LST REVIEW
Volume 18 Issue 249 July 2008

RELEVANCE OF INTERNATIONAL REMEDIES FOR RIGHTS VIOLATIONS

LAW & SOCIETY TRUST

CONTENTS

LST Review Volume 18 Issue 249 July 2008

Printed by:
Law & Society Trust
3 Kynsey Terrace, Colombo 8, Sri Lanka
Tel: (+94)11-2691228, 2684845 | Fax: (+94)11-2686843
Email: lst@eureka.lk
Web: www.lawandsocietytrust.org

ISSN – 1391 – 5770

Editor's Note ... ...

The month of July 2008 was marked by the fact that the Geneva based United Nations Human Rights Committee delivered three Communications of Views against Sri Lanka, finding violations of the Covenant on Civil and Political Rights (ICCPR) in individual petitions submitted under the First Optional Protocol procedure. Due to the general unavailability of public access to these Communications, the LST Review publishes the said three Communications given their importance to Sri Lanka's legal system.

The Recommendations made in this regard by the Committee are of particular importance. For example, *Dissanayake Mudiyanselage Sumanaweera Banda v. Sri Lanka* (CCPR/C/93/D/1373/2005, adoption of views 22.07.2008) concerned an order made by Sri Lanka's Supreme Court committing a politician to two years rigorous imprisonment for contempt of court. In issue was the author's statement made at a public meeting that he would not accept any "disgraceful decision" of the Supreme Court, in relation to a pending opinion on the exercise of defence powers between the President and the Minister of Defence.

In considering the matter, the Committee ruled that 'neither the Court nor the State party has provided any reasoned explanation as to why such a severe and summary penalty was warranted, in the exercise of the Court's power to maintain orderly proceedings, if indeed the provision of an advisory opinion can constitute proceedings to which any summary contempt of court ought to be applicable.' It concluded *inter alia* that the author's detention was arbitrary and in violation of ICCPR Article 9(1). Further, it upheld the claim of a violation of ICCPR Article 25(b), due to the author being prohibited from voting or from being elected for seven years after his release from prison, which prohibition was found to be disproportionate to the offence and sentence.

It was reiterated that changes should be made to the law and practice as are necessary to avoid similar violations in the future. Impliedly, this would mean the enactment of a Contempt of Court Act for Sri Lanka as indeed was pointed out by the Committee earlier in *Anthony Michael Emmanuel Fernando v. Sri Lanka* (CCPR/C/83/D/1189/2003, adoption of views 31.03.2005). *Fernando's Case* is, in fact, referred to repeatedly by the Committee in *Dissanayake's Case.*

The other two Communications are of equal importance. In *Vadivel Sathasivam and Parathesi Saraswathi v. Sri Lanka* (CCPR/C/93/D/1436/2005,

adoption of views 08.07.2008), it was observed that the Attorney General's decision not to initiate criminal proceedings in favour of disciplinary proceedings in respect of the death of a victim in police custody was clearly arbitrary and amounted to a denial of justice. Sri Lanka was held in breach of its obligations under ICCPR Articles 6 and 7 to properly investigate the death and torture of the victim and take appropriate action against those found guilty as well as under ICCPR Article 2(3), to provide an effective remedy to the authors.

Similarly, in *Soratha Bandaranayake v. Sri Lanka* (CCPR/C/93/D/1376/2005, adoption of views 24.07.2008), the dismissal procedure of a judge by Sri Lanka's Judicial Service Commission was held as not respecting the requirements of basic procedural fairness. The Committee ruled that the procedure failed to ensure that the author benefited from the necessary guarantees to which he was entitled in his capacity as a judge, thus constituting an attack on the independence of the judiciary and concluded that the author's rights under ICCPR Article 25(c) in conjunction with ICCPR Article 14(1) have been violated.

Highly controversial as the impact of these Communications may be on Sri Lanka's domestic legal order, involving directly as they do, decisions of Sri Lanka's Supreme Court, the question as to whether the Recommendations made by the Committee would improve the quality of the country's legal system needs to be answered in the positive. Up to this date, eleven Communications of Views have been delivered by the Committee against Sri Lanka but none have been implemented. The non-implementation of the Committee's Recommendations has moreover been validated by the recent decision of the Supreme Court in *Singarasa v. Hon. Attorney General* (S.C. Spl. (LA) No.182/1999, SCM 15.09.2006).

Nevertheless, Sri Lanka remains a party to the First Optional Protocol to the ICCPR; this is a contradiction in terms between international commitments and domestic obligations that is hard to refute.

Currently, the United Nations Human Rights Committee is in the process of drafting General Comment No. 33 on *'The Obligations of States Parties under the ICCPR'*, which specifically addresses the issue of 'the place and function of the Optional Protocol in the system of standard-setting and monitoring of obligations established by the International Covenant on Civil and Political Rights' (paragraph 13 of the Draft General Comment).

The customary international law principle of *pacta sunt servanda* enshrined in Article 26 of the Vienna Convention on the Law of Treaties is underscored not only by the principle of good faith in relation to submission to treaty body obligations (paragraph 16 of the Draft General Comment), but also as a result

of the 'integral role of the Committee' (paragraph 14 of the Draft General Comment) in terms of both the Covenant and the Protocol as well as by reason of the obligations flowing from Article 2(3) of the Covenant (paragraph 15 of the Draft General Comment).

Further, as observed in paragraph 25 of the Draft General Comment, the link between the Covenant and the Optional Protocol has particular significance. The Committee quotes a decision of the highest court of one State party, (*Mabo v. Queensland* (1992), High Court of Australia, per Justice Sir Gerard Brennan), to the effect that the ratification and entry into force of the Optional Protocol by that State party (has) strengthened and deepened the status of Covenant rights in the general law. It must be recalled in this context that there is similar judicial authority in Sri Lanka (*Weerawansa v. AG*, [2000] 1 SLR 387, 409, per Justice M.D.H. Fernando), where the Supreme Court observed as follows:

> *A person deprived of personal liberty has a right of access to the judiciary, and that right is now internationally entrenched, to the extent that a detainee who is denied that right may even complain to the Human Rights Committee.*
>
> *Should this Court have regard to the provisions of the Covenant? I think it must. Article 27(15) requires the State to 'endeavor to foster respect for international law and treaty obligations in dealings among nations'. That implies that the State must likewise respect international law and treaty obligations in its dealings with its own citizens, particularly when their liberty is involved. The State must afford to them the benefit of the safeguards which international law recognizes."*

In the context of the increased emphasis by the Committee on implementation of treaty obligations occasioned by the ICCPR, there is no doubt that States, including Sri Lanka, will be hard put to justify the continued contradiction between domestic implementation and international obligations.

This Issue also publishes an article by ***Mathura P. Shrestha*** reflecting upon the recent South Asian People's Assembly 2008 (People's SAARC 2008) held during the month of July in Colombo.

Lastly, we are pleased to publish a Book Review by Indian law academic ***Sarasu Esther Thomas*** assessing a recent publication of the Law & Society Trust, *"Sri Lanka - The Right Not To Be Tortured: A Critical Analysis Of The Judicial Response'.*

Kishali Pinto-Jayawardena

Convention Abbreviation: CCPR
HUMAN RIGHTS COMMITTEE
Ninety-third session
7-25 July 2008

COMMUNICATION NO.1373/2005: SRI LANKA 04.08.2008 CCPR/C/93/D/1373/2005 (JURISPRUDENCE)*

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Ninety-third session

Communication No.1373/2005†

Submitted by:	Dissanayake, Mudiyanselage Sumanaweera Banda (represented by counsel, Mr. Nihal Jayawickrama)
Alleged victim:	The author
State Party:	Sri Lanka
Date of Communication:	3 March 2005 (initial submission)

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

Meeting on 22 July 2008,

Having concluded its consideration of communication No. 1373/2005, submitted to the Human Rights Committee on behalf of Dissanayake, Mudiyanselage Sumanaweera Banda 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

1.1 The author of the communication is Mr. D.M. Dissanayake, a Sri Lankan citizen,

---

* Adopted in English, French and Spanish, the English 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. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

residing in Sri Lanka. He claims to be a victim of violations by the State party of article 7; article 8, paragraph 3(b); article 9, paragraph 1; article 14, paragraphs 1, 2, 3 (a), (e) and (g), and 5; article 15, paragraph 1; article 19, paragraph 3; article 25; and article 26 of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. Nihal Jayawickrama.

1.2 The author requested interim measures on the basis that he would suffer irreparable damage if required to serve his entire sentence of two years of rigorous imprisonment. He suggested that interim measures might include a request that the author be granted "respite from the execution of the sentence of hard labour". On 17 March 2005, the Special Rapporteur denied his request for interim measures on the ground that working in a print shop did not appear to come within the terms of article 8, paragraph 3 (b).

The facts as submitted by the author

2.1 In February 1989, the author, a member of the Sri Lankan Freedom Party (SLFP), was elected to parliament. In 1994 and October 2000, he was re-elected and appointed Cabinet Minister in the Peoples Alliance (PA), the Government of Prime Minister (later President) Chandrika Kumaratunge, which was a coalition of the SLFP with several smaller parties. In 2001, differences of opinion arose within the government on a number of political issues. On 9 October 2001, the author and seven other members of the SLFP joined the opposition, the United National Party (UNP). On 5 December 2001, at the general election, the author was elected to Parliament on the National List of the UNP, which formed a coalition government. As the PA was now in the minority in Parliament, the President Kumaratunge, who remained leader of that party, was compelled to appoint the leader of the UNF (comprising the UNP and the Ceylon Workers Congress (CWC)), Ranil Wickremasinghe as Prime Minister. The President, appointed the Cabinet proposed by the new Prime Minister, and the author was appointed Minister of Agriculture.

2.2 According to the author, the peculiar structure of government made good governance difficult. In 2003, the President referred to the Chief Justice for an opinion on questions relating to the exercise of defence powers between the President and the Minister of Defence. On 5 November 2003, a news release from the Presidential Secretariat announced the opinion of the Supreme Court, to the effect that "the plenary executive power including the defence of Sri Lanka is vested and reposed with the President", and that "the said power vested in the President relating to the defence of Sri Lanka under the Constitution includes the control of the armed forces as commander-in-chief of the forces". On 7 February 2004, the President dissolved Parliament and set a date for the next general election. Following this election on 2 April 2004, the United Peoples Freedom Alliance (UPFA) (which comprised of the SLFP and the JVP) led by the President formed a minority government in Parliament. The author, who had stood for the first time as a member of the UNP, was re-elected.

2.3 On 3 November 2003, pursuant to the President's request to the Chief Justice for an opinion on the exercise of defence powers between the President and the Minister of Defence, the author gave a speech during a public meeting in which he was reported in the press as saying that he and like-minded members of Parliament '*would not accept any shameful decision the Court gives*'. He was charged under Article 105 (3) of the Constitution with contempt of court[1]. He was served a "Rule"[2], dated 7 April 2004, requiring him to show

[1] According to Article 105 (3), "The Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each be a superior court of record and shall have all the powers of such court including the power to punish for contempt of itself, whether committed in the court itself or elsewhere, with imprisonment or fine or both as the court may deem fit."

"why he should not be punished under article 105(3) of the Constitution" for the offence of contempt of the Supreme Court. He was tried before the Supreme Court on 7 May and 14 September 2004. The Chief Justice presided over the case, despite the author's objection[3].

2.4 On 7 May 2004, at the author's first appearance in court, the Rule was read out and the Chief Justice asked him whether he had made the speech attributed to him therein. On the second occasion, his counsel was asked whether he admitted to having made portions of the speech, which on the previous occasion he had denied or stated he did not recall having made. The Chief Justice then requested officials of the television station to play back the recording of what was called a "copy of the original". On the author's instructions, counsel informed the court that for the purpose of the proceedings, he would admit having made the entire statement attributed to him. At this point, the Chief Justice declared that all that was left were questions of a legal nature, namely, whether the statement admitted by him amounted to contempt of court; and if so, how the court should deal with it.

2.5 The author states that no witnesses were called to give evidence. Neither the persons who made the original complaint nor the person/s who allegedly recorded the speech were called as witnesses or were submitted for cross-examination. The original video tape was not produced in evidence. The procedure was inquisitorial in nature and contrary to the provisions of section 101 of the Evidence Ordinance which requires that, "[w]hoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he assets, must prove that those facts exist", and Article 13 (5) of the Constitution which states that "every person shall be presumed innocent until he is proved guilty".

2.6 On 7 December 2004, the Court found the author guilty of contempt of court and sentenced him to two years of "rigorous imprisonment". The author had no right of appeal from the Supreme Court. The judgement refers to a charge of contempt against the author in 2000 for which he was given a warning and admonition by the Supreme Court, but was not convicted. In the judgement, the Chief Justice commented adversely on the author's conduct, due to his failure to admit at the outset that he had made the full statement in question and stated that he had displayed "a lack of candour". The author began serving his sentence on the same day in the Welikade Prison and was assigned to work in its printing room. According to the author, the Supreme Court did not have the power to sentence him to hard labour under Sri Lankan law. According to section 2 of the Interpretation Ordinance, which applies to the Constitution, "(x) rigorous imprisonment, "simple imprisonment", and "imprisonment of either imprisonment description" shall have the same meaning as in the Penal Code, and "imprisonment" shall mean simple imprisonment[4]. Shortly after the author's committal to prison, he was disqualified from being an elector and Member of Parliament pursuant to article 66(d) of the Constitution. Such a disqualification continues for a period of seven years commencing from the date on which the prisoner has served his prison sentence; in the author's case for a period of nine years in all.

2.7 According to the author, the composition of the Supreme Court which heard his case, and included the Chief Justice, was neither impartial nor independent. He argues that the Chief Justice is a personal friend of the President, and that she appointed him as Chief Justice,

---

[2] The author provides no further details on the definition of a "Rule".

[3] According to the author, his lawyer met with the Chief Justice in his chambers prior to the hearing informing him that he objected to his participation in the hearing and asking him to recuse himself. The Chief Justice refused to do so.

[4] The Penal Code of Sri Lanka (s. 30) states that imprisonment is of two descriptions: rigorous, that is, with hard labour; and simple. The Supreme Court purported to act under Article 105 (3) of the Constitution which refers to "imprisonment or fine".

superseding five more senior judges: he had only been a judge for four months. He refers to a statement made by the former UN Special Rapporteur on the Independence of Judges and Lawyers, upon the appointment of the Chief Justice, in which he expressed his concern at the haste of his appointment, particularly in light of the fact that there were at that time two petitions on charges of corruption pending against him. According to the author, every "politically sensitive" case in which the former President, her government or party appear to have an interest, including the author's case, has been listed before the Chief Justice, sitting more often than not with the same group of judges of the Supreme Court, many of whom had served under him when he was the Attorney General. The author states that he is unable to cite a judgement of the Chief Justice in a "politically sensitive" case which was favourable to the author's party (UNP). In addition, he states that a parliamentary motion calling for his removal, which was submitted to the Speaker by the UNP in November 2003, was signed by the author. The Chief Justice was aware of this motion and of the author's co-signature.

2.8 According to the author, the charges against him were politically motivated. He states that the Chief Justice was biased against him. In this regard, he refers to the fact that on 10 March 2004, at a crucial stage in the general election, the Chief Justice informed the press that the judges of the Supreme Court were examining a speech made by the author with a view to charging him for contempt. He reminded the press that this was not the first occasion the Supreme Court would be considering such a charge against the author. On 16 March 2004, a newspaper stated that the author had been charged with contempt. According to the author, the Rule was not issued by the Supreme Court until 7 April, after the election, and the Chief Justice took no steps to contradict these reports. In July 2004, the author submits that newspaper reports alleged that the Chief Justice had been caught in a compromising position with a woman in a car park. The Chief Justice publicly dismissed the allegation, stating that it was part of a campaign to 'discredit him and was related to certain cases pending before the Court'. The author states that this was a clear reference to him, as his case was the only politically sensitive case pending before the Supreme Court at that time.

The complaint

3.1 The author claims that his sentence was disproportionate to his alleged offence, and refers to other decisions of the Supreme Court dealing with defamation in which lighter penalties were handed down for more serious contempt[5]. He submits that a sentence of two years rigorous imprisonment imposed upon him, being the first reported instance in over a hundred years when the Supreme Court imposed a sentence of such excessive length and rigour, is a grossly disproportionate sentence, and amounts to cruel, inhuman and degrading punishment, in violation of article 7.

3.2 The author claims that, as he was required to perform hard labour in prison in pursuance of a sentence which the court was not competent in law to impose (see para. 2.6 above), he was required to perform forced or compulsory labour in violation of article 8, paragraph 3, of the Covenant. He claims a violation of article 14, paragraph 1, by reason of the Chief Justice's involvement in his case who, he claims, was neither impartial nor independent.

3.3 The author claims a violation of article 14, paragraph 2, as he was not presumed

[5] According to the information provided, the only other time the Supreme Court issued a sentence of "rigorous imprisonment" was in the case of Fernando, where the convict was sentenced to one year of rigorous imprisonment. This communication no. 1189/2003 was considered by the Committee, on 31 March 2005, and it found a violation of article 9, paragraph 1, for arbitrary deprivation of liberty.

innocent and the burden of proof was placed on him rather than the prosecution. He refers to the facts set out in paragraph 2.4 and 2.5 above. He submits that while trial by summary procedure may be permissible where the alleged contempt has been committed "in the face of the court", it is wholly inappropriate where the charge is based, not on the judge's observations, but on a petition submitted by a individual in respect of an alleged offence which had taken place several months previously, to which the petitioner was not a party, with which he or she was not concerned, and of which no member of the court had any knowledge until the petition was received. Where such an offence is tried summarily, the burden of proof is imposed on the accused to establish that the alleged act was not committed by him[6].

3.4 The author claims a violation of article 14, paragraph 3 (a), as he was not informed of the nature and cause of charges against him. The Rule which was served upon him did not refer to any particular sentence or sentences of his statement (of around twenty sentences in all), which was/were suppose to have amounted to contempt of court. The Rule did not indicate the specific nature of the contempt with which he was charged and he was not informed in court either of its specific nature. He claims a violation of article 14, paragraph 3 (e), as no witnesses were called to testify against him, and no witnesses were tendered for cross-examination by counsel appearing for the author. He claims a violation of article 14, paragraph 3 (g), due to the manner in which he was questioned by the Chief Justice on the contents of the speech he was alleged to have made, the coercion which he was subjected to by the Chief Justice, and the adverse inferences which the Chief Justice drew from his reluctance to provide evidence against himself (para. 2.4 and 2.6).

3.5 The author claims that because he was tried at first instance in the Supreme Court, rather than the High Court, he had no right to appeal against his conviction and sentence, in violation of his rights under article 14, paragraph 5. He argues that if there had been an appellate tribunal competent to review the judgement, there were serious misdirections of law and fact upon which he would have based an appeal. He sets out these misdirections in detail.

3.6 The author claims a violation of article 15, paragraph 1, as he was convicted of a criminal offence which did not constitute a criminal offence under law, and was sentenced to two years rigorous imprisonment when no finite sentence is prescribed by law. He invokes Article 105 (3) of the Constitution, upon which he was convicted for the offence of contempt of court. He refers to the article itself which he argues does not create the offence of "contempt", nor defines the term, nor sets out what acts or omissions would constitute it. It merely declares that among the powers of the Supreme Court is the, "power to punish for contempt of itself, whether committed in the court or elsewhere". He also argues that with reference to U.K. jurisprudence, it would appear that the type of contempt he was punished with was that of "scandalising the court", which is not an act declared to be an offence under any law of the State party. In addition, he argues that in light of the fact that Article 111C(2) of the Constitution has prescribed punishment of up to one year imprisonment for the substantive offence of interference with the judiciary, it would be irrational to suggest that the words "the power to punish for contempt with imprisonment or fine", means that the court's powers to impose a prison sentence is unlimited.

3.7 The author claims that his right to freedom of expression under article 19 has been violated, as the restrictions imposed on his right to freedom of expression through the application of the contempt of court offence in this instance did not satisfy the 'necessity'

---

[6] In support of his view, the author refers to a judgement of the Constitutional Court of South Africa, in the case of *State v. Mamabolo* [2002] 1 LRC 32.

requirement in article 19, paragraph 3. According to the author, the portion of his speech relating to the President's request was political in nature, related to a subject which was topical, and was couched in language that was appropriate to the occasion. He claims that his expulsion from Parliament, his exclusion for a period of nine years from participating in the conduct of public affairs, and particularly from performing his functions as National Organiser of the principal parliamentary opposition party in a year in which a presidential election is due to be held, and his disqualification for a period of nine years from voting or standing for election was grossly disproportionate, and not justifiable by reference to reasonable and objective criteria, thus violating his rights under article 25.

3.8 Finally, the author claims a violation of article 26, for failure of the Supreme Court to apply the law equally or to provide equal protection of the law without discrimination. He argues that the Supreme Court failed to take any action against either the Independent Television Network or the Sri Lankan Rupavahini Corporation, both of which had broadcast his speech.

The State party's submission on admissibility and merits

4.1 On 14 October 2005, the State party contested the author's claims. On the facts, it states that the Supreme Court, in addition to its original and appellate jurisdiction, has a consultative jurisdiction whereby the President may obtain the opinion of the Court on a question of law or fact which has arisen or is likely to arise and is of public importance. It submits that at the time of making the statement in question the author was a Cabinet Minister and not a civilian, which added to the impact of the statement. It highlights the previous charge of contempt against the author, when he admitted stating that, "they will close down Parliament and if necessary close down courts to pass this Constitution" and "if State judges do not agree with the implementation of the Constitution they could go home". The author was a senior Cabinet Minister when he had made these statements. In light of his apology and the fact that he had no previous criminal record, he was not convicted. In the current case, the Supreme Court specifically stated in its judgement that as its earlier leniency had had no impact on the author's behaviour, a "deterrent punishment of two years rigorous imprisonment" was appropriate. Considering these elements, the State party submits that the cases cited by the author are irrelevant and the sentence cannot be considered disproportionate. For these reasons, the State party did not violate article 7.

4.2 As to the allegation under article 8, paragraph 3, and the author's claim that according to the provisions of the Interpretation of Statutes Ordinance the word "imprisonment" denotes only "simple imprisonment", the State party submits that this Ordinance cannot be used to interpret the Constitution but only Acts of Parliament. The Constitution may only be interpreted by the Supreme Court, which has interpreted "imprisonment" to mean either "rigorous" or "simple imprisonment". It also notes that article 8, paragraph 3 (a), should be read with article 8, paragraph 3 (b), which states that the former paragraph should not be held to preclude the performance of hard labour.

4.3 As to the claims under article 14, paragraph 1, the State party denies the allegations against the Chief Justice and states that it will refrain from commenting on statements made against him which are unsubstantiated. A judgement of the Supreme Court may only be handed down by a panel of at least three judges. In this case, it consisted of five judges who rendered a unanimous finding on guilt and sentence. The author was represented by senior counsel and the hearing was in public. He admitted having made the statement, and it was left to the Supreme Court to consider whether the statement was contemptuous in whole or in part. The author had used the Sinhalese word "balu" in his statement to describe the Judges of the Supreme Court; a word which means dog/s and is thus extremely derogatory.

4.4 As to the claims of a violation of article 14, paragraphs 2, 3 (e) and (g), the State party submits that the author's admission that he had made the statement in question meant that these provisions were not violated. Had the author refuted having made the statement, the onus would then have been on the prosecution to prove that such statement was in fact made. As to paragraph 3 (e), having admitted making the statement, there was no necessity for the prosecution to hear evidence of witnesses to prove that the statement had indeed been made. As to paragraph 3 (g), the author's admission could not be construed as having to testify against himself or to confess guilt. The author and his counsel, having examined the evidence available took a considered decision to admit the entire statement.

4.5 As to article 14, paragraph 3 (a), the State party submits that the author was served with a document containing the relevant material long before the commencement of the proceedings. He was served with the charges beforehand and the statement was read out in open court in a language he understood. He was represented and neither the author nor counsel indicated that they failed to understand the nature of the charge. Counsel was given the opportunity to view a video clip of the author making the statement in question and to advise the author prior to admitting that he made the statement.

4.6 The State party denies that neither article 15, paragraph 1, nor article 14, paragraph 5, were violated. It confirms that the Supreme Court decision could not have been reviewed. Under Article 105 (3) of the Constitution it is vested with the power, as a superior court of record, to punish for contempt of itself whether committed within the court or elsewhere. It is clear under this article that contempt whether committed within the court itself or elsewhere is an offence. If it were not so then the power given to the Supreme Court would be futile. Any other interpretation would be unrealistic and unreasonable. Further, it submits that contempt could be considered criminal, according to "the general principles of law recognised by the community of nations (article 15, paragraph 2)."

4.7 On the article 19 claim, the State party submits that a restriction preventing incidents of contempt of court is a reasonable restriction, which is necessary to preserve the respect and reputation of the court, as well as to preserve public order and morals. Chapter iii of the Sri Lankan Constitution provides that the exercise of the right to freedom of expression is subjected to restrictions as may be prescribed by law which includes contempt of court. Article 89 (d) of the Constitution, "disqualifies a person who is or had during the period of seven years immediately preceding completed serving a sentence of imprisonment (by whatever name) for a term not less than six months after conviction by any court for an offence punishable with imprisonment for a term not less than two years..." The State party argues that preventing a person convicted of such a crime from being an elector or elected as a Member of Parliament could not be construed as an unreasonable restriction for the purposes of article 25 of the Covenant.

4.8 As to article 26, the State party submits that the contention that the television stations and the person who made the contentious statement be considered as equal is untenable. In addition, the author had already been warned and admonished for a previous charge of contempt of court, and thus cannot expect to be treated equally to a person who is brought before a court for the first time.

4.9 The State party submits that it has no control over the decisions of a competent court, nor can it give directions with regard to future judgements of a court. Upon signing the Optional Protocol, it was never intended to concede the competence of the Committee to express views on a judgement given by a competent court in Sri Lanka. It denies that there was any political or personal bias of the Chief justice towards the author.

Author's comments on State party's submission

5. On 9 November 2005, the author reiterated his claims and submits that the State party did not respond to many of his arguments. With regard to its arguments on article 8, paragraph 3, he submits that the Interpretation Ordinance explicitly states that it applies to the Constitution and the fact that the Supreme Court is vested with the power to interpret the Constitution does not mean that in exercising that power it can ignore the explicit provisions of the Ordinance. As to the claim that the context of the statement in question was to refer to judges of the Supreme Court as "dogs", the author refers the Committee to the translation of the words in question by the Supreme Court itself as "disgraceful decision". At no stage during the proceedings did the Attorney General or the Court itself claim that the author had referred to the Judges of the Supreme Court as "dogs". With respect to the State party's reference to article 15, paragraph 2, of the Covenant, the author submits that this provision was intended as a confirmation of the principles applied by the war crimes tribunals established after the Second World War.

Author's supplementary comments

6.1 On 31 March 2008, on instructions from the Special Rapporteur on New Communications, the Secretariat requested the author to confirm whether a claim of article 9, paragraph 1, was implicit in his complaint, and to provide it with information on his release. On 6 April 2008, the author confirms that a claim of a violation of article 9, paragraph 1, is implicit in each of the violations claimed in his initial submission. He refers to the Committee's Views in *Fernando v. Sri Lanka*[7], which were adopted three weeks after the present communication was submitted to the Committee, and in which the Committee found a violation of article 9, paragraph 1, for the arbitrary deprivation of liberty of the author by an act of the judiciary. The author also refers to the criteria by which the UN Working Group on Arbitrary Detention determines whether a deprivation of liberty is arbitrary - "when the complete or partial infringement of international standards relating to a fair trial is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character", and "when such detention is the result of judicial proceedings consequent upon, or a sentence arising from, the exercise by an individual of the right to freedom of opinion and expression guaranteed by article 19 of the Covenant".

6.2 The author submits that, on 15 February 2006, the President remitted the remainder of his sentence and he was released from prison, about six to eight weeks ahead of the day on which he would ordinarily have been entitled to be released. About two or three weeks before his release, the Speaker of Parliament ruled that the author had forfeited his seat in Parliament to which he had been elected for a six year term in April 2004, because he had absented himself from parliament for a continuous period of three months. The President did not grant a pardon (which he could have done under paragraph 2 of article 34 of the Constitution) which would have removed the disqualification to vote or seek election, which the author is subject to for seven years from the completion of his prison sentence, i.e. until April 2013.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights

[7] Communication No. 1189/2003, Views adopted on 31 March 2005.

Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

7.2 As to the claims of violations of articles 7, 8, paragraph 3 (b), 15, paragraph 1, and 26, of the Covenant, the Committee is of the view that these claims have not been substantiated, for purposes of admissibility, and that they are therefore inadmissible under article 2 of the Optional Protocol.

7.3 As to the remaining claims of violations of the provisions of article 14; article 9, paragraph 1; article 19; and article 25(b), the Committee considers these claims are sufficiently substantiated and finds no other bar to their admissibility.

Consideration of the merits

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

8.2 The Committee recalls its observation, in previous jurisprudence[8], that courts notably in Common Law jurisdictions have traditionally exercised authority to maintain order and dignity in court proceedings by the exercise of a summary power to impose penalties for "contempt of court." In this jurisprudence, the Committee also observed that the imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within the prohibition of "arbitrary" deprivation of liberty, within the meaning of article 9, paragraph 1, of the Covenant. The fact that an act constituting a violation of article 9, paragraph 1, is committed by the judicial branch of government cannot prevent the engagement of the responsibility of the State party as a whole.

8.3 In the current case, the author was sentenced to two years rigorous imprisonment for having stated at a public meeting that he would not accept any "disgraceful decision" of the Supreme Court, in relation to a pending opinion on the exercise of defence powers between the President and the Minister of Defence. As argued by the State party, and confirmed on a review of the judgement itself, it would appear that the word "disgraceful" was considered by the Court as a "mild" translation of the word uttered. The State party refers to the Supreme Court's argument that the sentence was "deterrent" in nature, given the fact that the author had previously been charged with contempt but had not been convicted because of his apology. It would thus appear that the severity of the author's sentence was based on two contempt charges, of one of which he had not been convicted. In addition, the Committee notes that the State party has provided no explanation of why summary proceedings were necessary in this case, particularly in light of the fact that the incident leading to the charge had not been made in the "face of the court". The Committee finds that neither the Court nor the State party has provided any reasoned explanation as to why such a severe and summary penalty was warranted, in the exercise of the Court's power to maintain orderly proceedings, if indeed the provision of an advisory opinion can constitute proceedings to which any summary contempt of court ought to be applicable. Thus, it concludes that the author's detention was arbitrary, in violation of article 9, paragraph 1.

[8] *Fernando v. Sri Lanka*, supra.

8.4 The Committee concludes that the State party has violated article 19 of the Covenant, as the sentence imposed upon the author was disproportionate to any legitimate aim under article 19, paragraph 3.

8.5 As to the claim of a violation of article 25 (b), due to the prohibition on the author from voting or from being elected for seven years after his release from prison, the Committee recalls that the exercise of the right to vote and to be elected may not be suspended or excluded except on grounds, established by law, which are objective and reasonable. It also recalls that "if a conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence"[9]. While noting that the restrictions in question are established by law, the Committee notes that, except for the assertion that the restrictions are reasonable, the State party has provided no argument as to how the restrictions on the author's right to vote or stand for office are proportionate to the offence and sentence. Given that these restrictions rely on the author's conviction and sentence, which the Committee has found to be arbitrary in violation of article 9, paragraph 1, as well as the fact that the State party has failed to adduce any justifications about the reasonableness and/or proportionality of these restrictions, the Committee concludes that the prohibition on the author's right to be elected or to vote for a period of seven years after conviction and completion of sentence, are unreasonable and thus amount to a violation of article 25(b) of the Covenant.

8.6 In light of the finding of violations of articles 9, paragraph 1, 19, and 25 (b) in this case, the Committee need not consider whether provisions of article 14 may have any application to the exercise of the power of criminal contempt.

9. 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 State party has violated article 9, paragraph 1; article 19; and article 25 (b), of the International Covenant on Civil and Political Rights.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an adequate remedy, including compensation and the restoration of his right to vote and to be elected, and to make such changes to the law and practice, as are necessary to avoid similar violations in the future. The State party is under an obligation to avoid similar violations in the future.

11. Bearing in mind that, by becoming a State 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, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

---

[9] General Comment No. 25 [57]: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25), CCPR/C/21/Rev.1/Add.7, para. 14.

HUMAN RIGHTS COMMITTEE
Ninety-third session
7-25 July 2008

COMMUNICATION NO.1436/2005: SRI LANKA 31.07.2008 CCPR/C/93/D/1436/2005 (JURISPRUDENCE)*

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Ninety-third session

Communication No. 1436/2005†

Submitted by:	Mr. Vadivel Sathasivam and Mrs. Parathesi Saraswathi (represented by counsel, Mr. V.S. Ganesalingam and Interights)
Alleged victim:	The authors and their son, Mr. Sathasivam Sanjeevan
State Party:	Sri Lanka
Date of Communication:	15 September 2005 (initial submission)

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

Meeting on 8 July 2008,

Having concluded its consideration of communication No. 1436/2005, submitted to the Human Rights Committee on behalf of Mr. Vadivel Sathasivam, Mrs. Parathesi Saraswathi and their son Mr. Sathasivam Sanjeevan 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 authors of the communication are Vadivel Sathasivam and Parathesi Saraswathi,

---

* Adopted in English, French and Spanish, the English 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. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

They submit the communication on their own behalf and on behalf of their son, Sathasivam Sanjeevan, deceased on or about 15 October 1998 at age 18. They claim to be victims of article 2, paragraph 3; article 6 and article 7 of the Covenant by the Democratic People's Republic of Sri Lanka ("Sri Lanka"). They are represented by counsel, V.S. Ganesalingam and Interights.

The facts as submitted by the authors

2.1 On 13 October 1998, the authors' son, Sathasivam, then aged 18, left their home in Kalmunai for an errand and did not return. The next day, around 9 a.m., the police informed the first author that his son had been arrested and was being detained at a police station. The first author was not provided with any reasons for the arrest. He went to the local (Kalmunai) police station, but, upon arrival, was denied access to his son. Around 4 p.m., he returned with a lawyer and was permitted to visit his son. His son was in poor physical condition, unable to walk and eat, his right ear swollen and oozing blood. His son informed him and the lawyer that upon his arrest by two police officers he had been thrown against a telephone post and further tortured and ill-treated.

2.2 On 15 October, the first author and his sister visited Sathasivam again at around 5pm. They were told that he had not been taken to hospital but treated by a doctor, which meant that no medical report of his condition and treatment existed. He was in an even worse condition, pleading for his release. Seated and unable to raise his hands, he recounted again that he had been thrown with force against a telephone post by two police officers, and as a result was unable to walk, eat or drink. The first author noticed swelling on the back of his neck, and blood oozing from both shoulders. Unable to stand by himself, he reiterated that his injuries resulted from assaults by police officers. The first author inquired of the police officer present how his son had been injured, but was informed that there would be an inquiry and that his son would be released subsequently. When the first author again visited his son on 15 October, his condition had deteriorated. He could not stand and could hardly talk, eat or drink. He could only indicate that he had been taken to a doctor the previous night and been given medicine.

2.3 On 16 October, the first author was denied access to his son. That evening, he received a message from the police station requesting that he proceed to Ampara hospital immediately. The following day, the first author went to Ampara and was shown his son's body at the mortuary. Stitches could be seen on his tongue and his body had been cut open from chest to stomach. The first author was informed that the postmortem and inquest had been completed and that he could therefore take the body, although it could not be removed from Ampara. Subsequently, he was allowed to take the body to Kalmunai for burial.

2.4 The first author subsequently learned that following filing of police notification, an inquest into his son's death had been conducted on 15 October by the Acting Magistrate of Kalmunai. The Acting Magistrate considered a report filed by the local Samamnathurai police, which stated that on 15 October, while the authors' son was being taken from Kalmunai to Ampara police station by eight police officers, the convoy was attacked around 9 p.m. by LTTE fighters. The report stated, without further substantiation, that two police officers and the first author's son were wounded, with the vehicle sustaining damage. All three were admitted to Ampara hospital, where the son died and the two officers survived. The Magistrate ordered that an inquest and postmortem be performed with results sent to him by 21 October, in order to undertake a full inquiry.

2.5 On 16 October, the Acting Magistrate of Kalmunai held an inquest after visiting the scene of the alleged incident. His inquest report noted five bullet wounds in the body of the first author's son, but stated that there were no other injuries. While observing that a shooting incident had taken place, he did not conclude that an attack could have been carried out as described by the police. He ordered that a postmortem be carried out by the Ampara District Medical Officer, and that the body then be released to the next of kin.

2.6 The District Medical Officer carried out a postmortem later the same day. His report found injuries to the lower abdomen, bladder and right femur, as well as a fracture of the right pelvic bone. He concluded that the cause of death was shock following severe bleeding due to injuries caused by firearms. There was no mention of torture. The report did not state whether the fatal gunshot injuries were, or could have been, inflicted before or after the victim's death, although there was provision in the form to so indicate.

2.7 The Acting Magistrate did not receive the postmortem report by the date of the inquiry hearing on 21 October 1998, leading to postponements until 29 October and then to 12 November, and again to 26 November, to secure the attendance of Kalmunai police officers. The authors had not received notice of the inquiry and thus neither they nor their lawyer were present at the hearings of 21 and 29 October. Having heard independently about the 12 November hearing date they were represented from that point onwards.

2.8 The authors brought the case to the attention of the Kalmunai office of the Human Rights Commission, which transmitted the case to the Colombo head office. On 2 November 1998, the authors' counsel wrote to the Chairperson of the Commission, requesting action under sections 14 and 15 of the Human Rights Commission of Sri Lanka Act 1996 by (a) directing the Deputy Inspector General of Police for the Kalumnai region to order an investigation, and (b) bringing this action to the attention of the local Magistrate. The letter was not acknowledged, nor was any action taken.

2.9 At the Magisterial hearing on 26 November, the first author and his sister gave evidence of the nature and extent of torture inflicted on the son, based on what they had seen and been told by him. The first author described the physical injuries, his son's inability to stand unassisted or walk, and the description his son had given during the visit of the physical abuse to which he had been subjected. The first author also described the extremely poor physical condition of his son during the second visit.

2.10 The authors' representatives submitted that the District Medical Officer erred in failing to reach a conclusion of torture and ill-treatment, since there was clear evidence both from the injuries listed in the report and the testimony of the authors that the son had been subject to such treatment before being killed. The Magistrate agreed, ordering that the body be exhumed and sent to the Judicial Medical Officer at Batticaloa for further examination pursuant to section 373(2) of the Criminal Code. On 27 November 1998, the body was exhumed in the presence of the Acting Magistrate and the body sent to the Judicial Medical Officer. The latter's report identified nine ante mortem injuries and concluded that these were caused by a blunt weapon applied prior to any shooting, whilst injuries to the neck could have been made by application of fingers. The cause of death was identified as four gunshot injuries.

2.11 On 21 October 1999, the Magistrate's verdict entered a finding of homicide, holding that the victim had been subjected to torture and had died of bleeding caused by gunshot wounds. He ordered that the supervisory officer of the Sammanthurai police should arrange for investigation by the Criminal Investigation Department, with a view to arrest and trial of

the perpetrators. Also in 1999, Amnesty International, in a report on torture in Sri Lanka, cited the case as "an example of how police have tried to cover up torture in custody even if the inquest procedure is held under normal law".[1]

2.12 On 10 July 2002, over two and a half years later and after several requests, the Magistrate received a letter from the Director of the Criminal Investigation Department, informing him that an investigation had been conducted following a letter on the case from the UN Special Rapporteur on Torture to the Attorney-General.

2.13 On 19 August 2002, the Attorney-General wrote to the Director, with copy to the Registrar of the Kalmunai Magistrates' Court, to the effect that having considered all available evidence, it was clear that the police version of the events of arrest and death were false and had been fabricated. The available material did not however provide a basis for instituting criminal proceedings for torture and murder against the police officers, but only disciplinary action. The Director was therefore requested to forward the letter and the investigative report to the relevant disciplinary body for appropriate action. To the authors' knowledge, no further action was taken.

2.14 In 2000, the then Special Rapporteur on Torture described the case in his annual report to the then UN Commission on Human Rights.[2] In 2002, his successor as Special Rapporteur noted in his annual report to the Commission on Human Rights[3] that the Attorney-General had concluded that there was insufficient evidence to initiate a criminal prosecution and instead recommended disciplinary measures. The Special Rapporteur expressed concern that the Government had not responded to a number of torture cases that he had brought to its attention.

2.15 Despite the international attention, the State party has refused to acknowledge its responsibility, pursue a criminal investigation against those considered responsible, or otherwise make reparation to the victim's family.

The complaint

3.1 The authors argue that the facts described disclose violations of article 2, paragraph 3; article 6 and article 7 of the Covenant.

---

[1] Amnesty International document SA 37/10/99, at section 5.2.

[2] E/CN.4/2000/9, at para 937 : "Sathasivam Sanjeevan died in police custody allegedly as a result of torture. He was reportedly arrested during a police search operation on 13 October 1998 in Paandiruppu and detained at the Almunai police station, where he was allegedly tortured. On 17 October 1998, the family reportedly went to the Amparai police station and then to the Government Hospital where they were informed that their son had been killed in an armed confrontation with the LTTE when he was being transferred to the Amparai station. A deep cut along his chest had reportedly been stitched up, his tongue severed and stitched together, and there were injuries on his head and hip. A second post-mortem inquiry ordered by the local magistrate confirmed signs of injuries by blunt weapons inflicted before the shooting. The second magisterial inquiry was still continuing."
See also the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/2000/3/Add.1), at 405: "Sathassivam Sanjeevan was arrested by the police at Paandiriuppo, Amparai district, on 3 October 1998. It was reported that when his relatives visited him at the Kalmunai police station on 14 and 15 october, they noted that he could not life his arms and that he had difficulty swallowing. On 16 October the police informed his relatives that he had been killed in an armed confrontation with the Liberation Tigers of Tamil Eelam (LTTE) while being taken to Amparai by the police."

[3] E/CN.4/2003/68, at para 1655.

3.2 Under article 6, they claim firstly that the State party had failed in various respects to discharge its obligation to take sufficient measures to protect the right to life. First, the evidence indicated that the victim died of gunshot wounds in police custody, which the police claims occurred while transporting him. While in the absence of a thorough and independent investigation it is difficult to ascertain who actually carried out the fatal shooting, the evidence clearly showed that, at a minimum the State party failed in its positive duty to protect the victim while in police custody.

3.3 The authors refer in this respect to the jurisprudence of the Human Rights Committee and the European Court of Human Rights that (i) the State party is under a duty to protect the wellbeing of those under its control or care, particularly in police custody;[4] and (ii) there is a strong presumption of State responsibility for the death of an individual in police custody, in respect of which the State must provide a satisfactory and convincing explanation in order to successfully rebut.[5] In this case, the State party has failed to provide an explanation for the theory that the victim was in fact killed by the LTTE. This failure is supported by the Attorney-General's conclusions that the police had fabricated the account of death, with the result that the presumption of sole State responsibility for the death must prevail.

3.4 As to the second aspect of article 6 obligation, the authors note that the evidence indicates that the victim was subjected to serious, life-threatening torture. The State party failed to take adequate measures to protect the life of and well-being of Sathasivam. For example, at no stage was he brought before a judicial officer, a step recognized as essential not only for verification of reasons for arrest but also for monitoring detainee treatment.

3.5 As to the third aspect of the article 6 obligation, the authors observe that there was a failure by the State party to investigate and prosecute the perpetrators after the victim's death. The Criminal Investigation Department, despite repeated requests from the local Magistrate, failed to carry out any investigation for over two years, and then only did so in response to a letter from the then UN Special Rapporteur on Torture. This was despite the fact that there was strong evidence that could have been followed up immediately, in view of the fact that there were a number of clearly identified police witnesses in the vehicle at the time of the shooting.

3.6 The authors note the jurisprudence of the Committee, the European Court of Human Rights and the Inter-American Court of Human Rights that States parties have an obligation deriving from the right to life, combined with the right to an effective remedy, to take positive measures to protect the right to life, including implementation of appropriate procedural safeguards that encompass investigation and prosecution of alleged State killings.[6] The absence of such safeguards can constitute a violation of the right to life even if there is

---

[4] *Barbato v Uruguay,* Communication No. 84/1981, Views adopted on 21 October 1981; *Lantsova v Russian Federation,* Communication No. 763/1997, Views adopted on 26 March 2002; and *Salman v Turkey* (2002) 34 EHRR 17, at para 99.

[5] *Jordan v United Kingdom* (2003) EHRR 52, at para 103; *McKerr v United Kingdom* (2002) 24 EHRR, at para 109; and *Salman v Turkey* (2002) 34 EHRR, at para 99.

[6] General Comment 6 on article 6, at para 3; *Chaparro v Colombia,* Communication No. 612/1995, Views adopted on 29 July 1997; *Baboeram-Adhin v Suriname,* Communication Nos. 146 & 148-154/1983, Views adopted on 4 April 1985; *Herrera Rubio v Colombia,* Communication No. 161/1983, Views adopted on 2 November 1987; *Velasquez Rodriguez v Honduras* (Series C) No.4 (1988), at para 188; *Edwards v United Kingdom* (2002) 35 EHRR 19, at para 69; *McCann v United Kingdom* (1996) 21 EHRR 97, at para 161; and *Kaya v Turkey* (1999) 28 EHRR 1, at para 86.

insufficient evidence to hold the State responsible for the actual death.[7]

3.7 The authors submit that even if there remained doubts about the involvement of the police in the death of the victim, the State party remains in breach of article 6 due to the failure to prevent it and respond thereto. Even when limited investigation was eventually carried out, the Attorney-General refused to recommend prosecution and opted in favour of clearly inadequate disciplinary action, which, in any event, has not been initiated. Mere disciplinary measures, which trivialize so serious an offence, are no substitute for criminal investigation and prosecution, which are required to be adopted in cases of arbitrary taking of life.[8] Further, in breach of the obligation to provide compensation to the family of the victim[9] neither compensation nor apology has been rendered by the State party for the death of the victim, even following the Attorney-General's recognition of culpability.

3.8 Under article 7, the authors argue that the victim was tortured in circumstances where the State's responsibility was clearly engaged, there being ample evidence that he was subjected to acts constituting cruel and inhuman treatment and, due to their severity, also to torture. Eyewitness testimony from the first author and his sister upon visiting the victim in the police station within 24 hours of arrest, indicated that he had sustained severe injuries in custody, to such extent that he was unable to stand, eat or drink. This evidence was reinforced by the postmortem finding of specific and detailed injuries consistent with severe ill-treatment and beating. According to the Committee's jurisprudence there was clear violation of article 7 by reason of the victim being subjected to the type of treatment described by the Judicial Medical Officer.[10] In the absence of any plausible explanation by the State party, it must be concluded that torture and ill-treatment had indeed occurred.

3.9 The authors argue that there was no evidence that the victim was offered any protection against torture, beyond the two visits of his closest relatives. There was no judicial scrutiny of detention, no records maintained of his condition, nor monitoring at all by senior police officers or medical staff. The authors invoke the Committee's General Comment 20 (at para 11) and the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, as safeguards necessary to guard against torture.[11]

3.10 The State party not only failed to provide adequate safeguards against torture, but also properly to investigate the conduct and prosecute the perpetrators. No investigation was carried out until over two years after the incident, and then only at the behest of the then UN Special Rapporteur on Torture. Following the investigation, the Attorney-General, despite having established the guilt of the police for torture of the victim, refused to prosecute the perpetrators, trivializing the crime by treating it instead as a disciplinary matter.[12] The Committee has held that as part of its duty to protect individuals against conduct in breach of

---

7 *Kaya v Turkey*, op.cit.; *Tanrikulu v Turkey* (2000) 30 EHRR 950; *Kilic v Turkey* (2001) 33 EHRR 1357.

8 *Baboeram-Adhin*, op.cit.; *Bautista de Arellana v Colombia*, Communication No. 563/1993, Views adopted on 27 October 1995; at paras 8.2 and 10.

9 *Chaparro v Colombia*, op.cit., at para 10.

10 *Bailey v Jamaica*, Communication No. 334/1988, Views adopted on 31 March 1993; *Linton v Jamaica*, Communication No. 255/1987, Views adopted on 22 October 1992; *Henry v Trinidad & Tobago*, Communication No. 752/1997, Views adopted on 3 February 1999; *Muteba v Zaire*, Communication No. 124/1982, Views adopted on 24 July 1984, at para 10.2; *Estrella v Uruguay*, Communication No. 74/1980, Views adopted on 29 March 1983; and *Arzuaga Gilboa v Uruguay*, Communication No. 147/1983, Views adopted on 1 November 1985.

11 See also *Algur v Turkey*, Appln. 32574/1996; judgment of 22 October 2002, at paras 33-47.

12 See *Bautista de Arellana*, op.cit., at para 10.

article 7, the State must take measures to prevent, investigate and punish acts of torture, whether committed in an official capacity or otherwise.[13] Nor was compensation paid to the authors, the victim's parents, further compounding the breach of article 7.[14]

3.11 Under article 2, paragraph 3, the authors invoke the Committee's jurisprudence for the proposition that the circumstances of the victim's death, comprising arbitrary arrest and detention followed by torture and arbitrary and unlawful killing, indicate that criminal investigation and appropriate prosecution is the only effective remedy.[15] The failure of the State party to take effective legal, administrative, judicial and other measures to bring to justice those responsible for the torture and death of the victim thus breaches this obligation. The Committee against Torture has likewise insisted that the right to a remedy requires an effective, independent and impartial investigation of allegations of torture.[16]

3.12 The decision of the Attorney-General not to initiate a prosecution but instead recommend disciplinary proceedings is clearly inadequate and does not constitute an effective remedy.[17] This breach was further compounded by the failure, to the authors' knowledge, of even disciplinary proceedings in fact being conducted. No apology or compensation has ever been offered to the authors despite the State party's acknowledgment, through its Magistrate and Attorney-General, that the police were responsible for the victim's torture and death.[18]

State party's failure to cooperate

4. By Notes Verbale of 21 November 2005, 25 July 2006 and 6 November 2007, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has not been received. The Committee regrets the State party's failure to provide any information with regard to admissibility or the substance of the author's claims. It recalls that under the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have taken. In the absence of a reply from the State party, due weight must be given to the author's allegations to the extent that these have been properly substantiated.

Issues and Proceedings before the Committee

Consideration of admissibility

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

---

[13] See *Rodriguez v Uruguay,* Communication No. 322/1988, Views adopted on 19 July 1994, at para 12.2; and General Comment 20, at paras 8 and 13. See also articles 12 to 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the State party acceded in 1994, *Aydin v Turkey* (1998) 25 EHRR 251, at para 109; and *Assenov v Bulgaria* (1999) 31 EHRR 372, at para 106.

[14] General Comment 20, at para 14. See also article 14 of the Convention against Torture, and Committee against Torture: *Dzemajl v Yugoslavia,* Communication 161/2000, Views adopted on 21 November 2002, at para 9.6.

[15] General Comment 31, at para 18.

[16] *Agiza v Sweden,* Communication No. 233/2003, Views adopted on 20 May 2005, at para 13.7.

[17] *Bautista v Colombia,* op.cit., at para 8.2; and *Chaparro v Colombia,* op.cit., at para 10.

[18] *Chaparro v Colombia,* op.cit., at para 10; and *Dzemajl Yugoslavia,* op.cit., at para 9.6.

5.2 In the absence of any submission by the State party on the admissibility of the communication, and there being no further obstacle apparent to the Committee, the Committee must give due weight to the material before it. It concludes that the authors have properly substantiated, for purposes of admissibility, their claims under article 6; article 7; and article 2, paragraph 3, of the Covenant for consideration on the merits.

Consideration of the merits

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

6.2 As to the claim under article 6 that the death of the victim is directly attributable to the State party, the Committee recalls that according to the uncontested material the victim was in normal health before being taken into police custody, where he was shortly thereafter seen by eyewitnesses suffering substantial and severe injuries. The alleged reasons for his subsequent death, namely that he died during an LTTE attack, have been dismissed by the State party's own judicial and executive authorities. In these circumstances, the Committee must give due weight to the presumption that injury and, a fortiori, death - suffered in custody must be held to be attributable to the State party itself. The Committee accordingly concludes that the State party is responsible for arbitrary deprivation of the victim's life, in breach of article 6 of the Covenant.

6.3 As to the claim under article 7 that the injuries suffered by the victim prior to his death amounted to a violation of that provision, the Committee recalls that the State party has offered no challenge to the evidence submitted to the Committee that the victim suffered severe injuries in police custody, and that the victim himself imputed these injuries to the police. On the basis of the presumptive responsibility described in paragraph 6.2, *supra*, and in view of the gravity of injuries described, the Committee concludes that the State party subjected the victim to treatment in violation of article 7 of the Covenant.

6.4 As to the claims under articles 6 and 7 on the ground that the State party failed in its procedural obligation to properly investigate the victim's death and incidents of torture, and to take appropriate investigative and remedial measures, the Committee recalls its constant jurisprudence that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by articles 6 and 7 of the Covenant.[19] In the instant case, the State party's own authorities dismissed the explanation for the victim's death advanced by the police in whose custody the victim died, and its judicial authorities directed criminal proceedings against the offending police officers. In the absence of any explanation by the State party and in view of the detailed evidence placed before it, the Committee must conclude that the Attorney-General's decision not to initiate criminal proceedings in favour of disciplinary proceedings was clearly arbitrary and amounted to a denial of justice. The State party must accordingly be held to be in breach of its obligations under articles 6 and 7 to properly investigate the death and torture of the victim and take appropriate action against those found guilty. For the same reasons, the State party is in breach of its obligation under article 2, paragraph 3, to provide an effective remedy to the authors.

---

[19] See the Committee's General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

7. 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 as found by the Committee reveal violations by Sri Lanka of article 6; article 7; and article 2, paragraph 3 in conjunction with articles 6 and 7, of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including initiation and pursuit of criminal proceedings and payment of appropriate compensation to the family of the victim. The State party should also take measures to ensure that such violations do not recur in the future.

9. 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 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 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

HUMAN RIGHTS COMMITTEE
Ninety-third session
7-25 July 2008

COMMUNICATION NO.1376/2005: SRI LANKA 04.08.2008 CCPR/C/93/D/1376/2005 (JURISPRUDENCE)*

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Ninety-third session

Communication No. 1376/2005†

Submitted by:	Mr. Soratha Bandaranayake (represented by counsel, Mr. S.R.K. Hewamanna)
Alleged victim:	The author
State Party:	Sri Lanka
Date of Communication:	21January 2005 (Initial submission)

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

Meeting on 24 July 2008,

Having concluded its consideration of communication No. 1376/2005, submitted to the Human Rights Committee on behalf of Mr. Soratha Bandaranayake 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 Mr. Soratha Bandaranayake, a Sri Lankan citizen, born on 30 January 1957. He claims to be a victim of violations by the State party of

---

* Adopted in English, French and Spanish, the English 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. Abdelfattah Amor, Mr. Praffillachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

article 14; article 25 (c); and article 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel, Mr. S.R.K. Hewamanna.

The facts as presented by the author

2.1 The author was appointed District Judge of Negombo with effect from 1 April 1998, after serving for 10 years as a Magistrate. On 17 October 1998, while driving to a religious ceremony in the company of a Tamil Hindu friend, the author and his friend were stopped at a checkpoint and abused by the police. As the policeman did not recognize him, the author presented his identity card. The author subsequently brought the matter to the attention of the officer-in-charge of the Kirulapona police station. On 26 October 1998, under the orders of the officer-in-charge, the police officer in question visited the author in his chambers at the District Court and apologized.

2.2 Following this incident, the author was summoned over the phone to appear before the Judicial Service Commission (JSC) on 18 November 1998 and, without any reference to any particular complaint, was questioned on whether he had claimed to be a High Court Judge at a police checkpoint at Kirulapona. It subsequently transpired that a complaint was dispatched by the local High Court Judge on 20 November 1998, two days after the author had been questioned by the JSC, which, the author claims, is evidence of a conspiracy against him. Under article 114 of the Constitution, the appointment, transfer and discipline of judicial officers is vested in the JSC. Under article 112, the Chief Justice is the Chairman of the JSC. It is also composed of two other judges of the Supreme Court.

2.3 By JSC order of 24 November 1998, the author was sent on compulsory leave without disclosing the nature of the complaint or the complainant. On 1 April 1999, he was served with a disciplinary charge sheet by the JSC, in which it was alleged that, during an altercation with a police officer at a checkpoint, he had "impersonated" a High Court judge, thereby receiving preferential treatment, and subsequently admonished the police officer in question. He was charged with interfering with the performance of the police officer's duties, making a false statement and of having exceeded his authority'[1]. He was requested to put his version of events in writing, which he did by letter of 7 July 1999, refuting the charges. Between 13 September 1999 and 21 March 2000, a Committee of Inquiry appointed by the JSC, consisting of a Supreme Court Judge, the President of the Court of Appeal and an Appeal Court Judge, investigated the matter. The author was represented by counsel.

2.4 The author highlights what he considers to have been irregularities in the conduct of the Committee of Inquiry:

- the inquiry did not make documents relevant to the author's defence available at

[1] The charges were the following: "(1) You having stated that you were the High Court Judge of Negombo prevented the said vehicle and passengers travelling in it being checked by the said officers, thereby wilfully obstructing and or interfering with the performance of duties of the officer in charge of the said barrier. (2) You made a false statement to Ranjith the RSI of Police who was in charge of the said barrier that you were the High Court Judge of Negombo and interfered and/or obstructed the said officer from performing his duties and thereby acted in a manner to cause injury to the reputation and office of Mr. Ganti A. L. Abeyratne, the High Court Judge of Negombo. (3) During the period between 17.10.98 and 25.10.98, you abused your office by informing the RSI Ranjith to appear in District Judge's Chambers in Negombo on 26.10.98 and warned him to be courteous to public when attending to the duties on Public Highway and thereby acted in excess of your authority as District Judge.

the hearing, including documents from the proceedings held on 18 November 1998, and refused counsel's request to have the Secretary of the JSC testi' and produce the documents in question;

- the members were not appointed by law;

- legally inadmissible evidence of witnesses to prove charges was relied upon;

- the affidavits of police officers had not been made under oath or affirmation in accordance with law;

- evidence relied upon to find the author guilty was unsubstantiated, including an undated complaint by the High Court Judge in question, which bore no official stamp;

- the author was questioned extensively on his past conduct in an alleged attempt to incriminate him and he was not given an opportunity to demonstrate that he had been exonerated for past misconduct and subsequently promoted;

- there was no opportunity to cross-examine the chief police witness;

- the inquiry overlooked the fact that the material witness (the police officer in question) had been remanded as a suspect to murder and a drug offence;

- the author was deprived of his right to summon important witnesses, including the officer-in-charge of the police station at the time of the alleged incident;

- the inquiry relied on evidence that was not adduced during the inquiry but came from the interview held by the JSC on 18 November 1998, in particular a document which was alleged to have been an admission by the author, but was not produced during the inquiry and not made available to the author;

- objections made by counsel in respect of the absence of a complaint or of official entries made by the police officers were neither recorded (as required by the rules and regulations of the Police Department) nor was any ruling made in respect of such objections;

- the inquiry did not take into account the fact that the High Court Judge in question habitually makes complaints against junior judges;

- when the High Court judge in question informed the Committee that in view of the tainted witnesses he no longer believed that the alleged incident had taken place, the inquiry refused to terminate the proceedings;

- an application made by author's counsel to address the inquiry on the question of whether a prima fade case had been established was denied;

– the inquiry insisted that the author should give evidence in his own defence as failure to do so would result in disastrous consequences, thus denying him his right to remain silent contrary to article 12 (1) of the Constitution.

2.5 On 12 June 2000, the author was advised that the Committee of Inquiry had found him guilty of the charges in question. No reasons were given for the finding. The letter directed him to appear before the JSC to decide on "consequential steps", and stated that he was entitled to have counsel present. In advance of the JSC meeting, the author repeatedly applied for access to the investigation file, including certified copies of the proceedings and the reasons for the Committee of Inquiry's findings. He did not receive any reply. On 31 July 2000, the author appeared before the JSC with counsel. Counsel submitted that there was no basis upon which the author could be found guilty. The Chief Justice, who chaired the hearing, indicated that even if the JSC ignored the findings of the Committee of Inquiry, he was inclined to find the petitioner guilty on other grounds, namely on his past record. When pointing out to the Chief Justice that he had been exonerated with respect to past incidents he was told to "shut up". The Chief Justice advised the author that he should agree to retirement and directed him to consider the same and give his consent in writing, which the author refused. A request from counsel to make further submissions was denied. On 7 November 2000, the author was notified of his dismissal from office by the JSC. On 15 November 2000, the author sent a letter of appeal to the JSC but did not receive a reply.

2.6 Subsequently, the author filed a complaint with the Sri Lankan Human Rights Commission. On 18 June 2001, the Commission requested the author to make submissions on whether it had jurisdiction to hear complaints against the JSC. On 8 April 2003, the author filed an application in the Court of Appeal to quash the order for his dismissal and to order his reinstatement in service. On 17 July 2003, a "junior judge" of the Court of Appeal dismissed the application on the basis that the author had failed to establish malice on the part of the Chief Justice[2]. According to the author, the judge who decided this case had previously worked under the Chief Justice and implies that the latter influenced him in making his decision to dismiss the case. A request for special leave to appeal this decision remains pending in the Supreme Court. According to the author, it is the Chief Justice who has failed to list this case for hearing.

2.7 The author filed a fundamental rights application with the Supreme Court for which leave to appeal was refused by a majority decision on 6 September 2004. According to the author, under the Chief Justice's direction the application was listed before him, despite his involvement in the case before the JSC and objection from counsel. Although he was not one of the judges who presided over this case, the author claims that the Chief Justice had the motion listed before him so that he could select those judges he could easily influence to consider the case, thereby ensuring a dismissal.

2.8 According to the author, the Chief Justice is not well disposed towards him due to several incidents during the Chief Justice's tenure as Attorney General which resulted in personal animosity between them. The author provides examples of cases in which judicial misconduct was sanctioned more lightly than in his case.

[2] The judgement refers *inter alia* to Rule 18 of the JSC, which states that "Copies of reports or reasons for findings relating to the inquiry or of confidential office orders or minutes, will not, however be issued.

The complaint

3.1 The author claims that he did not receive a fair hearing in relation to the charges against him, in violation of his rights under articles 14, paragraph 1, and 25 (c). His dismissal was mainly due to the animosity that the Chief Justice had towards him, who influenced the other members of the JSC. In addition, he refers to the irregularities of the disciplinary proceedings commencing with his address to the JSC on 18 November 1998, throughout the inquiry proceedings (see paragraph 2.4), and leading to his dismissal. In addition, he claims that the charges were trivial and even if they had been proven, none of them fall within the ambit of "improper conduct", as defined in Volume II of the Establishments Code, which deals with the disciplinary control of public officers[3]. His dismissal, he claims, was a disproportionate punishment.

3.2 He claims that he was discriminated against in violation of article 26, as other judges who were found to have been guilty of charges by the Committee of Inquiry were not dismissed from service but received lighter penalties. In addition, he claims he was treated unequally before the law, as incidents for which he was cleared and a single incident in which he was reprimanded, were taken into account by the Committee of Inquiry, in justifying the decision to dismiss him. He claims that the decision to dismiss him was not based on the purported inquiry into the High Court Judge's complaint.

3.3 The author also claims a violation of article 2, paragraph 3, as he was deprived of an effective remedy in as much as the National Human Rights Commission and the Supreme Court refused to grant him leave to proceed with respect to his fundamental rights application.

3.4 The author seeks relief including a declaration on the violation of his rights, reinstatement and compensation.

State party's submission on admissibility and merits

4.1 By submission of 7 October 2005, the State party submits that the author has failed to establish a prima facie ease of a violation of any of his rights under the Covenant and that the allegations against the Chief Justice are unsubstantiated. Under the Constitution, the Chief Justice Chairs the JSC but that it is also composed of two other judges of the Supreme Court. Thus, the Chief Justice does not decide alone. On the facts, it states that in 1988, the author became a judicial officer. On 10 January 1997, he was placed on compulsory leave and reinstated on 9 October 1997. On 23 November 1998, he was placed on compulsory leave again and dismissed on 7 November 2000. In the dismissal letter from the JSC, of 7 November 2000, several incidents of misconduct and of conduct unbecoming of a judicial officer were referred to.

4.2 During his career, the author has had his probation extended, was transferred for disciplinary reasons, reprimanded, "interdicted", and placed on compulsory leave prior to his final dismissal. The State party attaches information on the complaints made against the author throughout his career. It explains that all the matters referred to are matters which took place before the current Chief Justice took office, and thus, the claim that the author was

[3] The Establishment Code reads as follows: "Improper conduct not connected with official duties relates to such matters as habitual drunkenness, use of narcotic drugs, disorderly behaviour, in public places, immorality of a type that becomes a public scandal or any other act which brings the public service or the office he holds into disrepute."

singled out for discriminatory treatment by the Chief Justice due to personal animosity is unfounded. In addition, the author's career record makes it clear that he is unsuitable to hold office and that the decision to dismiss him was justified.

4.3 The State party submits that the Committee is not competent to sit on appeal to consider the merits of the Committee of Inquiry. It was conducted in a fair manner, the author was present and represented by counsel, and the decision was fair and reasonable under the circumstances. As to the discrimination claim, the State party submits that the author's case is not comparable to the other cases cited by the author in light of the cases of misconduct against him. Thus, this claim is not made out. As to the claim that he should have been presumed innocent until proven guilty, the State party argues that this concept arises in criminal trials only. In any event, there is no evidence that the author's case was prejudged.

Author's comments on the State party's submission

5.1 On 15 January 2006, the author responded to the State party's submission. He reiterates his claims and highlights the State party's failure to deny or respond to any of his allegations made. He submits that it tries to divert the deliberation of the Committee with reference to past incidents in his career, which had been dealt with in the past and which are not relevant to the inquiry under issue. In addition, the State party allegedly misrepresented, suppressed and distorted the author's past conduct, in an attempt to prejudice him and give a tainted picture of his judicial career. By reviving these incidents the author believes that he is being penalized twice for incidents which have long been put to rest.

5.2 The author contests the State party's argument's about the Committee's inability to grant the relief sought by him, on the argument that the Committee lacks jurisdiction, is not competent to interpret the State party's Constitution and grant relief thereon. He argues that these arguments do not provide a legal basis for rejecting his communication and refusing the relief sought. He notes that the State party has still not provided the proceedings or findings of the inquiry on the basis of which he was dismissed. He also points out that as is evidenced from the Supreme Court judgement of 6 September 2004, one of the three judges dissented from the decision taken by the Committee of Inquiry on this ground. He admits that all the incidents referred to by the State party prior to the incident in question had taken place when the current Chief Justice was Attorney General. However, he claims that the Chief Justice's animosity towards him is demonstrated by the fact that he took into account past incidents, to dismiss him from service.

5.3 With respect to the past incidents of misconduct cited by the State party, the author contests the allegation that the Supreme Court found him to have violated the fundamental rights of the person in question. He submits that he was not even a respondent to the proceedings in question and quotes from the judgement which states that "although learned counsel for the petitioner did submit that the learned magistrate had acted "mechanically" and complied with the proposal made by the police, there is insufficient evidence adduced before us to arrive at such a conclusion". However, the judgement went on to direct that a copy of the judgement be submitted to the JSC for such action as it may deem to be appropriate. This issue was one of seven in a charge sheet served on the author, for which he was subsequently exonerated.

5.4 The author denies that he was ever "interdicted" and, in the only incident in which he was transferred, the High Court judge who conducted the preliminary inquiry exonerated him of all allegations against him and recommended that he be reinstated in his prior post. As to the extension of his probationary period, the author argues that this was done in "curious

circumstances". As to his compulsory leave from 10 July 1997, he submits that several charges in the charge sheet related to orders made by other judicial officers and, when this as pointed out, the JSC ordered that the compulsory leave be withdrawn and that the author be paid his salary increments. Within a year he was given his promotion to a higher grade. The author admits that he was reprimanded by the JSC in an interview on 28 July 1991. However, according to the Establishment Code, this is only a minor punishment and should not have affected his career adversely. Furthermore, there had been no warning placed on record that any future lapse would entail dismissal.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 With regard to the question of exhaustion of domestic remedies, while noting that neither the author nor the State party provided information on the outcome of the author's application for leave to appeal the decision of the Court of Appeal to the Supreme Court (paragraph 2.6), the Committee notes that the State party has not argued that the communication is inadmissible on this ground. It therefore considers that it is not precluded from considering the communication by the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.3 With respect to the claim of a violation of article 26 of the Covenant, the Committee notes that insufficient information has been provided on comparable cases, to demonstrate that the author's dismissal amounted to discrimination or unequal treatment under this provision. As noted by the State party and as is evident from the material provided by the author, none of the circumstances of the judges referred to by him would appear to compare to the author's situation. Thus, the Committee finds that the author has failed to substantiate sufficiently, for purposes of admissibility, any claim of a potential violation of article 26, and this claim is inadmissible under article 2 of the Optional Protocol.

6.4 The Committee notes that article 25 (c) of the Covenant confers a right of access, on general terms of equality, to public service, and recalls that the right of equal access to public service includes the right not to be arbitrarily dismissed from public service[4]. For this reason, the Committee considers that the claim under article 25 is admissible and should be considered on the merits.

6.5 As to whether the author's remaining claims fall within the purview of article 14, paragraph 1 of the Covenant, the Committee recalls that the concept of a "suit at law under article 14, paragraph 1, is based on the nature of the right in question, rather than on the status of one of the parties[5]. It also recalls that the imposition of disciplinary measures imposed on civil servants does not of itself necessarily constitute a determination of one's rights and obligations in a "suit at law", nor does it, except in cases of sanctions that, regardless of their qualification in domestic law are penal in nature, amount to a "determination of a criminal

[4] *Stalla Costa v. Uruguay,* Case no. 198/1985, Views adopted on 9 July 1987.

[5] *Y. L. v. Canada,* Case No. 112/1981, Decision adopted on 8 April 1986; *Robert Casanovas v. France,* Case No. 441/1990, Views adopted on 19 July 1994.

charge" within the meaning of the second sentence of article 14, paragraph 1[6]. The same jurisprudence of the Committee goes on to provide that, while a decision on a disciplinary dismissal does not need to be taken by a court or tribunal, whenever a judicial body is entrusted with the task of holding a disciplinary enquiry and deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee. The Committee refers to its General Comment on article 14[7], which defines the notion of a "tribunal" in this article, and considers that the JSC, to the extent that it is "established by law, is independent of the executive and legislative" is a tribunal within the meaning of article 14, paragraph 1, of the Covenant. The Committee therefore considers that the proceedings before the JSC and subsequent appeals through the courts constitute a determination of the author's rights and obligations in a suit at law within the meaning of article 14, paragraph 1, of the Covenant.

6.6 The Committee observes, however, that the alleged arbitrary nature of the dismissal relates to a large extent to the evaluation of facts and evidence in the course of proceedings before the JSC and the Court of Appeal. The Committee recalls its jurisprudence and notes that it is generally for the courts of States parties to review or to evaluate facts and evidence, or to examine the interpretation of domestic legislation by national courts and tribunals, unless it can be ascertained that the conduct of the proceedings or the evaluation of facts and evidence or interpretation of legislation was manifestly arbitrary or amounted to a denial of justice.[8] The Committee notes that the Court of Appeal reviewed the JSC's decision to dismiss the author. The issues arising from this review which have been sufficiently substantiated, for purposes of admissibility, relate to the failure of the JSC to provide the author with copies of the proceedings from the hearing on 18 November 1998, and the findings and reasoning behind the decision of the Committee of Inquiry on the basis of which the author was dismissed. Accordingly, the Committee considers that, these claims raise issues under articles 14, paragraph 1 and 25 (c) of the Covenant; they have been sufficiently substantiated and should be considered on the merits. The Committee considers the remaining claims inadmissible under article 2 of the Optional Protocol, as they have not been substantiated for purposes of admissibility.

Consideration of merits

7.1 The Committee observes that article 25 (c) of the Covenant confers a right to access, on general terms of equality, to public service, and recalls its jurisprudence that, to ensure access on general terms of equality, not only the criteria but also the "procedures for appointment, promotion, suspension and dismissal must be objective and reasonable"[9]. A procedure is not objective or reasonable if it does not respect the requirements of basic procedural fairness. The Committee also considers that the right of equal access to public service includes the right not to be arbitrarily dismissed from public service.[10] The Committee notes the author's claim that the procedure leading to his dismissal was neither objective nor reasonable. Despite numerous requests, he did not receive a copy of the proceedings from his first hearing before the JSC on 18 November 1998; this is confirmed in the Supreme Court decision of 6 September 2004, and is not contested by the State party. Nor did he receive the findings of the Committee of Inquiry, on the basis of which he was dismissed by the JSC. The

---

6 *Perterer v. Austria*, Case no. 10 15/2001, Views adopted on 20 July 2004.

7 Human Rights Committee General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (article 14), U.N. Doc. CCPRJC/GC/32 (2007), paragraph 18.

8 *Simms v. Jamaica*, Case No. 541/1993, Decision of 3 April 1995.

9 *Ruben Santiago Hinostroza Solls v. Peru*, Case no. 1016/2001, Views adopted on 27 March 2006.

10 *Stalla Costa v. Uruguay*, supra.

decision of the Court of Appeal confirms that these documents were never provided to him, in accordance with the express provision of Rule 18 of the JSC rules.

7.2 According to Rule 18 of the JSC rules, "Copies of reports or reasons for findings relating to the inquiry or of confidential office orders or minutes, will not, however, be issued." The Committee notes that there is no justification in the JSC rules themselves nor any explanations offered by the courts or the State party, for the failure to provide judicial officers with the reasoning for the findings of the Committee of Inquiry against them. It also notes that the only reasoning provided to the author for his dismissal was set out in the dismissal letter of 7 November 2000, in which the JSC invoked the Committee of Inquiry's finding that he had been found guilty of the charges against him, without any explanation. The JSC also took cognizance of incidents of alleged past misconduct, for which the author had already been exonerated. It is relevant to note that the State party itself has not provided a copy of the Committee of Inquiry's findings. The Committee finds that the JSC's failure to provide the author with all of the documentation necessary to ensure that he had a fair hearing, in particular its failure to inform him of the reasoning behind the Committee of Inquiry's guilty verdict, on the basis of which he was ultimately dismissed, in their combination, amounts to a dismissal procedure which did not respect the requirements of basic procedural fairness and thus was unreasonable and arbitrary. For these reasons, the Committee finds that the conduct of the dismissal procedure was conducted neither objectively nor reasonably and it failed to respect the author's right of access, on general terms of equality, to public service in his country. Consequently, there has been a violation of article 25 (c) of the Covenant.

7.3 The Committee recalls its general comment on article 14,[11] that a dismissal of a judge in violation of article 25 (c) of the Covenant, may amount to a violation of this guarantee, read in conjunction with article 14, paragraph 1 providing for the independence of the judiciary. As set out in the same general comment, the Committee recalls that "judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the Constitution or the law." For the reasons set out in paragraph 7.2 above, the dismissal procedure did not respect the requirements of basic procedural fairness and failed to ensure that the author benefited from the necessary guarantees to which he was entitled in his capacity as a judge, thus constituting an attack on the independence of the judiciary. For this reason the Committee concludes that the author's rights under article 25 (0) in conjunction with article 14, paragraph 1, have been violated.

8. 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 25 (c), in conjunction with 14, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including, appropriate compensation.

10. Bearing in mind that, by becoming a party to the Optional Protocol, Sri Lanka has recognised 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

---

[11] Human Rights Committee General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (article 14), U.N. Doc. CCPRIC/GC/32 (2007), paragraph 64.

to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive, within 180 days, information from the State party about the measures taken to give effect to the Committee's Views. The State party is requested also to give wide publicity to the Committee's Views.

DEMOCRACY, PEOPLE AND SOME BURNING QUESTIONS

Mathura P. Shrestha[*]

Introduction

In spite of decades of development programs, the people of SAARC (the South Asian Association for Regional Cooperation) in general remain largely deprived of a fair or even just share. The gaps within and between peoples and cultures are rising alarmingly. What are the ways out? I propose to examine critically some interrelated issues—democracy, peace, development, the role of UN systems and international cooperation.

1. Democracy and Empowered People versus 'Conditioned' Democracy

Everyone talks about democracy. Unfortunately, democracy at present and everywhere is severely restricted either in terms of how it is understood or its scope. People are forced to keep on expecting and imagining democracy out of the maze of myths and misinterpretations around it and its relations, as many self-proclaimed 'stakeholders of democracy' are engaged subtly in 'programming peoples into conformity to the logic of a system they perceived and desired' and in to 'sectarian and domesticated dialectics' of a rightist or a leftist in order to turn them into docile pawns. These stakeholders have in their superficial vows of committing themselves to democracy and human liberation become themselves prisoners of a 'circle of certainty' (of their self-centered roadmaps) within which they also imprison reality and the people in to old or new variants of a '*culture of silence*'[1].

Today in our region, the so-called 'upper social strata', comprising the ruling and exploiting class and their hangers-ons, hype democracy with many adjectives but few verbs in order to continue their traditional dominance in politics, socio-cultural spheres, and economics by coercing the people to become submissive to the status quo or to a 'fear of change' or 'fear of freedom'. The people are covertly encouraged to become virtually dependent on the system as dummy subjects to fatalism, to obligate hunger, conformism, passivism, consumption, obesity, and even escapism. They are forced in to a rat-race—one against the other—in an attempt to eke out their living; or struggle constantly to ascend 'higher in social strata', with little understanding of the real nature of content, purposes, context or impacts. For this, the exploiting class prescribes many 'dos and don'ts' to them for their domestication. They are conditioned to hate politics and to shun participation in it.

Colonialism is said to be dead and countries are labeled independent. Nepal is proud to have been never colonized. Nevertheless, colonialism persists among or haunts us all, and it continues to erode our selves, our countries and the region like a persistent virus. Our people continue to loose political and economic initiative and independence. Colonial culture was thrust upon us for centuries to dissociate soul, mind and body. As Ngûgî wa Thing'o puts it,

> Two forms of colonial alienation: ... an active (or passive) distancing of oneself from the reality around; or an active (or passive) identification with that which is most external to one's environment. It starts with a deliberate

---

[*] President, Physicians for Social Responsibility, Nepal (PSRN), and Coordinator, People's Health Movement, Nepal. This paper was prepared as a country-keynote to South Asian People's Assembly 2008 (People's SAARC 2008), July 18-20, 2008, Colombo, Sri Lanka.

[1] Paulo Freire. *Pedagogy of the Oppressed.* London: Penguin Books. 1972.

> disassociation of the language of conceptualization, of thinking, of formal education, of mental development, from language of daily interaction in the home and the community. It is like separating the mind from the body so that they are occupying two unrelated linguistic spheres in the same person. On a larger social scale, it is like producing a society of bodiless heads or headless bodies.

He further elaborates,

> The real aim of colonialism was to control the people's wealth: what they produced, how they produced it, and how it was distributed; to control, in other words, the entire realm of the language of real life. Colonialism imposed its control of the social production of wealth... But the most important area of domination was the mental universe of the colonized, the control, through culture, of how people perceived themselves and their relationship to the world. Economic and political control can never be complete or effective without mental control. To control a people's culture is to control their tool of self-determination in relationship to others'[2]

We have thus yet to defeat colonial mentality and culturally to transform our countries and societies as free and liberated.

In spite of promised prosperity with globalization and 'new-style liberalism', and of peace following the end of Cold War, the world instead is in 'the crisis of accumulation' with 'worsening social conditions for the great majority of nations and working classes'. 'Militarism of the world order' has been thrust upon us all along with the Gulf War raging since 1991. 'Democracy is either marking time or in retreat; it is everywhere under threat'[3].

Globalization and neo-liberalism have eroded the very essence of democracy everywhere, with ever widening gaps within and between nations, cultures and peoples. These make the rich richer and disproportionately powerful and the poor poorer and powerless. 'Globalization is a mere episode in the history of dominance of the rich industrialized countries over the poor ones; its parentage extends right up to the days of colonialism and imperialism'[4]. Even today, multinationals are profiting immensely in spite of the current global food and energy crisis, leaving the poor severely disempowered and deprived, and poor countries in serious crisis.

Another trend against democracy is the overbearing mentality of the middle-class, including intellectuals, human rights defenders and civil society leaders, who tend to think of them as custodians of the revolution and social transformation. They believed that 'they (the middle strata) could guide the "lower social strata" in an "orderly revolution". (This is a *prescriptive* mentality with a belief-system of trickle-down effects or spin-off benefits to those in lower strata). 'At least they did not shrink from mobilizing the masses at the grassroots when

---

[2] Ngûgî wa Thing'o. *Decolonizing the Mind – The politics of language in African Literature.* London: James Curry, or Harare: Zimbabwe Publishing House, 1986, Reprinted 1987: 28.

[3] Samir Amin. *Obsolescent Capitalism, Contemporary Politics and Global Disorder* (Translated by Patric Camiller). London: Rainbow Publishers Ltd, 2004: 9.

[4] See Editorials by Debabar Banerji (as Guest editor). *Primacy of the People over Medical Technology; Impact of Globalizatio on the Access of the Poor to the Health Services;* and *Struggle between Memory and Forgetfulness.* Khoj-Bin: Journal of Nepal Health Research Council 1998, Kathmandu; 2(1): 2-5.

agitating for the revolution; and on several occasions managed to mobilize them. The courage they (the people) displayed in launching a revolution was another characteristic which put them (the people) a cut above the bourgeois constitutionalists'[5].

Bhagat Singh, the legendry revolutionary, and martyr of India, envisaged democracy as 'a social order from which violence in all forms will be eliminated, in which reason and justice will prevail and all questions will be settled by argument and education... We must make it clear that revolution does not merely mean an upheaval or a sanguinary strife. Revolution necessarily implies the program of systematic reconstruction of society on new and better-adapted basis, after complete destruction of the existing affairs. ... In the future society ..., the communist society that we want to build, we are not going to establish charitable institutions, but there shall be no needy and poor, and no alms-giving and alms-taking'[6].

Some tend to interpret democracy in a limited sense of electoral process with periodic bouts of 'people's verdict'. No denying that electoral process is important. But democracy means, more than that, an active, conscious and responsible participation of all peoples, at all times, in all political, social, cultural, economic and ecological (from harmony in nature to human relations) processes from respective localities upwards to national, regional and world arena to transform these dynamically, according to *need-based philosophy*, and to construct *by* and *with* the people themselves. Without this, electoral process becomes susceptible to corruption, rigging and criminalization of all sorts. Democracy is all about *by* the people and *of* the people. The tendency to prescribe democracy *for* the people, as passive or lay mass, must be discouraged as the word *for* indirectly justifies different levels among the people – the providers and receivers.

That way the concept of so called 'Welfare State' becomes a logical mismatch in democracy, as all *basic human goods* or *needs* are inalienable human rights of all, the peoples, and all should have them without any sort of discrimination or exclusion. These are:

i) Food security, including nutrition, food-safety and food-culture

ii) Shelter

iii) Clothing, including rights to related cultural identity

iv) Education, including knowledge, information, talent development and creativity

v) Health, including safe water, sanitation and healthy lifestyles

vi) Social security, including right to respectful living with social justice and identity all through a life cycle every one

vii) Clean and unpolluted environment

viii) Productive employment, including work- and workplace-safety

ix) Transportation, including rights to travel without borders

---

[5] Hu Sheng. *Anti-imperialism, democracyand industrialization in the 1911 revolution.* (In) Hu Sheng, Liu Danian (Eds). The 1911 Revolution – A Retrospective after 70 Years. Beijing: New World Press, 1983: 17.

[6] Bhagat Singh. *Why I am an Atheist. With an introduction by Bipin Chandra.* New Delhi: National Book Trust India, (Saka 1929). Reprint: 2008, first published in June 1931, in *The People, the Weekly,* established by Lala Lajpat Rai and editor, Lala Faqir Chand.

x) Participation in political, social, cultural, economic, developmental and ecological activities

xi) Entertainment and recreation, including imagining and dreaming rights, and

xii) Human rights, according to international humanitarian laws.

'Health for All' or 'Education for All' should be as simple as the quoted words. The governing strategy should focus on all political commitments and social or moral responsibilities by all in the governments, including politicians, planners, service personnel, and people in UN systems and aiding agencies. Attempts to seek alternative definition amount to denial of these rights by deception. Human goods or public goods are owned by peoples for distribution according to justifiable needs without profit. The above-mentioned twelve basic needs are the elements of twelve essential levels of human living; and are therefore public goods, and not items subject to welfare or charity.

Day in and day out, the agents of exploiting class continuously campaign to depoliticize the people in order to monopolize the politics and governing structures for themselves and for their perpetual dominance in these. The politics is also the life-blood of the people, determining or even shaping all aspects of humans and humanity, including lives and living, and including the environment and non-human life. That way, politics is a common human good with broad responsibilities encompassing all creation, with a need to constant and dynamic development by the people themselves in ever more encompassing frameworks. In order to save democracy, we thus have to *advocate* the people *to love politics*. Politics, however, need to be spared of all trickery, conspiracy, manipulation and deception by exploiters, even if these are perpetuated in the name of politics itself, or of county or people. The practice of defaming politics, or alternatively, naming politics as attributes of conspiracies or foul plays, should be condemned, no matter from what quarter these deceptions comes. Politics is not a pack of gaming cards. It is the eyes, ears and voices of people, all inclusive, and the objective reflections of their minds and hearts, and of the communities they live in, both human and natural. It is high time for the people to take the initiative in politics.

2. Peace and demilitarization

Conflict is understood differently by different persons. Each individual tends to perceive a conflict differently at different times, depending upon their mood, situation and condition. Understanding of conflict moreover shapes an individual's decision and behavior. Thus, frequent dialogues and interactions on conflict are necessary to bring a more or less common and collective understanding of a conflict, its origin, root causes, historical trends, temporal development, existing and long-term impacts, and future perspectives to facilitate conflict transformations.

Conflicts and contradictions are inherent in any place, condition, society, group and time. The so-called times of peace or conflict are relative to a dynamic equilibrium determined by an ever-changing scenario in these. Hence, the logic of addressing or solving a conflict, face to face, with dialogue and communication of understandings! A conflict cannot be eliminated by force or wishful thinking. Peace, rather than confrontation or violence, is preferred by all, even by those engaged as parties to the conflict.

Many believe that peace is a precondition to sense of security, development, happiness and well-being. But inert or dead peace out of fear psychosis or forced conditions is no less injurious to people and society. *Forced peace* breeds fatalism, individual or social inertia,

general discontent and even crisis. People tend to loose interest in their political and social responsibilities. The clever and powerful persons quickly occupy the resulting void. Such peace is detrimental to individual or social progress and development. Such peace provides better spaces and opportunity only to those who rule, who exploit and who are socially better placed to divert resources at the expense of the majority, which is forced to become poorer and displaced. The inertia forces people to submit as more or less willing slaves of the ruling or exploiting classes. The cult of male dominance and other socio-cultural anomalies are the result of such inert peace. Inert peace ultimately breeds more violent forms of conflict. On the other hand, conflict, especially the armed conflict, is viewed as disrupting all benefits of peace and development. There may be too much loss of life, property, and physical, social and cultural infrastructure. As the conflict grows, peace recedes farther and further away from the lives and hopes of people in conflict. The losses may be too painful to measure. However, a suppressed conflict is not synonymous to a resolved conflict. If root causes are not addressed, they will be reborn in complicated and violent reincarnations that are rarely predictable and usually far wider in their destructive power and impact. Peace requires not simply ending conflict but confronting it as thoroughly as possible, particularly the conflict that underlies the ruling class's conception of peace. Aspect-blindness and inflexibility are deep rooted among the parties in conflict.

Conflict, if properly perceived and managed, brings about much needed revolution or transformation in political, social, economic, cultural and mental interfaces of peoples. These changes facilitate overall well being of a nation and its peoples, especially the poor, deprived, socially excluded, women and disabled. It gives fresh impetus to develop and progress, as most of the edifices generating inertia and inaction will be demolished. People will have opportunity to understand their failures and to think and react afresh as better informed and empowered persons.

Nepal's experiment with peace might appear tortuous and tiring on the surface. The people in all spheres, ages, geographic areas and cultures are actively and openly engaged in public debates and continue to participate in sociopolitical transformations. The transition period is often painful for many. But people of Nepal are confident in what they themselves are constructing with hope and belief that this is their time, won after optimal sacrifices. They are also confident in neutralizing any possible ploys coming from internal and external reactions.

I believe that *gun culture* is bad for peoples and countries. Some holders of guns continue to glorify their exploits and parts then and now. Gun makes the holders headless demons. But in Nepal, people were prime movers in both the First and the Second People's Struggle for Democracy of 1990 and 2006. People from all cultures, areas, professions and ages rallied actively for the call to change and make peace with sociopolitical transformations. Real credit goes to the people in forcing all major parties to align themselves for dialogue and to forever do away with monarchy and feudalism. It is because of such participation of people in all spheres of political and social life of the country, that the gun culture in Nepal has become more or less irrelevant. Voices of peoples are beginning to become more powerful than guns and bombs. We call this in Nepali '*janataka boli golibhanda shaktishali hunchhan*'. But for sure the course ahead will not be smooth. The people are ready for all challenges.

3. Development paradigm

The Russian anthropologist and world authority on peasantry Teodor Shanin wrote,

> The strategy of progress/development/growth, has been offering blank cheques to repressive bureaucracies, national and international, to act on behalf of science and to disguise as objective, matters which are essentially political, taking away choice from those influenced most by such decisions.
>
> As often happens with overarching conceptualization on retreat, they are not necessarily replaced at once by a new vision. What has been coming instead ... were various forms of capitulation of intellectuals – a view that nothing can be made comprehensive any more. ... Those who find the unmasked result of the idea of progress reprehensible depart in to private lives, while "the masses" can proceed with life of a consumer society of goods and entertainments, of fears of incomprehensible global "markets" and global "unemployments" while society's centre becomes increasingly empty of human content[7].

Development is imprisoned within the parameters of a few indices of economic growth, per capita GNP, CPI, etc. for the convenience of a few in ruling classes. Too little is done or talked about appropriateness of the development programs in relation to real needs, affordable access to all, including distribution, related social justice, environmental impacts, social values and cohesion, and meaningful human livings. In turn, along with the development, common human and natural goods including knowledge, information, wisdom, nature and lives, human and non-human, are increasingly imprisoned or restricted for profit. For the same reason, basic human needs are commoditized and biological attributes like tastes, sex, preferences etc. are commercialized using aggressive marketing practices aimed at undermining critical and rational thought and embanking on misinformation or disinformation without a social or ethical responsibility.

Taking lessons from other countries is good, but trying to implant these lessons, as it is, without heeding sociopolitical and cultural conditions has been suicidal. Our course of action is to be determined by the needs of our peoples, their social and natural environments, and the country, for which ongoing research with active participation and final say of the people and their communities becomes mandatory.

The governments and the peoples in the region should learn that our development needs are our own; that these should be solved by ourselves (that is, by governments taking the people in confidence and people taking their governments into hand); and that we can solve our problems ourselves.

4. The UN Systems

The UN system in its attempts to appease global superpower centers, International Financial Institutions (IFIs), and other forces of capitalist globalization have drifted far away from the spirit of their constitutions and responsibilities. These together are subtly prescribing a formula of private-public mix to promote the agenda of IFIs including WTO, WB, IMF and

---

[7] Teodor Shanin. *The Idea of Progress*, November 1995, http://old.msses.ru/shanin/idea.html as retrieved on 26 May 2008.

then later work in tandem with transnational corporations for profits at the expense of the people. This way disparity between the poor and rich in every country, including the so-called developed countries, and between international power centers and local communities, human and natural, is increasing with devastating rapidity. Their attempt to deny the poor and poorer countries scientific information and technology and to tear communities from their natural and social heritage, through a maze of patents and Intellectual Property Rights (IPR) is criminal, with the robbers making themselves into policemen and magistrates. The attempt tends to imprison sciences, knowledge, civilization and nature – the products of human endeavor and natural evolution. These however can never be imprisoned[8]. UN systems at present are severely restricted due to the illusion, they managed to harvest, of correlation between income growth, development, health and quality of life. 'In the developed world, it is not the richest countries which have the best health'. Richard Wilkinson, the renowned researcher, found that 'the scale of income difference (including disparity in material wealth) and the condition of a society's social fabric are crucially important determinants of the real subjective quality of life among the modern populations'. Disparities (relative or absolute) precipitate different degrees of breakdown in 'social cohesion', and resulting 'stressful social hierarchies predispose to poor health among the troops of baboons as well as human societies'. In addition to disrupted psychosocial pathways there is increasing evidence... that 'chronic stress can affect endocrine and immunological processes' grossly afflicting health and well-being of populations[9].

'Back in 1942, John Maynard Keynes argued that the War (the Second WW) itself was partly a result of unregulated free trade and insufficiently regulated cut-throat competition for the same markets, and that it was therefore imperative that a more carefully internationally monitored trading system be established'. He was the chief architect of the original concept of World Bank (previously, International Bank for Reconstruction and Development), IMF and WTO in Breton Woods in the US state of New Hampshire, and he wanted these institutions to be UN bodies to ensure equity in international trade with international currency (Bancor currency). Roosevelt, the then US president, eventually vetoed the idea 'in order to protect US trade interests'. The WTO was eventually set up in 1995, in such a way as to embrace US control over global trade[10]. Susan George critiqued the historical background and wrote, 'If we could resurrect Keynes, *another world really might be possible*'[11].

5. International Cooperation

International aid or assistance should not, in any way, force donor-driven culture at the expense of development of the people in a real sense. One part of an interlinked planet cannot be healthy, developed or affluent if other parts are forced to remain sick, poor, hungry and underdeveloped. Thus international aid is, in a way, a public resource, or public good. Hence it is to be used according to a need-based development philosophy, again taking the people into confidence to stimulate their informed participation, initiative and action.

Unfortunately foreign aid is often used consciously or unconsciously to subvert the sovereign

---

[8] Mathura P Shrestha. Our Lives are not for Sale! Human Values and Wisdom can never be Imprisoned. *Pijuano PHA2 Daily Alert*, Cuenca- Ecuador, No.5, 21 July 2005: 1-2.

[9] Richard G Wilkinson. *Unhealthy Societies – The Afflictions of Inequality*. London and New York: Routledge, 1997 Reprint.

[10] Theódore H. MacDonald. *Sacrificing the WHO to the Highest Bidder*. Oxford and New York: Radcliffe Publishing, 2008. See Chapter 1, The UN: Its Origins, Problems and Contradictions. Pp 1-39; and Chapter 2, Selling Off the UN to Neoliberalism, Pp 40-64.

[11] Susan George. Alternative Finances: The World Trade Organization we could have had. *Le Monde Diplomatique*, 17 January 2007: 6-7.

rights of people, communities and independence, and to colonize minds and the intellectual sphere, along with cultural, social and economic dominance. If foreign aid is not taken as a token of friendship to the peoples of our Region by the peoples of donor countries for holistic and real socio-cultural and economic development and independence in a transparent and accountable manner, then it will only breed corruption of all kinds and forms, with syndromes of perpetual dominance of some and dependency of many. Here, I appeal to peoples of donor countries and those in the UN system to ponder the real objectives and intricacies of aid or development assistance and to study seriously the impacts and short or long term consequences of making judgmental prescriptions based upon experiences of developed or other countries for the Region's peace, development, and transformations in political, social, cultural, economic and ecological aspects of peoples and the country.

As no other country of the world can be like Nepal, Nepal too cannot be like any other country as such. Before the inflow of foreign aid Nepal began in the 1950s, Nepal had already begun to experience a great upsurge of dynamism and internal initiative, all of which were squashed, dissipated and terribly twisted and distorted with the onset of foreign aid. Thus all of us should save ourselves from becoming prey to 'aspect blindness' that tends to imprison us into our preferred belief systems or narrow horizons, and turn blind eyes to other's culture, resources and potentialities. The economic or capitalist globalization is essentially a product of such aspect blindness. That is why the globalization accelerated gaps between and within countries and peoples; undermined sustainable and meaningful development and freedom of peoples and nations; deteriorated global environment making the peoples and countries slaves to consumption and wasteful energy use ('energy-slaves' in the words of Ivan Illich); compromised standards for national independence; and tainted social responsibilities of users and professional servers.

Conclusion

The current and main task of the People's SAARC is to advocate strongly, or even force government machineries, political parties, bureaucracies, professionals and professional bodies to learn to speak the languages in the hearts and minds of the peoples and behave accordingly, and according to the principle of 'One for all, and all for one'. They also need to think and behave according to the principles of 'one really has none to be partial to and at the same time one has all as one's own including one's foes and adversaries' to move ahead.

Lastly, we all need to recognize and appreciate the new way of inauguration of this South Asian Peoples' Assembly with drumbeats by *Dalits* of Sri Lanka and Kerala, all dressed in black. In Nepal too *ta*, the central theme of the beat, is called 'soul of music and mood'. The black color is auspicious in Nepal too. Black is the color of our soul and of the space which holds our universe and our planets, and along with that all human and other biotic community, and non-biotic world. It also absorbs all colors. Thus, the color black contains in it all colors. We thus have to reject Western notion of incriminating black as bad or a wrong color. Hence we should not use black flag of black bands as symbol of bad or of what we want to reject. Black is really beautiful and inclusive. I wish that I could bring a troupe of Nepali *Jyapoo* (*Indigenous Newa ethnic community in Nepal with rich history, culture and tradition of Nepal*) women drummers, all in black, in this and in coming assemblies of the future.

BOOK REVIEW – 'SRI LANKA - THE RIGHT NOT TO BE TORTURED: A CRITICAL ANALYSIS OF THE JUDICIAL RESPONSE' BY KISHALI PINTO-JAYAWARDENA AND LISA KOIS

Reviewed by Sarasu Esther Thomas*

The Study on 'Critical Analysis of the Judicial Response to Torture in Sri Lanka', generated by the Civil and Political Rights Programme of the Law & Society Trust, is based on the findings of a year-long research study of cases from 2000-2006. This is yet another contribution of the Law & Society Trust which has brought out studies examining various aspects of human rights, especially in regard to critiquing the role of different State agencies in protecting human rights of citizens in Sri Lanka. The authors are well known for their work on civil and political rights and for their editing of similar publications.

As the title of the Study states, *judicial responses* are looked at from two Courts—the Supreme Court and the High Courts[1]. As the book is targeted towards a broad audience, it begins with a concise and clear overview of torture provisions covering international standards as well as international perceptions of Sri Lanka's record on torture. This sets the basis for evaluation and comparison throughout the book.

The first Part of the book dealing with the Supreme Court is divided in to four sections covering a broad overview of Article 11 judgments, analyses of joint categorizations, patterns of torture noted and categorization of violence. While not discrete categories, they help a reader to better understand what would otherwise be a mass of cases.

The scope of the Study in this Part is confined to an analysis of the decisions delivered by the Supreme Court under Article 11, sometimes with other provisions. The materials examined are not restricted to practices of torture by Police officials, but also by Prison and Military personnel. Too infrequent a concern for victims and paltry compensation awards are constant motifs. There is a detailed statistical analysis of various combinations of constitutional provisions with which Article 11 was invoked before the Court. However, it is felt that it is perhaps too small a sample size to display clear trends—a caution which is recognized by the authors.

While the number of cases are not as many as should be when it is well known that torture is a prevalent problem, this is possibly because of the difficulty in accessing case files, which difficulty may not be easily apparent to a non Sri Lankan reader. Since few cases are reported, it is a challenge to access data, a constant barrier which is repeated time and again in the book.

It however does not detract from the importance of this book that permission to access case files was not given, or was tardy or was given only in some cases. Compounded with this is a unique problem faced at the High Court stage where, even though a number of acts did constitute torture and even though police officers and others were held guilty of crimes, torture legislation was not used in the bulk of the cases. The cases where they have been used have been analysed thoroughly.

---

* Assistant Professor, National Law School of India University, Bangalore. Her areas of specialisation includes Human Rights Law and Family Law.

[1] In case of the High Courts, prosecutorial and investigative processes where relevant have also been examined.

Marshalling facts, procuring reports and analyzing them to draw trends and conclusions is a daunting task in this background. The authors of the Study have been cautious and have refrained from drawing conclusions, where no clear pattern is visible. Yet, prevailing socio political realities have been considered to explain some of the phenomena which the data do not adequately reflect. The fact that abuse occurs in a situation of powerlessness with no access to legal counsel or magistrates is one such reality.

There is also throughout the paper, an effort to examine the more cruel effects torture has on different sections of society. Besides looking at common ways of classifications, e.g minors/children and ethnic minorities, other classifications such as professional status and geographical locations of cases filed are the other snapshots which are useful. For instance, it has been seen that the majority of cases were filed by petitioners living within a 30 mile radius from Colombo[2]. Compensation amounts are compared as are the opinions drafted by various judges[3].

A decrease in cases from 2005 to 2006 indicates (to use the words of the authors), "the Supreme Court in retreat".[4] This trend bodes ill for the future of Article 11 jurisprudence in Sri Lanka. Judicial reluctance to use the term 'torture' despite findings of violations of Article 11 comes as a surprise. Non publication of many Supreme Court judgments makes precedent unreliable when it could play a major role in important substantive and procedural norms, particularly in looking beyond the plain meaning of the Constitution and recognizing both named and unnamed (implied) rights and affirming doctrines of vicarious liability and command responsibility of superior officers.

A work such as this would be incomplete without at least a few detailed case studies. The reader finds this in the analysis of the High Courts' response in Part Two of the book. Sri Lanka acceded to the Torture Convention in 1994, subsequently adopting legislation referred to as the CAT Act.[5] The Study makes the interesting observation that the Act is broader than the Convention as the *mens rea* (criminal intention) requirement is broader[6] as the basis on which to build the argument that Officers-in-Charge of police stations should be indicted for offences relating to torture along with their subordinates[7].

Despite this, there have been only three cases of convictions so far in fourteen years. Why this is so has not been completely explained; the paucity of cases, in the first instance, is also unexplained.

The cases where convictions have, in fact, been entered in to, point to the commonplace nature of torture even for petty crimes and reiterated telling features earlier discussed of the victims and perpetrators of torture. The best known among the cases discussed is probably that of Nandani Herath which drew international and national condemnation and demand for action in an instance where a woman political opponent who lost the elections was brutally tortured and sexually abused at the police station in the electorate she had contested from. Another controversial case was that of Gerard Perera where the witness was shot dead during the progress of the case and before his evidence could be taken on record.

---

[2] at page 14.
[3] at pages 15-19 and at page 23.
[4] at page 29.
[5] Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment Act No. 22 of 1994.
[6] at page 65.
[7] Ibid.

It would have been useful to also discuss strategies at this juncture on following up on these very troubling cases. While civil society has taken the matter up, for instance pressing for appeal in the Gerard Perera case, there is little that can be done if the Government does not comply.

Perhaps it is partly to address this issue that the Study tries to examine alternate remedies in international law in the third Part of the Study. Indeed such a chapter at first glance seems out of place in a document meant to deal with the responses of the domestic judiciary. However, it is an alternative because the natural mechanism—the domestic judiciary—has not proved effective enough in addressing cases on torture. A review of cases of torture originating in Sri Lanka and taken up by the United Nations (UN) Human Rights Committee is a telling reflection on the state of Sri Lanka's judicial system during the period under review in the Study. The response of the government that implementing these Views would be construed as interference with the judiciary and subsequent non implementation of the Views has rendered the individual complaints mechanism meaningless.

Being denied a remedy on both counts, although in law both are available, makes a mockery of the rights of victims of torture as well as the institution of the judiciary which is, in many ways, the last hope of citizens. Assessed from this perspective, there is no doubt that this is a crucial Study in regard to the analysis of judicial responses to the right to be free from torture in Sri Lanka. If the serious anomalies and failings flagged by the Study are not tackled expeditiously, great detriment may be caused to the country's legal system itself. Addressing this is the challenge for future work and research in this area. The Study is also instructive for similar studies across South Asia where the prevalence of torture is equally problematic as it is in Sri Lanka.

Subscriptions

The annual subscription rates of the LST Review are as follows:

Local:	Rs. 2,000.00 (inclusive of postage)	
Overseas:	South Asia/Middle East	US$ 40
	S.E.Asia/Far East/Australia	US$ 45
	Europe/Africa	US$ 50
	America/Canada/Pacific Countries	US$ 55

Individual copies at Rs.220/- may be obtained from the Trust, No. 03 Kynsey Terrace, Colombo-08, and BASL Bookshop at No.153, Mihindu Mawatha, Colombo-12.

For further details, please contact;

Law & Society Trust
No. 3 Kynsey Terrace, Colombo 08, Sri Lanka
Tel: (+94)-11 2691228 / 2684845
Fax: (+94)-11 2686843
Email: lst@eureka.lk

Now Available

SRI LANKA: THE RIGHT NOT TO BE TORTURED
A Critical Analysis of the Judicial Response
KISHALI PINTO-JAYAWARDENA AND LISA KOIS

This Study investigates the judicial response to the right to freedom from torture and cruel/inhuman & degrading treatment in Sri Lanka. Its broad focus is on an examination of the judicial response of the Supreme Court to alleged infringements of Article 11 during the years 2000-2006 and, an examination of the judicial response of the High Court to prosecutions under the Convention Against Torture and Other Inhuman and Degrading Punishment Act No 22 of 1994 and the prosecutorial and investigative process relevant thereto.

The research interrogates why practices of torture, cruel, inhuman or degrading treatment are yet so commonly resorted to in Sri Lanka despite stringent constitutional and statutory safeguards. Some lacunae are easily identifiable. The fact that enforcement authorities, (ie; the police), do not take judgments of the Court seriously is an identified problem. Disciplinary action is not imposed in regard to individual police officers found culpable of human rights violations. Oversight agencies such as the Human Rights Commission of Sri Lanka and the National Police Commission have been demonstrably ineffective in checking this trend. In recent times, their independence and integrity have been seriously compromised as a result of appointments of their members being made by the President without the constitutionally mandated approval by the Constitutional Council as stipulated in the 17th Amendment to the Constitution.

In a context where heightened conflict has made grave human rights violations a common occurrence, the absence of effective deterrents in regard to the right to freedom against torture is deeply worrying. It is our hope that this Study would forge a common consensus as to the extent of this problem and lead to new initiatives in this regard.

From the Preface

Price: Rs. 350/-

Law & Society Trust

3, Kynsey Terrace, Colombo 8, Sri Lanka
Tel: 2691228, 2684845 Tele/fax: 2686843
E-mail: lst@eureka.lk Website: http://www.lawandsocietytrust.org.