investigation and the trial are not at issue in the present case. In this context, counsel notes that the matter of a retrial has no relevance to the author's claims. He does not challenge the evidence against him, rather he contends that he should not have been convicted and punished for these established facts, since his activities were well within the boundaries of peaceful exercise of his freedom of thought, opinion and expression.

5.2 As regards the State party's argument that the communication is inadmissible ratione temporis, counsel notes that, although the case against the author was initiated before the entry into force of the Covenant and the Optional Protocol, the High Military Court and the Supreme Court confirmed the sentences against him after the date of entry into force. The Covenant is therefore said to apply and the communication to be admissible.

5.3 As regards the State party's statement that the constitutionality of article 7, paragraphs 1 and 3, of the National Security Law, is at present being reviewed by the Constitutional Court, counsel notes that the Court on 2 April 1990 already decided that the articles of the National Security Law were constitutional. Later applications concerning the same question

were equally dismissed by the Court. He therefore argues that a further review by the Constitutional Court is devoid of chance, since the Court is naturally expected to confirm its prior jurisprudence.

#### The Committee's admissibility decision

6.1 At its 57th session, the committee considered the admissibility of the communication.

6.2 The Committee noted the State party's argument that the communication was inadmissible since the events complained of occurred before the entry into force of the Covenant and its Optional Protocol. The Committee noted, however, that, although the author was convicted in first instance on 22 December 1989, that was before the entry into force of the Covenant and the Optional Protocol thereto for Korea, both his appeals were heard after the date of entry into force. In the circumstances, the Committee considered that the alleged violations had continued after the entry into force of the Covenant and the Optional Protocol thereto and that the Committee was thus not precluded ratione temporis from examining the communication.

6.3 The Committee also noted the State party's arguments that the author had not exhausted all domestic remedies available to him. The Committee noted that some of the remedies suggested by the State party related to aspects of the author's trial which did not form part of his communication to the Committee. The Committee further noted that the State party had argued that the issue of the constitutionality of article 7 of the National Security Law was still pending before the Constitutional Court. The Committee also noted that the author had argued that the application to the Constitutional Court was futile, since the Court had already decided, for the first time on 2 April 1990, and several times since, that the article was compatible with the Korean Constitution. On the basis of the information before it, the Committee did not consider that any effective remedies were still available to the author within the meaning of article 5, paragraph 2(b), of the Optional Protocol.

6.4 The Committee ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.5 The Committee considered that the facts as submitted by the author might raise issues under articles 18, 19 and 26 of the Covenant that need to be examined on the merits.

7. Accordingly, on 5 July 1996 the Human Rights Committee decided that the communication was admissible.

#### State party's observations concerning the merits and counsel's comments thereon

8.1 In its observations, the State party notes that the author has been convicted for a transgression of national laws, after a proper investigation bringing to light the undisputed facts of the case. The State party submits that in spite of the precarious security situation it has done its utmost to guarantee fully all basic human rights, including the freedom to

express one's thoughts and opinions. The State party notes, however, that the overriding necessity of preserving the fabric of its democratic system requires protective measures.

8.2 The Korean Constitution contains a provision (article 37, paragraph 2) stipulating that "the freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order and for public welfare." Pursuant to the Constitution, the National Security Law contains some provisions which may partially restrict individuals' freedoms or rights. According to the State party, a national consensus exists that the NSL is indispensable to defend the country against the North Korean communists. In this connection, the State party refers to incidents of a violent nature. According to the State party, it is beyond doubt that the author's activities as a member of YKU, an enemy benefitting organization that endorses the policies of the North Korean communists, constituted a threat to the preservation of the democratic system in the Republic of Korea.

8.3 In respect to the author's argument that the Court should have applied the provisions of the Covenant to his case, the State party submits that the "author was convicted not because the Court intentionally precluded the application of the Covenant but because it was a matter of necessity to give the NSL's provisions priority over certain rights of individuals as embodied in the Covenant in view of Korea's security situation."

9.1 In his comments on the State party's submission, counsel argues that the fact that the State party is in a precarious security situation has no relation with the author's peaceful exercise of his right to freedom of thought, opinion, expression and assembly. Counsel argues that the State party has failed to establish any relation between the North Korean communists and the YKU or the author, and has not provided any sound explanation about which policies of the North Korean communists the YKU or the author endorsed. According to counsel, the State party has likewise failed to show what kind of threat the YKU or the author's activities posed to the security of the country.

9.2 It is submitted that the author joined the YKU as a student with aspiration for democracy and peaceful unification of his country. In his activities, he never had any intention to give benefit to North Korea or put the security of his country in danger. According to counsel, the kind of opinion expressed by the author can be rebutted by discussion and debate, but, as far as such expression is discharged in a peaceful manner, it should never be suppressed by criminal prosecution. In this context, counsel submits that it is not for the State to assume the role of divine judge about what is the truth or the false and the good or the evil.

9.3 Counsel maintains that the author was punished for his political opinion, thought and peaceful expression thereof. He also claims that his right to equal protection before the law under article 26 of the Covenant was denied. In this connection, he explains that this is so because, while every citizen is guaranteed to enjoy the right to freedom of association under article 21 of the Constitution, the author was punished and thereby subjected to discrimination for joining the YKU which had allegedly different political opinions than those of the Government of the Republic of Korea.

9.4 The author refers to the report on the mission to the Republic of Korea by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression<sup>2</sup>. The author requests the Committee to recommend to the Government to publish its Views on the communication and its translation into Korean in the Official Gazette.

#### Issues and proceedings before the Committee

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee takes note of the fact that the author has not invoked article 22 of the Covenant, related to freedom of association. As a reason for not invoking the provision, counsel has referred to a reservation or declaration by the Republic of Korea according to which article 22 shall be so applied as to be in conformity with Korean laws including the Constitution. As the author's complaints and arguments can be addressed under other provisions of the Covenant, the Committee need not on its own initiative take a position to the possible effect of the reservation or declaration. Consequently, the issue before the Committee is whether the author's conviction under the National Security Law violated his rights under articles 18, 19 and 26 of the Covenant.

10.3 The Committee observes that article 19 guarantees freedom of opinion and expression and allows restrictions only as provided by law and necessary (a) for respect of the rights and reputation of others; and (b) for the protection of national security or public order (*ordre public*), or of public health or morals. The right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification. While the State party has stated that the restrictions were justified in order to protect national security and that they were provided for by law, under article 7 of the National Security Law, the Committee must still determine whether the measures taken against the author were necessary for the purpose stated. The Committee notes that the State party has invoked national security by reference to the general situation in the country and the threat posed by "North Korean communists". The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19. The Committee has carefully studied the judicial decisions by which the author was convicted and finds that neither those decisions nor the submissions by the State party show that the author's conviction was necessary for the protection of one of the legitimate purposes set forth by article 19 (3). The author's conviction for acts of expression must therefore be regarded as a violation of the author's right under article 19 of the Covenant.

10.4 In this context, the Committee takes issue with the State party's statement that the "author was convicted not because the Court intentionally precluded the application of the Covenant but because it was a matter of necessity to give the NSL's provisions priority over certain rights of individuals as embodied in the Covenant in view of Korea's security

situation." The Committee observes that the State party by becoming a party to the Covenant, has undertaken pursuant to article 2, to respect and to ensure all rights recognized therein. It has also undertaken to adopt such legislative or other measures as may be necessary to give effect to these rights. The Committee finds it incompatible with the Covenant that the State party has given priority to the application of its national law over its obligations under the Covenant. In this context, the Committee notes that the State party has not made the declaration under article 4(3) of the Covenant that a public emergency existed and that it derogated certain Covenant rights on this basis.

10.5 In the light of the above findings, the Committee need not address the question of whether the author's conviction was in violation of articles 18 and 26 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose a violation of article 19 of the Covenant.

12. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Tae-Hoon Park with an effective remedy, including appropriate compensation for having been convicted for exercising his right to freedom of expression. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is requested to translate and publish the Committee's Views and in particular to inform the judiciary of the Committee's Views.

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\*/ The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zahkia.

1/ The National Security Law was amended on 31 May 1991. The law applied to the author, however, was the 1980 law, article 7 of which reads (translation provided by the author):

"(1) Any person who has benefited the anti-State organization by way of praising, encouraging, or siding with or through other means the activities of an anti-State

organization, its member or a person who had been under instruction from such organisation, shall be punished by imprisonment for not more than 7 years.

...

"(3) Any person who has formed or joined the organisation which aims at committing the actions as stipulated in paragraph 1 of this article shall be punished by imprisonment for more than one year.

...

"(5) Any person who has, for the purpose of committing the actions as stipulated in paragraphs 1 through 4 of this article, produced, imported, duplicated, possessed, transported, disseminated, sold or acquired documents, drawings or any other similar means of expression shall be punished by the same penalty as set forth in each paragraph."

2/ E/CN.4/1996/39/Add.1

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]