



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE

Eighty-fourth session

11 – 29 July 2005

VIEWS

Communication No. 968/2001

<u>Submitted by:</u>	Kim Jong-Cheol (represented by counsel, Mr. Cho Yong-Whan, of the Horizon Law Group, Seoul)
<u>Alleged victim:</u>	The author
<u>State Party:</u>	Republic of Korea
<u>Date of communication:</u>	31 January 2000 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 20 February 2001 (not issued in document form)
<u>Date of adoption of Views:</u>	27 July 2005

* Made public by decision of the Human Rights Committee.

Subject matter: Criminal conviction of journalist for having published opinion poll results prior to election

Procedural issues: None

Substantive issues: Right to freedom of expression

Articles of the Covenant: 19, paragraph 2 and 3, 25 (a) and (b) and 26

Articles of the Optional Protocol: 1

On 27 July 2005, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 968/2001. The text of the Views is appended 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

Eighty-fourth session

concerning

Communication No. 968/2001*

Submitted by: Kim Jong-Cheol (represented by counsel, Mr. Cho
Yong-Whan, of the Horizon Law Group, Seoul)

Alleged victim: The author

State Party: Republic of Korea

Date of communication: 31 January 2000 (initial submission)

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

Meeting on 27 July 2005,

Having concluded its consideration of communication No. 968/2001, submitted to the
Human Rights Committee on behalf of Kim Jong-Cheol 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:

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

An Individual opinion signed jointly by Committee members Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Ahmed Tawfik Khalil and a separate opinion signed by Committee member Ms. Ruth Wedgwood are appended to the present document.

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

1. The author of the communication is Mr. Kim Jong-Cheol, a Korean national. He claims to be a victim of violations by the Republic of Korea of his rights under articles 19, paragraph 2, 25 (a) and (b), and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Factual background

2.1 On 11 December 1997, the author, a journalist, published an article in a national weekly publication, reporting on opinion polls, between 31 July and 11 December 1997, for the Presidential election of 18 December 1997. In February 1998, he was charged by the District Attorney for violating section 108 (1) of the Election for Public Office and Election Malpractice Prevention Act (hereinafter the "Election Act"), which prohibits publication of public opinion polls during the electoral campaign period¹. According to article 33 (1), the presidential campaign period is 23 days. The Election Act imposes criminal liability for the disclosure of political opinion polls for the 23 day period running up to and including election day.² On 16 July 1998, the author was found guilty as charged by the Seoul Criminal District Court Collegiate Division and fined 1,000,000 won (approx. 445 USD).

2.2 The author appealed this decision and at the same time challenged the constitutionality of the related provisions of the Election Act before the Constitutional Court. On 28 January 1999, the Constitutional Court declared the relevant provisions of the Election Act constitutional, finding that the length of the ban suppressing the publication of polls during the electoral campaign period was reasonable to ensure a fair and undistorted election result. In its judgement, it referred to a study which allegedly demonstrates that a public opinion poll may encourage voters to move toward a candidate with a stronger chance of winning (so-called "bandwagon effect"), or may add sympathy votes to the underdog (so-called "underdog effect"), thereby distorting the will of voters. On 13 April 1999, the High Court upheld the District Court's decision, and on 20 August 1999, the Supreme Court dismissed the author's appeal.

The complaint

3.1 The author claims that his conviction violates articles 19, paragraph 2, and 25 (a) and (b) of the Covenant. He contends that the ban on the publication of polling results during the campaign period has not been shown to promote fair elections, as the Constitutional Court simply

¹ It stipulates that "No person may publish or quote in a report the details and result of a public opinion poll (including a mock voting or popularity poll) making a degree of support to a political party or a successful candidate anticipated, in connection with an election, from the day the election period commences to the time the voting is closed on the election day."

² According to article 256(1), as amended, "any person who discloses the details and result of a survey of public opinion, or makes a report citing them or makes another person do so, in contravention of the provisions of article 108(1).....with imprisonment for not more than two years, or a fine not exceeding four million won.

speculated that publication of polls could swing votes both towards and away from particular candidates. The Constitutional Court's reasoning is based primarily on an unsubstantiated academic theory (the "bandwagon" and "underdog" effects) and cannot be invoked to deprive the author of his right to freedom of expression and provision of information based on such an uncertain "theory". In fact, according to the Constitutional Court's own reasoning, the two possible adverse effects may theoretically cancel each other out.

3.2 The author considers that, as a journalist, article 19 guarantees him the right to discharge his professional duty, by reporting pertinent news information to the reader. His duty to report is a prerequisite to the public right to access information and the particular ban is an excessive and disproportionate restriction.

3.3 The author claims that Section 108 (1) of the Election Act violates article 25 (a) and (b), as it denies the free and full exchange of information, which is vital to voters in forming their will meaningfully. Results of reliable public opinion polls provide relevant and meaningful information of interest to voters. By being informed of the candidates' prospective standing in an election, voters may freely form or modify their own opinion about the candidates.

3.4 The author argues that the ban unreasonably discriminates between persons with direct access to polls (taking polls itself not being unlawful) and those who do not have such access, and that this leads to distortions in the forming of voter will. He contends that as readily-accessible foreign media are not restricted in the publication of poll data, the ban serves no effective purpose. Finally, he argues that the State party has not demonstrated any negative effect on the election caused by the author's publication, and that accordingly his punishment was unjustified.

3.5 The author states that the matter has not been submitted to another procedure of international investigation or settlement and that he has exhausted domestic remedies.

State party's submission on admissibility and merits and author's comments thereon

4.1 On 22 February 2002, the State party provided its submission on admissibility and merits. It invokes to the Constitutional Court's decision, which considered that restrictions on the publication of public opinion poll information for the time necessary to guarantee a fair election does not constitute a violation of either the Constitution or the Covenant. It refers to article 37 (2) of the Constitution, which provides that the freedoms and rights of citizens may be restricted by law only when this is essential for national security, maintenance of order or public welfare, as well as article 19, paragraph 3 of the Covenant. It argues that the guarantee of fair elections is an integral part of public order in a democratic society. The length of the period of restriction cannot be considered as excessive or discriminatory.

4.2 The State party submits that the Constitutional Court's reasoning is not based on theory or possibility, but on the country's own experience. It takes into account how vulnerable the election culture and climate have been to political manipulation and irregularities in the Republic of Korea in the past. Unfairly or partially-manipulated public opinion poll results released prior to an election have often affected the choices of voters, thus jeopardizing a fair election.

Nevertheless, the State party submits that over time, once the political climate has matured, the ban on the publication of public opinion poll results could be lifted.

5. On 31 July 2003, the author commented on the State party's submission, stating that there is no connection between his reporting of the public opinion polls and the so called, "political manipulation and irregularities" concerning the election, and that it was the government itself that was responsible for creating an the "election culture and climate" that was "vulnerable to political manipulation and irregularities". In his view, such manipulation was made possible partly because the government had imposed restrictions on the freedom of expression and free access to information in relation to elections. The State party has not explained what kind of harm the author had caused by reporting the results of the poll and how the ban was related to the desire to ensure a fair election. It also did not make the necessary connection between the punishment of the author and the grounds on the restriction of the right to freedom of expression stipulated in the Covenant.

State party's supplementary submission

6.1 By submission of 28 June 2004, the State party recalls that the Election Act is designed to ensure that public elections are fairer by preventing them from being adversely affected by biased or manipulated public opinion polls, thereby influencing voters with incorrect information. Even if conducted in a fair and objective manner, such polls can influence voters through the "bandwagon" and "underdog" effects.

6.2 While acknowledging that abuse of power by some political actors has in the past undermined the quest for fair elections, the State party denies that the government is responsible for the current election culture. Today's media has grown in terms of social and political power that has crucial effects on opinion making, especially on elections. Under the Election Law, the Government has a legal duty to improve the electoral culture by preventing interference with the election outcomes by publication of incorrect opinion poll results by the media. Finally, it submits that it does not have to prove the harm done by the publication of public opinion polls in each individual case to justify enforcement of the law.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol. With respect to the exhaustion of domestic remedies, the Committee notes that the State party has not claimed that there are any domestic remedies that have not been exhausted or could be further pursued by the author.

7.3 As to the author's claims under articles 25 (a) and (b), and 26 of the Covenant, the Committee considers that the author has insufficiently substantiated these claims for the purposes of admissibility. Thus, it finds these claims inadmissible under article 2 of the Optional Protocol. The Committee proceeds immediately to the consideration of the merits as it relates to the claim under article 19 of the Covenant.

Consideration of the merits

8.1 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 for in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes that the issue before it is whether the author's conviction, under Section 108 (1) of the Election for Public Office and Election Malpractice Prevention Act, for having published an article on the results of opinion polls during the campaign period of the Presidential election, violates article 19, paragraph 2, of the Covenant. 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 through his articles, the author was exercising his right to impart information and ideas within the meaning of article 19, paragraph 2, of the Covenant.

8.3 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 the aims enumerated in paragraph 3 of article 19, and must be necessary to achieve the purpose. The restrictions were provided for by law, under Section 108(1) of the Election for Public Office and Election Malpractice Prevention Act. As to whether the measures addressed one of the aims enumerated in paragraph 3, the Committee notes that the State party maintains that the restriction is justified in terms of the protection of public order (paragraph 3(b)). The Committee considers that, to the extent that the restriction relates to the rights of Presidential candidates, this restriction may also fall within the terms of article 19, paragraph 3 (a)(necessary for the respect of the rights of others). The Committee notes the underlying reasoning for such a restriction is based on the wish to provide the electorate with a limited period of reflection, during which they are insulated from considerations extraneous to the issues under contest in the elections, and that similar restrictions can be found in many jurisdictions. The Committee also notes the recent historical specificities of the democratic political processes of the State party, including those invoked by the State party. Under such circumstances, a law restricting the publication of opinion polls for a limited period in advance of an election does not seem ipso facto to fall outside the aims contemplated in article 19, paragraph 3. As to the issue of proportionality, the Committee notes that, while a cut-off date of 23 days prior to the election is unusually long, it need not pronounce itself on the compatibility per se of the cut-off date with article 19, paragraph 3, since the author's initial act of publishing previously unreported opinion polls took place within seven days of the election. The author's conviction for such publication cannot be considered excessive in the context of the conditions obtaining in the State party. The Committee also notes that the sanction visited on the author, albeit one of criminal law, cannot be categorized as excessively harsh. It is not, therefore, in a

position to conclude that the law, as applied to the author, is disproportionate to its aim. Accordingly, the Committee does not find a violation of article 19 of the Covenant in this regard.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of the International Covenant on Civil and Political Rights.

[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.]

APPENDIX

Individual opinion (dissenting) by Committee members, Ms. Christine Chanet and Messrs. Abdelfattah Amor, Prafullachandra Natwarlal Bhagwati, Alfredo Castillero Hoyos, Ahmed Tawfik Khalil and Rajsoomer Lallah,

We observe 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 a legitimate purpose. While the State party has stated that the restrictions in this case were justified in order to protect public order and were provided for by law, under Section 108(1) of the Election for Public Office and Election Malpractice Prevention Act, we do not consider that the measures taken against the author were necessary for the purpose stated. We note that the State party has invoked public order by reference to the desire to ensure free and fair elections and the fear that the media may manipulate public opinion by publishing inaccurate opinion poll results. It has also referred to a desire to avoid feared 'bandwagon' or 'underdog' effects on the electorate. We consider however that the State party has failed to demonstrate the reality of the threat which it contends the exercise of the author's freedom of expression posed; nor has it explained why its electorate should be deprived of information that could help them ensure an electoral outcome most consistent with their overall political preferences. We also note that the alleged 'bandwagon' and 'underdog' effects are mutually contradictory, and further stress the unusually long period of 23 days required by the law. We conclude that the arguments advanced by the State party are insufficient to make the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19. Accordingly, we consider that the facts before the Committee, disclose a violation of article 19, paragraph 2, of the Covenant.

[signed] Mr. Christine Chanet
[signed] Mr. Abdelfattah Amor
[signed] Mr. Prafullachandra Natwarlal Bhagwati
[signed] Mr. Alfredo Castillero Hoyos
[signed] Mr. Ahmed Tawfik Khalil
[signed] Mr. Rajsoomer Lallah

[Done 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.]

Individual opinion (dissenting) by Committee member Ms. Ruth Wedgwood

I join six of my colleagues on the Human Rights Committee in concluding that South Korea's criminal statute banning the publication of political polling data during an election campaign is inconsistent with Article 19 of the Covenant on Civil and Political Rights.

South Korea's "Election Malpractice Prevention Act" forbids publishing or quoting the "results" of public opinion polls, and any details of the polls, during the entire interval of a political campaign. Thus, throughout the 23-day campaign period for the South Korean presidency, no writer or political analyst may speculate which candidate is ahead or behind, or which party's political platform is winning the approbation of the public, if this characterization is based on any attempt to sample the views of voters.

This muzzles what citizens can say and write, as well as the free expression of journalists. The statute restricts what a political party could say about the scope of its public support, and applies to local campaigns as well as national contests. The absence of any definition of a "poll" would apparently forbid even a mock election among members of a local soccer club. This limit on writing and speech is especially harsh, because it is punishable by imprisonment for up to two years, though here the criminal penalty applied was a monetary fine.

Some might welcome an interval in which elections were not discussed as a horse race. But the complete ban for the duration of a campaign of any polling about political candidates and political parties also hobbles the ability to discuss issues and controversies. The prohibition means that no journalist could discuss on national radio or mention in a newspaper column that, based on public opinion sampling, a particular candidate appears to have gained support in a contest and that such support was tied to the candidate's views on an issue of the day.

The state party has argued that election polls may be "incorrect" and that the media has "growing power," and seeks to justify the ban as a way of protecting "public order." See paragraph 6.2 *supra*. But public opinion polls may also be seen as part of the conversation between candidates and citizens. They can provide one of the safeguards for honest elections in both emerging and established democracies. And in any event, under Article 19 of the Covenant, citizens enjoy the right to "hold opinions without interference," the right to "freedom of expression," and the right to "seek, receive and impart information and ideas of all kinds, ... either orally, in writing, or in print."

The state party has not shown that its flat ban on any published sampling of the evolving views of voters is a justifiable restriction in light of the Covenant's broad guarantee of freedom of expression.

In a challenge to the statute before the Constitutional Court of South Korea, a "contending" judge noted that "the freedom to exchange opinions is an absolute precondition to the system of Democracy." That prescient statement is reflected in the Covenant as well.

[signed] Ms. Ruth Wedgwood

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