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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3101/2018*, **

Communication submitted by:	Joaquín José Ortiz Blasco
Alleged victim:	The author
State party:	Spain
Date of communication:	8 April 2016 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 16 January 2018 (not issued in document form)
Date of adoption of Views:	13 March 2024
Subject matter:	Conviction in sole instance
Procedural issue:	Abuse of the right of submission
Substantive issue:	Right to have a criminal judgment reviewed by a higher court
Article of the Covenant:	14 (5)
Article of the Optional Protocol:	3

1.1 The author of the communication is Joaquín José Ortiz Blasco, a national of Spain born on 25 August 1950. He claims that the State party has violated his rights under article 14 (5) of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is not represented by counsel.

1.2 On 17 October 2018, the State party requested that the admissibility of the communication be examined separately from the merits. On 29 August 2019, the Committee, acting through its Special Rapporteurs on new communications and interim measures, in accordance with rule 93 (1) of its rules of procedure, decided to examine the admissibility of the communication together with its merits.

* Adopted by the Committee at its 140th session (4–28 March 2024).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Laurence R. Helfer, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobauyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu. Pursuant to rule 108 (b) of the Committee's rules of procedure, Carlos Gómez Martínez did not participate in the examination of the communication.

Facts as submitted by the author

2.1 The author is a judge in the Administrative Division of the High Court of Justice of Catalonia and, in 2012, was tried in sole instance for the offence of dealings and activities prohibited for public servants and abuse of public office.[1] As a judge of the High Court of Justice, the author was tried in sole instance by the Supreme Court.[2] On 25 April 2014, the Supreme Court convicted the author, indicating that its ruling was not appealable. The author was sentenced to a nine-month fine with daily instalments of 50 euros,[3] with subsidiary personal liability of one day of deprivation of liberty for every two daily instalments not paid; a two-year suspension from public employment or office, including that of judge; and payment of legal costs.

2.2 On 2 June 2014, the author filed a motion for annulment before the Second Chamber of the Supreme Court and, on 14 July 2014, the Chamber dismissed the motion, without addressing the merits.

2.3 On 24 September 2014, the author filed a petition for amparo with the Constitutional Court, in which he argued the special constitutional relevance of the violation of the right to a second hearing. The author further argued that rulings in sole instance were a violation of the right to due process and effective judicial protection.[4]

2.4 On 24 November 2015, the Constitutional Court dismissed the petition for amparo on the grounds that it was moot since there was manifestly no violation of a fundamental right subject to protection.

Complaint

3.1 The author claims a violation of article 14 (5) of the Covenant, alleging that the fact that he was convicted in sole instance by the Criminal Division of the Supreme Court, which is the highest ordinary court, violates his right to have his conviction and sentence reviewed by a higher court, since the ruling is not appealable.

3.2 Furthermore, the author emphasizes that, despite several previous findings by the Committee of a violation of article 14 (5) of the Covenant by the State party, the necessary legislative amendments have not yet been made to provide an effective remedy for officials with parliamentary privilege whose criminal cases are tried in sole instance by the Supreme Court.[5] Consequently, the author claims that the State party has failed to take the necessary measures to ensure that the violation of this article is not repeated.

3.3 The author recalls that the expression “as prescribed by law” is not intended to leave the very existence of a right to review to the discretion of States parties, as this right is recognized in the Covenant and not merely in domestic law, but refers instead to the definition of the modalities of such reviews by a higher court and the selection of the court responsible for conducting the review in accordance with the Covenant. If the highest court of a country acts as the first and only instance, the absence of a right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned. On the contrary, according to the author, such a system is incompatible with the

[1] Article 441 of the Criminal Code provides that: “Other than in the cases permitted by law or regulations, authorities or public officials who, themselves or through another person, engage in a professional activity or ongoing or inadvertent consultancy, under or for private entities or individuals, concerning matters in which they are called on to intervene or have intervened by virtue of their position, or matters that are processed, reported on or resolved in the department or executive body to which they were assigned or to which they report, are liable to a fine of six to twelve months and suspension from public employment or office for a period of two to five years.”

[2] Judiciary Act No. 6/1985 of 1 July 1985, art. 57 (3).

[3] A total of €13,500.

[4] Constitution of Spain, art. 24.

[5] The author cites *Terrón v. Spain* (CCPR/C/82/D/1073/2002); *Oliveró v. Spain* (CCPR/C/87/D/1211/2003); and *Hens Serena and Corujo Rodríguez v. Spain* (CCPR/C/92/D/1351-1352/2005).

Covenant, unless the State party concerned has made a reservation to this effect, which Spain has not.[6]

3.4 Concerning the motion for annulment as a step prior to filing a petition for amparo with regard to decisions not subject to ordinary or extraordinary appeal, the author points out that this motion is heard by the same judges who issued the ruling and is not, therefore, a new appeal in which the conviction and sentence are submitted to a higher court. The author also claims that amparo cannot be considered an appropriate remedy within the meaning of article 14 (5) of the Covenant, as it does not guarantee the review of the sentence and conviction by a higher court. The author adds that more than 90 per cent of petitions for amparo are dismissed without any possibility for the petitioner to challenge the decision even though a fundamental right may have been violated.

3.5 The author is seeking a finding that the right concerned was violated, as well as an effective remedy in the form of a review by a higher court of his conviction and sentencing by the Supreme Court. The author further requests compensation from the State party in the amount of €13,500 for the fine already paid in execution of the sentence, in addition to the €36,090.93 deducted by the Administration during his suspension from duty. The author notes that it would be appropriate to enforce the deduction only if he was granted an effective remedy that enabled him to appeal the Supreme Court's ruling and if, following that appeal, the ruling and conviction were upheld.

State party's observations on admissibility and the merits

4.1 On 17 October 2018, the State party submitted its observations on the admissibility and merits of the communication. The State party maintains that the case is inadmissible as an abuse of the right of submission under article 3 of the Optional Protocol. The State party claims that the author has specific knowledge of the procedural rules, in particular with regard to the criminal prosecution of judges which, under article 57 of the Judiciary Act No. 6/1985 of 1 July 1985, falls to the Second Chamber of the Supreme Court, and was therefore well aware that, having been tried by the highest instance, the ruling in his case would not have been subject to review as there was no higher court. Moreover, the author did not make any allegations during the investigation or the trial before the Second Chamber of the Supreme Court, and it was not until the motion for annulment of the proceedings that he raised the violation of article 14 (5) of the Covenant.

4.2 The State party claims that, in a similar case, the Committee noted that a judge tried by the Supreme Court who had not opposed his prosecution by that Court but, on the contrary, had insisted on being tried in sole instance "had renounced his right of appeal".[7]

4.3 The State party also argues that the concept of sole instance was a feature of the procedure in the nineteenth century that was closely linked to the establishment of the jury, the principles of oral hearings and the free assessment of evidence. At that time, where the people administered justice through a jury, it was considered a fraud against the people's participation for a higher court, made up exclusively of judges, to correct what had been decided by the people. Likewise, a higher jury would violate the principle of the equality of citizens before the law. There were also technical reasons requiring a sole instance, namely the fact that the oral nature of the proceedings prevented evidence from being reproduced for the second instance. The State party notes the need to set a logical limit on the right of appeal, as well as the importance of higher courts, which are in theory "higher" due to their level of knowledge and experience.

4.4 The State party considers that prosecution in first instance by the highest court is a consequence of certain levels of public office, whose holders occupy a special position and must be treated unequally so that, by treating unequally those who are unequal, equality of all before the law may be achieved. The State party adds that, given this specificity, to be tried in first instance by the highest court while keeping the right to a second hearing would breach the principle of equality among individuals.

[6] The author cites general comment No. 32 (2007), paras. 45 and 47.

[7] The State party cites *Pascual Estevill v. Spain* (CCPR/C/77/D/1004/2001), para. 6.2.

4.5 Lastly, the State party submits that the aspects of a conviction that relate to fundamental rights can always be reviewed through the remedy of amparo.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 15 December 2018, the author submitted his comments on the State party's observations on admissibility and the merits of the communication. With regard to the State party's argument that the communication is inadmissible on the grounds that it constitutes an abuse of the right of submission because he did not challenge the Supreme Court's competence during the investigation or trial phases, the author submits that only once notification has been made of the ruling by the Criminal Division of the Supreme Court, which is not appealable, does it become possible to take procedural action against the ruling, thus preventing an effective remedy against the ruling. The author adds that he denounced this fact, first by means of a motion for annulment of the proceedings before the same Criminal Division of the Supreme Court and, subsequently, by means of a petition for amparo before the Constitutional Court, which are the channels recognized in national law for claiming violations of the right to due process and effective judicial protection.

5.2 The author notes that, as occurred in his case, motions for annulment are frequently dismissed without consideration of the merits because the authority that adjudicates the motion is the same one that handed down the impugned ruling. Concerning the remedy of amparo, he repeats that 90 per cent of such petitions are rejected because their substance must be of such special constitutional transcendence as to warrant a decision on the merits by the Constitutional Court, which, given that Court's restrictive interpretation, is almost impossible to demonstrate.

5.3 The author submits that there was no reason to challenge the competence of the Criminal Division of the Supreme Court to try him as a judge of a High Court of Justice, as it was established in a legal text with the rank of organic law.[8] The author recalls the Committee's position according to which being subject to a special court does not imply renouncing the right of appeal.[9]

5.4 As for the claim that the Committee has already decided a case similar to his, the author argues that the case cited by the State party and his own are substantially different. In the present case, the author was tried and convicted directly by the Supreme Court, without any other court having been involved in the proceedings prior to his trial.

5.5 Lastly, the author notes that the State party has yet to comply with the recommendation, made repeatedly by the Committee since 2004, to provide an effective remedy to officials with parliamentary privilege whose criminal cases are tried in sole instance by the Criminal Division of the Supreme Court. Nor has it complied with the obligation to take the measures necessary to ensure that violations of article 14 (5) of the Covenant are not repeated in the future.[10]

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

6.2 The Committee notes the State party's argument that the author's complaint constitutes an abuse of the right of submission, as the author has special knowledge of procedural rules and was therefore well aware that, having been tried by the highest instance, his prosecution would not be subject to review since there is no higher court and its argument that, despite this, the author claimed a violation of article 14 (5) of the Covenant only in the motion for annulment of proceedings and the petition for amparo. However, the Committee

[8] Judiciary Act No. 6/1985 of 1 July 1985, art. 57 (3).

[9] The author cites *Oliveró Capellades v. Spain*, para. 7.

[10] The author refers to general comment No. 32 (2007), paras. 4 and 45–47.

notes the author's argument that it was only after he was notified of the ruling of the Criminal Division of the Supreme Court, which is not appealable, that it became possible to take procedural action against the ruling and file a motion for annulment of the proceedings with the court a quo and, subsequently, a petition for amparo, in which he claimed a violation of his right to a second hearing. The Committee considers that the *Pascual Estevill v. Spain* case, cited by the State party, differs substantially from the present case. Unlike in the present case, the author in that case contradicted himself by repeatedly requesting to be tried in sole instance by the Supreme Court. The Committee notes the author's argument that having appeared before the special court as the only competent court in his case under current law cannot be considered a renunciation of the right of appeal. The Committee is therefore of the opinion that article 3 of the Optional Protocol is not an obstacle to the admissibility of the communication.

6.3 The Committee considers that the author has sufficiently substantiated his claims under article 14 (5) of the Covenant, in that he was tried by a sole instance without the possibility of review of his conviction and sentence. Consequently, it declares the communication admissible and proceeds with its consideration of the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claim that the criminal proceedings against him constituted a violation of article 14 (5) of the Covenant, in that there was no effective mechanism to enable him to appeal the ruling and request a review by a higher court of the conviction and sentence handed down by the Criminal Chamber of the Supreme Court on 25 April 2014. The Committee also notes the State party's argument that the prosecution by the Supreme Court of officials who enjoy parliamentary privilege is a consequence of the need to place a "logical limit" on the right of appeal, and that trial in first instance by the highest court, which has greater experience and knowledge, is a consequence of holding certain levels of public office.

7.3 The Committee recalls that article 14 (5) of the Covenant provides that anyone convicted of an offence has the right to have their conviction and sentence reviewed by a higher tribunal according to law. The Committee also recalls that the phrase "according to law" is not intended to mean that the very existence of a right to review should be left to the discretion of States parties. Although a State party's legislation may provide, in certain circumstances, for the trial of an individual, because of his or her position, by a higher court than would normally be the case, this circumstance alone does not imply a renunciation of the defendant's right to have his or her conviction and sentence reviewed by a higher court.[11] In the present case, the Committee notes that there was no available effective remedy whereby the author could request that his conviction and sentence be reviewed by a higher court. Accordingly, the Committee finds that the State party violated the author's rights under article 14 (5) of the Covenant.[12]

8. The Committee, acting under article 5 (4) of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of article 14 (5) of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the State party must provide the author with an effective remedy to make it possible for his conviction and sentence to be reviewed under the terms set forth in article 14 (5) of the Covenant. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In this connection, the Committee reiterates that, in accordance with its obligation

[11] *Terrón v. Spain*, para. 7.4; *Pretelt de la Vega v. Colombia* (CCPR/C/129/D/2930/2017), para. 7; *Velásquez Echeverri v. Colombia* (CCPR/C/129/D/2931/2017), para. 9.4; and *Arias Leiva v. Colombia* (CCPR/C/123/D/2537/2015), para. 11.4; See also general comment No. 32 (2007), paras. 45–47.

[12] *Pretelt de la Vega v. Colombia*, para. 7.4; *Velásquez Echeverri v. Colombia*, para. 9.4; *Arias Leiva v. Colombia*, para. 11.4; *I.D.M. v. Colombia* (CCPR/C/123/D/2414/2014), para. 10.4; and *Gómez Vázquez v. Spain* (CCPR/C/69/D/701/1996), para. 11.1.

under article 2 (2) of the Covenant, the State party should ensure that the relevant legal framework is in conformity with the requirements of article 14 (5) of the Covenant.

10. Bearing in mind 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 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, as well as an effective and applicable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures it has taken to give effect to the present Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.