

## **National Security and Constitutional Rights in Korea**

### **- National Security Law, Past and Present**

Park Won Soon, Human Rights Lawyer  
Chair, Executive Committee, PSPD  
Director, Beautiful Foundation

As of 25 August, of the 99 political prisoners in detention, 54 were detained on charges under the National Security Law. Of these, the majority were arrested under Article 7, which punishes membership of organizations deemed to "benefit the enemy", improving relations with North Korea prompted debate on reform of the National Security Law. President Kim Dae-Jung apparently encouraged by his award of the Nobel Peace Prize, announced his support for revisions to the National Security Law, but opposition to reform in the National Assembly from both the GNP and the ULD prevented significant revisions. (Amnesty International Report 2001)

### **1. Introduction**

#### **De Facto Constitution - The National Security Law**

The National Security Law (NSL) in Korea has been called as a de facto constitution. It means the NSL was under no other laws including the Constitution. Even though it is inferior to the Constitution namely, no legal enforcement agencies and the court could not challenge unconstitutionality of the law in reality.

Korean peninsula has been one of the powder magazine where small incident could lead to big armed conflict. As a matter of fact, in 1950, there broke out Korean war in which over 3 million people were killed. Since then, national security has been regarded as the most important and sensitive agenda among Korean people. Basic freedom and human rights enshrined in the Constitution has been sacrificed in the name of national security.

In this way, the NSL was a symbol of the past dark history and dictatorship in Korea. Innumerable citizens used to be imprisoned under the law, labelled as a subversives, communists, or pro-North Korea. It was the first law which was demanded to be abolished or amended by the democratization movement.

With the democratization process, the debate surrounding abolition of the NSL became heated. There was increasing number of the supporting public opinion to repeal the law, but it

was not enough to overshadow the people who still believe the law was indispensable to keep superiority of the national defense against North Korea. Despite intensive challenge, opposition, and pressure, the law survived.

## **2. The Evolution of the National Security Law**

### **(1) Born as Emergency Measure**

On August 15, 1945, following Japan's defeat in World War II, Korea gained its independence after forty years of Japanese colonial rule. The liberation, brought other political developments which would keep the Korean Peninsula divided to this day. Korea was forcibly divided at the 38th parallel as U.S forces occupied the South and the Russian forces occupied the North in 1945. Thus, South Korea, supported by the United States, became Republic of Korea, which followed the capitalist path. On August 1948, northern Korea, supported by the Soviet Union, became the Democratic People's Republic of Korea. The two governments argued over which was the legitimate government and, from this time on, competition and conflicts between the two intensified.

As the South-North division became a reality, many communists within South Korea began struggle against the South government. It drafted and passed a special law to prevent and punish such subversive activities by the communists. It's the National Security Law (NSL). Even in those days, and in the process of the legislation of the law, several members of the National Assembly opposed on some reasons. Main reason was it would indict not only communists, but also innocent citizens and patriots inheriting Chian-yuji-bop, which limited freedom of Koreans during the Japanese colonial period. Majority of the National Assembly approved the draft and passed the law on December 1, 1948, arguing it was inevitable to crack down the communists and it's only tentative and emergency law which would be ending after the serious unstable situation.

### **(2) Aggravated Each Regime**

However, even though the subversive and highly unstable situation was over, the NSL was aggravated as the time passed on. Through 7 revision of the NSL, one can note special characteristics of the revision process.

First, the law has been revised by the ruling power driven by political motives. The revisions took place not because of deterioration of or danger to the national security, but as a means to oppress the people who rebelled against the ruling power. The revisions were frequently used by those who came into power through an illegal coup to crackdown on those who challenged the legitimacy of their rule.

Second, through successive revisions the NSL became more oppressive. Aside from the post April 10, 1960 revision and the seventh revision, the NSL became bloated with new articles and more penalties. The initial 6 provisions of the original NSL became 40. The maximum sentence in the first revised NSL was life sentence, but now there are 40 provisions which carry maximum penalty of death. This shows that the NSL is one of the most cruel laws that has been enacted.

Third, the process of revising the law has been unconstitutional, unlawful, and undemocratic. The fifth revision of the law, and enactment of the Anti-Communist Law, and the sixth revision of the NSL were carried out by the military juntas created after the National Assembly was dismissed. The fourth revision was passed by the ruling party while the opposition members were under the house arrest by the police.

In this way, from its enactment and through all of its revisions, the NSL does not possess legitimacy either procedurally or in substance. It was not enacted and revised according to democratic process and its provisions were not intended to truthfully guarantee the security of the nation and the basic rights of the people.

### **(3) Main Instrument of the Dictatorship**

As mentioned before, the NSL has been enacted and functioned not for 'national security' in the genuine sense of the phrase, but for an illegal and illegitimate government to suppress its dissidents. Hence, it is very natural that the law has been applied for the purpose of oppression and countless number of students, citizens, workers, and artists have endured prosecution in the process.

It is impossible to count the precise number of the NSL -related cases. In 1949, one year after the NSL was enacted, 80% of the 118,621 criminal arrests involved NSL violations. This fact alone attests to the enormous number of people abused under the law. Much of the information about the NSL is missing, and a statistical analysis of the NSL cases prior to 1964 remains unfeasible. It encompasses every aspect of political, social, and even artistic life of the Korean people. Control over the press has occurred without saying, and targets of the NSL extends to poetry, paintings, professor's lecture notes, plays, and films.

Such excessive use of the NSL has been made possible with the support of the regular as well as secret police, the notorious Korean CIA. They routinely conducted illegal and criminal torture, involving interrogation methods tacitly approved by the judicial system. In other words, an independent judiciary and an impartial prosecution - essential legal structure of any lawful society - did not exist in South Korea, and therefore, those indicted for the NSL violations were deprived of the legal due process afforded elsewhere.

Since 1987 after the military dictatorship collapsed, the NSL was also challenged by the public opinion. The prosecution and police became cautious to apply the law gradually. The court also began to sentence the accused less heavier terms. However, the NSL still is existing and surviving with the apparatus maintained.

### **3. The NSL and the Violation of the Constitutional Rights**

#### **(1) Freedom of Associations**

The NSL could punish a person on the grounds of organizing or participating in an organization. No specific act of crime had to be committed. The law was written specifically in this fashion so as to eradicate the very existence of leftist organizations regardless of its actual activities. This is clearly a violation of the freedom of associations.

#### **(2) Freedom of Thoughts**

In addition, since the law was intended to incriminate communists, the members of the leftist organizations would be labelled as a communist follower. Without any concrete and actual actions, he or she could be punished only on the reason that he or she was a member of the communist or anti-governmental organizations. It's also violating the freedom of thoughts.

Freedom of thoughts generally refers to the right to freely form and maintain one's thoughts and philosophy, which equals in importance with freedom of education and religion. To nurture one's thoughts one should be allowed accesses to other political and economic thoughts expressed in books and other printed materials. In numerous NSL cases, people were interrogated about their philosophies and were punished when they did declare them.

#### **(3) Freedom of Expression**

The NSL punishes such act as praise, encourage, support, and benefit the North Korean government and anti-state organizations. With this article, so many artists, novelists, painters had been imprisoned under the law. No 7 of the Law is clearly infringing the freedom of the expression.

#### **(4) NSL's Violations of the ICCPR**

Korean government maintained that there was no fundamental disparity between the Constitution and the International Covenant on Civil and Political Rights (ICCPR) except those differences arising from customary legal procedures and from the statutory framework and practice designed for policy purposes. Thus, only those differences were behind from the ratification of the ICCPR.

However, many experts and NGOs dealing with human rights issues within and without South Korea viewed the government's allegation as being an outright lie. According to them, the following fundamental rights and human rights were repressed under the South Korean legal system ; freedom of ideology and conscience, freedom of expression, freedom of peaceful assembly, right to participate in politics, right to life, prohibition of torture, right to liberty and security of person, humane treatment of inmates, right to labor, right to liberty of movement and residence, right to privacy, freedom of association.

Article 3 deals with the "formation of and association with an Anti-State Organization". This article specifies the crime of forming or joining an Anti-State Organization. Once an organization or a group is determined to be an Anti-State organization, not only those who formed or joined it, but also those who made communication or otherwise contacted with it are punishable under this law. This article grossly violates the freedom of assembly delineated in Article 22 of the ICCPR.

Article 6 articulates that "anyone who infiltrating into the Republic of Korea from an area controlled by an Anti-State Organization, or escaping to such area, with the knowledge that it endangered national security or survival or the basic liberal democratic order" shall be punished with imprisonment for up to ten years. This article, which punishes simple movement between South and North Korea under the name of 'infiltration and escape' violates Article 12, paragraph 2 of the Covenant, which guarantees the freedom to leave any country including his own, and Article, paragraph 4 of the Covenant, which also guarantees the right not be deprived of the right to enter his own country.

Article 7, which punishes "praising, encouraging, sympathizing" with an enemy, is the principal provision used to usurp the freedom of expression guaranteed under the Covenant. Article 7, Section 1 of the NSL, stipulates that persons who have "benefited an Anti-State Organization by way of praising, encouraging, propagating, or siding with the activities of an Anti-State Organization, its membership or the persons who have propagated or instigated the disruption of the State with the knowledge that it will endanger the national security or survival or the basic liberal democratic order" shall be punished with up to seven years of imprisonment. Under this Article. countless books and works were considered problematic, resulting in the arrest and punishment of writers and artists who produced the work.

#### **4. Changing Circumstances**

In view of the historical progress being made between South and North Korea, the need for the NSL no longer exists. The existence of the law had been historically justified in the context of alleged North Korean threat. However, continuing improvements in relations and expansion

of exchanges between South and North Korea have dramatically diminished the usefulness of the NSL.

The Public Prosecution and those who defend the NSL insist that the law is not unique to South Korea, and similar laws are found in advanced Western countries where democracy is well established. Yet, security-related laws found in these countries differ greatly from the NSL in substance. The security-related laws of these countries teach us how to enact and implement laws that protect the national security, without violating individual's basic rights.

The problems of the NSL have now become well publicized internationally. It has been reviewed at various international meetings and also at the U.N Human Rights Committee meetings. The conclusion reached at these meetings was that the NSL violated not only the International Covenant on Civil and Political Rights , but also the norms of the International Human Rights Law.