

HUMAN RIGHTS COMMITTEE

Fanali v. Italy

Communication No. 75/1980

31 March 1983

VIEWS

Submitted by: *Duilio Fanali*

Alleged victim: *The author*

State party concerned: *Italy*

Date of communication: *July 1980 (date of initial letter)*

Date of decision of admissibility: *28 July 1981*

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

Meeting on 31 March 1983,

Having concluded its consideration of communication No. 75/1980 submitted by Duilio Fanali 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 by the State party concerned,

Adopts the following:

Views under Article 5 (4) of the Optional Protocol

1. The author of the communication (initial letter dated July 1980) is Duilio Fanali, an Italian citizen residing in Rome, Italy. He submits the communication on his own behalf.
2. The author alleges that he is a victim of a breach by the Government of Italy of article 14 (5) of the International Covenant on Civil and Political Rights and requests the Human

Rights Committee to examine his case.

3.1 The author, a retired Air Force General, states that having been sentenced by the Constitutional Court on 1 March 1979 to one year and nine months' imprisonment and to a fine of 200,000 Lire, conditionally suspended, on the charge of corruption through actions contrary to the duties of office, he was denied the right to appeal against the allegedly unsubstantiated charges and related conviction. The criminal proceedings had taken place before the Constitutional Court, as part of a larger criminal suit involving also members of the Government for whom the Constitutional Court was the only competent tribunal. While the Italian Constitution provides that no appeal is allowed against decisions of the Constitutional Court in as far as they concern the President of the Republic and the Ministers, the "ordinary" law No. 20 of 25 January 1962 extends the above constitutional provisions of 'no appeal' to 'other individuals' sentenced by the Constitutional Court for crimes related to those committed by the President of the Republic or Ministers. The author claims that because law No. 20 is not a constitutional law it should be rescinded and therefore is not applicable in his case.

3.2 Mr. Fanali submits that the Italian reservation with regard to the applicability of article 14 (5) of the International Covenant on Civil and Political Rights could not be regarded as valid because of defective Italian domestic procedures used in promulgating it. He further argues that, even if valid, the reservation did not apply in his case because it excludes Italy's obligation under the Covenant to grant the right to appeal only as far as the President of the Republic and Ministers are concerned.

3.3 The author states that the preliminary investigations and trial proceedings related to several politicians and some 'laymen', such as the author himself, and were based on charges of corruption and abuse of public office in connection with the purchase by the Italian Government of military planes of the type Hercules C130 from the United States of America company, Lockheed.

3.4 The author claims that during the preliminary investigations and trial proceedings due process was not always observed. Most of these events took place before 15 December 1978, the date of entry into force for Italy of the Covenant and the Optional Protocol. However, the judgement by the Constitutional Court which the author claims has caused him severe material and moral damage and from which he had, contrary to article 14 (5) of the Covenant, no right to appeal, was rendered on 1 March 1979, as mentioned above.

3.5 The author finally states that the matter has not been submitted under any other procedure of international investigation or settlement.

4. By its decision of 24 October 1980, the Human Rights Committee transmitted the communication under rule 91 of its provisional rules of procedure to the State party concerned, requesting information and observations relevant to the question of admissibility of the communication.

5.1 In its submission dated 12 January 1981, the State party objected to the admissibility of

the communication invoking (a) the specific reservation made by the Italian Government upon the deposit of the instrument of ratification of the Optional Protocol to the International Covenant on Civil and Political Rights, with respect to article 5 (2), that the Committee ... 'shall not consider any communication from an individual unless it has ascertained that the same matter is not being and has not been examined under another procedure of international investigation or settlement' and (b) the Italian declaration made upon deposit of the instrument of ratification of the Covenant on Civil and Political Rights with regard to article 14 (5) of the Covenant intended to protect the legality of the conduct, 'at one level only, of proceedings before the Constitutional Court'.

5.2 The State party submitted with regard to the condition stipulated in article 5 (2) (a) of the Optional Protocol, that verification of the statement of the author that he has not already submitted the 'matter' to another international tribunal should not be restricted to the affirmation of this fact, 'but must rather have the objective of ascertaining that the 'same matter', as prescribed by article 5, paragraph 2, is not already being examined by another international body to which it might have been submitted by an individual other than the author of the communication addressed to this Committee'. The State party then concluded that ... "the determining element is the 'matter' submitted to the international body and not the individual author of the communication or of the application ...".

5.3 The State party, then referring to the specific case of Duilio Fanali before the Human Rights Committee, pointed out that the former co-defendants of Mr. Fanali in the proceedings before the Constitutional Court had submitted "the same matter" to the European Commission of Human Rights, concerning several of the same alleged violations related to the procedure, competence and judgement of the Constitutional Court that have been put forward by Mr. Fanali.

5.4 In its note the Italian Government then referred to the Italian declaration with regard to article 14 (5) which ... "clearly precludes the applicability of the principle of review by a higher court, contained in article 14, paragraph 5, to the above-mentioned proceedings, which took place before the Constitutional Court in accordance with the Italian legislation in force".

6.1 On 13 March 1981, the author of the communication forwarded his comments in reply to the State party's submission of 12 January 1981. He objected to the State party's contention of inadmissibility made with respect to the provisions of article 5 (2) (a) of the Optional Protocol and with regard to article 14 (5) of the Covenant. With regard to the first the author contested, Inter alia, the argument of the Italian Government "that other individuals have filed an appeal before another international tribunal in connection with the same sentence and that this (cases-pendency) constitutes the preclusion contemplated by article 5 (2) of the Protocol". He argued that "cases-pendency" only exists when two or more distinct actions have been brought by the same individual before different tribunals.

6.2 Referring to the second contention of inadmissibility by the Italian Government on the grounds of the Italian declaration made with regard to the applicability of article 14 (5) of the Covenant to Italy, the author pointed out that the reservation regarding article 14,

paragraph 5, of the Covenant did not apply to his status as a 'layman' and 'non-politician'. He drew the attention of the Committee to the full text of the said reservation which reads as follows: "Article 14, paragraph 5, shall be without prejudice to the application of existing Italian provisions which, in accordance with the Constitution of the Italian Republic, govern the conduct, at one level only, of proceedings instituted before 'the Constitutional Court in respect of charges brought against the President of the Republic and its Ministers'".

6.3 The author further argued that his right to appeal was not only confirmed by the inapplicability of the Italian reservation, but also by the provisions of article 2 (3) of the Covenant. He therefore could not be deprived of the right to appeal provided for in article 2 (3) of the Covenant even if the Italian reservation to article 14 (5) were applicable. The author stressed that no reservation was made by Italy with regard to article 2 (3) of the Covenant.

7.1 Having examined the information before it, the Committee concluded that it could not at that stage reject the communication as inadmissible on the basis of the Italian reservation to article 14 (5) of the Covenant, since the text of the reservation only referred to the President of the Republic and the Ministers and that, therefore, the communication was not, within the meaning of article 3 of the Optional Protocol, incompatible with the provisions of the Covenant read in conjunction with this reservation.

7.2 With regard to article 5 (2) (a) of the Optional Protocol, the Committee did not agree with the State party's contention that "the same matter" had been brought before the European Commission of Human Rights since other individuals had brought their own cases before that body concerning claims which appeared to arise from the same incident. The Committee held that the concept of "the same matter" within the meaning of article 5 (2) (a) of the Optional Protocol had to be understood as including the same claim concerning the same individual, submitted by him or someone else who has the standing to act on his behalf before the other international body. Since the State party itself recognized that the author of the present communication had not submitted his specific case to the European Commission of Human Rights, the Human Rights Committee concluded that the communication was not inadmissible under article 5 (2) (a) of the Optional Protocol.

8. On 28 July 1981 the Human Rights Committee therefore decided that the communication was admissible.

9.1 In its submission under article 4 (2) of the Optional Protocol, dated 15 February 1982, the State party reiterates its earlier contention that the communication is inadmissible, citing in support the decision of the European Commission of Human Rights in the "Lockheed Affair", on 18 December 1980, declaring inadmissible the case against Italy brought by Messrs. Crociani, Lefebvre, Palmiotti and Tanassi (former co-defendants of Mr. Fanali before the Constitutional Court).

9.2 The State party further points out that the purpose of Italy's reservation to article 14 (5) of the International Covenant on Civil and Political Rights was to safeguard existing provisions in Italian law such as article 49 of the Code of Criminal Procedure and law No.

20 of 25 June 1962 which allow for the conduct of proceedings before the Constitutional Court, at one level only. Article 49 of the Code of Criminal Procedure provides for a common trial for persons accused of the same crime; law No. 20 of 25 June 1962 extends in specific cases the competence of the Constitutional Court to persons other than the President of the Republic and Ministers.

9.3 Finally, the State party refutes the author's contention that law No. 20 of 25 June 1962 is unconstitutional, citing a judgement of the Constitutional Court on 2 July 1977 specifically upholding the constitutionality of the said law.

10.1 In his response dated 29 June 1982, commenting on the State party's submission under article 4 (2) of the Optional Protocol, Mr. Fanali maintains, *inter alia*, that the "one level only" proceedings before the Constitutional Court in the 'Lockheed Affair' are widely recognized as having been unjust and that there are several draft bills and reports before the houses of the Italian Parliament proposing changes in the present juridical regime.

10.2 The author also rejects the interpretation placed by the State party upon its reservation to article 14 (5) of the International Covenant, holding it to be 'extensive' and thus contrary to the generally accepted legal principle of 'restrictive' interpretation of reservations.

11.1 The Human Rights Committee notes the decision of the European Commission on Human Rights of 18 December 1980 declaring inadmissible the cases of Messrs. Crociani, Lefebvre, Palmiotti and Tanassi. These applications concerned different allegations. Furthermore, the right of appeal is not granted under the European Convention of Human Rights. For the reasons stated in paragraph 7.2 above, *the* Human Rights Committee reaffirms its earlier decision that the communication brought by Duilio Fanali was admissible. It therefore has to examine the merits of the dispute which relates mainly to the effect of the Italian reservation.

11.2 AS regards the merits of the present case, the Committee has examined the communication in the light of all information made available to it by the parties as provided for in article 5 (1) of the Optional Protocol.

11.3 The author of the communication alleges that the Italian juridical system which prevented him from appealing the judgement rendered by the Constitutional Court on 1 March 1979, is in violation of the provisions of article 14 (5) of the International Covenant on Civil and Political Rights. Article 14 (5) of the 'Covenant reads as follows:

'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.'

11.4 The State party upon ratification of the Covenant has made a reservation with regard to article 14 (5) which it has now invoked. The Committee, therefore, has to decide whether this reservation applies to the present case. The Italian reservation reads as follows:

'Article 14, paragraph 5, shall be without prejudice to the application of existing Italian

provisions which, in accordance with the Constitution of the Italian Republic, govern the conduct, at one level only, of proceedings instituted before the Constitutional Court in respect of charges brought against the President of the Republic and its Ministers.'

11.5 The author contests the applicability of the reservation in his case. He objects to its validity and furthermore argues, inter alia, that he cannot be classified under either of the two categories referred to in the reservation.

11.6 In the Committee's view, there is no doubt about the international validity of the reservation, despite the alleged irregularity at the domestic level. On the other hand, its applicability to the present case depends on the wording of the reservation in its context, where regard must be had to its object and purpose. Since the two parties read it differently, it is for the Committee to decide this dispute.

11.7 The State party, in its submission under article 4 (2) of the Optional Protocol of 15 February 1982, asserts that the reservation is applicable in the present case, adducing the following grounds: The reference in the reservation to the 'one-level only' proceedings before the Constitutional Court with respect to charges brought against the President of the Republic and the Ministers was a reflection of the provisions of article 134 of the Italian Constitution. Article 49 of the Code of Criminal Procedure established the rule of a common trial for persons accused of the same crime. Law No. 20 of 25 June 1962 provided for the application of this rule to the special proceedings instituted before the Constitutional Court in accordance with article 134 of the Constitution, thereby extending the proceedings to persons other than the President of the Republic and its Ministers, if they are charged with the same offences. The constitutionality of this law was upheld by a decision of the Constitutional Court of 2 July 1977.

11.8 The Committee observes that it is outside its competence to pronounce itself on the constitutionality of domestic law. Furthermore, the Committee notes that the reservation only partly excludes article 14 (5) from the obligations undertaken by Italy. The question is whether it is applicable only to the two categories mentioned, and not to the "layman", Mr. Fanali. A close reading of the text shows that a narrow construction of the reservation would be contrary both to its wording and its purpose. The reservation refers not only to the relevant rules of the Constitution itself, but to "existing Italian provisions ... in accordance with the Constitution", thus clearly extending its scope to the implementing laws enacted by the ordinary legislator. As shown by the Government in its submission, it was also the purpose of the reservation to exclude proceedings before the Constitutional Court instituted in connection with criminal charges against the President of the Republic and its Ministers from Italy's acceptance of article 14 (5). Even when proceedings are brought against "laymen", as they were in the present case, they must therefore be described in the terms of the reservation as "proceedings before the Constitutional Court in respect of charges brought against ... Ministers". This follows from the connection between the cases, the charges against the Ministers were the cause and the conditio sine qua non for the other charges and for instituting proceedings against all defendants. It must follow that all of the proceedings were in this sense brought "in respect of charges" against Ministers, because they related to the same matter, which under Italian law only, that Court was competent to consider. On the

background of the applicable Italian law this is not only a possible reading, but in the Committee's view the correct reading of the reservation.

12. For these reasons the Human Rights Committee concludes that Italy's reservation regarding article 14 (5) of the Covenant is applicable in the specific circumstances of the case.

13. The author also argues, however, that his right to appeal is confirmed in article 2 (3) of the Covenant to which Italy has made no reservation. The Committee is unable to share this view which seems to overlook the nature of the provisions concerned. It is true that article 2 (3) provides generally that persons whose rights and freedoms, as recognized in the Covenant, are violated "shall have an effective remedy". But this general right to a remedy is an accessory one, and cannot be invoked when the purported right to which it is linked is excluded by a reservation, as in the present case. Even had this not been so, the purported right, in the case of article 14 (5), consists itself of a remedy (appeal). Thus it is a form of lex specialis besides which it would have no meaning to apply the general right in article 2 (3).

14. Accordingly, the Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the present case does not disclose any violation of the Covenant.