

A Step in the Wrong Direction

SAHRDC

The tension between national investigations and international interactions on human rights concerns was brought to the fore in the recent exchange between the Supreme Court and the Citizens for Justice and Peace about the latter forwarding letters written to the Special Investigation Team on the Gujarat killings to the Office of the UN High Commissioner for Human Rights. How appropriate was the Supreme Court's ire towards Setalvad and the CJP? And did CJP have to acquiesce to the Supreme Court's direction?

The Indian Supreme Court, known for its openness and commitment to international law standards, recently adopted a stance towards international scrutiny which is worrying.

On 20 January 2011, the Supreme Court convened to decide a significant aspect of the Gujarat riots cases: the complaint against chief minister Narendra Modi.¹ Appearing at this hearing was Kamini Jaiswal, lawyer for Teesta Setalvad of the non-governmental organisation (NGO), Citizens for Justice and Peace (CJP). Formed on 1 April 2002, the CJP is a response of citizens to the infamous events in Gujarat that same year. Its self-stated aims include bringing justice to those affected by the violence.²

Setalvad received reproach from the bench, comprising justices D K Jain, Aftab Alam and P Sathasivam, for forwarding letters written to the Special Investigation Team (SIT) appointed by the Supreme Court to the Office of the United Nations High Commissioner for Human Rights (OHCHR). In these letters she raised concern for the protection of witnesses in the Gujarat riots cases.³ The bench stated that in writing such letters, Setalvad showed a lack of confidence in the court and also opened the court to foreign interference.⁴ It further demanded that she refrain from entering into correspondence with the OHCHR in future. This was acceded to, orally, by advocate Jaiswal for Setalvad.

The exchange between the Supreme Court and Setalvad has thrown into sharp relief the tension between national investigations and international interaction on human rights concerns. It also begs two important questions. First, how appropriate was the Supreme Court's ire towards CJP and second, whether the CJP's acquiescence was necessary?

As part of the global dialogue on democracy and human rights, the Indian state has on several occasions opened itself up to the scrutiny of international organisations. The Indian judiciary should likewise be open to dialogue. The Supreme Court is the supreme arbiter on all legal matters in

India. There evidently was no intention on the part of CJP, by marking a communication addressed to the SIT to the OHCHR, to suggest that there was a hierarchy over the Supreme Court.

The Indian Supreme Court has been open to incorporation of all the major international human rights and humanitarian law standards in its work. Indeed, in 1997, Chief Justice J S Verma of the Supreme Court held that the rights enumerated by the Committee on the Elimination of Discrimination against Women (CEDAW) should be read into Indian domestic law, as long as there is no inconsistency. Generally, he held that:

The international conventions and norms are to be read into [the fundamental rights guaranteed in the Constitution of India] in the absence of enacted domestic law occupying the field when there is no inconsistency between them.⁵

By incorporating international rights standards into the Indian Constitution, the Supreme Court effectively delegated itself the role of "international scrutineer". Indeed, this interpretation of the Constitution tasked the Supreme Court with deciding when international norms and standards were to be derogated by the national and state governments of India.

India's Engagement with International Law

The Supreme Court's stance in the Setalvad matter is surprising in light of India's general commitment to international norms and conventions. Indeed, India is a signatory to significant international conventions protecting human rights including the International Covenant on Economic, Social and Cultural Rights (CESCR) and International Covenant on Civil and Political Rights (ICCPR). India acceded to both on 10 April 1979.⁶ The international expectation that human rights defenders should be protected has particular bearing on the events that transpired.⁷ The protection of human rights defenders is an accepted international standard to which all nations should aspire. It formally entered international discourse via the 1998 UN Declaration on Human Rights Defenders ("the Declaration") which appears as an annex to the General Assembly Resolution A/RES/53/144.

While there is no specific definition of who amounts to a human rights defender,

the Declaration refers to “individuals, groups and associations...contributing to... the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals.”⁷⁸ As an NGO advocating for victims of violence, CJP sits comfortably within this broad definition, and therefore, attracts protection under the Declaration.

Article 9 of the Declaration provides that all people have the right “to benefit from an effective remedy and to be protected in the event of the violation of [their] rights”. Human rights defenders are instrumental in ensuring redress is available in light of rights violations. As such, Article 9(4) states that

everyone has the right, individually and in association with others, to *unhindered access to and communication with international bodies* with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms.⁹

The first optional protocol to the ICCPR, which allows individual complaints from countries that have ratified it, is not relevant here as India is not a signatory to it. However, that does not preclude Setalvad from communicating with international bodies including OHCHR. In any case, the Supreme Court did not appear concerned with the legal basis of Setalvad’s complaint. Rather, it admonished Setalvad for what it perceived as allowing foreign interference¹⁰ in its internal processes. It also appears that the Supreme Court was concerned that Setalvad’s letters demonstrated a lack of faith in the domestic legal system on the part of CJP.

India’s Openness to Scrutiny

India, in the most part, fulfils its various international reporting obligations by submitting periodic reports on its compliance to the United Nations. India had submitted itself to universal periodic review by the Human Rights Council in June 2008, a form of peer review in an international setting.

On 23 October 2007, India submitted a combined second, third, fourth and fifth periodic report to the UN Economic and Social Council on its implementation of the CESC. Similarly, on 26 January 2006, India submitted its 19th periodic report to the UN Committee on the Elimination of Racial Discrimination on its implementation of the International Convention on the Elimination of all forms of Racial Discrimination

(CERD). These reports are submitted exactly for the reason of monitoring adherence to international norms as well as the implementation of treaty objectives. Another means by which India is open to scrutiny is the involvement of its National Human Rights Commission (NHRC) in the Human Rights Council Universal Periodic Reviews. The NHRC is an Indian body which scrutinises India’s human rights record. In May this year India’s NHRC will be under review for re-accreditation by the International Coordinating Committee of National Human Rights Institutions.¹¹ The NHRC is headed by a former chief justice of India.

Not only does India regularly submit itself to scrutiny in these ways, but treaty bodies regularly comment on a country’s conduct and progress. An important example of such international scrutiny is found in the UN Human Rights Committee’s concluding observations regarding India’s implementation of the ICCPR. In its observations, the Human Rights Committee made 23 recommendations on points of concern regarding India’s implementation of the ICCPR. An important recommendation was “that steps be taken to incorporate fully the provisions of the Covenant in domestic law, so that individuals may invoke them directly before the courts”. The committee also recommended “that consideration be given by the authorities to ratifying the Optional Protocol to the Covenant, enabling the Committee to receive individual communications relating to India”. Certainly by signing the optional protocol, India would be underlining its commitment to democracy and the rule of law.

Currently, India is represented on the CEDAW by Indira Jaising, the additional solicitor general and CESC by Chandrashekhar Dasgupta. In the past, India’s representation on the Human Rights Council included no less than a former chief justice of the Supreme Court, P N Bhagwati. Given that these Indian nationals play a pivotal role in scrutinising the records of other countries, it seems odd that the Supreme Court should balk at letters merely marked for attention to the OHCHR.

In any case, India also regularly gives UN charter based bodies entry into the country.¹² Most recently, India opened itself up to the UN Special Rapporteur on the situation of human rights defenders, the UN Special

Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights,¹³ the UN Special Rapporteur on the right to health,¹⁴ the UN Special Rapporteur on the freedom of religion or belief,¹⁵ the UN Special Rapporteur on the right to food¹⁶ and the UN Special Rapporteur on violence against women, its causes and consequences.¹⁷

By signing the optional protocol, other countries have more definitively opened their courts to scrutiny. In south Asia, the Supreme Court of Sri Lanka’s 2006 decision, *Singarasa*, was criticised by the HRC for incorrectly finding that “the [ICCPR] does not have internal effect and the rights under the ICCPR are not rights under the law of Sri Lanka”.¹⁸ This case demonstrates how such scrutiny ensures national courts remain accountable to international standards and norms. By remaining accountable to such norms, national courts also ensure a greater level of public and international legitimacy.

The Malaysian government suffered international embarrassment when it attempted to quash international scrutiny. In 1999, the International Court of Justice (ICJ) delivered an advisory opinion in response to the law suits the Malaysian government brought against Dato Param Kumaraswamy, a Malaysian jurist who was appointed Special Rapporteur on the Independence of Judges and Lawyers for comments he made in that capacity. The opinion concerned the legal immunity of Special Rapporteurs of the Commission on Human Rights. The ICJ held that:

Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations was “applicable” in the case of... Kumaraswamy ... and that he was “entitled to immunity from legal process of every kind for the words spoken by him during an interview...”¹⁹

In so doing, the ICJ demonstrated the importance of the scrutiny provided by the UN’s Special Rapporteurs. This scrutiny is only possible and legitimate if their legal immunity is also protected.

It is certainly a development of concern that the Supreme Court of India has not recognised that it is in the best interests of the Indian state to conduct the Gujarat trials in such a way that it is beyond the reproach of both the Indian and international

communities. Instead, by denying Setalvad the opportunity to contact the OHCHR (even in the most benign way as forwarding correspondence) the Supreme Court has unwittingly cast doubt on this. Given the contentious and emotive nature of these particular trials, this can only have been an inadvertent oversight on the part of the Supreme Court which should subject the reproach to Setalvad to its own review.

The Role of NGOs

These recent events indicate the soft power NGOs can wield by publicly and internationally bringing to light the shortcomings of state legal processes. It is an important role to play and it must be conducted to the full extent that international law and custom allow.

Ironically, CJP's actions were limited to simply voicing its concerns to the SIT regarding the safety of advocates and witnesses. It in no way directly criticised the Supreme Court. Certainly. It is understandable that when faced with the ire of the highest court in India, particularly in

the context of the personal attacks from elsewhere experienced by Setalvad, CJP succumbed to the court's insistent demands.

While appreciating the pressure front-line NGOs face in balancing their general aspirations with the pragmatic necessity of seeing a case to trial, it is better for the victims of human rights abuses, and indeed, better for democracy if the NGOs stand firm against the machinations of the state where there is support to do so in both national and international law.

NOTES

- 1 See: <http://www.cjponline.org/teesta/critical-hearing.htm>
- 2 See: <http://www.cjponline.org>
- 3 For coverage of this incident see the following: <http://expressbuzz.com/nation/teesta-writes-to-sit-on-witness-protection/241163.html>; <http://www.thehindu.com/news/national/article1106115.ece> and <http://timesofindia.indiatimes.com/city/ahmedabad/Supreme-Court-raps-Teesa-for-reporting-riot-hearings-to-UN-body/articleshow/7329960.cms>.
- 4 Ibid.
- 5 *Vishakha vs State of Rajasthan* 1997 (6) SCC 241, [14].
- 6 See: <http://www1.umn.edu/humanrts/research/ratification-india.html>
- 7 Incredibly, only a day after the Court's comments were published, the UN Special Rapporteur on the

situation of human rights defenders voiced her concern for the rights of human rights defenders in India. See UN News Service, *India's Human Rights Defenders Need Better Protection, says UN expert*, 21 January 2011, available at: <http://www.unhcr.org/refworld/docid/4d4115871a.html> (accessed 8 February 2011).

- 8 Fourth perambulatory clause. See: <http://www2.ohchr.org/english/issues/defenders/who.htm>
- 9 Emphasis added. Declaration available at: <http://daccess-ods.un.org/TMP/3230412.90044785.html>
- 10 *The Indian Express*, New Delhi, 21 January 2011, "Don't Want UN to Guide Us on Gujarat Riots: SC to Teesta".
- The SC was reported to have said: "We are capable... So now you want the international body to tell us what to do." It said it would not tolerate "direct interference". "We are capable of doing our work. We don't want to be guided."
- 11 <http://nhri.net/default.asp?PID=637>
- 12 See: <http://www.ohchr.org/EN/countries/AsiaRegion/Pages/INIndex.aspx>
- 13 Report available at: <http://daccess-ods.un.org/TMP/5042806.86378479.html>
- 14 Report available at: <http://daccess-ods.un.org/TMP/3426564.03779984.html>
- 15 Report available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/104/62/PDF/G0910462.pdf?OpenElement>
- 16 Report available at: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2006/44/Add.2&Lang=E>
- 17 Report available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/108/65/PDF/G0110865.pdf?OpenElement>
- 18 See: <http://www.unhcr.org/refworld/country,,IFHR,,LKA,,482c5bf7c,o.html>
- 19 See: <http://www.icj-cij.org/docket/index.php?pr=154&code=numa&p1=3&p2=1&p3=6&case=100&k=9>