Jong-Kyu Sohn v. Republic of Korea, Communication No. 518/1992, U.N. Doc. CCPR/C/54/D/518/1992 (1995).

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HUMAN RIGHTS COMMITTEE

Fifty-fourth session

VIEWS

Communication No. 518/1992

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

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)

- CCPR/C/50/D/518/1992 (Decision on admissibility, dated 18 March 1994)

Date of adoption of Views: 19 July 1995

On 19 July 1995, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 518/1992. The text of the Views is annexed to the present document.

[ANNEX]

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4,

of the Optional Protocol to the International Covenant on Civil and Political Rights

- Fifty-fourth session -

concerning

Communication No. 518/1992

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

Victim: The author

State party: Republic of Korea

Date of communication: 7 July 1992 (initial submission)

Date of decision on admissibility: 18 March 1994

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

Meeting on 19 July 1995,

Having concluded its consideration of communication No. 518/1992 submitted to the Human Rights Committee on behalf of Mr. Jong-Kyu Sohn 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 its Views under article 5, paragraph 4, of the Optional Protocol.

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.

The facts as submitted by the author:

2.1 The author has been president of the Kumho 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. TheGovernment 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, in 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. The Daewoo Shipyard strike ended peacefully on 13 February 1991.

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 Dispute 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 Dispute 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 Dispute 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.

The complaint:

3.1 The author argues that article 13(2) of the Labour Dispute 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 Dispute 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.

The State party's observations on admissibility and author's comments thereon:

4.1 By 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 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 Dispute 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.

4.3 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.

4.4 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 Dispute Adjustment Act when it has done so in the recent past.

5.2 The author submits that if the question of constitutionality of a legal provision is brought before the Constitutional Court, the 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.

5.3 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 Dispute Adjustment Act, including a possible violation of the constitutional right to freedom of expression.

The Committee's admissibility decision:

6.1 At its 50th session, the Committee considered the admissibility of the communication. After having examined the submissions of both the State party and the author concerning the constitutional remedy, the Committee found that the compatibility of article 13(2) of the Labour Dispute Adjustment Act with the Constitution, including the constitutional right to freedom of expression, had necessarily been 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 considered that a further request to the Constitutional Court to review article 13(2) of the Act, by reference to freedom of expression, did not constitute a remedy which the author still needed to exhaust under article 5, paragraph 2, of the Optional Protocol.

6.2 The Committee noted 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, and considered that the facts as submitted by the author might raise issues under article 19 of the Covenant which should be examined on the merits. Consequently, the Committee declared the communication admissible.

The State party's observations on the merits and author's comments thereon:

7.1 By submission of 25 November 1994, the State party takes issue with the Committee's consideration when declaring the communication admissible 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". The State party emphasizes that the author not only attended the meeting of the Solidarity Forum on 9 February 1991, but also actively participated in distributing propaganda on 10 or 11 February 1991 and, on 11 November 1990, was involved in a violent demonstration, during which Molotov cocktails were thrown.

7.2 The State party submits that because of these offences, the author was charged with and convicted of violating articles 13(2) of the Labour Dispute Adjustment Act and 45(2) of the Act on Assembly and Demonstration.

7.3 The State party explains that the articles of the Labour Dispute Adjustment Act, prohibiting intervention by third parties in a labour dispute, are meant to maintain the independent nature of a labour dispute between employees and employer. It points out that the provision does not prohibit counselling or giving advice to the parties involved.

7.4 The State party invokes article 19, paragraph 3, of the Covenant, which provides that the right to freedom of expression may be subject to certain restrictions **inter alia** for the protection of national security or of public order.

7.5 The State party reiterates that the author's sentence was revoked on 6 March 1993, under a general amnesty.

8.1 In his comments, the author states that, although it is true that he was sentenced for his participation in the demonstration of November 1990 under the Act on Assembly and Demonstration, this does not form part of his complaint. He refers to the judgment of the Seoul Criminal District Court of 9 August 1991, which shows that the author's participation in the November demonstration was a crime punished separately, under the Act on Assembly and Demonstration, from his participation in the activities of the Solidarity Forum and his support for the strike of the Daewoo Shipyard Company in February 1991, which were punished under the Labour Dispute Adjustment Act. The author states that the two incidents are unrelated to each other. He reiterates that his complaint only regards the "prohibition of third party intervention", which he claims is in violation of the Covenant.

8.2 The author argues that the Spate party's interpretation of the freedom of expression as guaranteed in the Covenant is too narrow. He refers to paragraph 2 of article 19, which includes the freedom to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print. The author argues therefore that the distribution of leaflets containing the Solidarity Forum's statements supporting the strike at the Daewoo Shipyard falls squarely within the right to freedom of expression. He adds that he did not distribute the statements himself, but only transmitted them by telefax to the striking workers at the Daewoo Shipyard.

8.3 As regards the State party's argument that his activity threatened national security and public order, the author notes that the State party has not specified what part of the statements of the Solidarity Forum threatened public security and public order and for what reasons. He contends that a general reference to public security and public order does not justify the restriction of his freedom of

expression. In this connection he recalls that the statements of the Solidarity Forum contained arguments for the legitimacy of the strike concerned, strong support for the strike and criticism of the employer and of the Government for threatening to break the strike by force.

8.4 The author denies that the statements by the Solidarity Forum posed a threat to the national security and public order of South Korea. It is stated that the author and the other members of the Solidarity Forum are fully awareof the sensitive situation in terms of South Korea's confrontation with North Korea. The author cannot see how the expression of support for the strike and criticism of the employer and the government in handling the matter could threaten national security. In this connection the author notes that none of the participants in the strike was charged with breaching the National Security Law. The author states that in the light of the constitutional right to strike, police intervention by force can be legitimately criticised. Moreover, the author argues that public order was not threatened by the statements given by the Solidarity Forum, but that, on the contrary, the right to express one's opinion freely and peacefully enhances public order in a democratic society.

8.5 The author points out that solidarity among workers is being prohibited and punished in the Republic of Korea, purportedly in order to "maintain the independent nature of a labour dispute", but that intervention in support of the employer to suppress workers' rights is being encouraged and protected. He adds that the Labour Dispute Adjustment Act was enacted by the Legislative Council for National Security, which was instituted in 1980 by the military government to replace the National Assembly. It is argued that the laws enacted and promulgated by this undemocratic body do not constitute laws within the meaning of the Covenant, enacted in a democratic society.

8.6 The author notes that the Committee of Freedom of Association of the International Labour Organization has recommended that the Government repeal the provision prohibiting the intervention by a third party in labour disputes, because of its incompatibility with the ILO constitution, which guarantees workers' freedom of expression as an essential component of the freedom of association. [294th Report of the Committee on Freedom of Association, June 1994, paragraphs 218 to 274. See also the 297th Report, March- April 1995, paragraph 23.]

8.7 Finally, the author points out that the amnesty has not revoked the guilty judgment against him, nor compensated him for the violations of his Covenant rights, but merely lifted residual restrictions imposed upon him as a result of his sentence, such as the restriction on his right to run for public office.

9.1 By further submission of 20 June 1995, the State party explains that the labour movement in the Republic of Korea can be generally described as being politically oriented and ideologically influenced. In this connection it is stated that labour

activists in Korea do not hesitate in leading workers to extreme actions by using force and violence and engaging in illegal strikes in order to fulfil their political aims or carry out their ideological principles. Furthermore, the State party argues that there have been frequent instances where the idea of a proletarian revolution has been implanted in the minds of workers.

9.2 The State party argues that if a third party interferes in a labour dispute to the extent that the third party actually manipulates, instigates or obstructs the decisions of workers, such a dispute is being distorted towards other objectives and goals. The State party explains therefore that, in view of the general nature of the labour movement, it has felt obliged to maintain the law concerning the prohibition of third party intervention.

9.3 Moreover, the State party submits that in the instant case, the written statement distributed in February 1991 to support the Daewoo Shipyard Trade Union was used as a disguise to incite a nation-wide strike of all workers. The State party argues that "in the case where a national strike would take place, in any country, regardless of its security situation, there is considerable reason to believe that the national security and public order of the nation would be threatened."

9.4 As regards the enactment of the Labour Dispute Adjustment Act by the Legislative Council for National Security, the State party argues that, through the revision of the constitution, the effectiveness of the laws enacted by the Council was acknowledged by public consent. The State party moreover argues that the provision concerning the prohibition of the third party intervention is being applied fairly to both the labour and the management side of a dispute. In this connection the State party refers to a case currently before the courts against someone who intervened in a labour dispute on the side of the employer.

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 has taken note of the State party's argument that the author participated in a violent demonstration in November 1990, for which he was convicted under the Act on Assembly and Demonstration. The Committee has also noted that the author's complaint does not concern this particular conviction, but only his conviction for having issued the statement of the Solidarity Forum in February 1991. The Committee considers that the two convictions concern two different events, which are not related. The issue before the Committee is therefore only whether the author's conviction under article 13, paragraph 2, of the Labour Dispute Adjustment Act for having joined in issuing a statement supporting the strike at the Daewoo Shipyard Company and condemning the Government's threat

to send in troops to break the strike violates article 19, paragraph 2, of the Covenant.

10.3 Article 19, paragraph 2, of the Covenant guarantees the right to freedom of expression and includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media". The Committee considers that the author, by joining others in issuing a statement supportingthe strike and criticizing the Government, was exercising his right to impart information and ideas within the meaning of article 19, paragraph 2, of the Covenant.

10.4 The Committee observes that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3(a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. While the State party has stated that the restrictions were justified in order to protect national security and public order and that they were provided for by law, under article 13(2) of the Labour Dispute Adjustment Act, 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 and public order by reference to the general nature of the labour movement and by alleging that the statement issued by the author in collaboration with others was a disguise for the incitement to a national strike. 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.

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, paragraph 2, of the Covenant.

12. The Committee is of the view that Mr. Sohn is entitled, under article 2, paragraph 3(a), of the Covenant, to an effective remedy, including appropriate compensation, for having been convicted for exercising his right to freedom of expression. The Committee further invites the State party to review article 13(2) of the Labour Dispute Adjustment Act. 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 90 days, information about the measures taken to give effect to the Committee's Views.

[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.]

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footnotes

*****/ Made public by decision of the Human Rights Committee.