



International Covenant on Civil and Political Rights

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8–26 March 2010

Decision

Communication No. 1794/2008

<i>Submitted by:</i>	María Dolores Barrionuevo and Francisco Bernabé (represented by counsel, José Luis Mazón Costa)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Spain
<i>Date of communication:</i>	20 February 2008 (initial submission)
<i>Documentation references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 6 June 2008 (not issued in document form)
<i>Date of adoption of decision:</i>	19 March 2010
<i>Subject matter:</i>	Cancellation of a ballot paper in municipal elections
<i>Procedural issues:</i>	Lack of substantiation
<i>Substantive issues:</i>	Right to equality before courts; right to be elected in periodic elections; right to effective remedy
<i>Article of the Covenant:</i>	14, para. 1; 25 (a) and (b); 2, para. 3
<i>Article of the Optional Protocol:</i>	2

[Annex]

* Published 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 (ninety-eighth session)

concerning

Communication No. 1794/2008*

Submitted by: María Dolores Barrionuevo and Francisco Bernabé (represented by counsel, José Luis Mazón Costa)

Alleged victims: The authors

State party: Spain

Date of communication: 20 February 2008 (initial submission)

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

Meeting on 19 March 2010,

Adopts the following:

Decision on admissibility

1. The authors of the communication, dated 20 February 2008, are María Barrionuevo Álvarez and Francisco Bernabé Pérez, Spanish nationals residing in La Unión, Murcia. They allege they are victims of a violation by Spain¹ of articles 14 and 25 of the Covenant. The authors are represented by counsel, José Luis Mazón Costa.

The facts as submitted by the authors

2.1 The authors were standing as candidates for councillors for the Partido Popular (People's Party) (PP) in the local elections held on 27 May 2007 in the town council of La Unión (Murcia). Mr. Bernabé headed the list and was a candidate for mayor. Ms. Barrionuevo was ninth on the list of candidates for councillor.

2.2 According to the authors, the PP list obtained 4,055 votes, which entitled it to nine councillors and meant it would have an absolute majority on the town council, which has 17 seats in all.² During the ballot count, the representative of the Partido Socialista Obrero

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

¹ The Optional Protocol entered into force for Spain on 25 April 1985.

² The town council of La Unión has a total of 17 seats.

Español (Spanish Socialist Workers Party) (PSOE), which obtained 3,604 votes and seven councillors, disputed the validity of a ballot paper marked with a handwritten “X”. Despite the fact that electoral law stipulates that ballot papers must not be marked in any way, the polling officers declared the ballot paper valid and dismissed the claim. The validity of the ballot paper was important because, had it been considered void, the PP would have obtained eight seats instead of nine and would have lost their majority on the town council.

2.3 The PSOE and Izquierda Unida-Los Verdes (United Left-Greens) parties contested the ballot count before the Electoral Board for the Cartagena area on account of the ballot paper marked with an “X”. On 31 May 2007, the Board dismissed the claim and decided that the ballot paper was valid. It argued that the general principle of maintaining the result of an election, supported by electoral case law, should take precedence and that the constitutional right to cast a vote is overridden only if irregularities in the ballot paper clearly reflect an obvious desire to invalidate, spoil or amend it. The PSOE and Izquierda Unida-Los Verdes lodged an appeal against the decision before the Central Electoral Board. On 9 June 2007, the Central Electoral Board concurred with the decision of the Cartagena Electoral Board, considering that the irregularity did not invalidate the ballot paper.

2.4 The PSOE³ then lodged an appeal with the Administrative Chamber of the Superior Court of Murcia. On 29 June 2007, this court dismissed the appeal, invoking constitutional case law on the matter, and declared that the ballot paper in question was valid.

2.5 On 2 July 2007, the PSOE submitted an application for *amparo* (enforcement of constitutional rights) before the Constitutional Court, invoking a violation of the right of access to public office on equal terms in compliance with the requirements laid down by the law. According to the authors, the application was accepted for consideration without the need to justify the “special constitutional role” of the case, as required by law, and despite the Prosecutor’s view to the contrary. In its decision of 18 July 2007, the Constitutional Court accepted the application for *amparo*, declared that the aforementioned right had been violated and cancelled the disputed ballot paper and the area Electoral Board’s decision on its validity. As a consequence, Ms. Barrionuevo’s mandate as elected councillor was revoked. As for Mr. Bernabé, he was adversely affected as a result of his party losing its absolute majority on the town council, which restricted his independence as mayor.

2.6 The authors provided the Committee with a copy of the Constitutional Court’s ruling. This refers back to a ruling of 2003, in which the Court decided that, from a fundamental rights perspective, the legal interpretation — whereby votes submitted on ballot papers that should have been declared void because they were flawed according to the electoral law could still be considered valid — was inadmissible, in cases where admitting validity would alter the final result of the election. Applying the same criteria to this case, the Court considered that the administrative and legal decisions allowing the ballot paper to be declared valid had not only violated the electoral law, by having a direct bearing on the final result of the election, but also contravened the right of access to public office on equal terms in compliance with the requirements of the law.

The complaint

3.1 The authors contend that the Constitutional Court did not follow its own electoral case law and thus violated article 25, paragraphs (b) and (c), of the Covenant. They argue that the Court wrongly favoured the PSOE in its interpretation of the law, in violation of the guarantee of equality between candidates. This guarantee of equality was also violated on account of the fact that the PP did not at the time contest two similar ballots — in favour of

³ The Izquierda Unida-Los Verdes did not join this appeal.

the PSOE — found at other polling stations, because they had considered them valid pursuant to electoral case law. The Cartagena Electoral Board's decision was to refuse categorically to examine the matter because at the time the PP had not contested the ballot papers. According to the author, this is a violation of article 2, paragraph 3, of the Covenant (effective remedy).

3.2 The authors allege that the guarantee of equality, provided for in article 14, paragraph 1, of the Covenant, was violated on the grounds that current electoral case law was disregarded to the detriment of the authors; the reporting judge, elected by Congress on a proposal by the PSOE, should have withdrawn from the case because that political party was the plaintiff; and the PSOE was exempted from having to justify the "special constitutional role" of the case in amparo, as required by law.

State party's observations on admissibility and merits

4. The State party contested the admissibility of the communication through notes verbales dated 29 August and 30 December 2008. It pointed out that the issue of the validity of the ballot paper had been dealt with by electoral management bodies and the relevant courts. The final decision should in no way be branded as arbitrary, unreasonable, inadmissible or not in line with the objectives of the Covenant. It also requires an appreciation of the facts and an interpretation of electoral law that must be beyond reproach. The State party therefore considers that the communication must be considered inadmissible since it fails to address any issue relating to strict compliance with the Covenant and constitutes a use of the Covenant that amounts to clear abuse of its purpose according to the provisions of article 3 of the Optional Protocol. The State party also contends that the communication manifestly lacks substantiation and requests the Committee, failing inadmissibility, to consider that there has been no violation of the Covenant.

Authors' comments on the State party's observations

5. In their comments of 5 March 2009, the authors reiterate their initial complaints and the fact that the Constitutional Court acted arbitrarily by not following case law on ballot papers with marks or signs. They allege that the Court's ruling is contradictory, since, on the one hand, it states that it is strictly a matter of electoral legality, which it is not competent to review, and, on the other hand, it annuls decisions made by electoral bodies and the Superior Court of Justice.

Committee's decision on admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 The authors contend that the Constitutional Court's ruling declaring that the controversial ballot paper was void violated their rights to equality before the courts, to an effective remedy and to be elected, as provided for respectively in article 14, paragraph 1; article 2, paragraph 3; and article 25 (b) and (c) of the Covenant. The Committee observes that these complaints refer to a review of the facts and evidence by the courts of the State party. The Committee recalls its jurisprudence in this respect and reiterates that, generally

speaking, it is for the relevant domestic courts to review or evaluate facts and evidence, unless their evaluation is manifestly arbitrary or amounts to a denial of justice.⁴ After examining the decisions handed down by the domestic courts, the Committee considers that the authors have not shown sufficient grounds to support their argument that there was such arbitrariness or denial of justice, and it therefore concludes that the communication must be declared inadmissible pursuant to article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

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

[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.]

⁴ See communication No. 1212/2003, *Lanzarote v. Spain*, decision of inadmissibility of 25 July 2006, para. 6.3.