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HUMAN RIGHTS COMMITTEE
Eighty-fourth session
11-29 July 2005

DECISION

Communication No. 1326/2004

Submitted by:	José Luis Mazón Costa and Francisco Morote Vidal (represented by counsel, Mr. José Luis Mazón Costa)
Alleged victim:	The authors
State party:	Spain
Date of communication:	22 August 2002 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 17 November 2004 (not issued in document form)
Date of decision:	26 July 2005

* Made public by decision of the Human Rights Committee.

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Subject matter:	Impossibility for a lawyer to challenge an allegedly hostile judge
Procedural issues:	The case has been submitted to another procedure of international investigation or settlement; exhaustion of domestic remedies
Substantive issues:	Right to an impartial tribunal
Articles of the Covenant:	14, paragraph 1, and 26
Articles of the Optional Protocol:	5, paragraph 2 (a)

[ANNEX]

Annex

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-fourth session

concerning

Communication No. 1326/2004∗

Submitted by: José Luis Mazón Costa and Francisco Morote Vidal (represented by counsel, Mr. José Luis Mazón Costa)

Alleged victim: The authors

State party: Spain

Date of communication: 22 August 2002 (initial submission)

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

Meeting on 26 July 2005,

Adopts the following:

Decision on admissibility

1.1 The authors of the communication, which is dated 22 August 2002, are José Luis Mazón Costa (first author) and Francisco Morote Vidal (second author), both Spanish nationals. They allege violations by Spain of the rights recognized in article 14, paragraph 1, and article 26 (in conjunction with article 14, paragraph 1) of the Covenant. Mr. Mazón is representing himself and Mr. Morote.

1.2 The Optional Protocol entered into force for the State party on 25 April 1985.

∗ The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Jonson López, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsooner 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.

Factual background

2.1 In October 1994, the first author represented the second author in a claim in which the latter requested a change in the maintenance allowance awarded to his wife in a previous divorce proceeding. On 10 July 1995, the claim was dismissed by Murcia court of first instance No. 3. Subsequently, the first section of the Murcia provincial high court rejected an appeal.

2.2 The authors allege that, during the proceedings in the provincial high court, the court did not inform them of the names of the judges who were members of the court nor the name of the reporting judge in the case, which is contrary to article 203.2 of the Judiciary Act. According to the authors, it is the practice of the first section, unlike other sections of the provincial high court, not to fulfil this legal obligation. The reporting judge has a decisive effect on the outcome of a case, since he is the one who drafts the judgement and, in practice, decides the case, since, owing to the large number of cases in the provincial high courts, collegiality is purely a matter of form in most proceedings.

2.3 The authors learned of the composition of the court and the name of the reporting judge (Francisco José Carrillo) only when the judgement was handed down, on 3 June 1996. The first author states that, if he had known the name of the reporting judge previously, he would have lodged an objection, as he had well-founded suspicions that the aforementioned judge had regularly been handing down judgements unfavourable to his clients since 1992, when the first author had publicly criticized in the press a judgement in penal proceedings in which the judge had participated. Since that time, Judge Carrillo has regularly handed down judgements against the first author in the appeals brought by the first author and at which he presided as reporting judge (a total of seven up to 1997).[1]

2.4 On 10 July 1996, the first author filed an application for *amparo* on his own behalf, and not representing the second author, before the second division of the Constitutional Court. In his application, he complained of the violation of the right to an impartial tribunal and a trial with all guarantees. He alleged that legislation is discriminatory because it allows a judge to disqualify himself when the lawyer is a member of his family but does not oblige the judge to disqualify himself when he is hostile towards one of the lawyers, nor in this last case does it enable the lawyer to request that the hostile judge be removed from the case.[2] The first author contended that the denial of a lawyer's right to challenge a judge would place the litigant or the party in an unequal position, since the rights and interests of the lawyer can also be affected by the participation of a hostile judge. The author also alleged that he had not been informed of the name of the reporting judge, which prevented him from exercising the right to challenge the judge on the basis of the right to an impartial tribunal.

2.5 In its decision of 29 September 1998, the Constitutional Court declared the appeal inadmissible. The second division considered that, with a minimum of diligence, the first author could have ascertained the composition of the division of the provincial court hearing the case and filed the appropriate motion for disqualification. The decision adds that the appeal hearing was held on 3 June 1996. At the hearing, the first author did not invoke the alleged violation of his basic rights, but awaited notification of the judgement in order to do so before the Constitutional Court. With regard to the merits, the Court concluded that the first author's application was clearly devoid of content, since the right to an impartial tribunal is a recognized

right of the parties to the proceedings, and not of the lawyers who take on their defence, and the fact that the Judiciary Act does not include hostility towards a lawyer as one of the reasons for disqualification did not raise questions of constitutionality. The Court cited a previous decision handed down in another *amparo* action brought by the first author concerning the same question, in which it concluded that "on the assumption, which has not been demonstrated here, that such clear hostility existed, in accordance with the guarantees contained in article 24 of the Spanish Constitution the solution does not lie in the judge's removal from the case; rather, it is for the person subject to trial to decide whether or not it is appropriate to retain the defence lawyer that he has chosen. Impartiality involves the person who requests the protection of the law and not those who, cooperating with the justice system, represent and defend persons subject to trial".

2.6 On 26 October 1998, the first author requested before the plenary session of the Constitutional Court the annulment of the proceedings in the *amparo* application. In the first place, the author argued that he had not had an opportunity to acquaint himself with the allegations of the public prosecutor, nor to deny them. In the second place, he alleged that the judges of the second division of the Constitutional Court, whose dismissal the first author had already requested in connection with another case, lacked impartiality. In a decision of 10 November 1998, the first section of the first division of the Constitutional Court rejected the author's claims.

2.7 The first author submitted a complaint to the European Court of Human Rights. On 5 October 2000, the European Court declared the complaint inadmissible *ratione personae*, since it deemed that the author could not be considered to be directly affected by the violations that he alleged on his own behalf, and not on behalf of his client, in proceedings in which he had not taken part, since he participated in them only as the legal representative of his client. The authors allege before the Committee that the present communication is different from the case examined by the European Court, for two reasons: first, the second author did not apply to the European Court; secondly, the Court did not recognize the first author's right to bring an action and dismissed the application without considering the case on the merits. It therefore cannot be considered that the case was examined in the meaning of article 5, paragraph 2 (a), of the Optional Protocol.

2.8 The file that the authors submitted to the Committee contains a copy of the application to the European Court. In it, the first author, who is the applicant, includes a paragraph 8 bis, which reads: "My client, Mr. Francisco Morote Vidal, associates himself with the application submitted to Strasbourg through the attached document." The copy of the attached document was not submitted to the Committee. The issues raised in the application included violation of the right to an impartial tribunal and the right of a lawyer disadvantaged by the action of a hostile judge to have access to justice; discrimination that calls for the withdrawal of a judge when he is hostile to a party to the proceedings but not when he is hostile to a lawyer; and violation of the right to adversarial proceedings before the Constitutional Court.

The complaint

3.1 Both authors allege that the State party violated their right to an impartial tribunal and the right of access to justice (article 14, paragraph 1, of the Covenant). These rights were violated by the decision of the second division of the Constitutional Court, according to which, when

there is manifest hostility between a lawyer for one party and the judge hearing the case, "in accordance with the guarantees contained in article 24 of the Spanish Constitution the solution does not lie in the judge's removal from case; rather, it is for the person subject to trial to decide whether or not it is appropriate to retain the defence lawyer that he has chosen. Impartiality involves the person who requests the protection of the law and not those who, cooperating with the justice system, represent and defend persons subject to trial". The right of access to justice is impaired when a lawyer's right to defend himself in any way against a hostile judge is not recognized.

3.2 The authors allege the violation of the right to equal access to justice (article 26 in conjunction with article 14, paragraph 1, of the Covenant). The partiality of a judge resulting from his hostility to a lawyer for one party affects both the party and his representative. The failure to recognize access to the challenge procedure for a lawyer who has a direct interest in removing a judge suspected of being partial against him constitutes discriminatory treatment with respect to the party, which is incompatible with the provisions of article 26 of the Covenant. Furthermore, discriminatory treatment exists because Spanish law allows the disqualification of a judge when he is related by family to a lawyer of one of the parties, but not because of manifest hostility between a judge and a lawyer for one of the parties.

3.3 The first author alleges that his right to adversarial proceedings before the Constitutional Court has been violated (article 14, paragraph 1, of the Covenant), owing to the fact that the first author did not have an opportunity, during the *amparo* proceedings, to acquaint himself with the allegations of the prosecution, which objected to the admissibility of the appeal, nor to reply to them.

Observations of the State party concerning admissibility and comments of the authors

4.1 In its observations of 19 January 2005, the State party maintains that the communication should be considered inadmissible. With regard to the identity of the reporting judge in the appeal before the provincial high court, the State party asserts that the first author was aware of the appointment of the judge. In this regard, the State party attaches a copy of a document of the provincial high court dated 11 October 1995 that refers to the beginning of appeal proceedings and contains the name of Judge Carrillo as reporting judge in the proceedings. Moreover, in the oral proceedings in the appeal, held on 3 June 1996, the first author did not lodge any complaint regarding the composition of the court or the participation of Judge Carrillo. Even if the first author had not been aware of the identity of the reporting judge, he could have filed challenge proceedings, since he was aware of the composition of the section. On the other hand, the fact that the first author did not know which judge would be the reporting judge is irrelevant, since the requirement of impartiality does not affect only, nor even principally, the reporting judge but affects all judges in the section equally, when a collegial decision is involved. The State party therefore concludes that the communication should be declared inadmissible in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

4.2 The State party adds that it is difficult for someone to claim to be a victim when that person has not brought a complaint before the domestic courts, whether it be the party that is not affected by the judge's alleged "hostility" or, in his personal capacity, the lawyer acting in the party's defence, who has no legal grounds for any challenge.

4.3 The authors do not adduce objective data in support of the alleged hostility of the reporting judge; the assessments they make are purely subjective. For this reason, the State party invokes the grounds for inadmissibility contained in article 3 of the Optional Protocol.

4.4 The State party does not consider it admissible that the mere existence of a number of judgements unfavourable to a lawyer's other clients should oblige a judge to abstain from hearing a new case in which the same lawyer participates. Such a criterion would have the unacceptable consequence of making the composition of courts dependent on the whim and discretion of the party, simply because the lawyer has had better or worse luck in previous cases. The State party explains the reasons for which the law considers kinship alone as grounds for the abstention and disqualification of judges in relations with lawyers and prosecutors. The State party concludes that there is no reason for challenge proceedings, and invokes article 3 of the Optional Protocol as grounds for the inadmissibility of the communication.

4.5 Equal treatment in the regulation of the grounds for abstention and disqualification of the parties and their lawyers is not only not required by the principle of equality but is clearly an ill-advised means of ensuring the impartiality of the courts. The situations of the party and the lawyer are clearly different, and the difference in legal treatment is fully justified. Consequently, also with regard to the alleged violation of article 14, paragraph 1, and article 26 of the Covenant, the communication is unfounded in accordance with article 3 of the Optional Protocol.

4.6 It should also be pointed out that the "same case" submitted to the Committee was brought before the European Court of Human Rights, which declared it inadmissible. The State party recalls the Committee's jurisprudence concerning Spain's reservation to article 5, paragraph 2 (a), of the Optional Protocol, and requests the Committee to declare the communication inadmissible in accordance with that jurisprudence.

4.7 Lastly, the State party asserts that the present communication, which was submitted to the Committee in August 2002, refers to an alleged violation of the Covenant that is claimed to have occurred in June 1996 and on which the domestic courts ruled in September 1997 and September 1998. The fact that the authors waited four years to submit the case to the Committee renders the complaints contained therein frivolous and the communication an abuse in the meaning of article 3 of the Optional Protocol.

5.1 In their comments of 11 April 2005, the authors claim, with respect to the failure to exhaust domestic remedies, that, according to the Committee's jurisprudence, remedies that are clearly useless are not necessary. The Constitutional Court recognized that the challenge would have been useless when, in its decision declaring the *amparo* application inadmissible, it stated: "With regard to the merits, the present application is clearly devoid of content … in the sense that the basic right to an impartial tribunal is a recognized right of the parties to the proceedings and not of the lawyers who take on their defence." Moreover, since the Constitutional Court considered the merits of the case in order to dismiss the complaint, domestic remedies were exhausted.

5.2 With regard to the abuse of rights invoked by the State party, the authors point out that the Optional Protocol does not set a time limit for the submission of a communication, and that

the facts occurred after Spain's ratification of the Covenant and the Optional Protocol. Therefore, the mere fact that the submission of a communication is delayed does not constitute an abuse of rights.

Consideration of admissibility

6.1 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 communication is admissible under the Optional Protocol to the Covenant.

6.2 The authors allege that the State party violated their right to an impartial tribunal and the right of access to justice owing to the fact that it was impossible for someone who served as a lawyer in a case to challenge a judge who acted in a hostile manner towards him, which had detrimental consequences for the lawyer's client. They also allege a violation of their right to equal access to justice, since the right to challenge a judge is granted to the parties to the proceedings but not to the parties' lawyers. The first author further alleges a violation of his right to adversarial proceedings before the Constitutional Court.

6.3 The Committee takes note of the State party's observation that the document of the provincial high court dated 11 October 1995 that refers to the beginning of appeal proceedings contains the name of Judge Carrillo as reporting judge in the proceedings. Moreover, in the oral proceedings in the appeal, held on 3 June 1996, the first author did not lodge any complaint regarding the composition of the court or the participation of Judge Carrillo. The State party adds that even if the first author had not been aware of the identity of the reporting judge, he could have filed challenge proceedings, since he was aware of the composition of the division. The Committee also notes that the Constitutional Court, in its decision of 29 September 1998, found that, with a minimum of diligence, the first author could have ascertained the composition of the division of the provincial court and filed the appropriate motion for disqualification. As for the second author, the Committee notes that he did not raise the issue of the alleged hostility of the competent judge in the case towards his counsel at any stage of the proceedings. He did not even lodge an *amparo* application on this issue in the Constitutional Court. In these circumstances, the Committee concludes that the authors did not exhaust domestic remedies.[3]

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the authors.

[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 author provides information concerning each case. He states that, in two cases, his clients were sentenced after having been acquitted in a court of first instance. He also states that on 15 April 1997 he challenged Judge Carrillo in an appeal relating to another case, and that the challenge was declared inadmissible.

[2] In his appeal, the author cited the Piersak case decided by the European Court of Human Rights.

[3] See, for example, communication No. 536/1993, *Perera v. Australia*, Decision adopted on 28 March 1995, para. 6.5.
