

## HUMAN RIGHTS COMMITTEE

Nam v. Republic of Korea

Communication No. 693/1996

28 July 2003

CCPR/C/78/D/693/1996

### ADMISSIBILITY

*Submitted by: Gi-Jeong Nam (represented by counsel Mr. Suk Tae Lee)*

*Alleged victim: The author*

*State party: Republic of Korea*

*Date of communication: 14 February 1996 (initial submission)*

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

Meeting on 28 July 2003,

Having concluded its consideration of communication No. 693/1996, submitted to the Human Rights Committee on behalf of Mr. Gi-Jeong Nam 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, and the State party,

Adopts the following:

### DECISION ON ADMISSIBILITY

1. The author of the communication, dated 14 February 1996, is Mr. Gi-jung Nam, a Korean national born 20 October 1959. 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.

### The facts as presented by the author

2.1 In 1989, the author, a national language (Korean literature) teacher in a Seoul middle school and representative of an organization concerned with improving national language education called "Teachers for a National Language Education", started work on a new national language curricular textbook intended for publication. Subsequently, he and the other members of his organization realized that the relevant education laws (article 157 of the Education Act and article 5 of the Education Decree (Presidential Decree on Educational Curricular Materials)) prohibited the independent publication of middle school national language curricular textbooks.

2.2 The author brought a constitutional challenge against the relevant education laws in the Constitutional Court of Korea. **(1)** He contended that, by restricting the authorship of curricular education materials and textbooks, and by delegating comprehensive authority to the Ministry of Education for this purpose, the laws violated his rights to independent and professional education. Moreover, the laws prohibiting non-governmental publication of curricular materials violated the author's constitutional right to freedom of expression. The author also claimed a breach of article 22, paragraph 1, of the Constitution (right to freedom of learning and arts), in that the relevant education laws made it impossible for teachers to research and develop ways to improve methods of education.

2.3 On 12 November 1992, the Constitutional Court dismissed the author's application, finding no impropriety in the restrictions contained in the relevant education laws.

### The complaint

3. In his communication, the author complains that the prohibition of non-governmental publication of middle school national language textbooks which prevents him from pursuing publication of his curricular textbook, violates his right to freedom of expression guaranteed by article 19, paragraph 2, of the Covenant. He points out that middle school teachers and students studying Korean as a national language rely almost exclusively on textbooks, and that writing such a curricular textbook was the only effective way of communicating his ideas concerning middle school national language education. Article 19, paragraph 2, of the Covenant, it is claimed, encompasses his right to express his professional knowledge in the form of curricular textbooks.

### The State party's observations with regard to the admissibility of the communication

4.1 The State party, by submission of 11 June 1996, objects to the admissibility of the communication on grounds of non-exhaustion of domestic remedies, arguing that, notwithstanding the rejection of the author's constitutional complaint by the Constitutional Court, other domestic remedies remain open to the author. In particular, articles 26 and 29, respectively, of the Korean Constitution provide a right to petition and a right to claim from the State compensation.

4.2 Article 26 of the Constitution confers on all citizens the right to petition any State organization, according to law, and provides that the State must examine all such petitions. Under article 4 of

the Petition Act, a petitioner may seek enactment, amendment or repeal of any law, order or regulation.

4.3 Article 29 of the Constitution as implemented by the National Compensation Act, which stipulates that any person who sustains damage by an unlawful act committed by a public official in the course of official duties may claim just compensation from the State or public organization, according to law. The State party contends that the author must claim appropriate compensation for the alleged violation of his basic rights before domestic remedies can be said to have been exhausted.

#### The author's response to the State party's observations

5.1 The author, by submission of 20 July 1996, argues that neither the right to petition nor the right to claim compensation would afford him an effective remedy in his case.

5.2 As to the right of petition, the author points out that, as the law in question has been interpreted, an action by an agency on a petition has no legally binding effect. Moreover, the agency cannot act on a petition in a way contrary to law, if that law is constitutional. Since the Constitutional Court has determined the constitutionality of the relevant education laws and has dismissed the author's claim, he is precluded from using any other legal remedy to object to the relevant education laws.

5.3 The author also argues that he cannot seek compensation from the State under the National Compensation Act, for governmental action pursuant to a law, unless the relevant law is shown to be unconstitutional, which is not the case, since the author's constitutional claim was rejected by the Court. Moreover, under the State party's law, the compensation process generally applies only in respect of specific illegal acts committed by officials, rather than in respect of a law itself.

5.4 By submission of 4 March 1997, the author also states that, by implication, the Constitutional Court itself found that there is no remedy available for the alleged violation of his rights, since, under article 68, paragraph 1, of the Constitutional Court Act, the Court would not have considered the merits of his claim if there was any such remedy available to him.

#### The State party's and author's further comments

6.1 The State party, by submission of 30 July 1997, accepts that the Constitutional Court's decision to adjudicate upon the merits of the constitutional claim implies that there are no judicial remedies remaining to be exhausted, but it does not imply that there are no existing legislative or administrative remedies. The author therefore should have exercised his right of petition to the appropriate body or sought compensation under the National Compensation Act.

6.2 By further submission of 31 January 2001, the author denies the State party's contention that the Constitutional Court adjudicating on the merits of his claim implies only that no judicial remedies remain to be exhausted. In his view, the plain wording of the Constitutional Court Act cover all remedies, including administrative or legislative remedies. The Court does not adjudicate a case if any effective remedy, of whatever type, still remains available to the petitioner.

6.3 The author also asserts that since the Court's decision binds all organs of the State party, including legislative and administrative organs, any appeal to those bodies would be ineffectual and without any prospect of success. Therefore, he cannot be required to exhaust legislative or administrative remedies, including those under the Petitions Act or National Compensation Act.

#### Decision on admissibility

7. At its 72nd session, the Committee considered the admissibility of the communication. Having ascertained that the same matter was not being examined and had not been examined under another procedure of international investigation or settlement, the Committee examined the question of exhaustion of domestic remedies and noted that the State party had accepted that the decision of the Constitutional Court on the merits of the author's application meant that no further judicial remedies were available to him; accordingly, the Committee found that judicial remedies had been exhausted in this case. With regard to the State party's contention that administrative remedies under the National Compensation Act and the Petitions Act remained available, the Committee considered that, even if such remedies were theoretically available after the Constitutional Court's decision, the State party had not shown that, in the circumstances, these remedies could be effective. Accordingly, the Committee found that the author had exhausted all such remedies as were available and effective, and that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met. On 3 July 2001, the Committee therefore declared the communication admissible.

#### State party's observations on the merits

8.1 By submission of 22 February 2002, the State party commented on the merits of the communication.

8.2 The State party notes that many countries have adopted some form of state authorship or censorship on educational curricular materials used in elementary and secondary schools and argues that these principles constitute necessary measures to examine the educational suitability of material that may be used in school curricula (a system that is not applied at the college and university level). Moreover, these measures are intended to maintain political and religious neutrality in education, to secure the "universal validity" of education by avoiding factual errors or "prejudices", and to substantially guarantee the students' right to learn.

8.3 Regarding the compatibility of article 157 of the Education Act with article 19 of the Covenant, the State party emphasizes that state authorship and the system of examination or approval by its Ministry of Education is not intended to prohibit the publication of non-governmental books, but to ensure that books used for educational curricula are of suitable quality. In this case, the author, who compiled material at his own discretion, was prohibited from using his textbook in the classroom, but retained the right to publish it as reference tool for teachers and students. He could thus still enjoy his right to freedom of expression guaranteed by article 19 of the Covenant.

8.4 Moreover, although article 19 of the Covenant addresses the author's right to express his professional knowledge in the form of curricular textbooks, the State party may impose restrictions

on this right within the limits laid down in article 19, paragraph 3, of the Covenant. In this respect, the necessity of state censorship, as described above, constitutes a restriction to protect public morals in the sense of article 19, paragraph 3 (b), of the Covenant. The State party therefore declares that "[s]ince the aforementioned necessity of state censorship constitutes 'the protection of public morals', prohibiting non-governmental publication is compatible with the Covenant".

8.5 The State party concludes that the communication is without merits and that the author's request to annul or revise the legislation in question as well as his claim for compensation cannot be sustained.

8.6 The State party finally draws attention to its efforts to promote the right to freedom of expression. Its plans are gradually to replace state authored educational curricular material for elementary and secondary schools with material examined or approved by the government. The government's long-term plan is to improve its system on educational curricular material to eventually allow free publication.

#### Author's comments

9.1 By submission of 2 December 2002, the author commented on the State party's merits submission.

9.2 According to him, the State party admits that, since the Korean government reserves sole authorship for textbooks of national language pursuant to the Education Act, he is prohibited from publishing his own textbook and using compilations of material related to national language education.

9.3 The author disputes that state authorship of textbooks is a better safeguard for "political and religious neutrality" than if the authorship was granted to citizens. He argues that state authorship for textbooks has historically been used in many countries, particularly in dictatorships, to orient education in accordance with government policy. In the State party, which was under military rule for a long period, textbooks were used as a means to justify government policy.

9.4 The author considers that "political and religious neutrality" is adequately preserved in open democratic societies that guarantee people's right to freedom of expression, including the right to publish textbooks. Moreover, the State party's Constitution contains no reference to a state religion and textbooks of national language are not related to a specific religion. The State party would fully preserve "political and religious neutrality" by allowing a system under which the state would choose textbooks. Such a system would allow citizens to publish a textbook and its use in schools would be conditioned to governmental approval. By so providing, the state would maintain "political and religious neutrality".

9.5 The author reemphasizes the absence of any relationship between textbooks on national language education and the protection of "public morals" in the sense of article 19, paragraph 3 (b), of the Covenant. Courses on national language are merely designed to teach students to read and write national language and literature. Furthermore, there is a separate curricular textbook on "public morals", which is also subject to exclusive state authorship and is used by the government

to protect those "public morals".

9.6 The author considers that even assuming that the State party's assertion related to the protection of "public morals" is correct, the State party would retain its ability to protect "public morals" with a system of approval of non-governmental textbooks.

9.7 The author therefore concludes that exclusivity of state authorship for national language textbooks is in violation of article 19, paragraph 2, of the Covenant.

#### Review of the admissibility decision.

10. In the light of the submissions by the parties, the Committee observes that the communication, as construed by the parties, does not relate to a prohibition of non-governmental publication of textbooks as was originally complained of (paragraph 3) and found admissible by the Committee (paragraph 7). Rather, the communication relates to the author's allegation that there is no process of scrutiny in place for the purpose of submitting non-governmental publications for approval by the authorities, for their use as school textbooks. While affirming that the right to write and publish textbooks intended for use at school falls under the protection of article 19 of the Covenant, the Committee notes that the author claims that he is entitled to have the textbook prepared by him scrutinized and approved / rejected by the authorities for use as textbook in public middle schools. This claim, in the Committee's opinion, falls outside the scope of article 19 and consequently it is inadmissible under article 3 of the Optional Protocol.

11. Accordingly, the Human Rights Committee, acting under rule 93, paragraph 3, of its rules of procedure:

- a) reverses its decision of 3 July 2001, declaring the communication admissible;
- b) decides that the communication is inadmissible under article 3 of the Optional Protocol;
- c) decides that a copy of the present decision shall be sent to the author and to the State party.

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

\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

\*\* The text of the one individual opinion signed by Committee member Mr. Hipólito

Solari-Yrigoyen is appended to the present document.

## APPENDIX

### Individual opinion by Committee member

#### **Mr. Hipólito Solari-Yrigoyen (dissenting)**

I disagree with the present communication on the following grounds:

1. The Education Act referred to in article 157, paragraph 1, provides that: "The educational curricular materials of each type of schools shall be restricted to those materials whose copyright belongs to the Ministry of Education or to those examined or approved by the Ministry of Education." The Presidential Decree on Educational Curricular Materials states that teaching materials may be compiled by the Ministry of Education or, when deemed necessary by the Minister of Education, subcontracted to research institutions or universities. Although it may be inferred from article 157 that private individuals may prepare materials and submit them to the Ministry for approval, the State party has denied this possibility on the grounds that State censorship is a restriction designed to protect public morals within the meaning of article 19, paragraph 3 (b), of the Covenant.
2. The Committee considers that, although restrictions on freedom of expression and on the dissemination of information and ideas of all kinds in print may be established by law for reasons of public morals, such restrictions cannot lead to disregard for the right provided for in article 19, paragraph 2, of the Covenant. The fact that an author has no possibility of submitting a middle school national language textbook to the authorities for approval or, as the case may be, rejection on valid grounds constitutes a restriction which goes beyond the restrictions provided for by article 19, paragraph 3, of the Covenant, as well as disregard for the right to freedom of expression.
3. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.
4. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including the right to submit his middle school national language textbook to the competent educational authorities for scrutiny and possible approval, with a view to its possible use in the classroom. The State party is also under an obligation to prevent similar violations in future.

[Signed] Hipólito Solari-Yrigoyen

7 August 2003

[Adopted in English, French and Spanish, the Spanish 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.]

#### Notes

1. The constitutional provisions pleaded by the author were articles 21 (1) ("All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association"), 22 (1) ("All citizens shall enjoy freedom of learning and the arts"), and 31 (4) ("Independence, professionalism and political impartiality of education and the autonomy of institutions of higher learning shall be guaranteed under the conditions as prescribed by law") [all translations by author].