



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE

Eighty-fourth session
11 – 29 July 2005

DECISION

Communication No. 1389/2005

<u>Submitted by:</u>	Luis Bertelli Gálvez (represented by counsel, Mr. José Luis Mazón Costa)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Spain
<u>Date of communication:</u>	2 December 2004
<u>Date of decision:</u>	25 July 2005

Subject matter: Extent of the review of criminal case against complainant on appeal by Spanish courts

Procedural issues: Non- exhaustion of domestic remedies, failure to substantiate claims

Substantive issues: Right to equal treatment before the courts and tribunals, right to have the sentence and conviction reviewed by a higher tribunal according to law and prohibition of unlawful attacks on the honour and reputation.

Articles of the Covenant: 14, paragraphs 1 and 5, and 17.

Articles of the Optional Protocol: 2 and 5, paragraphs 2 (a) and 2 (b)

[ANNEX]

* Made public by decision of the Human Rights Committee.

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. 1389/2005*

Submitted by: Luis Bertelli Gálvez (represented by counsel,
José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of communication: 2 December 2004

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

Meeting on 25 July 2005

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication, dated 2 December 2004, is Luis Bertelli Gálvez, a lawyer of Spanish nationality born in 1949. He is represented by counsel Mr. Mazón Costa. He claims to be a victim of violations of articles 14, paragraph 1 and 5, and article 17 of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985.

Factual background

2.1 In 1984, the author was said to be a well respected lawyer in Malaga. He was known to have denounced abuses allegedly committed by local judges. On 18 May 1984, one Mr. Bohsali, accompanied by a police agent, visited the author's office. Mr. Bohsali had been investigated by Interpol in five countries and there were five criminal proceedings pending

* 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.

against him before Spanish courts. The author decided to assume the defence of Mr. Bohsali, who paid him part of his fees in advance. While the author was in the Canary Islands, where Mr. Bohsali had been indicted, the latter was arrested in Seville, but later released. According to the author, the police induced Mr. Bohsali to believe that the author had done nothing to help him but had deceived him. Accordingly, Mr. Bohsali filed for fraud against the author.

2.2 Proceedings against the author were conducted by a judge who was allegedly biased against him. The author was indicted by the First Chamber of the Provincial Court of Malaga (*Sección Primera de la Audicencia Provincial de Malaga*). The author filed criminal charges against the judges in the Supreme Court, alleging that they had committed an offence by handing down a manifestly unjust decision against him. The Supreme Court dismissed his allegations. In December 1985, the First Chamber of the Provincial Court of Malaga, allegedly composed of the same judges who had indicted him, sentenced him for fraud. The author states that the judgment characterised him in public as a swindler, a lawyer who had received payment in advance and had done nothing to defend his client.

2.3 On 13 December 1985, the author appealed to the Supreme Tribunal, alleging that the Provincial Court did not consider the evidence presented by him to demonstrate that he had duly performed his lawyer's duties. In November 1998, the Supreme Court dismissed the author's appeal, stating that it was not the task of the Court to weigh the evidence in the case. While this appeal was still pending before the Supreme Court, the Constitutional Court handed down a judgment in which it decided that a judge who indicted an accused could not participate in the judgment against the same accused. The Supreme Court allegedly totally ignored the Constitutional Court's decision in the author's case.

2.4 The author then appealed to the Constitutional Court, alleging that he was tried by biased judges who had sentenced him notwithstanding he had denounced them for handing down an unjust indictment against him. He also alleged that the appeal (cassation) did not fulfil the requirements of article 14, paragraph 5, of the Covenant, and that he was sentenced in violation of the principle of the presumption of innocence. On 19 June 1989, the Constitutional Court dismissed the appeal. The Court considered that the denunciation of the judges was not sufficient to recuse them because it was filed after the proceedings against the author had been instituted¹. The Court also considered that the appeal (cassation) satisfied the requirements of the Covenant.

2.5 The author appealed to the European Commission of Human Rights, alleging that the judges who tried him were not impartial. On 29 May 1991, the Commission found that the application was inadmissible for non-exhaustion of domestic remedies². The author considers that the Commission did not "examine" his application within the meaning of article 5, paragraph 2 (a), of the Optional Protocol. The alleged violation of article 14, paragraph 5 of the Covenant, or its equivalent under the European Convention on Human Rights, was never submitted to the Commission.

¹ According to the judgment of the Constitutional Court, the Court decided that the alleged violation of lack of impartiality of the judges was inadmissible due to the author's failure to raise the issue before the Supreme Court

² The Commission considered that the allegation related to the lack of impartiality was not raised in the appeal (cassation) to the Supreme Court.

The complaint

3.1 The author claims a violation of article 14, paragraph 5, of the Covenant because he could not get a re-evaluation of the evidence in his case.

3.2 The author alleges a violation of article 14, paragraph 1, of the Covenant because he was sentenced by biased judges who had previously indicted him and who had been denounced by him. The judgment handed down by these judges was silent on all the evidence presented by the author to prove his innocence.

3.3 The author further alleges a violation of article 17 of the Covenant because the sentence of the Provincial Court of Malaga depicted him as a swindler, notwithstanding the evidence he presented. As a result of the judgment, his reputation was affected before public opinion.

Issues and proceedings before the Committee

Consideration of the Committee

4.1. Pursuant to rule 93 of its Rules of Procedure, before considering any claim contained in a complaint, the Human Rights Committee must determine whether it is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

4.2. The author first approached the Committee in 1998 and subsequently in 2004. He explains that , in the meantime, he had become the President of Fundación Jurei and that the Foundation had been involved in many activities for the promotion of human rights in Europe and South America, and that therefore not only his own reputation was at risk but also that of the Foundation. Subsequent delays in the registration of his communication were due to circumstances outside the control of the author. The Committee therefore concludes that the submission of the communication does not constitute an abuse of the right of submission of communications in the sense of Article 3 of the Optional Protocol.

4.3. The Committee has noted that the author's complaint concerning article 14, paragraph 1, of the Covenant had already been submitted to the European Commission of Human Rights, which declared it inadmissible for non-exhaustion of domestic remedies on 29 May 1991. The Committee notes, however, that the European Commission did not *examine* the case within the meaning of article 5, paragraph 2 (a) of the Optional Protocol, since its decision was solely based on procedural grounds and it did not involve any consideration of the merits of the case. Therefore, no issue arises with regard to article 5, paragraph 2 (a) of the Optional Protocol as modified by the State party's reservation to this provision.

4.4. Concerning the requirement of exhaustion of domestic remedies, with respect to the alleged violation of article 17, which relates to the effects that the sentence of the Provincial Court of Malaga had on the author's reputation, the Committee notes that this issue was never raised before domestic courts. With regard to the alleged violation of article 14, paragraph 1, the Committee notes that this issue was not raised in the appeal (cassation) in the Supreme Court. This fact prompted both the Constitutional Court of Spain and the European Commission of Human Rights to decide that the allegation concerning the lack of impartiality was inadmissible for non-exhaustion of remedies. Therefore, the Committee finds that the author has not exhausted available domestic remedies for these two claims and declares this

part of the communication inadmissible under article 5, paragraph 2 (*b*) of the Optional Protocol.

4.5. With regard to the alleged violation of article 14, paragraph 5, it transpires from the text of the judgment of the Supreme Court that, although the Court stated that “evaluation of [the evidence] is the responsibility of the trial court and not of this Court”, it did deal extensively with the arguments put forward by the author and concluded that the author in fact had committed fraud because “there was deceitful behaviour and a selfish desire for profit, which misled another person and induced him to perform an act of disposition that was contrary to his own interests”. The claim regarding article 14, paragraph 5, therefore, appears to be insufficiently substantiated for purposes of admissibility. Therefore, the Committee concludes that this claim is inadmissible under article 2 of the Optional Protocol.

4.6. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (*b*) of the Optional Protocol;
- (b) That this decision shall be transmitted to the State party and to the author.

[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.]
