HUMAN RIGHTS COMMITTEE

Gómez v. Spain

Communication No 701/1996*

20 July 2000

CCPR/C/69/D/701/1996

VIEWS

Submitted by: Cesario Gómez Vázquez (Represented by José Luis Mazón Costa)

Alleged victim: Author

State party: Spain

Date of communication: 29 May 1995

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

Meeting on 20 July 2000,

Having concluded its consideration of communication No. 701/1996 submitted to the Human Rights Committee by Mr. Cesario Gómez Vázquez 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:

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

1. The author of the communication is Cesario Gómez Vázquez, a Spanish citizen born in 1966 in Murcia, formerly employed as a physical education teacher. He is currently living in hiding somewhere in Spain. He claims to be the victim of violations by Spain of articles 14, paragraph 5, and 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel, Mr. José Luis Mazón Costa.

Facts as submitted by the author

2.1 On 22 February 1992, the author was sentenced to 12 years and one day by the Provincial Court (*Audiencia Provincial*) of Toledo for the attempted murder (*asesinato en grado de frustración*) of one Antonio Rodríguez Cottin. The Supreme Court (*Tribunal Supremo*) rejected his appeal on 9 November 1993.

2.2 At around 4 a.m. on 10 January 1988, Antonio Rodríguez Cottin was stabbed five times in a car lot outside a discotheque in Mocejón, Toledo. The wounds required 336 days' hospitalization and a total of 635 days for complete recovery.

2.3 The case for the prosecution was that the author, who had been working as doorman at the discotheque, saw the victim drive into the car lot and went out to talk to him, asking him to get out of the car. While they argued, an unidentified car came up to them, a person got out asking for a light and, when Mr. Rodríguez turned around, the author allegedly stabbed him in the back and neck.

2.4 The author has consistently denied this description of the events and maintains that, on 10 January 1988, he left the discotheque between 2 and 2.30 a.m., going home to Mostoles, Madrid, as he was feeling ill. He was taken home by Benjamin Sanz Carranza, Manuela Vidal Ramírez and another woman. When he arrived at his home at 3.15 a.m., he asked his flatmate for an aspirin and remained in bed all the following day. The author knew the victim, who was a frequent visitor to the discotheque, and considered him to be a violent person. The author states that, on 5 December 1987, Mr. Rodríguez had had an argument with Julio Pérez, the owner of the discotheque, and drawn a knife on him. During the trial, the author claimed that the assault on Mr. Rodríguez on 10 January 1988 was a settling of accounts between the victim and someone in the underworld of which he is a part.

2.5 During the trial, both the author and the prosecutor called witnesses to corroborate their respective versions.[1]

2.6 Counsel states that the author did not file an appeal (*recurso de amparo*) because, as the right to an appeal is not covered by articles 14-38 and, in particular, article 24, paragraph 2, of the Spanish Constitution, the appeal would simply have been rejected. He later submitted an additional allegation to the effect that the Constitutional Court's repeated rejection of *amparo* applications made them an ineffective remedy. Consequently, he considers the requirement of exhaustion of domestic remedies to have been duly met.

Complaint

3.1 The author's complaint concerns primarily the right to an effective appeal against conviction and sentence. He argues that the Spanish Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*) violates articles 14, paragraph 5, and 26 of the Covenant because those charged with the most serious crimes have their cases heard by a single judge (*Juzgado de Instrucción*), who conducts all the pertinent investigations and, once he considers the case ready for the hearing, refers it to the Provincial Court (*Audiencia Provincial*), where a panel of three judges is in charge of proceedings and hands down the sentence. Their decision is subject to judicial review proceedings only on very

limited legal grounds. There is no possibility of a re-evaluation of the evidence by the Court of Cassation, as all factual determinations by the lower court are final. By contrast, those convicted of less serious crimes for which sentences of less than six years' imprisonment have been imposed have their cases investigated by a single judge (*Juzgado de Instrucción*) who, when the case is ready for the hearing, refers it to a single judge ad quo (*Juzgado de lo Penal*), whose decision may be appealed before the Provincial Court (*Audiencia Provincial*), thus ensuring an effective review not only of the application of the law, but also of the facts.

3.2 Counsel claims that, as the Supreme Court does not re-evaluate evidence, the above constitutes a violation of the right to have one's conviction and sentence reviewed by a higher court according to law. In this context, the author's lawyer cites the decision of 9 November 1993 rejecting the application for judicial review filed on behalf of Mr. Cesario Gómez Vázquez, the first ground of which states:

> "since it must also be pointed out that such evidence has to be evaluated exclusively by the court *ad quo* in accordance with the provisions of article 741 of the Criminal Procedure Act."
>
> "The appellant therefore recognizes that there is a great deal of evidence for the prosecution and his arguments consist only in interpreting this evidence according to his own way of thinking - and this approach is inadmissible when the principle of the presumption of innocence is invoked because, if it were allowed, it would change the nature of the judicial review and turn it into an appeal ".

The second ground states:

> "[in this case] of the principle *in 'dubio pro reo'*, the result is also rejection because the complainant forgets that this principle cannot be the subject of a review for the obvious reason that that would mean re-evaluating the evidence and such an evaluation is, as we have stated and repeated, not admissible."

3.3 Counsel further claims that the existence of different recourse procedures, depending on the gravity of the offence, implies a discriminatory treatment of persons convicted of serious offences, constituting a violation of article 26 of the Covenant.

3.4 The author states that the communication has not been submitted to another procedure of international investigation or settlement.

State party's observations and comments on admissibility and author's comments

4.1 In its submission under rule 91 of the Committee's rules of procedure, the State party requested the Committee to declare the communication inadmissible for failure to meet the requirement contained in article 5, paragraph 2, of the Optional Protocol, namely, exhaustion of domestic remedies, as the author had not lodged an appeal with the Constitutional Court, and referred in this connection to the position of the European Commission of Human Rights, which has systematically denied admissibility in cases involving Spain when an *amparo* application has not been filed. The State party claimed that the author's defence was inconsistent, as counsel had stated in a first

submission that he had not filed an application for *amparo* because the right to an appeal is not protected by the Spanish Constitution and had subsequently corrected that allegation in a second submission in which he had stated that his failure to file an application for *amparo* had been due to the Constitutional Court's repeated rejection of such appeals. The State party also maintained that the communication was inadmissible for failure to exhaust domestic remedies, since this question had never been brought before the Spanish courts.

4.2 The State party further claimed that the case was inadmissible because the author had abused his right to submit a communication, as his whereabouts were unknown and he had placed himself beyond the reach of the law. Lastly, the State party expressed doubts regarding counsel's right to represent the author, as counsel did not have sufficient authority and had not sought the permission of the previous defence counsel.

5.1 Counsel admitted that he had claimed in his initial submission that no effective remedy was available before the Constitutional Court. When he realized his error, he had made an additional submission, however, claiming that the said remedy was ineffective because the Constitutional Court had repeatedly rejected it (Constitutional Court judgement attached), and he referred to the Committee's case law on this point.[2]

5.2. Counsel admitted that the author's whereabouts were unknown, but claimed that this had not been an obstacle in other cases which the Committee had accepted. With regard to the doubts about his right to represent the author, counsel regretted that the State party did not clearly explain the real reasons, if any, for such doubts.

Decision of the Committee on admissibility

6.1 At its sixty-first session, of October 1997, the Committee considered the admissibility of the communication. It ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter had not been examined under another procedure of international investigation or settlement.

6.2 The Committee noted that the State party had challenged the communication on the ground of failure to exhaust domestic remedies. The Committee referred to its case law, in which it had repeatedly found that, for the purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must be both effective and available. With regard to the State party's argument that the author should have filed an appeal for *amparo* before the Constitutional Court, the Committee noted that the Constitutional Court had repeatedly rejected similar applications for *amparo*. The Committee considered that, in the circumstances of the case, a remedy which had no chance of being successful could not count as such and did not need to be exhausted for the purposes of the Optional Protocol. The Committee accordingly finds that article 5, paragraph 2 (a), of the Optional Protocol is not an obstacle to consideration of the complaint, which might raise issues under article 14, paragraph 5, and article 26 of the Covenant.

Comments of the State party on the merits and author's response

7.1 In its submission dated 31 May 1999, the State party reiterates its view with regard to the

inadmissibility of the complaint because the issues which are now being brought before the Committee were not raised at the domestic level. It also believes that the domestic appeals From information submitted by the State party, this refers only to the application for *amparo*, even though the plural form "appeals" is used [3] in respect of the allegations of violation of article 14, paragraph 5, and article 26, of the Covenant were not lodged on time and in the correct form, resulting in their dismissal.

7.2 Counsel for the State maintains that the allegations made to the Committee are abstract and aim to amend the law in general; they do not relate specifically to Mr. Gómez Vásquez, and therefore he does not have the status of a victim. Consequently, since there is no victim in the sense of article 1 of the Optional Protocol, the State party considers that the case should be declared inadmissible.

7.3 Counsel for the State also maintains that, since Mr. Gómez Vásquez has placed himself beyond the reach of the law and is a fugitive from justice, the case should be dismissed, since the "clean hands" principle has been violated. Counsel for the State considers that, since the complaint was not brought before the national judicial bodies, the author does not have the capacity to be the victim of a violation of a human right, particularly since not only was no violation invoked at the domestic level, but also the facts established by the judiciary were explicitly accepted.

7.4 Counsel for the State affirms that it was only after the appointment of a new lawyer that the author requested a review of all the judicial proceedings. He also contends that the appointment of the lawyer to appear at the international level was defective in terms of form. According to counsel for the State, when appointing a lawyer at the domestic level, the author made the appointment through a public document, while at the international level he did so by means of a mere paper.

7.5 As to the allegation of violation of article 26, the State party maintains its view already expressed at the stage of admissibility that two separate types of crimes are being compared, on the one hand the most serious crimes and, on the other hand, less serious crimes. In this respect the State party believes that a differentiation in the treatment of the two different types of crimes cannot possibly constitute discrimination.

7.6 As to the question of violation of article 14, paragraph 5, in the author's case, the State party explains that not only did the author's lawyer not raise the question of the lack of a full appeal or of a complete review of the proceedings when applying for a review, but he also explicitly recognized in his submission to the Supreme Court that: "In claiming a constitutional presumption of innocence, we do not aim to subvert or distort the purposes of an appeal, and convert it into a second judicial instance". Moreover, not only did the author not file an appeal for *amparo* with the Constitutional Court after the rejection of the appeal on 9 December 1993, but also, and instead, on 30 December he applied to the Ministry of Justice for a pardon, and as a first plea affirmed: "The conduct of the undersigned has always been irreproachable, with the exception of the crime committed, which was an isolated incident in his life and for which he has given ample demonstrations of remorse". Also, in a submission to the court of Toledo, of 14 January 1994, the author affirms: "The crime for which he is being sentenced is an isolated incident in his life, and at all times he has shown a fervent and sincere desire to be reintegrated into society". The State party therefore considers that it cannot be argued that there was a violation of the Covenant, since the author has accepted the facts as established by the Spanish courts.

8.1 The author's lawyer, in his response to the State party's allegations dated 8 November 1998, rejects the State party's contentions that the communication is abstract and the author does not have the status of a victim, since the author was sentenced on the basis of contradictory evidence and did not have an opportunity to request a review, or a re-evaluation of the evidence in a higher court, which took up only the legal aspects of the sentence.

8.2 The author's lawyer rejects the State party's claim that he is not authorized to represent the author since he sought the permission of the previous representative of Mr. Gómez Vázquez before beginning to act in his defence at the international level; he also contends that neither the Covenant, nor its Optional Protocol, nor the Committee's case law requires that representation by counsel should be effected by means of a document granted by a public authenticating officer, so that he believes that the State party's allegation is completely groundless.

8.3 As to the allegation by counsel for the State that article 26 has not been at issue because there are two different categories of crimes and therefore they do not have to be treated in the same way under the law, the author's counsel reiterates that the claim is not based on differential treatment of two different types of crimes, but on the fact that in the Spanish legal system, persons convicted of the most serious crimes do not have the possibility of a complete review of their convictions and sentences, in violation of article 14, paragraph 5, of the Covenant.

8.4 With regard to the alleged renunciation of his rights under article 14, paragraph 5, by drafting the appeal document subject to the limitations laid down under the Criminal Procedure Act, counsel explains that in the Spanish system of judicial appeals, acceptance of the legal limits of appeals made before a court is a condition *sine qua non* for the appeal to be accepted for processing and subsequently considered. This cannot possibly be interpreted as a renunciation of the right to a sentence being reviewed in its entirety. The author's counsel maintains that the author's lawyer in the domestic court applied only for the partial review allowed under Spanish law, and it is precisely for this reason that there is a violation of article 14, paragraph 5; in this respect, he cites the Committee's case law.[4]

8.5 Counsel explains that the Committee is not being asked to evaluate the facts and evidence established in the case, a matter which in any case is beyond its jurisdiction, as the State affirms, but merely to ascertain whether the review of the sentence which convicted the author met the requirements of article 14, paragraph 5 of the Covenant. Counsel maintains that the case law submitted by the State party, 29 verdicts of the Supreme Court, have no connection with the denial of the author's right of appeal. Moreover, a careful examination of the texts of the verdicts shows that they lead to conclusions which are the opposite of those claimed by the State, since most of them recognize that criminal appeals are subject to severe limitations as to the possibility of reviewing the evidence brought before the court of the first instance. The criminal section of the Supreme Court did not review the evaluation of the evidence carried out by the court of the first instance in any of these cases unless there was some violation of the law or there was a gap in the evidence which would support a violation of the right to presumption of innocence or if the factual observations made in the sentence were in contradiction with documents which demonstrated the error.

8.6 The State party alleges that article 14, paragraph 5, of the Covenant does not require that a

remedy of review should be specifically termed a remedy of appeal and that the Spanish criminal appeal fully satisfies the requirements in the second instance although it does not allow review of the evidence except in extreme cases which are specified in the law. In view of the foregoing, counsel believes that the criminal proceedings against his client and specifically the sentence convicting him were vitiated by the lack of a full review of the legal and factual aspects, so that the author was denied the right guaranteed under article 26 of the Covenant.[5]

Consideration on the merits

9. The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with the provisions of article 5, paragraph 1, of the Optional Protocol.

Review of admissibility

10.1 With respect to the State party's claim of inadmissibility on the ground of failure to exhaust domestic remedies, the Committee has consistently taken the view that a remedy does not have to be exhausted if it has no chance of being successful. In the case under consideration, the case law of the Spanish Constitutional Court shows repeated and recent rejections of applications for *amparo* against conviction and sentence. The Committee therefore considers, as it did upon determining the admissibility of this case on 23 October 1998, that there is no obstacle to its consideration of the merits.

10.2 With respect to the State party's claim that the author is not a victim because his counsel's objective is to amend Spanish legislation, and that the case is therefore inadmissible, the Committee points out that the author was convicted by a Spanish court and that the issue before the Committee is not the amendment, in the abstract, of Spanish legislation, but whether or not the appeals procedure followed in the author's case provided the guarantees required under the Covenant. The Committee therefore considers that the author can be considered a victim in accordance with the requirements of article 1 of the Optional Protocol.

10.3 With respect to the State party's allegation that the communication should be declared inadmissible because the author abused his right to lodge a complaint, since he did not serve his sentence and is currently a fugitive from justice, in violation of Spanish law, the Committee reiterates [6] its position that an author does not lose his or her right to lodge a complaint under the Optional Protocol simply because he or she has not complied fully with an order imposed by a judicial authority of the State party against which the complaint was lodged.

10.4 Lastly, with respect to the final ground of inadmissibility claimed by the State party, to the effect that the author's counsel does not have the right to represent him before the Human Rights Committee, the Committee takes note of the State party's claim, but reiterates that there are no specific requirements for representation before it and that the State party does not question whether or not Mr. Gómez Vázquez's counsel represents him, but only whether certain formalities that are not required by the Covenant have been fulfilled. The Committee therefore considers that the author's counsel is acting in accordance with the instructions of the principal and, therefore, legitimately represents him.

Substantive issues

11.1 As to whether the author has been the victim of a violation of article 14, paragraph 5, of the Covenant because his conviction and sentence were reviewed only by the Supreme Court on the basis of a procedure which his counsel, following the criteria laid down in article 876 et seq, of the Criminal Procedure Act, characterizes as an incomplete judicial review, the Committee takes note of the State party's claim that the Covenant does not require a judicial review to be called an appeal. The Committee nevertheless points out that, regardless of the name of the remedy in question, it must meet the requirements for which the Covenant provides. The information and documents submitted by the State party do not refute the author's complaint that his conviction and sentence were not fully reviewed. The Committee concludes that the lack of any possibility of fully reviewing the author's conviction and sentence, as shown by the decision referred to in paragraph 3.2, the review having been limited to the formal or legal aspects of the conviction, means that the guarantees provided for in article 14, paragraph 5, of the Covenant have not been met. The author was therefore denied the right to a review of his conviction and sentence, contrary to article 14, paragraph 5, of the Covenant.

11.2 With regard to the allegation that article 26 of the Covenant was violated because the Spanish system provides for various types of remedy depending on the seriousness of the offence, the Committee considers that different treatment for different offences does not necessarily constitute discrimination. The Committee is of the opinion that the author has not substantiated the allegation of a violation of article 26 of the Covenant.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 5, in respect of Mr. Cesario Gómez Vázquez.

13. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The author's conviction must be set aside unless it is subjected to review in accordance with article 14, paragraph 5, of the Covenant. The State party is under an obligation to take the necessary measures to ensure that similar violations do not occur in future.

14. Considering that, by becoming a 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.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. P.N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin

Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden, Mr. Hipólito Solari Yrigoyen and Mr. Abdallah Zakhia.

[Adopted in English, French and Spanish, the Spanish being the original version. It will subsequently be translated also into Arabic, Chinese and Russian as part of the annual report of the Committee to the General Assembly.]

Notes

1/ The author's witnesses at the trial were his girlfriend and his flatmate, who clearly had close ties with him, whereas the prosecution witnesses knew him only by sight.

2/ Communication No. 445/1991, *Champagne, Palmer and Chisholm v. Jamaica*. Views adopted on 18 July 1994.

3/ From information submitted by the State party, this refers only to the application for *amparo*, even though the plural form "appeals" is used.

4/ Communications 623-626/1995, *Domukovsky and others v. Georgia*. Views adopted on 6 April 1998.

5/ In this respect counsel cites information from the press referring to part of the judicial memorandum of 1998 of the Basque Supreme Court of Justice indicating that the Supreme Court of Justice of the Basque country considers the need for referral to the second instance in criminal cases to be indisputable, since, in its view, there is no doubt that this shortcoming is not remedied by an appeal.

6/ Communication 526/1993, *Will v. Spain*. Views adopted on 2 April 1997.