

HUMAN RIGHTS COMMITTEE

De Clippele v. Belgium

Communication No 1082/2002 *

28 March 2003

CCPR/C/77/D/1082/2002

ADMISSIBILITY

Submitted by: Mr. Olivier de Clippele (represented by counsel Mr. Arnaud Jansen)

Alleged victim: The author

State party: Belgium

Date of communication: 8 March 2002 (initial submission)

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

Meeting on: 28 March 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication is Olivier de Clippele, a Belgian citizen residing in Brussels, Belgium. He claims to be a victim of violations by Belgium of article 25 (b) of the International Covenant on Civil and Political Rights. The author is represented by counsel. (The Covenant and its Optional Protocol entered into force for Belgium on 17 August 1984.)

The facts as submitted by the author

2.1 The Belgian Act of 11 April 1994 (as amended by the Act of 18 December 1998 and the Act of 12 August 2000) instituted an automated voting system in certain electoral districts, cantons and communes.

2.2 The author, as a voter and candidate in the communal elections in the commune of Ixelles, brought suit before the competent Belgian courts with a claim that the Act on automated voting did not respect the rights set out in article 25 (b) of the International Covenant on Civil and Political Rights.

2.3 On 17 November 2000, under the Belgian communal elections law, the author brought an action challenging the procedure for the preparation, holding and counting of automated votes in the communal election of 8 October 2000 in Ixelles, with a view to having the election cancelled by the Judicial Council of the Brussels-capital region.

2.4 On 14 December 2000 the Judicial Council rejected the author's complaint.

2.5 On 26 December 2000 the author lodged an appeal with the Council of State.

2.6 On 4 April 2001 the Council of State rejected the author's appeal.

The complaint

3.1 The author is challenging the Act on automated voting on the following grounds:

- Lack of independent monitoring of electoral procedures such that the distribution of seats between the lists might be influenced; there are four elements to this:

The system lacks transparency. The software for recording and counting votes has not been made public, so neither the main bureau nor the polling stations can effectively monitor voting procedures;

Voters have no certainty that their vote and the electronic record of their vote on the magnetic card correspond, as the software constitutes an intermediary which they cannot monitor in any way;

The counting of votes is organized and overseen by the Ministry of the Interior.

The monitoring performed by a College of Experts does not compensate for this lack of independence of the body counting the votes, as the functioning, authority and organization of the College are deficient in numerous ways (the College is unable to monitor each polling station effectively, and is powerless against fraud);

Candidates and witnesses are unable to verify the counting of votes or the results as they have no access to the software and therefore can only watch as a printer produces the results of hidden electronic processing;

- Restriction of the right to vote, as the voter must select a list without being able to view all the candidates on each list at the same time;

- Unreliability and errors relating to the automated vote that came to light in the elections of 8

October 2000, when there were discrepancies at several polling Stations between the number of cards recorded in the ballot boxes and the number of voters who actually voted, and between the number of magnetic cards recorded and the number cancelled.

3.2 The author claims that the Act on automated voting that was applied in the communal elections of 8 October 2000 contravenes article 25 (b) of the Covenant.

3.3 The author states that all domestic remedies have been exhausted, and indicates that the matter has not been submitted under any other procedure of international investigation or settlement.

State party's observations on admissibility

4.1 In its observations of 29 July 2002, the State party challenges the admissibility of the communication.

4.2 Firstly, referring to the Committee's jurisprudence, 1/ the State party asserts that the author has not demonstrated that he is a victim. The author voices general and abstract criticism of the automated voting system without specifically demonstrating that such a system could have affected him directly or caused him personal harm, either as a candidate for the communal elections in Ixelles or as a voter in the same commune. The State party affirms that as a candidate the author suffered no harm, since he was elected. Furthermore, according to the State party, the author makes no specific allegation that the supposed irregularities that he has complained of falsified the results of the Ixelles communal elections to either his detriment or that of the candidate for whom he voted.

4.3 Secondly, the State party maintains that the author has not exhausted domestic remedies in respect of his complaint alleging discrepancies at several polling stations between the number of cards recorded in the ballot boxes and the number of voters who actually voted, and between the number of magnetic cards recorded and the number cancelled. According to the State party, the Judicial Council of the Brussels-capital region, as the administrative court of first instance with competence for communal election disputes, decided in a judgement of 14 December 2000 that these allegations constituted new pleas, submitted after the expiration of the 40-day time limit for the filing of complaints with the Council (Act on communal elections, art. 74 (1)). In fact these pleas did not appear at all in the original complaint and were advanced only later, in the submissions filed on 8 and 11 December 2000. The Council, considering that these were new pleas and that they could not be considered merely as developments of the pleas in the initial complaint, found them inadmissible. Furthermore, according to the State party, the Council of State, acting as an appellate body, at the conclusion of a detailed statement of reasons in a judgement dated 4 April 2001, fully concurred in that view and concluded that "the plea submitted out of time to the Judicial Council was inadmissible and remains so on appeal before the Council of State".

4.4 Basing itself on the Committee's jurisprudence, 2/ the State party considers that the author has not exhausted domestic remedies inasmuch as he failed to exhaust such remedies owing to his own negligence, by failing to comply with the time limit for the filing of appeals stipulated by domestic law.

4.5 Thirdly, the State party maintains that the author has not sufficiently substantiated his allegations.

Referring to the Committee's jurisprudence, 3/ the State party considers that the author merely makes assertions without producing concrete evidence justifying admissibility.

4.6 Lastly, the State party points out that the author's complaints have been carefully considered by the national courts, and that in accordance with the Committee's jurisprudence 4/ it is for the appeal courts in States parties, not the Committee, to review the findings of facts in a given case unless it can be proved that the courts' decisions were clearly arbitrary.

4.7 The State party points out that the Council of State observes first of all that article 25 (b) of the Covenant neither prescribes nor prohibits any specific voting system.

4.8 The Council of State refutes the complaints of a lack of transparency in the automated voting system, in particular as the "source code" was divulged, albeit without the security algorithms. There is no indication that the transparency provided by divulging the "source code" was insufficient.

4.9 Concerning the ability of voters to verify their votes, the Council of State notes, and the author acknowledges, that voters are able to verify their votes after having expressed their choice, and that the monitoring performed by the College of Experts has shown that there was no discrepancy between the votes as displayed and the information recorded on the magnetic card.

4.10 As for the independence of the College of Experts, the Council of State notes that the author criticizes the College for being elected by legislative assemblies. The Council of State observes firstly that such reasoning, if followed, would necessarily cast doubt on the independence and impartiality of all judges in Belgium, who are appointed by the King on the nomination of the competent minister, and thus on the country's established authorities. The Council of State then notes that no specific evidence demonstrating the lack of independence of the College has been put forward. In fact, the Council of State notes that criticism by the College, in its report on the elections of 13 June 1999, led to amendment of the Act of 11 April 1994. In its report on the elections of 8 October 2000 the College lists the various improvements made to the automated voting system, both in respect of procedures and equipment. Among these improvements was the possibility for voters themselves to verify their votes.

4.11 The Council of State then draws attention to the fact that prior to the elections of 8 October 2000 the College of Experts carried out tests involving casting votes, viewing them and comparing the results with the votes cast, and that it noted that the voting machines accurately recorded the votes in the computer's memory. The Council of State also points out that verification exercises were conducted both on election day and afterwards, during which it was confirmed that: (1) the software commands were identical to those created during the benchmark compilation; (2) the magnetic card readers did not alter the content of the cards in the ballot box; and (3) it is possible to carry out an independent recount by viewing all the cards in a commune's ballot box one by one, and counting the votes manually. The Council of State also emphasizes that a double appeal can be lodged, with the Provincial Executive Council or the Judicial Council in first instance, and subsequently with the Council of State on appeal, and that these bodies can order investigations. These bodies have full competence, and their intervention thus provides an additional guarantee.

4.12 With regard to the complaint of restriction of the right to vote, the Council of State notes, on the one hand, that article 15 of the Act of 11 April 1994 provides that all lists of candidates must be posted at each polling station and in each voting booth, and, on the other hand, that article 7 stipulates that the number and party affiliation of all candidate lists must be displayed on the screen, with an invitation to confirm the vote cast and the option, as long as the vote has not been confirmed, of starting over. The right to vote is thus not hindered in any way by the automated voting system.

4.13 In respect of the complaint concerning unreliability and errors associated with automated voting, the Council of State rejects that plea as the case has not been properly brought before a court of first instance.

Author's comments on the State party's observations concerning admissibility

5.1 In his letter of 26 September 2002, the author contests the State party's arguments.

5.2 Firstly, he maintains that he was personally and directly a victim of the failure to respect article 25 (d) of the Covenant, which confers upon him individual political rights, and requests the Committee to examine the violation of his rights stemming from the application of the Act of 11 April 1994 on automated voting in the communal elections of 8 October 2000. In the author's opinion, the guarantees of substance and form corresponding to the electoral rights citizens are ensured under the Covenant are not fulfilled by the automated voting system, and it would thus be unreasonable to demand concrete evidence of irregularities.

5.3 Secondly, in respect of the exhaustion of domestic remedies, the author acknowledges that the complaints of discrepancies at certain polling stations between the number of cards recorded in the ballot boxes and the number of voters who actually voted, and between the number of magnetic cards recorded and the number cancelled, were found inadmissible on procedural grounds, as they were out of time. However, according to the author, this has no bearing on the admissibility of his communication concerning the violation of article 25 (b) of the Covenant by the Act on automated voting applied in the communal elections of 8 October 2000.

5.4 Thirdly, the author contends that his allegations are duly substantiated by rigorous, serious and detailed analysis. The author maintains that his communication does not relate to actual facts or evidence, namely the holding of the elections, the existence of the Act of 11 April 1994 on automated voting and the way in which it was applied, but, rather, to the compatibility with article 25 (b) of the Covenant of the Act in its present form and as it has been applied. The author states that he is not convinced by the judgement issued by the Council of State on 4 April 2001, in particular for the following reasons: (1) the Council of State did not respond to the criticism that it was materially impossible for the College of Experts to monitor all the polling stations; (2) the Council of State referred to the findings of the College of Experts in respect of the problem of verification by voters of the accuracy of their votes, but failed to respond to the above criticism; (3) the author maintains the complaint concerning the lack of guarantees of independence of the College of Experts; and (4) the Council of State did not address the question of the monitoring of the vote count by candidates and their witnesses.

Issues and proceedings before the Committee concerning admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 In respect of the exhaustion of domestic remedies, the Committee notes the arguments of the State party to the effect that the allegations of discrepancies at several polling stations between the number of cards recorded in the ballot boxes and the number of voters who actually voted, and between the number of magnetic cards recorded and the number cancelled, are inadmissible, as these complaints were not raised with the competent national courts in the period set by law. The Committee also notes that the author acknowledges these reasons for inadmissibility. The Committee therefore considers that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 In respect of the complaints concerning the absence of independent monitoring of electoral procedures and restriction of the right to vote resulting from the Act on automated voting, the Committee considers that even assuming that the author could claim the status of a victim of an alleged violation of the Covenant, he has not provided any evidence to substantiate his complaint.

The Committee therefore considers that this part of the complaint is inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

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

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

[Adopted in English, French and Spanish, the French 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.]

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Gl l Ahanhanzo, Mr. Walter K lin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hip lito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Notes

1/ Communications Nos. 35/1978 (Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius); and 831/1998 (Michael Meiers v. France).

2/ Communications Nos. 925/2000 (Wan Kuok Koi v. Portugal); 26/1978 (N.S. v. Canada).

3/ Communication No. 779/1997 (rel , Anni and N kk l j rvi, Jouni v. Finland).

4/ Communications Nos. 866/1999 (Marina and Al Torregrosa Lafuente v. Spain) and 947/2000 (Barry Hart v. Australia).