SRI LANKA:

TOWARDS A CONTEMPT OF COURTS LAW

Edited by:
Basil Fernando
Shyamali Puvimanasinghe

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Asian Human Rights Commission
19/F, Go-Up Commercial Building
998 Canton Road
Mongkok
Kowloon
Hong Kong
Telephone: (852) 2698-6339
Fax: (852) 2698-6367
E-mail: ahrc@ahrc.asia
Web site: www.achrhk.net/index.php

Edited by: Basil Fernando and Shyamali Puvimanasinghe

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CONTENTS

COURTS ARE NOT FUNNY PLACES

Basil Fernando

The state should not treat courts as a funny place. The powerful sectors of society should also not treat the courts as a funny place. The bureaucracy should also not act in that manner. Particularly the law enforcement agencies should not treat courts as funny places. Similarly, the citizens also owe an obligation to treat the courts with due seriousness; it must also be said that the judiciary as a whole, or its individual members should not act in any manner to create the impression that the courts are a funny place. These are considerations valid for all countries that consider themselves democracies. Of course, under authoritarian systems the courts are always reduced to being a funny place.

Due seriousness towards courts emerges from the following factors:

The Constitution

The ultimate test as to whether the court is given a significant place or not, is the constitution of a nation. If the

constitution recognises the separation of powers and provides for the functioning of courts in order to fulfill their task as a separate branch of the government, the nation is then provided with an opportunity to have a judiciary that can perform its function in such a way as to play a significant role in the lives of the people of the country. However, if the constitution itself provides impediments for the functioning of an independent judiciary, then the role of the judiciary will be undermined. Thus, under those circumstances, the judiciary cannot really act as a judiciary is expected to act within a democracy.

The impediments that can be created by a constitution to the independence of a judiciary are the various types of impunities that place some individuals above the law. This simply means that these individuals are not under the jurisdiction of the courts. Generally those who get such impunity are the executive head of the state, ministers and military generals and the like. They are also the group of persons who exercise the greatest extent of power within a country. If these persons have impunity virtually this means that the courts can have jurisdiction only on people who exercise less power. This imbalance itself makes the claim of the independence of the judiciary hollow. When the entire nation gets the impression that the judicial power exists only over less powerful sections of society the people's own perception of the significance of the judiciary is reduced. Such impunities are usually granted by the constitution directly, for example, by making provisions that the executive head of the state or any other person cannot be brought

before court. A constitution can also give such impunity indirectly by creating provisions for unlimited powers to suspend the law by way of emergency laws, anti terrorism or special laws. Through such laws many persons who exercise power can be treated with impunity, directly or by indirect means.

Equality before the Law

Powerful sections of society should not enjoy any possibility of being treated differently by the judiciary. Huge business corporations or even feudal lords can exercise power in a way to prevent the judiciary from dealing with their affairs on the basis of equality before law. Here the complex link between the law enforcement agencies and the independence of the judiciary needs to be noted. A law enforcement agency, such for example, the police, who either act with partiality towards the powerful or simply lack the legal power and resources to deal with crimes that the powerful sectors engage in, can practically frustrate the functioning of an independent judicial system. Thus, the incapacity of law enforcement agencies to deal with corruption virtually makes the most powerful groups in society, as well as individuals, being placed above the law. Under those circumstances the courts are being disabled from exercising their power over many areas of life within a country. Naturally people perceive this disability on the part of the judiciary and that affects their regard for the judiciary negatively.

Viability of Public Institutions

The strength of a state, in fact, is the extent of the efficiency and effectiveness of the basic institutions of the state. Judicial independence cannot be separated from the independence that is required from the nation's basic institutions. For example if the civil service is inefficient or corrupt then almost every aspect of the work of the courts will be affected thereby. Another example is that if the electoral process cannot take place in the manner required within a democracy, either due to the limited powers of the elements of the bureaucracy involved in the elections, or if the state machinery is made to act in a manner to favour the ruling regime or to maintain a climate of violence, then there is hardly anything that the judiciary can do to make a significant change in that situation. Under those circumstances the judiciary can be reduced to the position of a powerless spectator. Of course in worse situations the judiciary or some part of it can contribute to this state of neglect created by the bureaucracy. Thus, the problem of the politicisation of the bureaucracy seriously threatens the independent functioning of the judiciary.

Citizens' Respect for the Courts

The citizens of the country owe an obligation of respect to the courts because it is that respect which creates the environment for the rational discourse that is expected in the judicial process. If, for example, due to cultural or other reasons people prefer to settle disputes by violence or by arbitrators who can be brought under the pressure or favour

of some persons, then the citizens themselves prevent the emergence of an independent judiciary. If the feudal cultural habits favour the treatment of human beings outside the framework of equality such a society may find it difficult to create an independent judiciary. In this respect south Asian societies are handicapped by centuries of enslavement to the caste system. The social and psychological impact of caste is even now quite strong. Within that system disproportionate punishment is a norm. This means that the rich and the powerful are treated leniently before the law and the poor and the powerless are treated harshly. Such cultural habits can also be a serious obstacle to the evolution of the judiciary as an independent institution.

Judiciary's Capacity to Maintain High Standards

The judiciary as a whole and each member of the judiciary owes serious obligations if the judiciary is to enjoy the respect it needs to serve the purposes of a nation. They owe, above all, to maintain the highest levels of rational discourse in all matters relating to the judiciary. In fact, the only real strength of the judiciary, as compared to other branches of the government, is the capacity to maintain the highest standards of rational discourse. In all rational discourse tolerance and humour are essential components. Arrogance and all sorts of petty considerations obstruct rational discourse. Of course, corruption and deliberate abuse of power are the very opposites of rational discourse and instead of respect such behaviour creates contempt and cynicism.

Role of Opinion Makers

All these are factors that need the consideration of opinion makers in any country who work towards a law on contempt of court, as an essential component of the independence of the judiciary. It is the consensus on what kind of judiciary we need to have in the country that can create the environment for a proper law on contempt of court. The state must have the political will to make the independence of the judiciary a reality. The society must have the will to push the agenda of the democratic empowerment of the judiciary as a central aspect of the life of the nation.

On this, lessons can be learned from the lawyer's movement of Pakistan. This is one of the greatest movements to have emerged in the entire history of south Asia in trying to create political consensus on the significance of justice. It is only on the foundations of justice that the independence of the judiciary can be grounded. When the foundations of justice are shaky, it is unrealistic to expect the judiciary to be strong.

CONTEMPT OF COURT - THE NEED FOR SUBSTANTIVE *CUM* PROCEDURAL DEFINITION AND CODIFICATION OF THE LAW IN SRI LANKA

Kishali Pinto-Jayawardena and
Dr J de Almeida Guneratne, P.C.*

Introduction: The Modern Context of Contempt of Court

Freedoms of conscience, expression, assembly, association and political participation are inherent elements of the type of society ideally contemplated by the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka, as reflected in the particular constitutional provisions relating to the same. These freedoms are specifically promoted in international instruments on human rights to

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* *Analysis engaged in by the writers in their capacity as senior legal consultants for the Law Review Project of the National Human Rights Commission, 2002-2004. The research paper and draft Act formed part of the documents submitted by the National Human Rights Commission to the Parliamentary Select Committee on Contempt, which sat in late 2003. The analysis was published by the National Human Rights Commission in December 2004.*

which Sri Lanka is a signatory, including the International Covenant on Civil and Political Rights (ICCPR).

The above freedoms underlie the importance of public scrutiny of the processes of governance, which in present day thinking, encompasses the administration of justice. The primary justification for public scrutiny of the judiciary is that it constitutes a democratic check on judges who are not elected but who exercise public power. Importantly, this is a method of scrutiny that is appropriate where impeachment and removal from office of a judge under the Constitution is a remedy resorted to only in extreme situations in most countries, normally amounting to incapacity, gross incompetence or gross misconduct on the part of the judge.

International human rights law has maintained that when balancing rights of free speech with the principle of the authority of the judiciary, the question should be whether the prohibition is strictly necessary in a democratic society.[1] The freedom to debate the conduct of public affairs by the judiciary does not however mean that unwarranted attacks on the judiciary as an institution, can be condoned. At all times, comment should be fair and without personal bias.

Salient Features of the Law of Contempt in the United Kingdom and India

Section 2(1) of the UK Contempt of Court Act (1981) states that there should be a substantial risk that the state-

1 The Sunday Times v United Kingdom, *Judgement of the European Court of Human Rights, 26 April, 1979, Series A. No 30, 14 EHRR 229*

ment was intended and was likely to interfere with the administration of justice.

This Act incorporated the recommendations of the Phillimore Committee on Contempt of Court, (1974) and brought the UK law into line with the European Convention on Human Rights, providing for particular defences to contempt such as innocent publication and distribution etc.

In addition, the Act gave effect to the common law principle that a fair and accurate report of legal proceedings published in good faith could not constitute contempt of court. The Phillimore Committee recommended that this principle should be subject to no exceptions. The Committee's recommendations reflected the vigorous debates prevalent in regard to the proper balance that ought to be maintained between two compelling and equally important interests.[1a]

Relevant in this regard is the following—and particularly enlightened—caution;

> *"(This) is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter.*
>
> *Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor*

1a *see for example,* AG v Times Newspapers Ltd, *(1974) AC 273, 1973 3 AER, 54, HL and* Ambard *vs.* AG *for Trinidad and Tobago (1936) AC 355(1936) 1 AER 704 at 709 (per Lord Atken)*

will we use it to suppress those who speak against us. We do not fear criticism not do we resent it. For there is something far more important at stake. It is no less than the freedom of speech itself.

It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment on matters of public interest.

Those who comment can deal faithfully with all that is done in a court of justice. They can say we are mistaken and our decisions erroneous, whether they are subject to appeal or not. All we ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to those criticisms. We cannot enter into public controversy, still less political controversy. We must rely on our conduct itself to be its vindication."[2]

Similar principles are contained in the Indian law relating to contempt of court following the Report of the Sanyal Committee, which considered the working of the old 1952 Contempt of Court Act and found it unsatisfactory in its substantive contents. Thereafter, the 1971 Contempt of Court Act was enacted, 'harmonising as far as possible the interests of the individual in exercising his or her freedom of expression and the interests of the admin-

2 *Lord Denning in* Regina *vs.* Commissioner of Police of the Metropolis *(1968 2 QB, 150 at 154)*

istration of justice within the framework of the Republican Constitution."

The 1971 Act, (in Section 5), provides expressly that fair criticism of judicial acts does not amount to contempt and stipulates also the defences of innocent publication/distribution. It provides moreover that no sentence should be imposed for contempt unless the act substantially interferes with the administration of justice.

Crucially, (and contrasted to the UK Act of 1981), the Contempt of Court Act in India not only prescribes a minimum sentence for contempt but also lays down an exhaustive procedure for contempt hearings. Thus, an accused person is furnished with a charge and evidence is heard on the charge. In addition, Section 14 of the Act provides a right, on appeal and if it is practicable and in the interests of proper administration of justice, to be heard before a different court than the court, which the alleged contempt occurred.

Indian judges have generally dealt with the issue of contempt in a liberal manner, asserting that –

> *"even intemperate and extreme statements do not amount to contempt because they carry within them their own condemnation and no one would attach importance to them as they would be dismissed as the ravings of a crank...".*[3]

3 *Mass Media Laws and Regulations in Sri Lanka, 1998 (2nd Ed.), Asian Media Information and Communication Centre, (AMIC), Singapore, at page 29*

The necessary criterion for contempt to be found is that there must be a substantial likelihood of interference with the due administration of justice.

Again, in the case of *sub judice*, the test is whether there is a substantial likelihood of prejudice to the outcome of the case. Courts in the United Kingdom have declared that there must not be gagging of *bona fide* public discussion in the press, of controversial matters of general public interest, merely because there are in existence contemporaneous legal proceedings in which some particular instance of these controversial matters may be in issue.[3a]

Dealing with refusal to disclose sources of information, which is an issue particularly dear to a journalist's heart, the prevalent UK law prohibits courts from ordering media personnel to disclose confidential sources except when "disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime." The greater the legitimate public interest in the information which the source has given to the journalist, the greater would be the importance of protecting the source.[4]

The Sri Lankan Case Law Relating to Contempt

Unlike in the United Kingdom and India (and quite apart from the jurisprudence of the United States on these issues which concedes an even greater latitude to freedom

3a Maxwell v Pressdram Ltd. *(1987) 1 All ER 656, also,* Secretary of State v Guardian Newspapers Ltd. *(1985) AC 339, 1984 3 AER 601, HL*

4 Attorney General v English *(1983) 1 AC, 116, also* AG v Times Newspapers Ltd, *(1974) AC 273, 1973 3 AER, 54, HL*

of speech), Sri Lankan law on contempt of court has effectively resulted in a 'chilling' of the freedoms of speech, expression and information on matters of public interest.

In the first instance, what amounts to contempt has been subjected to differing interpretations by the courts, the majority of which have inclined towards conservative views. This has had an inevitable impact on public discussion of vital public interest issues due to fears that journalists or citizens voicing their opinions on particular judgements of the Court or with regard to pending adjudications, will be cited for contempt.

Early cases in Sri Lanka concerning contempt of court and the press in particular, were fairly straightforward with regard to the question as to whether contempt should indeed, have been found. Thus, *In the Matter of a Rule on De Souza*[5] the deliberate and wilful publication of false and fabricated material concerning a trial held in court, calculated to hold the court or a judge thereof to odium and ridicule was ruled as amounting to contempt of court.

In a subsequent case, an article which imputed to the judges a serious breach of duty by taking an unauthorised holiday by going to race meets and thereby contributing to arrears of work, was ruled to be contempt of court.[6] In this case, Abrahams CJ opined that;

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5 18, NLR, 41
6 39, NLR, 294

"It would be thoroughly undesirable that the press should be inhibited from criticising honestly and in good faith, the administration of justice as any other institution. But it is equally undesirable that such criticism should be unbounded."

A far more extreme rationale was evidenced in the mid seventies when a deputy editor of the Ceylon Daily News was sentenced for contempt when, commenting on an incident where a witness who had appeared in bush shirt and slacks before the Criminal Justice Commission (Exchange Control) had been ordered to return to give evidence properly attired, he wrote that such attitudes were not in keeping with the new legal trends of the day. The CJC ordered six months imprisonment for the deputy editor as well as a day's imprisonment for the acting editor of the paper.[7]

In another context altogether, the case of *Hewamanne v Manik de Silva and Another*[8] also illustrates unduly restrictive judicial attitudes. In this case, a divided bench of the Supreme Court dismissed *inter alia*, the argument that what constitutes contempt must be reviewed and modified in the light of Articles 3 and 4 of the Constitution which vests legal and political sovereignty in the people and consequently gives the people the right to comment actively on the administration of justice. Part of this argument that was dismissed was the contention that in any case, developed jurisdictions and

7 *The Ceylon Daily News, 6 June, 1974. The former became seriously ill as a result of the incarceration and had to be released prematurely.*

8 *1983, 1 SLR, 1*

in particular, courts in the United Kingdom have, in recent times, allowed greater latitude to the public to criticise judges and the administration of justice.

In delivering the judgement of the majority, Wanasundera J. preferred to depart from the developing modern law that strove to balance the rights of due administration of justice and freedom of speech, reasoning on the contrary, that;

> *"the law of contempt ....would operate untrammelled by the fundamental right of freedom of speech and expression..."*

He went on to add that, (subjecting the judiciary to public discussions);

> *"....would engulf the judges and they would find themselves in a position where they would be directly exposed to the passing winds of popular excitement and sentiment..."*

In finding justification for these views, (in a somewhat unfortunate reference), the majority relied on a decision from a wholly different age (McLeod's Case, 1899) where a distinction had been drawn between the United Kingdom and 'small colonies consisting primarily of coloured populations', the Court warning meanwhile of the dangers of indiscriminate use of decisions of western countries having their own social milieu and reflecting the permissive nature of their societies.

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9 1991, 1 SLR, 134

The Sub-Judice *Rule*

The *sub-judice* Rule is an issue that is highly relevant to public discussion and publications in Sri Lanka. The contentious nature of this Rule is very well illustrated in a fairly recent case[9] in which a provincial correspondent of a Sinhala paper, the 'Divaina', sent a report of a speech made by a member of Parliament in the opposition at a time when the presidential election petition was being heard, in which the latter said that

> *"the petition had already been proved and if the petitioner did not win her case, it would be the end of justice in Sri Lanka..."*

Contempt proceedings were instituted against both the journalist and the editor. Though the latter pleaded guilty, the former took a no-guilt stand, contenting that he had merely transmitted the contents of the speech as was his duty as provincial correspondent, that he had no intention to prejudice the outcome of the election petition and that the speech in question was solely political and that the readers of the papers would take it in that context.

The Court, however, rejected this contention on the basis that the article insinuated that the judges had already made up their minds, with the effect of possibly deterring potential witnesses from coming before court. The decision in this case ran counter to the test of 'substantial likelihood of prejudice', preferring instead a far more fluid determining as to whether statements might or were likely to result in prejudice.

A succinct analysis of the decision in the *'Divaina' Case* put the matter well at that time;

> *... is the exclusive judicial function of the Court to determine cases really usurped by an unbalanced and patently partisan opinion expressed by some politician? I cannot believe that is so. Is the expression of such an opinion really a prejudgement of the pending case? If that be so, then in every home and on every street corner every day, thousands of contempts will be committed...*[10]

Disclosure of Sources

Prevalent Sri Lankan law is to the effect that a court has the authority to order disclosure of sources if it thinks necessary, which principle was out to the strict test in two recent cases where indictments were filed against two newspaper editors on the basis that the newspapers had criminally defamed President Chandrika Kumaratunge. [11]

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10 Freedom of Expression and Sub Judice, *Lakshman Kadirgamar, P.C., OPA Journal, Vol. 15, 1992-3, see also in same publication, a comment by HL de Silva P.C. on* Free Press and Fair Trial, *calling for a separate legal enactment on contempt that would permit a reasonable degree of public discussion, even when judicial proceedings are pending.*

11 *The Democratic Socialist Republic of Sri Lanka vs. Sinha Ratnatunge (HC/No 7397/95) per judgement of then High Court Judge Upali De Z. Gunewardene and The Democratic Socialist Republic of Sri Lanka vs. P.A. Bandula Padmakumara (HC/No 7580/95) per judgement of then High Court Judge Shiranee Tillekewardene*

In the *Sunday Times* Case, the editor was sentenced under both the Penal Code and the Press Council Law to one and a half years simple imprisonment suspended for seven years and a fine of approximately US $111 for publication of a gossip item in the newspaper which, (incorrectly), stated that President Kumaratunge had attended the birthday party of a parliamentarian at a hotel suite around midnight.

The trial judge in this case castigated the editor for not revealing the source of the information, proceeding to infer that such a "suppression of evidence" meant only that the editor was himself the author of the impugned item.

Not long thereafter, another accused editor was acquitted of criminal defamation charges in another trial court upon publication of a substantially similar news item in a Sinhala language newspaper on the basis that the necessary intent was not found to lie. In this instance, the trial judge in the *Lakbima* case adopted a directly contrary line of reasoning to her colleague in the parallel High Court as far as the rule pertaining to disclosure of sources was concerned, pointing out that the confidentiality of such sources needs to be protected as otherwise, this would lead to

> *"very serious consequences and do much to restrain freedom of communication which is so essential to comfort and well being."*

Though both judgements came before the appellate courts, they were disposed of without any final judicial pronouncement on the relevant issues when the criminal defamation law itself was repealed in Sri Lanka on 18th

June, 2002. The repeal came at a point when *the Sunday Times* appeal was before the Supreme Court following the conviction being affirmed by the Court of Appeal and the *Lakbima* case, (where the State appealed against the acquittal), was also pending in the Court of Appeal.

The *Times* editor was discharged from all proceedings and the conviction set aside by the Supreme Court after the newspaper agreed to publish a statement in the newspaper wherein the editor accepted responsibility for the impugned publication as editor, reiterated that there was no malicious intent whatsoever on the part of the writer, the newspaper or himself in wanting to defame the President and regretted the publication of the said erroneous excerpt. The *Lakbima* appeal against the acquittal of the editor was withdrawn by the State.

In consequence, contrasting judicial attitudes in regard to the circumstances in which disclosure of sources may be

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12 Public pressure to stipulate fair procedures for contempt inquiries intensified after a lay litigant Tony Michael Fernando was sentenced by the Supreme Court on 6 February, 2003 to one year rigorous imprisonment for contempt of court for 'filing applications without any basis, raising his voice and insisting on his right to pursue the application." (Bench comprised Sarath Nanda Silva, CJ and JJ Yapa and Edussuriya). Fernando appealed to the Geneva based UN Human Rights Committee (Vide Communication No 1189/2003 submitted to the UNHRC under the International Covenant on Civil and Political Rights (ICCPR)) as a consequence of which the UNHRC ordered interim measures to be taken by the State for the protection of Mr Fernando after he was threatened by unnamed individuals following release from prison in late 2003 consequent to serving eight months of his sentence. The substantive application is still pending before the Committee.

13 (1984 (2) SLR 193)

ordered by court were not resolved in a satisfactory manner, highlighting yet again therein, the need for a specific enactment on contempt of court that would pertain to substantive issues relating to the use of contempt powers as well as lay down fair procedures in regard to the exercise of such powers."[12]

Contempt of Court: Is a Constitutional Amendment necessary for Enacting a Contempt of Court Act?

Re: Limits & Scope for Punishment

In *Chandradasa Nanayakkara* vs. *Liyanage Cyril*,[13] Article 105 (3) of the Constitution which provides that –

> *"The S.C. and the C. A. ..... (being) a Superior Court of Record shall have all the power including the power to punish for contempt of itself ..... or elsewhere with imprisonment or fine or both as the Court may deem fit ...",*

came in for interpretation and it was said that,

> *"The punishment that can be imposed is imprisonment or fine or both as the court may deem fit."*

The Supreme Court (S.C.) and the Court of Appeal (C.A.), both regarded as Superior Courts of Record, derive their powers under the Constitution (and other stat-

14 *Judicature Act, No 2 of 1978*

utes). The important point is that, both these courts are creatures of the Constitution, (thus, the label, Superior Courts of Record), unlike the subordinate courts, (which are creatures of an Act of Parliament).[14]

Parliament as well as the S.C. and the C.A. being creatures of the Constitution and being subordinate to the Constitution, (the doctrine of constitutional supremacy), it appears to follow that if Parliament in terms of Article 4 (a) read with Article 75 of the Constitution seeks to limit the power of the S.C. or the C.A. to impose punishment by imprisonment or fine or both as the "Court may deem fit", then there would have to be a constitutional amendment. This part of the analysis puts forward the competing arguments that may be advanced in this regard.

Re: Procedure to be followed

Subordinate courts have to follow, the procedure laid down in Acts of Parliament, another apparent concomitant of the proposition that they are not Superior Courts of Record on account of their being creatures of Acts of Parliament as opposed to the S.C. and the C.A. (which are constitutional creatures) the case of *Paramasothy* vs. *Delgoda*[15] is indicative of the circumscribed procedural limits within which subordinate courts are required to operate. No such procedure is laid down in the Constitution in regard to the S.C. or the C.A. and the question is whether such procedure could be laid down by an 'Ordinary' Act of Parliament.

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15 (1981 (2) SLR 489 and 493)

Article 136 (1) of the Constitution confers power on the S.C. to make rules regulating generally the practice and procedure of the Court. Article 136 (1) (b) is explicit when it decrees that the S.C. has power to make rules as to the proceedings in the S.C. and the C.A. in the exercise of the several jurisdictions conferred on such Courts by the Constitution (which would therefore include the power to charge for contempt of Court as envisaged in Article 105 (3) of the Constitution.

The S.C. in pursuance of those provisions has not made any rules to date. The question then is, could the legislature in terms of Article 4(a) read with Article 75 enact an ordinary law spelling out the procedure to be followed by the S.C. and the C.A. in contempt proceedings when the said Courts exercise the said constitutionally conferred power under Article 105 (3) of the Constitution?

The contention that procedures with regard to the exercise of contempt powers by the S.C. and the C.A. could be prescribed in an ordinary law as opposed to a constitutional amendment could be supported by reason of the following arguments;

a) ***By reason of the constitutional limitation contained in Article 136 (3) of the Constitution itself.***

Article 136 (3) decrees that,

All rules made under this Article shall as soon as convenient after their publication in the Gazette be brought before Parliament for approval. Any

such rule which is not so approved but without prejudice to anything previously done there under.

The aforesaid constitutional provision clearly classes the Rules made by the Supreme Court on par with any other subordinate legislation, (and therefore certainly lower in level to "legislation"), bringing in the concept of negative laying in procedure in Parliament established in the area of Administrative Law.

The traditional constitutional justification for this is also clear in as much as 'law' (as a means of resolving conflicting interests or a norm affecting rights) is the domain of the supreme legislature (the courts' function being to interpret the law). The only way in which the doctrine of separation of powers embodied in Article 4(a), (b) and (c) of the Constitution, (subject perhaps to certain qualifications in the context of our Constitution, which qualifications have no relevance to the issue under consideration), could have been preserved is by what the Constitution, in the philosophy of its framers, has done, namely by putting in Article 136 (3) conferring the final say on Parliament (as the supreme legislature) as a check on any Rule making body as opposed to its superior law making function. (Note: the reference to the word "Rules" in Article 136 is also significant in the context of that constitutional philosophy)

16 *Vide:* Atapattu *vs.* Peoples Bank *1997 (1) SLR 208 at 221 to 223 though perhaps obiter on the facts of that case, through a cursus curiae (Vide:* Cooray *vs.* Bandaranayake *1999 (1) SLR and* Wijepala Mendis *vs.* Perera *1999 (2) SLR 110 at page 119) and presently forming the ratio in the Supreme Court decision in* Moosajees Ltd *vs.* Arthur and others *(SC/58/2001- SC minutes of 5/12/2002).*

b) By reason of the constitutional language employed in Article 136 (1) itself;

The said Article opens thus:

"Subject to the provisions of the Constitution and of any law the Chief Justice... may .... rules ..." (our emphasis)

The language employed in the said Article may be contrasted with that employed in Article 140 of the Constitution which decrees "Subject to the provisions of the Constitution....." (with no reference to the words 'and of any law'), which prompted the Supreme Court to hold that, "the ouster clauses" referred to in the Interpretation (Amendment) Act, No. 18 of 1972,

(Vide: Section 22 or that Act), did not prevail over the constitutional jurisdiction conferred on the Supreme Court to grant writs as provided for, in Article 140 of the Constitution.[16]

The point sought to be underscored is that, in contrast with the language employed under Article 140 which led the Supreme Court in the said decisions to hold that the writ jurisdiction is untrammelled by reason of it being a post 1972 constitutional provision (the year of the Interpretation (Amendment) Act No. 18 of 1972 designing "the ouster

[17] *Vide: the inveterate and/or established classifications of law into (i) Public Law and Private Law (ii) Civil Law and Criminal Law and (iii) Substantive Law and Procedural Law). Consequently, the law making power of Parliament, (Vide: Article 4 (a) read with Article 75) encompasses not only substantive law but also procedural law.*

clauses"), the rule making power conferred by Article 136 (1) being not subject not only to the provisions of the Constitution, which in any event gives power to Parliament in terms of Article 4 (a) read with Article 75) and more significantly "subject to the provisions of any other law" (and therefore, retrospectively – though absent in the present context, but prospectively authorised by reason of Article 4 (a) read with Article 75 of the Constitution), there is nothing to prevent Parliament enacting an ordinary law prescribing the procedure to be followed in regard to contempt proceedings.

c) By reason of the Theory of Jurisdiction

"Jurisdiction" is the power to decide or determine which is a proposition that needs no elaboration. "Jurisdiction" is also the power to decide or determine "according to law" (this is also a proposition that needs no elaboration). "Law" as it commonly and (indeed) jurisprudentially understood is both substantive and procedural.[17] Accordingly, it could be contended that there is no fetter on the legislative powers of Parliament, taking the initiative as it might, in laying down "by law", procedure to be followed by the S.C. and the C.A. in regard to contempt proceedings that, the said Courts may take cognisance of. This, Parliament, could do by law (meaning, ordinary legislation).

However, for some reason or rationale, if some argument was to be put forward that, Parliament cannot do so, then the prescribing of procedures for the exercise of contempt powers could be done in any event through a constitutional amendment, which process (given the direct impor-

tance of the issue to the people in this country), should be engaged in as a matter of priority by the country's legislature.

Conclusion - the need for a Specific Enactment on Contempt of Court

The preceding analysis illustrates why Sri Lanka should consider the enactment of a Contempt of Court Act, which may be modelled on the UK and Indian Acts but with even greater emphasis on modern standards relating to contempt of court.

The Act, in order to clarify substantive issues relating to contempt as well as clear up confusion in prevalent case law, should;

a) Define what amounts to contempt;

b) Define what could be legitimately prohibited with reference to the *sub judice* rule;

And

c) Clarify the rule regarding disclosure of sources.

The draft Act should also address the parallel – but no less urgent – need to stipulate fair procedures for contempt inquiries in a manner akin to the Indian Act on Contempt of Court, particularly in regard to contempt hearings in the appellate courts in Sri Lanka.

THE CONTEMPT OF COURTS (DRAFT) ACT

Drafted by Kishali Pinto-Jayawardena, AAL with input by Desmond Fernando PC, Dr J de Almeida Guneratne, P.C., JC Weliamuna AAL, advisory comments by former judge of the Supreme Court, MDH Fernando and with assistance by the British law firm of Kirkland and Ellis International together with INTERIGHTS, the International Centre for the Legal Protection of Rights (United Kingdom).

Approved by the Bar Council of Sri Lanka on 25th February 2006 and forwarded to the Government by then President of the Bar Association, Desmond Fernando, P.C.

An Act To Define and Limit the Powers of Courts in punishing Contempt of Courts

	Be it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka in … , as follows;
Short title and extent	1. This Act may be called the Contempt of Courts Act, …
Definitions	2. In this Act, unless the context otherwise requires-

	a) 'contempt of court' means civil contempt or criminal contempt; b) 'civil contempt' means wilful disobedience to any judgement, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court; c) 'criminal contempt' means the publication (whether by words spoken or written or by signs or by visible representations or otherwise) of any matter or the doing of any other act whatsoever which; (i) lowers or tends to lower the authority of any court; (ii) prejudices or interferes with the due course of any judicial proceeding; (iii) interferes or obstructs the administration of justice in any other manner; Provided that the provisions of this Act shall be in addition to and not in derogation of, the provisions of any other law presently in force defining contempt of court
Contempt in respect of Pending Proceedings	3. A person shall be guilty of contempt on the ground that, that person has published (whether by words spoken or written or by signs or by visible representations or otherwise) of any matter or the doing of any other act whatsoever which lowers or tends to lower the authority of any court, prejudices or interferes with the due course of any judicial proceeding, interferes or obstructs the administration of justice in any other manner only if; (1) the contempt is in respect of pending proceedings; *and*

	(2) is contained in a publication addressed to the public at large or any section of the public which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.
Innocent Publication or Distribution	4.(1) A person is not guilty of contempt of court if at the time of publication of matter amounting to contempt of court under this Act, (having taken all reasonable care), that person does not know and has no reason to suspect that relevant proceedings are pending; (2) A person is not guilty of contempt of court as the distributor of such publication containing matter if at the time of publication of matter amounting to contempt of court under this Act (having taken all reasonable care) if that person does not know that it contains such matter and has no reason to suspect that it is likely to do so; (3) The burden of proof of any fact tending to establish a defence afforded by this section lies upon that person.
Contemporary reports of proceedings	5.(1) A person is not guilty of contempt of court in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith; (2) A person is not guilty of contempt of court in respect of an abridged or condensed report of legal proceedings held in public, published contemporaneously and in good faith, provided it gives a correct and just impression of the proceedings.

Discussion of Public Affairs	6. A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest does not amount to contempt of court under this Act if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.
Sources of Information	7. No court may require a person to disclose, nor is a person guilty of contempt of court for refusing to disclose, nor may any adverse inferences be drawn against him/her consequent to such refusal to disclose the source of information contained in a publication for which that person is responsible.Provided that a court may order a person to disclose a source of information if it is established to the satisfaction of the court that disclosure is necessary in a democratic society in the interests of justice or national security or for the prevention of disorder or crime.
Limitations	8. A person is not guilty of contempt of court for; (1) publishing any fair comment on the merits of a case which has been heard and finally decided; (2) honest and fair criticism on a matter of public importance or public concern; (3) fair criticism of the legal merits of judicial decisions; 9. Notwithstanding anything contained in any law for the time being in force, contempt of court shall not be found under this Act unless the contempt is of such a nature that it substantially interferes with the due course of justice.

Other defence not affected	10. Nothing contained in this Act shall be construed as implying that any other defence which would have been a valid defence in any proceedings for contempt has ceased to be available merely by reason of the provisions of this Act
Act not to imply enlargement of scope of contempt	11. Nothing contained in this Act shall be construed as implying that any disobedience, breach, publication or other act is punishable as contempt of court, which would not be so punishable apart from this Act.
Procedure	12. (1) Notwithstanding anything to the contrary contained in any other law for the time being in force, where it is alleged or appears to the Supreme Court or the Court of Appeal that a person has been guilty of contempt committed in its presence or hearing, such Court may cause such person to be detained in custody and at any time before the rising of that Court, on the same day or as early as possible thereafter, shall cause that person to be informed in writing of the contempt with which that person is charged and nominate a date for the hearing of the charge. (2) On the date so nominated, such Court shall afford such person an opportunity to make his defence to the charge; and; a) after taking such evidence as may be necessary or as may be offered by such person and after hearing him, proceed either forthwith or after adjournment, to determine the matter of the charge; *and* b) make such order for the punishment or discharge of such person as may be just.

	(3) Notwithstanding anything contained in sub-section (1), where a person charged with contempt under that sub-section applies, in writing, to have the charge against him tried by some judge other than the judge or judges in whose presence or hearing, the offence is alleged to have been committed, such application shall be placed before the Chief Justice (or a bench of the three most senior judges of the Supreme Court where the said application concerns a charge issued by the Chief Justice himself) together with a statement of the facts of the case, for such directions as the Chief Justice (or the Bench assigned as aforesaid), may think fit to issue as respects the trial thereof; (4) Notwithstanding anything contained in any other law, in any trial of a person charged with contempt under sub-section (1), which is held in pursuance of directions issued under sub-section (3) by a Court other than the Court in whose presence or hearing the offence is alleged to have been committed, it shall not be necessary for the judge or judges in whose presence or hearing the offence is alleged to have been committed, to appear as a witness or witnesses and the statement placed before the Chief Justice (or the Bench assigned) under sub-section (3) shall be treated as evidence in the case; (5) Pending the determination of the charge, the Court may direct that a person charged with contempt under this section, be detained in such custody as it may specify; Provided that, that person may be released on bail, if a bond for such sum of money as

	the Court thinks sufficient is executed with or without sureties with the condition that the person charged, shall attend at the time and place mentioned in the bond and shall continue to so attend until otherwise directed by the Court. Provided further that the Court may, if it thinks fit, instead of taking bail from such person, discharge that person on execution of a bond without sureties for his attendance as aforesaid.
	13.In the case of contempt committed under this Act, other than contempt *ex facie*, the Supreme Court or the Court of Appeal may take action on its own motion or on a motion made by a) the Attorney General; b) any other person, with the consent in writing of the Attorney General; *or* c) where power is exercised by the Court of Appeal in respect of the High Court of the Provinces and such other courts of First Instance, tribunals or other institutions as Parliament may from time to time, ordain and establish, on the motion of such court. Every motion or reference made under this section shall specify the contempt of which the person or persons charged, is alleged to have committed. 14. (1) Notice of every proceeding under Section 16 shall be served personally on the person charged; (2) The notice shall be accompanied;

	(i) in the case of proceedings commenced on a motion, by a copy of the motion as also copies of the affidavits, if any, on which such motion is founded; *and* (ii) in the case of proceedings commenced on a reference by a subordinate court, by a copy of the reference.
	(3) Any person charged with contempt under Section 16 may file an affidavit in support of his defence and the Court may determine the matter of the charge either on the affidavits filed or after taking such further evidence as may be necessary and pass such order as the justice of the case requires.
	(4) An appeal shall lie to the Supreme Court from any order, judgement, decree or sentence of the Court of Appeal in the exercise of its jurisdiction to punish for contempt or in the exercise of its appellate powers in respect of the same if the Court of Appeal grants leave to appeal to the Supreme Court *ex mero motu* or at the instance of any aggrieved party. Provided that, the Supreme Court may, in its discretion grant special leave to appeal to the Supreme Court from any order, judgement, decree or sentence of the Court of Appeal, where the Court of Appeal has refused to grant leave to appeal to the Supreme Court.
	15. Pending any appeal, the Supreme Court or the Court of Appeal may order that; a) the execution of the punishment or order appealed against, be suspended; b) if the appellant is in confinement, that he or she be released on bail.

Punishment for contempt of court	16 (1) Save as otherwise expressly provided for in this Act or in any other Law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months or with a fine which may extend to twenty thousand rupees or with both. Provided that the accused may be discharged or the punishment awarded may be remitted on apology made to the satisfaction of court. Explanation: An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.
	(2) Notwithstanding anything contained in any Law for the time being in force, no court shall impose a sentence in excess of that specified in sub-section (1) for any contempt either in respect of itself or of a court subordinate to it.
	(3) Notwithstanding anything contained in this section, where a sentence of imprisonment is imposed by a court under this Act, specific reasons must be given by such court, that a sentence of imprisonment alone is called for in the facts and circumstances of the case.

UN HUMAN RIGHTS COMMITTEE VIEWS IN THE CASE OF

Anthony Michael Emmanuel Fernando v. Sri Lanka,
Communication No. 1189/2003,
U.N. Doc. CCPR/C/83/D/1189/2003 (2005).

Submitted by: Anthony Michael Emmanuel Fernando (represented by counsel, Kishali Pinto-Jayawardena and Suranjith Hewamanne)

Alleged victim: The author

State Party: Sri Lanka

Date of communication: 10 June 2003 (initial submission)

Views under Article 5, Paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Anthony Michael Emmanuel Fernando, a Sri Lankan national currently seeking asylum in Hong Kong. He claims to be a victim of violations by Sri Lanka of his rights under articles 7, 9, 10, paragraph 1, 14, paragraphs 1, 2, 3, (a), (b), (c), (d), (e), 5, and articles 19, and 2,

paragraph 3, of the Covenant on Civil and Political Rights. He is represented by counsel, Kishali Pinto-Jayawardena and Suranjith Hewamanne.

1.2 A request for interim measures to release the author from prison in Sri Lanka, submitted at the same time as the communication, was denied by the Special Rapporteur on New Communications.

Factual Background

2.1 The author filed a workers compensation claim with the Deputy Commissioner of Worker's Compensation, for redress in respect of injuries he had suffered. According to the Court proceedings, the author was an employee of the Young Men's' Christian Association (Y.M.C.A). While engaged in that employment he suffered injuries as a result of a fall. The Deputy Commissioner of Workmen's Compensation held an inquiry into the incident. The author and the Y.M.C.A were represented by lawyers. A settlement was arrived at but when the matter was called before the Deputy Commissioner on 9 January 1998, the author refused to accept the settlement. The author's claim was thereafter dismissed and following the rejection of his claim, the author filed four successive motions in the Supreme Court. The first two motions concerned alleged violations of his constitutional rights by the Deputy Commissioner of Worker's Compensation. On 27 November 2002, the Supreme Court considered these two motions jointly and dismissed them.

Thereafter, on 30 January 2003, the author filed a third motion, claiming that the first two motions should not have been heard jointly, and that their consolidation violated his constitutional right to a "fair trial". On 14 January 2003, this motion was similarly dismissed.

2.2 On 5 February 2003, the author filed a fourth motion, claiming that the Chief Justice of Sri Lanka and the two other judges who had considered his third motion should not have done so, as they were the same judges who had consolidated and considered the first two motions. During the hearing of this motion on 6 February 2003, the author was summarily convicted of contempt of court and sentenced to one year's "rigorous imprisonment" (meaning that he would be compelled to perform hard labour). He was imprisoned on the same day. According to the author, approximately two weeks later, a "second" contempt order was issued by the Chief Justice, clarifying that, despite earlier warnings, the author had persisted in disturbing court proceedings. The operative part of the Order stated as follows: "The petitioner was informed that he cannot abuse the process of Court and keep filing applications without any basis. At this stage he raised his voice and insisted on his right to pursue the application. He was then warned that he would be dealt with for contempt of Court if he persists in disturbing the proceedings of Court. In spite of the warning, he persists in disturbing the proceedings of Court. In the circumstances, we find him guilty of the offence of contempt of Court and sentence him to one year

rigorous imprisonment. The Registrar is directed to remove the Petitioner from Court and commit him to prison on the sentence that is imposed". The Order was based on article 105 (3) of the Sri Lankan Constitution, which confers on the Supreme Court "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.....". (1) According to the author, neither the Constitution nor any other statutory provisions regulate the procedure for informing the person in contempt of the charges against him, so as to enable him to consult a lawyer or appeal against the order of the Supreme Court, nor does it specify the sentence that may be imposed in cases of contempt.

2.3 Following his imprisonment, the author developed a serious asthmatic condition which required his hospitalization in an intensive care unit. On 8 February 2003, he was transferred to a prison ward of the General Hospital, where he was made to sleep on the floor with his leg chained, and only permitted to move to go to the toilet. He developed a chill from lying on the floor, which worsened his asthmatic condition. Neither the author's wife nor his father was informed that he had been transferred to hospital; they had to make their own enquiries.

2.4 On 10 February 2003, the author experienced severe pain all over his body but was not given medical attention. On the same day, he was returned to prison

and was assaulted several times by prison guards during his transfer. In the police van, he was repeatedly kicked on the back, causing damage to his spinal cord. On arrival at the prison, he was stripped naked and left lying near the toilet for more than 24 hours. When blood was noticed in his urine, he was returned to the hospital, where he was subsequently visited by the United Nations Special Rapporteur on Independence of the Judges and Lawyers, who expressed concern about the case. After 11 February 2003, the author was allegedly unable to rise from his bed. On 17 October 2003, he was released from prison, after completing ten months of his sentence. The Sri Lankan authorities brought criminal charges against the prison guards accusing them of having been involved in the assault of the author. They have since been released on bail, pending trial.

2.5 On 14 March 2003, the author filed a fundamental rights petition under article 126 of the Constitution with respect to his alleged torture, which is currently pending in the Supreme Court. He also submitted an appeal against his conviction for contempt, on the grounds that no charge was read out to him before conviction and that the sentence was disproportionate. He also submitted that the matter should not be heard by the same judges, since they were biased. The appeal was heard by the same three judges who had convicted him and was dismissed on 17 July 2003.

The Complaint

3.1 The author claims violations of his rights under article 14, paragraphs 1, 2, and 3 (a), (b), (c) and (e), and 5, in that: he was denied a hearing on the question of contempt, having been convicted summarily; conviction and sentence were handed down by the same judges who had considered his previous three motions; (2) he had not been informed of the charges against him, nor given adequate time for the preparation of his defence; (3) the appeal was heard by the same Supreme Court judges who had previously considered the matter; there was no proof that he had committed contempt of court or that "a deliberate intention" to commit contempt, required under domestic law, had been established; the term of one years imprisonment was grossly disproportionate to the offence which he was found to have committed.

3.2 The author claims that the fact that the same judges heard all his motions was contrary to domestic law. According to the author, Section 49 (1) of the Judicature Act No. 2 of 1978 (as amended) stipulates that no judge shall be competent, and in no case shall any judge be compelled to exercise jurisdiction in any action, prosecution, proceedings or matter in which he is a party or is personally interested. Sub-section (2) of the section provides that no judge shall hear an appeal from, or review, any judgment, sentence or order passed by himself. Sub-section (3) provides that where any judge who is a party or personally interested, is a judge of the Supreme Court or the Court of Appeal, the action,

prosecution or matter to or in which he is a party or is interested, or in which an appeal from his judgment shall be preferred, shall be heard or determined by another judge or judges of the court. In support of the author's view that the trial was unfair he refers to international and national concern regarding the conduct of the Chief Justice.(4)

3.3 The author argues that his imprisonment without a fair trial amounts to arbitrary detention, in violation of article 9 of the Covenant. He refers to the criteria under which the Working Group on Arbitrary Detention determines whether a deprivation of liberty is arbitrary.

3.4 The author claims that his freedom of expression under article 19 was infringed by the imposition of a disproportionate prison sentence, given that the exercise of contempt powers was neither "prescribed by law", (given the insufficient precision of the relevant provisions), nor "necessary to protect the administration of justice" or "public order" (article 19 (3) (b)), in the absence of an abusive behaviour on his part that could be considered as "scandalizing the court". He argues that his treatment and the consequent restrictions of his freedom of expression did not meet the three pre-conditions for a limitation: (5) it must be provided by law; it must address one of the aims set out in paragraphs 3(a) and (b) of article 19; and it must be necessary to achieve a legitimate purpose.

3.5 On the first condition, the author argues that the restriction is not provided by law, as the measures in

question are not clearly delineated and so wide in their ambit that they do not meet the test of certainty required for any law. He invokes the case law of the European Court on Human Rights for the proposition that the legal norm in question must be accessible to individuals, in that they must be able to identify it and must have a reasonable prospect of anticipating the consequences of a particular action. (6) The State party's laws on contempt are opaque, inaccessible and the discretion for the Supreme Court to exercise its own powers of contempt is so wide and unfettered that it fails the test of accessibility and predictability.

3.6 On the second condition, it is argued that the latitude afforded to the judiciary regarding its powers of contempt under Sri Lankan law, and the extent to which they operate as a restriction on the right to freedom of expression, are not sufficiently closely related to the aims specified in article 19, namely the protection of "public order" and "the rights and reputation of others". On the third condition, while the right to freedom of expression may be restricted, "to protect the rights and reputations of others", and in this instance, to safeguard the administration of justice, the powers of the Supreme Court provided for under Sri Lankan law for contempt of court, including the power to impose prison sentences, are wholly disproportionate and cannot be justified as being "necessary" for this end. Even if the Committee were to find that there is a pressing social need in this case (to secure the administration of justice) and that the author was in fact in contempt, one year

of imprisonment—with hard labour—is in no way a proportionate or necessary response. (7)

3.7 The author claims that article 105 (3) of the Sri Lankan Constitution is in itself incompatible with articles 14 and 19 of the Covenant. He claims violations of articles 7 and 10, paragraph 1, in relation to his assault and his conditions of his detention (paras. 2.3 and 2.4 above). He also claims that in having submitted his appeal against his conviction for contempt, he has exhausted all available domestic remedies.

The State Party's Admissibility Submission

4.1 On 27 August 2003, the State party provided its comments on the admissibility of the communication. It submits that the appeal judgment, of 17 July 2003, of the Supreme Court on the author's conviction for contempt, deals with the entirety of the case; it is significant that the author failed to express regret for this "contemptuous behaviour", though given an opportunity to do so by Court, and thereby exhibiting his contempt of justice and the judiciary.

4.2 With regard to the alleged torture by the Prison Authorities, the State party confirms that it had taken measures to charge the persons held responsible, that the case is still pending and that the accused are currently on bail, pending trial. There are two cases pending before the courts. If the accused are convicted they will be sentenced. Further, it is confirmed that the author has filed a fundamental rights petition in the

Supreme Court against the alleged torture, which remains pending. In the event that the Supreme Court decides the fundamental rights application in the author's favour he will be entitled to compensation. As such, the allegation of torture is inadmissible for failure to exhaust domestic remedies. Further, since the State took all possible steps to prosecute the alleged offenders there can be no cause for further complaint against the State in this regard.

4.3 The State party adds that the Sri Lankan Constitution provides for an independent judiciary. The judiciary is not under the State's control and as such the State cannot influence nor give any undertaking or assurances on behalf of the judiciary on the conduct of any judicial officer. If the State attempts to influence or interfere with the judicial proceedings, this would be tantamount to an interference with the judiciary and would lead to any officer responsible facing charges of contempt himself.

4.4 Although the State party requested the Committee to consider the admissibility separately from the merits of the communication, the Committee advised, through its Special Rapporteur on New Communications, that it would consider the admissibility and merits of the communication together, on the basis that the State party's future submissions on the merits would provide greater clarity on the issues of admissibility and that the information provided was too scarce for any final determination on these issues at that point.

Interim Measures Request

5.1 On 15 December 2003, following the receipt of death threats, the author requested interim measures of protection, requesting the State party to adopt all necessary measures to ensure his protection and that of his family, and to ensure that an investigation into the threats and other measures of intimidation be initiated without delay. He submits that on 24 November 2003, at about 9.35 a.m., an unknown person called his mother and asked her whether he was at home. When she answered in the negative, this person made death threats against the author and demanded that he withdraw his three complaints: The communication to the Human Rights Committee; the fundamental rights case in the Supreme Court regarding alleged torture; and the complaint filed in the Colombo Magistrate's Court against the two Welikade prison guards. The caller did not reveal his identity.

5.2 On 28 November 2003, the author's complaint against the two prison guards was taken up in the Colombo Chief Magistrate's court, and the author was present. The magistrate directed the police to charge the accused on 6 February 2004, as they had failed on three occasions to present themselves before the Maligakanda Mediation Board, as directed by the court. Later that day on 28 November 2003, his mother told him that an unidentified person had come to the house at about 11.30 a.m. and, while standing outside the locked gate, had called out for the author. When the author's mother told him that he was not in, he went

away threatening to kill him. Once again, on 30 November 2003, at about 3.30 p.m., the same person returned, behaved in the same threatening manner and demanded that the author's mother and father send their son out of the house. The author's parents did not respond and called the police. Before the police arrived, the person uttered threats against the author's parents and after once again threatening to kill the author left the premises. The author's mother filed a complaint at the police station on the same day.

5.3 On 24 November 2003, at 10.27 a.m., an unidentified person called at the office of a Sri Lankan newspaper, Ravaya, which had supported the author throughout his ordeal. The caller spoke to a reporter and leveled death threats against him and the editor of Ravaya, demanding that they cease publishing further news concerning the author. This newspaper had published interviews of the author on 16 and 23 February and 2 November 2003 regarding the alleged miscarriage of justice suffered by him. The threats were reported in the weekend edition of the Ravaya newspaper.

5.4 The author adds that, on 4 December 2003, he received information to the effect that the two prison guards who had been cited in the fundamental rights petition filed by the author as well as in the case filed in the Colombo Magistrate's court, had been reinstated: one of them was transferred to the New Magazine prison and the other remains at the Welikade prison. As a result, the author lives in daily fear for his life as well as for the life and safety of his wife, his son and his

parents. In spite of his complaint to the authorities, he has not, to date, received any protection from the police and is unaware of what action has been taken to investigate the threats against himself and his family. He recalls that he had received death threats in prison as well; he invokes the Committee's Concluding Observations, of November 2003, which stated that, "The authorities should diligently enquire into all cases of suspected intimidation of witnesses and establish a witness protection program in order to put an end to the climate of fear that plagues the investigation and prosecution of such cases." He also refers to the Committee's Views in Delgado Paez v Colombia on the State party's obligation to investigate and protect subjects of death threats. (8)

5.5 On 9 January 2004, pursuant to rule 86 of the rules of procedure and, on the behalf of the Committee, the Special Rapporteur on New Communications requested the State party to adopt all necessary measures to protect the life, safety and personal integrity of the author and his family, so as to avoid irreparable damage to them, and to inform the Committee on the measures taken by the State party in compliance with this decision within 30 days from the date of the Note Verbale, i.e. not later than by 9 February 2004.

5.6 On 3 February 2004, the author submitted that on the morning of 2 February 2004, he had been subjected to an attack by an unknown assailant who sprayed chloroform in his face. A van pulled up close by during

the attack, and the author believes that it was going to be used to kidnap him. He managed to escape and was taken to hospital. Had he not escaped, he would have been the victim of an assassination or disappearance. On 13 February 2004, the Committee, through its Special Rapporteur on New Communications, reiterated his previous request to the State party under Rule 86 of the Committee's rules of procedure in his note of 9 January 2004.

5.7 On 19 March 2004, the State party commented on the attack against the author of 2 February 2004. It submits that the Attorney General's Department directed the police to investigate the alleged attack and to take measures necessary to ensure his safety. The police recorded his statement in which he was unable to either name the suspects or to provide the police with the number of the vehicle that the alleged assailants had traveled in. The investigations remain in progress and steps will be taken to inform the author of the outcome. If the investigations reveal credible evidence that the threats were caused by any person with a view to subverting the course of justice, the State party will take appropriate action.

5.8 With regard to the author's security, a police patrol book has been placed at his residence and police patrol have been directed to visit his residence day and night and to record their visits in the police patrol book. In addition to this, his residence is kept under surveillance by plain-clothes policemen. There is no evidence to conclude that the author received threats to his life

because of his communication to the Human Rights Committee.

The State Party's Merits Submission

6.1 On 16 March 2004, the State party provided its submissions on the merits. On the alleged violations of articles 9, 14 and 19 of the Covenant, it concedes that the author has exhausted domestic remedies. It refers to the judgment of the Supreme Court of 17 July 2003, on appeal against the contempt order, and submits that it cannot comment on the merits of any judgment given by a competent Sri Lankan Court. The State party relies on the arguments set out in the judgment for its proposition that the author's rights were not violated. It submits that the manner in which the author behaved from the time he walked out on a settlement reached between himself and the Y.M.C.A. where both parties were legally represented, before the Deputy Commissioner General of Workman's Compensation, to the point of his refusal to express any regret for his behaviour, when his case for contempt was reviewed by the Supreme Court, demonstrates the author's lack of respect for upholding the dignity and decorum of a judicial tribunal. It refers to the judges' consideration of the powers vested in such Courts to deal with cases of contempt, noting that in such cases committed in the face of the Court punishment may be imposed summarily. While the author was given an opportunity to mitigate the sentence by way of apology, he failed to do so.

6.2 Freedom of speech and expression, including publication, are guaranteed under article 14, paragraph 1 (a), of the Sri Lankan Constitution. Under article 15, paragraph 2, it is permissible to place restrictions on rights under article 14; these may be prescribed by law in relation to contempt of court. The State party denies that the power of the Supreme Court under article 105, paragraph 3 of the Constitution is inconsistent with either the fundamental right guaranteed by Article 14, paragraph l (a) of the Sri Lankan Constitution or with articles 19 or 14 of the Covenant.

6.3 The State party reiterates that the author did not exhaust domestic remedies with respect to the claim relating to torture and ill-treatment as the case is still pending. Since the State cannot make submissions on behalf of the accused, it would be tantamount to a breach of rules of natural justice for the Committee to express its views on the alleged violation, as there is no opportunity for the persons accused of the assault to give their version of the incident. A determination of the case by the Committee at this stage would be prejudicial to the accused and/or the prosecution. It observes that the author has not submitted that such remedies are ineffective or that such remedies would be unreasonably prolonged.

6.4 The State party notes that the fundamental rights case filed by the author in the Supreme Court remains pending, and that a violation of the same rights as those protected under articles 7 and 10, paragraph 1, of the Covenant will be considered in these proceedings. It

further submits that it has declined to appear for the individuals against whom allegations of torture are made. The Attorney General who represents the State refrains, as a matter of policy, from appearing for public officers against whom allegations of torture are pending, since the Attorney General could consider filing criminal charges against the perpetrators even after such a case is concluded. In the present case such action (criminal prosecution) is pending.

The Author's Comments on Admissibility and the Merits

7.1 On 6 August 2004, the author commented on the State party's submission and reiterated his earlier claims. Following the attack on him of 2 February 2004, he lived in hiding. Despite having made complaints to the police, no investigations were made, and no one was prosecuted or arrested. Although the author concedes that police patrols did pass by his house he argues that this is insufficient protection from an attempted kidnapping and possibly attempted murder. He was diagnosed with post-traumatic stress disorder and his mental health deteriorated. Because of these events, he left Sri Lanka on 16 July 2004 and applied for asylum in Hong Kong, where he continues to receive treatment for his mental difficulties. His application has not yet been considered. He contests the State party's view that it has no role to play with regard to a judgment pronounced by a local court of law.

7.2 Contrary to his initial submission, the author now contends that no charges have been filed against the suspects of the alleged assault to date. According to him, preliminary reports called "B reports" have been before the Magistrate's Court in Colombo, but these are merely reports relating to the progress of the inquiries. The last time this report was heard by the Court was on 23 July 2004. Thus, even after one and a half years after the incident, the inquiry is supposed to be continuing. In the author's view, this failure by the State party promptly to investigate complaints of torture violates article 2, and the lack of witness protection makes it impossible to participate in any trial that may eventually take place.

7.3 The author also claims that the State party has failed to contribute to his rehabilitation. He states that four doctors have diagnosed him with psychological trauma caused by the above events, but that his fundamental rights and request for compensation application filed on 13 March 2003 has been postponed constantly. According to article 126 (5) of the Constitution, "[t]he Supreme Court shall hear and finally dispose of any petition or reference under this article within two months of the filing of such petition or the making of such reference". The author's petition remains pending. The State party's failure to consider these applications are also said to demonstrate that exhaustion of domestic remedies with respect to the alleged violations of articles 7 and 10, paragraph 1 has been unduly prolonged, and that the remedies are ineffective.

7.4 The author adds a new claim relating to his conviction for contempt, that he was not given an opportunity to be tried and defend himself in person, or through legal assistance of his own choosing and he was not informed of the right to have legal assistance, nor was legal assistance assigned to him. In this regard he claims a violation of article 14, paragraph 3 (d).

Issues and Proceedings before the Committee

Consideration of Admissibility

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

8.2 As to the alleged violation of articles 7 and 10, paragraph 1, with respect to the author's alleged torture and his conditions of detention, the Committee notes that these issues are currently pending before both the Magistrate Court and the Supreme Court. Although it is unclear whether the individuals allegedly responsible for the assault have been formally charged, it is uncontested that this matter is under review by the Magistrates Court. The Committee is of the view that a delay of 18 months from the date of the incident in question does not amount to an unreasonably prolonged delay within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. The Committee therefore finds these claims inadmissible for non-exhaustion of

domestic remedies in accordance with article 5, paragraph 2 (b) of the Optional Protocol.

8.3 As to the claim that the author's detention was arbitrary under article 9, since it was ordered after an allegedly unfair trial, the Committee finds that this claim is more appropriately dealt together with article 14 of the Covenant as it relates to post-conviction detention.

8.4 As to the alleged violation of article 14, paragraph 3 (c), the Committee finds that this claim has not been substantiated for the purpose of admissibility and is therefore inadmissible under article 2 of the Optional Protocol.

8.5 As to the remaining claims of violations of articles 9, paragraph 1, and 14, paragraphs 1, 2, 3 (a), (b), (d), (e), and 5, and article 19, the Committee considers these claims are sufficiently substantiated and finds no other bar to their admissibility.

Consideration of the Merits

9.1 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.

9.2 The Committee notes that courts notably in Common Law jurisdictions have traditionally enjoyed authority to maintain order and dignity in court debates by the exercise of a summary power to impose penalties for "contempt of court." But here, the only disruption

indicated by the State party is the repetitious filing of motions by the author, for which an imposition of financial penalties would have evidently been sufficient, and one instance of "rais[ing] his voice" in the presence of the court and refusing thereafter to apologize. The penalty imposed was a one year term of "Rigorous Imprisonment". No reasoned explanation has been provided by the court or the State party as to why such a severe and summary penalty was warranted, in the exercise of a court's power to maintain orderly proceedings. Article 9, paragraph 1, of the Covenant forbids any "arbitrary" deprivation of liberty. The imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within that prohibition. 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. The Committee concludes that the author's detention was arbitrary, in violation of article 9, paragraph 1. In the light of this finding in the present case, the Committee does not need to consider the question whether provisions of article 14 may have any application to the exercise of the power of criminal contempt. Similarly, the Committee does not need to consider whether or not there was a violation of article 19.

10. 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 articles 9, paragraph 1, of the International Covenant on Civil and Political Rights.

11. 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 to make such legislative changes as are necessary to avoid similar violations in the future. The State party is under an obligation to avoid similar violations in the future.

12. 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 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[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. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Notes:

1. *"Article 105 (3), provides that "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. The power of the Court of Appeal shall include the power to punish for contempt of any other court, tribunal or institution referred to in paragraph (1) (c) of this article, whether committed in the presence of such court or elsewhere:*

   Provided that the preceding provisions of this Article shall not prejudice or affect the rights now or hereafter vested by any law in such other court, tribunal or institution or punishment for contempt of itself."

2. *The author refers to Karttunen v. Finland, Case No. 387/1989 and Gonzalez del Rio v. Peru, Case No. 263/1987. He also distinguishes the current case from that of Rogerson v. Australia, Case No. 802/1998 and Collins v. Jamaica, Case No. 240/1987.*

3. *He refers to a press release of 17 February 2003, in which it is stated that the UN Special Rapporteur on the Independence of the Judges and Lawyers and the Sri Lankan Legal Profession, are of the view that contempt of court cases are not an exception to the right of an accused to present a defence.*

4. *Report of the United Nations Special Rapporteur on Independence of Judges and Lawyers to the United Nations Commission in April 2003, in which it states that "the Special Rapporteur continues to be concerned over the allegations of misconduct on the part of the Chief Justice Sarath Silva, the latest being the proceedings filed against him and the Judicial Service Commission in the Supreme Court by two district judges...." He also refers to the Report of the International Bar Association, 2001, Sri Lanka on failing to protect the rule of law and the independence of the judiciary.*

5. *Faurisson v. France, Case No. 550/93.*

6. *Grigoriades v. Greece (24348/94) and Sunday Times v. the United Kingdom (6538/74) 1979.*

7. *The author refers to the European Court of Human Right's case of De Haes & Gijsels v. Belgium.*

8. *Delgado Paez v. Colombia, Case no. 195/1985 - "States parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them....."*

UN HUMAN RIGHTS COMMITTEE VIEWS IN THE CASE OF

Mudiyanselage S.B. Dissanayake v. Sri Lanka,
Communication No. 1373/2005,
U.N. Doc. CCPR/C/93/D/1373/2005 (2008)

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)

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, 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 I; 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.

* 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 Glelé Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Julia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Perez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

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. He was served a "Rule" [2], dated 7 April 2004, requiring him to show "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, "whoever 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 ease 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, 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 article7.

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 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.

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.[6]

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' 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 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, paragraph1.

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 Committees Views.

[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 Committees annual report to the General Assembly.]

Notes:

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."*

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 excuse 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".

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.

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. Marnabolo [20021 1 LRC 32.

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

8 Fernando v. Sri Lanka, supra

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. 1

THE INDIAN CONTEMPT OF COURTS ACT

[ACT NO. 70 OF 1971]

[December 24, 1971]

An Act to define and limit the powers of certain courts in punishing contempt of courts and to regulate their procedure in relation thereto.

1. Short title and extent—

(1) This Act may be called the Contempt of Courts Act, 1971.

(2) It extends to the whole of India

Provided that it shall not apply to the State of Jammu and Kashmir except to the extent to which the provisions of this Act relate to contempt of the Supreme Court.

2. Definitions—

In this Act, unless the context otherwise requires—

(a) "Contempt of court" means civil contempt or criminal contempt.

(b) "Civil contempt" means willful disobedience to any judgement, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a court.

(c) "Criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which -

(i) Scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court, or

(ii) Prejudices, or interferes or tends to interfere with the due course of any judicial proceeding, or

(iii) Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

(d) "High Court" means the High Court for a State or a Union territory and includes the court of the Judicial Commissioner in any Union territory.

3. Innocent publication and distribution of matter not contempt—

(1) A person shall not be guilty of contempt of court on the ground that he has published (whether by words, spoken or written, or by visible representations, or otherwise) any matter which interferes or tends to interfere with, or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding pending at that time of publication,

if at that time he had no reasonable grounds for believing that the proceeding was pending.

(2) Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, the publication of any such matter as is mentioned in sub section (1) in connection with any civil or criminal proceeding which is not pending at the time of publication shall not be deemed to constitute contempt of court.

(3) A person shall not be guilty of contempt of court on the ground that he has distributed a publication containing any such matter as is mentioned in sub section (1), if at the time of distribution he had no reasonable grounds for believing that it contained or was likely to contain any such matter as aforesaid.

Provided that this sub section shall not apply in respect of the distribution of—

(i) Any publication which is a book or paper printed or published otherwise than in conformity with the rules contained in section 3 of the Press and Registration of Books Act, 1867 (25 of 1867).

(ii) Any publication which is a newspaper published otherwise than in conformity with the rules contained in section 5 of the said Act.

Explanation: For the purposes of this section, a judicial proceeding—

(a) Is said to be pending,

(b) In the case of a civil proceeding, when it is instituted

by the filing of a plaint or otherwise,

(c) In the case of a criminal proceeding under the Code of Criminal Procedure, 1898 [5 of 1898 (Note: Now see Code of Criminal Procedure, 1973 (2 of 1974)], or any other law—

(i) Where it relates to the commission of the offence, when the charge sheet or challan is filed, or when the court issues summons or warrant, as the case may be, against the accused, and

(ii) In any other case, when the court takes cognizance of the matter to which the proceeding relates, and

(iii) In the case of a civil or criminal proceeding, shall be deemed to continue to be pending until it is heard and finally decided, that is to say, in a case where an appeal or revision is competent, until the appear or revision is heard and finally decided or, where no appeal or revision in preferred, until the period of limitation prescribed for such appeal or revision has expired,

(iv) Which has been heard and finally decided shall not be deemed to be pending merely by reason of the fact that proceedings for the execution of the decree, order or sentence passed therein are pending.

4. Fair and accurate report of judicial proceeding not contempt—

Subject to the provisions contained in section 7, a person shall not be guilty of contempt of court for publishing a fair and accurate report of a judicial proceeding or any state thereof.

5. Fair criticism of judicial act not contempt—

A person shall not be guilty of contempt of court for publishing any fair comment on the merits of any case which has been heard and finally decided.

6. Complaint against presiding officers of subordinate courts when not contempt—

A person shall not be guilty of contempt of court in respect of any statement made by him in good faith concerning the presiding officer or any subordinate court to -

(a) Any other subordinate court, or

(b) The High Court to which it is subordinate.

Explanation: In this section, "subordinate court" means any court subordinate to a High Court.

7. Publication of information relating to proceeding in chambers or in camera not contempt except in certain cases—

(1) Notwithstanding anything contained in this Act, a person shall not be guilty of contempt of court for publishing a fair and accurate report of a judicial proceedings before any court sitting in chambers or in camera except in the following cases, that is to say-

(a) Where the publication is contrary to the provisions of any enactment for the time being in force.

(b) Where the court, on grounds of public policy or in exercise of any power vested in it, expressly prohibits the publication of all information relating to the pro-

ceeding or of information of the description which is published.

(c) Where the court sits in chambers or in camera for reason connected with public order or the security of the State, the publication of information relating to those proceedings,

(d) Where the information relates to secret process, discovery or invention which is an issue in the proceedings.

(2) Without prejudice to the provisions contained in sub section (1) a person shall not be guilty of contempt of court for publishing the text or a fair and accurate summary of the whole, or any part, of an order made by a court sitting in chambers or in camera, unless the court has expressly prohibited the publication thereof on grounds of public policy, or for reasons connected with public order or the security of the State, or on the ground that it contains information relating to secret process, discovery or invention, or in exercise of any power vested on it.

8. Other defences not affected—

Nothing contained in this Act shall be construed as implying that any other defence which would have been a valid defence in any proceedings for contempt of court has ceased to be available merely by reason of the provisions of this Act.

9. Act not to imply enlargement of scope of contempt—

Nothing contained in this Act shall be construed as implying that any disobedience, breach, publication or other act is punishable as contempt of court which not be so punishable apart from this Act.

10. Power of High Court to punish contempt of subordinate courts—

Every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of courts subordinate to it and it has and exercise in respect of contempts of itself.

Provided that no High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code (45 of 1860).

11. Power of High Court to try offences committed or offenders found Outside jurisdiction—

A High Court shall have jurisdiction to inquire into or try a contempt of itself or of any court subordinate to it, whether the contempt is alleged to have been committed within or outside the local limits of its jurisdiction, and whether the person alleged to be guilty of contempt is within or outside such limits.

12. Punishment for contempt of court—

(1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both.

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.

Explanation: An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.

(2) Notwithstanding anything contained in any law for the time being in force, no court shall impose a sentence in excess of that specified in sub section for any contempt either in respect of itself or of a court subordinate to it.

(3) Notwithstanding anything contained in this section, where a person is found guilty of a civil contempt, the court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary shall, instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period not exceeding six months as it may think fit.

(4) Where the person found guilty of contempt of court in respect of any undertaking given to a court is a

company, every person who, at the time the contempt was committed, was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of each such person.

Provided that nothing contained in this sub section shall render any such person liable to such punishment if he proves that the contempt was committed without his knowledge or that he exercised all due diligence to prevent its commission.

(5) Notwithstanding anything contained in sub section (4) where the contempt of court referred to therein has been committed by a company and it is provided that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manger, secretary or other officer of the company, such director, manager , secretary or other officer shall also be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of such director, manager, secretary or other officer.

Explanation: For the purpose of sub sections (4) and (5) -

(a) "Company" means any body corporate and includes a firm or other association of individuals, and

(b) "Director" in relation to a firm, means a partner in the firm.

13. Contempt's not punishable in certain cases—

Notwithstanding anything contained in any law for the time being in force, no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice.

14. Procedure where contempt is in the face of the Supreme Court or a High Court—

(1) When it is alleged, or appears to the Supreme Court or the High Court upon its own view, that a person has been guilty of contempt committed in its presence or hearing, the court may cause such person to he detained in custody, and, at any time before the rising of the court, on the same day, or as early as possible thereafter, shall—

(a) Cause him to be informed in writing of the contempt with which he is charged.

(b) Afford him an opportunity to make his defence to the charge,

(c) After taking such evidence as may be necessary or as may be offered by such person and after hearing him, proceed, either forthwith or after adjournment , to determine the matter of the charge, and

(d) Make such order for the punishment or discharge of such person as may be just.

(2) Notwithstanding anything contained in sub section (1) where a person Charged with contempt under the sub section applies, whether orally or in writing, to have the charge against him tried by some Judge other than the Judge or Judges in whose presence or hearing the offence is alleged to have been committed, and the court is of opinion that it is practicable to do so and that in that interest of proper administration of justice the application should be allowed, it shall cause the matter to be placed, together with a statement of the facts of the case, before the Chief Justice for such directions as he may think fit to issue as respects the trial thereof.

(3) Notwithstanding anything contained in any other law, in any trial of a person charged with contempt under sub section (1) which is held, in pursuance of a direction given under sub section (2), by a Judge other than the Judge or Judges in whose presence or hearing the offence is alleged to have been committed, it shall not be necessary for the Judge or Judges in whose presence or hearing the offence is alleged to have been committed to appear as a witness and the statement placed before the Chief Justice under sub section (2) shall be treated as evidence in the case.

(4) Pending the determination of the charge, the court may direct that a person charged with contempt under this section shall be detained in such custody as it may specify.

Provided that the shall be released on bail, of a bond for such sum of money As the court thinks sufficient is executed with or without sureties conditioned that the person charged shall attend at the time and place mentioned in the bond and shall continue t so attend until otherwise directed by the court.

Provided further that the court may, if it thinks fit, instead of taking bail from such person, discharge him on his executing a bond without sureties for his attendance as aforesaid.

15. Cognizance of criminal contempt in other cases—

(1) In the case of a criminal Contempt, other than a contempt referred to in section 14, the Supreme Court or the High Court may take action on its own motion or on a motion made by—

(a) The Advocate-General, or

(b) Any other person, with the consent in writing of the Advocate-General, (Note: Ins. by Act 45 of 1976, sec.2) [or]

(c) In relation to the High Court for the Union territory of Delhi, such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf, or any other persons, with the consent in writing of such Law Officer.

(2) In the case of any criminal contempt of a subordinate court, the High Court may take action on a reference made to it by the subordinate court or on a motion

made by the Advocate General or, in relation to a Union territory, by such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf.

(3) Every motion or reference made under this section shall specify the contempt of which the person charge is alleged to be guilty.

Explanation:
In this section, the expression "Advocate-General" means-

(a) In relation to the Supreme Court, the Attorney or the Solicitor –General

(b) In relation to the High Court, the Advocate-General of the State or any of the States for which the High Court has been established.

(c) In relation to the court of a Judicial Commissioner, such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf.

16. Contempt by judge, magistrate or other person acting judicially—

(1) Subject to the provisions of any law for the time being in force, a judge, magistrate or other persons act in judicially shall also be liable for contempt of his own court or of any other court in the same manner as any other individual is liable and the provisions of this Act, so far as may be, apply accordingly.

(2) Notwithstanding in this section shall apply to any observations or remarks made by a judge, magistrate or other person act in judicially, regarding a subordinate court in an appeal or revision pending before such judge, magistrate or other person against the order or judgement of the subordinate court.

17. Procedure after cognizance—

(1) Notice of every proceeding under section 15 shall be served personally on the person charged, unless the court for reasons to be recorded directs otherwise.

(2) The notice shall be accompanied -

(a) In the case of proceedings commenced on a motion, by a copy of the motion as also copies of the affidavits, if any, on which such motion is founded and,

(b) In case of proceedings commenced on a reference by a subordinate court, by a copy of the reference.

(3) The court may, if it is satisfied that a person charged under Section 15 is likely to abscond or keep out of the way to avoid service of the notice, order the attachment of his property of such value or amount as it may deem reasonable.

(4) Every attachment under sub section (3) shall be effected in the manner provided in the code of Civil procedure., 1908 [5 of 1908 (Note:- Now see Code of Criminal Procedure, 1973 (2 of 1974)], for the attachment of property in execution of a decree for payment of money, and if , after such attachment, the person charged

appears and shows to the satisfaction of the court that he did not abscond or keep out of the way to avoid service of the notice, the court shall order the release of his property from attachment upon such terms as to costs or otherwise as it may think fit.

(5) Any person charged with contempt under Section 15 may file an affidavit in support of this defence, and the court may determine the matter of the charge either on the affidavits filed or after taking such further evidence as may be necessary, and pass such order as the justice of the case requires.

18. Hearing of cases of criminal contempt to be by Benches—

(1) Every case of criminal contempt under section 15 shall be heard and determined by a Bench of not less than two Judges.

(2) Sub section (1) shall not apply to the court of a judicial commissioner.

19. Appeals—

(1) An appeals shall lie as of right from any order to decision of High Court in the exercise of its jurisdiction to punish for contempt-

(a) Where the order or decision is that of a single judge, to a Bench of not less than two Judges of the Court.

(b) Where the order or decision is that of a Bench, to the Supreme Court.

Provided that where the order or decision is that of the Court of the Judicial Commissioner in any Union territory, such appeal shall lie to the Supreme Court.

(2) Pending any appeal. The appellate court may order that-

(a) The execution of the punishment or order appealed against be suspended

(b) If the appellant is in confinement, he be released on bail, and

(c) The appeal be heard notwithstanding that the appellant has not purged his contempt.

(3) Where any person aggrieved by any order against which an appeal may be filed satisfied the High Court that he intends to prefer an appeal, the High Court may also exercise all or any of the powers conferred by sub section(2).

(4) An appeal under sub section (1) shall be filed-

(a) In the case of an appeal to a Bench of the High Court, within thirty days.

(b) In the case of an appeal to the Supreme Court, within sixty days, from the date of the order appealed against.

20. Limitation for actions for contempt—

No court shall initiate any proceedings if contempt, either on its own motion or otherwise, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed.

21. Act not to apply to Nyaya Panchayatas or other village courts—

Nothing contained in this Act shall apply in relation to contempt of Nyaya Panchayats or other village courts, by whatever name known, for the administration of justice, established under any law.

22. Act to be in addition to, and not in derogation of, other laws relating to contempt—

The provisions of this Act shall be in addition to, and not in derogation of the provision of any other law relating to contempt of courts.

23. Power of Supreme Court and High Court to make rules—

The Supreme Court or, a the case may be, any High Court, may make rules, not inconsistent with the provisions of this Act, providing for any matter relating to its procedure.

24. Repeal—

The Contempt of Courts Act, 1952 (32 of 1952) is hereby repealed.

THE CONTEMPT OF COURTS (AMENDMENT) ACT, 2006

[NO. 6 OF 2006]

[March 17, 2006]

An Act further to amend the Contempt of Courts Act, 1971

Be it enacted by Parliament in the Fifty-seventh Year of the Republic of India as follows:—

1. Short title—

This Act may be called the **Contempt of Courts (Amendment) Act, 2006.**

2. Substitution of new section for Section 13.—

In the Contempt of Courts Act, 1971 (70 of 1971), for Section 13, the following section shall be *substituted*, namely:—

"13. *Contempts not punishable in certain cases.*— Notwithstanding anything contained in any law for the time being in force—

(*a*) no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice;

(*b*) the court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in the public interest and the request for invoking the said defence is bona fide."

RULES TO REGULATE PROCEEDINGS FOR CONTEMPT OF THE SUPREME COURT, 1975 G.S.R. 142—

In exercise of the powers under section 23 of the Contempt of Courts Act, 1971 read with article 145 of the Constitution of India and all other powers enabling it in this behalf, the Supreme Court hereby makes, with the approval of the President, the following rules—

1. (1) These Rules may be called the Rules to Regulate Proceedings for contempt of the Supreme Court, 1975.

(2) They shall come into force on the date of their publication in the official Gazette

(Note: Published in the Gazette of India, dated 1 Feb ruary, 1975 and came into force on the date)

2. (1) Where contempt is committed in view or presence or hearing of the Court, the contemnor may be punished by the Court before which it is committed either

forthwith or on such date as may be appointed by the Court in that behalf.

(2) Pending the determination of the charge, the Court may direct that the contemnor shall be detained in such custody as it may specify.

Provided that the contemnor may be released on bail on such terms as the Court may direct.

3. In case of contempt other than the contempt referred to in rule 2, the Court may take action.

(a) Suo motu, or

(b) On a petition made by Attorney General, or Solicitor General, or

(c) On a petition made by any person, and in the case of a criminal contempt with the consent in writing of the Attorney General or the Solicitor General.

4. (a) Every petition under rule 3 (b) or (c) shall contain:

(i) The name, description and place of residence of the petitioner or petitioners and of the persons charged.

(ii) Nature of the contempt alleged, and such material facts, including the date or dates of commission of the alleged contempt, as may be necessary for the proper determination of the case.

(iii) If a petition has previously been made by him on the same facts, the petitioners shall give the details of the petition previously made and shall also indicate the result thereof.

(b) The petition shall be supported by an affidavit.

(c) Whether the petitioner relies upon a document or documents in his possession or power, he shall file such document or documents or true copies thereof with the petition.

(d) No court-fee shall be payable on the petition, and on any documents filed in the proceedings.

5. Every petition under rule 3 (b) and (c) shall be posted before the Court for preliminary hearing and for orders as to issue of notice. Upon such hearing, the Court, if satisfied that no prima facie case has been made out for issue of notice, may dismiss the petition, and, if not so satisfied direct that notice of the petition be issued to the contemnor.

6. (1) Notice to the person charged shall be in Form 1. The person charged shall, unless otherwise ordered, appear in person before the Court as directed on the date fixed for hearing of the proceeding, and shall continue to remain present during hearing till the proceeding is finally disposed of by order of the Court.

(2) When action is instituted on petition, a copy of the petition along with the annexure and affidavits shall be served upon the person charged.

7. The person charged may file his reply duly supported by an affidavit or affidavits.

8. No further affidavit or document shall be filed except with the leave of the Court.

9. Unless otherwise ordered by the Court, seven copies of the Paper Book shall be prepared in the Registry, one for the petitioner, one for the opposite party and the remaining for the use of the Court. The Paper Book in case shall be prepared at the expense of the Central Government and shall consist of the following documents:

(i) Petition and affidavits filed by the petitioner,

(ii) A copy of, or a statement relating to, the objectionable matter constituting the alleged contempt,

(iii) Reply affidavits of the parties,

(iv) Documents filed by the parties,

(v) Any other document which the Registrar may deem fit to include.

10. The Court may direct the Attorney-General or Solicitor-General to appear and assist the Court.

11. (1) The Court may, if it has reason to believe, that the person charged is absconding or is otherwise evading service of notice, or if he fails to appear in person or to continue to remain present in person in pursuance of the notice, direct a warrant bailable or non-bailable for his arrest, addressed to one or more police officers or may order attachment of property. The warrant shall be issued under the signature of the Registrar. The warrant shall be in Form II and shall be executed, as far as may be in the manner provided for execution of warrants under the Code of Criminal Procedure.

(2) The warrant shall be executed by the officer or officers to whom it is directed, and may also be executed by any other police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.

(3) Where a warrant is to be executed outside the Union Territory of Delhi, the Court may instead of directing such warrant to a police officer, forward it to the Magistrate of the District or the Superintendent of Police or Commissioner of Police of the district within which the person charged is believed to be residing. The Magistrate or the police officer to whom the warrant is forwarded shall endorse his name thereon, and cause it to be executed.

(4) Every person who is arrested and detained shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate, and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.

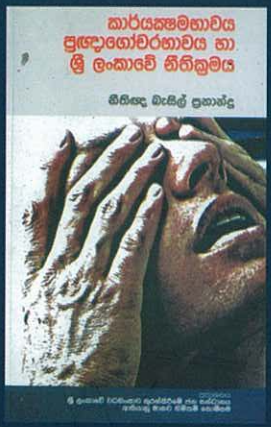
12. The court may, either suo motu, or on motion made for that purpose, order the attendance for cross-examination, of a person whose affidavit has been filed in the matter.

13. The court may make orders for the purpose of securing the attendance of any person to be examined as a witness and for discovery of production of any document.

14. The court may pass such orders as it thinks fit including orders as to costs which may be recovered as if the order were a decree of the court.

15. Save as otherwise provided by the rules contained herein, the provisions of the Supreme Court Rules, 1966 shall, so far as may be, apply to proceedings in relation to proceedings in contempt under this part.

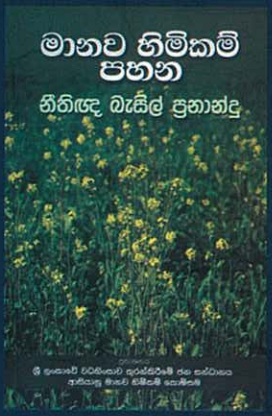
16. Where a person charged with contempt is adjudged guilty and is sentenced to suffer imprisonment, a warrant of commitment and detention shall be made out in Form IV under the signature of the Registrar. Every such warrant shall remain in force until it is cancelled by order of the Court or until is executed. The Superintendent of the Jail shall in pursuance of the order receive the person so adjudged and detain him in custody for the period specified therein, or until further orders.



කාර්යක්ෂමභාවය ප්‍රඥාගෝචරභාවය හා ශ්‍රී ලංකාවේ නීති ක්‍රමය

නීතිඥ බැසිල් ප්‍රනාන්දු

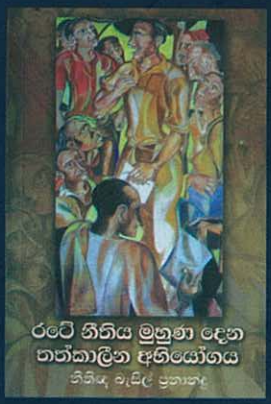
ප්‍රකාශනය
ශ්‍රී ලංකාවේ වදහිංසාව තුරන්කිරීමේ ජනසංසදය
ආසියානු මානව හිමිකම් කොමිසම



මානව හිමිකම් පහන

නීතිඥ බැසිල් ප්‍රනාන්දු

ප්‍රකාශනය
ශ්‍රී ලංකාවේ වදහිංසාව තුරන්කිරීමේ ජනසංසදය
ආසියානු මානව හිමිකම් කොමිසම



රටේ නීතිය මුහුණ දෙන තත්කාලීන අභියෝගය

නීතිඥ බැසිල් ප්‍රනාන්දු

ප්‍රකාශනය
ශ්‍රී ලංකාවේ වදහිංසාව තුරන්කිරීමේ ජනසංසදය
ආසියානු මානව හිමිකම් කොමිසම

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