UNITED
NATIONS

CCPR

International covenant on civil and political rights

Distr.
RESTRICTED*

CCPR/C/83/D/1118/2002
10 May 2005

ENGLISH
Original: FRENCH

HUMAN RIGHTS COMMITTEE
Eighty-third session
14 March-1 April 2005

DECISION

Communication No. 1118/2002

Submitted by:	Jean-Louis Deperraz and his wife, Geneviève Delieutraz (represented by counsel, Mr. Alain Lestourneau)
Alleged victim:	The authors
State party:	France
Date of communication:	11 October 2000 (initial submission)
Document references:	Special Rapporteur's rule 97 (old rule 91) decision, transmitted to the State party on 27 September 2002 (not issued in document form)
Date of decision:	17 March 2005

* Made public by decision of the Human Rights Committee.

GE.05-41637 310505 030605

Subject matter:	Irregularities in the judicial procedure for winding up two companies
Procedural issues:	Inadmissibility ratione materiae - non-exhaustion of domestic remedies
Substantive issues:	Right to a fair and public hearing - right to be tried without undue delay
Articles of the Covenant:	14, paragraphs 1 and 3 (c)
Articles of the Optional Protocol:	2 and 5, paragraph 2 (b)

[ANNEX]

Annex

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-third session

concerning

Communication No. 1118/2002*

Submitted by:	Jean-Louis Deperraz and his wife, Geneviève Delieutraz (represented by counsel, Mr. Alain Lestourneau)
Alleged victim:	The authors
State party:	France
Date of communication:	11 October 2000 (initial submission)

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

Meeting on 17 March 2005,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Jean-Louis Deperraz and his wife, Geneviève Delieutraz, both French nationals. They claim to be the victims of violations by France of article 14 of the International Covenant on Civil and Political Rights. They are represented by counsel, Mr. Alain Lestourneau.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Under rule 90 of the Committee's Rules of Procedure, Ms. Christine Chanet did not participate in the Committee's consideration of the case.

Factual background

2.1 The authors were the owners of a limited company, SARL Deperraz Electricité, and of a property investment partnership, SCI Le Praley. The former carried out electrical installations; the latter was formed by the Deperraz, who had married under the separation of property regime, for the purpose of purchasing and managing all their property, including the premises from which Deperraz Electricité was run.

2.2 On 6 November 1985, pursuant to a petition from a supplier for payment of a disputed bill, the Bonneville Regional Court ordered Deperraz Electricité to be wound up. One of the company's employees entered a third-party challenge to this ruling in an attempt to show that the company was not insolvent. In a ruling of 18 December 1985, the same Court found that insolvency had not been formally established and retracted its earlier judgement.

2.3 However, the winding-up order had had an adverse effect on the company: court decisions of this kind are subject to provisional execution, with the result in this case that, among other things, all the company's employees left forthwith, all work in progress came to a halt, the entire customer base was lost and suppliers stopped delivering. On 18 April 1990, the same Court ordered the company's affairs to be administered under court supervision, this time pursuant to a petition from the *Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales* (URSSAF) - the agency responsible for recovering social security contributions and family allowances - and the tax authorities. On its own motion, the Court also ordered Le Praley's affairs to be administered under court supervision. That decision, according to the authors, was taken without notification of the proceedings or the presence in court of the company's legal representative, and furthermore the judgement was not duly served upon the company. The two companies subsequently went into liquidation by order of the same Court on 22 May 1991.

2.4 Le Praley appealed against this judgement on the grounds that it had never been legally merged with Deperraz Electricité. By a ruling of 7 April 1992, the Chambéry Appeal Court found that the Regional Court, of its own motion and contrary to the law, had ordered Le Praley's affairs to be administered under court supervision in proceedings to which the company itself had not been a party. Consequently, the Court struck down the rulings relating to Le Praley. It made no ruling, however, on the merits of the case, namely the question of the merger of the two companies.

2.5 On 5 January 1993, the official receiver for Deperraz Electricité petitioned the Regional Court for the winding-up order to include Le Praley, on the grounds that the two companies had merged, and for Mr. Deperraz to be ordered to cover the debts personally, on the grounds that, among other things, he had continued to run the business at a loss. On 7 October 1993, in a telephone call from the court registry, the authors' counsel was informed that the Court had handed down a judgement the previous day rejecting this application. However, he never received a written copy of the judgement referred to by the Registrar.

2.6 In February 1994, counsel was informed that the hearings were to reopen. He wrote to the President of the Court objecting to the proceedings, on the grounds that the 6 October ruling could be challenged only by appeal. The authors claim this situation arose because the President of the Court who handed down the 6 October 1993 ruling failed to record it in writing and has now moved to another court.

2.7 In a fresh ruling on 7 September 1994, the reconstituted Court found that the two companies had been merged and issued a winding-up order against Le Praley. In a second ruling that same day, the Court found that the debts of Deperraz Electricité were the result of a series of management errors and ordered Mr. Deperraz to pay the official receiver the sum total of the company's debts.

2.8 SCI Le Praley and Mr. Deperraz appealed these rulings in the Chambéry Appeal Court. Le Praley's principal argument was that proceedings against it were blocked by the Appeal Court's own previous ruling of 7 April 1992, which had the force of *res judicata*. The Appeal Court, however, upheld the rulings in two separate decisions on 24 September 1996. In respect of the judgement against Le Praley, it found that the force of *res judicata* attaching to its 7 April 1992 ruling applied only insofar as that ruling struck down the Regional Court's ruling of 22 May 1991, and did not prevent the official receiver from applying for a winding-up order against Le Praley.

2.9 The authors challenged these rulings in the Court of Cassation on the following grounds:

- As to the Appeal Court's decision to uphold the liquidation of Le Praley, they maintain that this was based on a ground raised by the Court of its own motion and without seeking the views of the parties, in violation of the right to a defence and the principle of adversarial proceedings. They also claim that the Court applied the wrong criteria in concluding that the companies had merged;

- As to the judgment against Mr. Deperraz, they contend that the Appeal Court ruled of its own motion on a charge of mismanagement not raised in the originating claim and not substantiated in law, in violation of the right to a defence and the principle of adversarial proceedings.

2.10 The Court of Cassation rejected these challenges in rulings handed down on 6 July 1999.

The complaint

3.1 The authors claim a violation on several counts of article 1, paragraph 14, of the Covenant, separately and in conjunction with article 5, paragraph 2 (b), of the Optional Protocol. In their view, the various proceedings taken against them constitute an indivisible whole which relates to the same events, and the case should therefore be considered as a whole in the light of the Covenant. They state that they have exhausted all domestic remedies.

3.2 With regard to article 14, paragraph 1, of the Covenant, the authors consider that they were not given a fair and public hearing insofar as:

- The erroneous winding-up of Deperraz Electricité under the 6 November 1985 judgement constituted a major miscarriage of justice that destroyed the business. The 18 December 1985 retraction did not remedy the effects of that judgement, which had been provisionally executed;

- The placing of Le Praley's affairs under court supervision, ordered on 18 April 1990, was also a miscarriage of justice since the law was not followed. The Appeal Court struck it down as contrary to public policy in its final judgement of 7 April 1992. Yet on 24 September 1996 the same Court ruled, ex parte and unfairly, that Le Praley should also be wound up;

- The 6 October 1993 judgement was not recorded in writing but existed nonetheless. The reconstituted Court had no right to hand down two rulings contradicting the first on the grounds that the first had not been recorded in writing by the previous President;

- Mr. Deperraz had been unjustly ordered to pay the debts of Deperraz Electricité on a ground raised by the Court of its own motion, namely an issue of mismanagement that was considered ex parte and was not mentioned in the originating claim;

- Contrary to the requirements of the Covenant, the contested proceedings were not conducted in public, which could not be reasonably justified by the nature of the case.

3.3 The authors claim that the proceedings as a whole have lasted nearly 15 years (1985-2000) and that successive miscarriages of justice have contributed to this unreasonably lengthy process. This, they maintain, is a violation of article 14, paragraph 1, taken in conjunction with article 5, paragraph 2 (b), of the Optional Protocol.

3.4 The authors also state that the communication has not been examined under another procedure of international investigation or settlement.

The State party's observations

Observations on admissibility

4.1 In a note verbale dated 6 January 2002, the State party submitted its comments on the admissibility of the communication.

4.2 With regard to the lack of a fair hearing, the State party contests the admissibility of this allegation and maintains that the authors are in effect attempting to challenge decisions handed down by the domestic courts that have in every case been extensively and closely argued.

Furthermore, the authors did not appeal against some of the decisions they now criticize, namely those of 6 November 1985 and 18 April 1990. As to the proceedings relating to the recovery of the debt, the authors claim that the sentence was based on a ground raised by the Appeal Court of its own motion. Yet the Court of Cassation found that that ground had been discussed in the Appeal Court. The Committee has repeatedly stated that it may not consider facts or evidence submitted to the domestic courts unless it is clear that their evaluation was arbitrary or amounted to a denial of justice.

4.3 As to the lack of a public hearing, the State party contends that the authors at no time brought such a complaint before the Court of Cassation. Consequently, domestic remedies have not been exhausted.

4.4 As to the complaint of unreasonably lengthy proceedings, the State party considers that the authors have not exhausted all domestic remedies. In the first place, they have not availed themselves of the remedy provided under article L 781-1 of the Judicial Code, which stipulates: "The State is required to make good any damage caused by the improper administration of justice. Such liability is incurred only in the event of gross negligence or a denial of justice." The European Court of Human Rights has recognized the effectiveness of the remedy provided under this article, which may reasonably be used to challenge the length of any civil or criminal proceedings. The State party requests the Committee to endorse the European Court's case law in this regard.

4.5 Furthermore, the authors did not raise the issue of the length of the proceedings in the domestic courts and in particular before the Court of Cassation. In this regard, the State party recalls the Committee's decision on communication No. 661/1995,[1] in which it found the claim that the examination of the case and the judicial proceedings were unreasonably lengthy inadmissible on the grounds that the author had not brought that complaint before the Court of Cassation.

Observations on the merits

4.6 On 14 April 2003, the State party submitted its comments on the merits of the complaint.

4.7 As to the lack of a fair hearing, and with reference to the miscarriages of justice alleged by the authors, in the State party's view an error by a court does not constitute a culpable miscarriage of justice within the meaning of article 14 of the Covenant, to the extent that it arises in the course of a judicial process that also allows for its rectification. Thus the error of judgement made by the Court in its ruling of 6 November 1985 was promptly put right and the authors produce no evidence of the alleged harm suffered, namely the total loss of their business. The Appeal Court ruling of 7 April 1992 struck down the 18 April 1990 judgement on the grounds that the lower court had of its own motion ordered Le Praley's affairs to be placed under court supervision, despite the fact that Le Praley was not itself a party to the proceedings. The 4 September 1996 judgement was handed down in different proceedings and, contrary to the authors' claim, did not reinstate a decision that had, in any event, been struck down only because of a procedural irregularity.

4.8 The authors have provided no real evidence of the existence of the alleged judgement to which they refer, dated 6 October 1993 and supposedly in their favour. It is, moreover, surprising that they waited until they were informed by the court registry that hearings were to resume before making inquiries about the 6 October 1993 judgement.

4.9 As to the action to recover the debt and the contention that Mr. Deperraz was sentenced on a ground raised by the Appeal Court of its own motion, namely an issue of mismanagement that was not examined in adversarial proceedings and not mentioned in the originating claim, the State party points out that the parties discussed the question of mismanagement in court and Mr. Deperraz deemed it unnecessary to reply to the summons to appear in court to explain in person the mismanagement for which he was blamed.[2] The Appeal Court did indeed take a different view of that mismanagement from that of the lower court, but it did so on the basis of points raised in the course of the hearings which had thus previously been discussed by the parties, namely an examination of the accounts and the fact that they did not balance. This was confirmed by the Court of Cassation.

4.10 As to the lack of a public hearing in these proceedings, in the State party's view there has been no violation of article 14, paragraph 1, of the Covenant. Referring to domestic law in this regard, it points out that, while the Regional Court hearings were held in chambers, i.e., were not open to the public, the Appeal Court hearings were held in public. Moreover, the Regional Court handed down its judgement in open court.

4.11 As to the length of the proceedings, the State party notes that, contrary to the authors' claim, this case involved not one but four distinct sets of proceedings, each with a different objective. The last two, which extended over seven and six years respectively, were complicated, particularly as regards assessment of Mr. Deperraz' management shortcomings. In this regard, the State party recalls the Committee's decision finding communication No. 831/1998 inadmissible on the grounds that the author had not sufficiently established that the length of the procedure before the French administrative authorities had caused him genuine harm.[3]

Authors' comments

Comments on admissibility

5.1 In their comments of 4 August 2003, the authors contest the State party's observations on admissibility. They assert that article L 781-1 of the Judicial Code in fact establishes a highly restrictive, unworkable form of State responsibility. They refer to a Court of Cassation ruling of 23 February 2001 showing that case law, at least at the highest level, applies stringent criteria in determining the existence of gross negligence or a denial of justice, concepts that are in themselves already restrictive. The Court goes on to state that the reparation sought is rarely obtained other than for the most blatant of errors or particularly grotesque aberrations and the solution adopted by the European Court of Human Rights, in its rulings of November 2000 and

September 2001, in effect contradicts its own case law. Moreover, those rulings post-date the final judgement in the present case handed down by the Court of Cassation on 14 March 2000. The Committee should not therefore require exercise of the remedy provided under article L 781-1.

5.2 The authors state that they have spent years drawing attention to the miscarriages of justice, errors and irregularities to which they have been exposed and that they have taken specific complaints of violations of the right to a defence and of the principle of adversarial proceedings all the way up to the Court of Cassation.

5.3 The authors reject as groundless the State party's claim that they did not appeal the 18 April 1990 judgement. No valid appeal could be entered against a ruling that had been struck down as contrary to public policy.

Comments on the merits

5.4 The authors also reject the State party's observations on the merits. They again describe the irreparable effects of the 6 November 1985 judgement and point out that the winding-up order against Le Praley issued on 22 May 1991 was revoked nearly a year later. Yet the provisional execution of that order had prevented the company from collecting any rent and had hastened its financial decline. Moreover, the domestic courts had ultimately disregarded the fact that the 18 April 1990 ruling placing the affairs of Le Praley under court supervision had been struck down, since the 24 September 1996 judgement eventually confirmed the partnership's liquidation.

5.5 As to evidence of the existence of a judgement handed down on 6 October 1993, the authors point out that there is a letter sent by their lawyer on 22 February 1994 to the Bonneville Regional Court to the effect that the court registry had notified his office by telephone on 7 October 1993 that the judgement had been handed down on 6 October 1993. The lawyer had informed the authors of this judgement in writing on 12 October 1993.

5.6 As to the allegations of mismanagement by Mr. Deperraz, the Appeal Court, in its 24 September 1996 ruling, accepted, of its own motion, a fresh complaint under article 68 of the Act of 24 July 1966, which states: "The cumulative losses may not exceed half the capital without measures being taken to correct the situation." This complaint was never discussed either in the lower court or in the Appeal Court which brought the matter up, despite the fact that Mr. Deperraz was present during the proceedings and duly represented by counsel.

5.7 In the authors' view, there is no justification for the failure to hold public hearings. The fact that the domestic courts handed down their judgements in open court has no bearing on the public nature of the proceedings themselves.

5.8 Lastly, with regard to the unreasonably lengthy proceedings, the authors consider that the State party's division of the proceedings into four separate phases is artificial. If the Deperraz company had not been wound up in error in 1985, Mr. Deperraz would never have been ordered to cover the debt and the liquidation order would never have been extended to cover Le Praley as well, the whole leading up to a judgement by the Court of Cassation on 14 March 2000. The authors cannot be reproached for having legally exercised the remedies available to them.

Issues and proceedings before the Committee

6.1 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 the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as it is required to do under article 5, paragraph 2 (a), of the Convention, that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement.

6.3 The authors allege a violation of article 14, paragraph 1, of the Covenant on the grounds that their case was not given a fair hearing by the domestic courts. They claim to have been the victims of judicial errors and violations of the right to a defence and the principle of adversarial proceedings. The State party contests the admissibility of these claims, pointing out that the authors are in effect attempting to challenge decisions handed down by the domestic courts that have in every case been extensively and closely argued. The Committee notes that the alleged errors and violations, including the erroneous winding-up of Deperraz Electricité on 6 November 1985, the automatic placing of Le Praley's affairs under court supervision and the judgement made against the first author following proceedings that did not respect the adversarial principle, were examined by the domestic courts. When such courts found errors in earlier judgements such errors were rectified. In this respect, the Committee recalls its jurisprudence under which it is generally a matter for domestic courts to examine the facts and evidence in a particular case, unless it is clear that their assessment was arbitrary or that it amounts to a denial of justice. The arguments advanced by the authors and the evidence adduced to this purpose do not show that the judicial decisions suffered from defects that might warrant admitting this part of the communication. Accordingly, the Committee considers that the authors have not provided sufficient substantiation for their complaint of a violation of article 14, paragraph 1, and finds this part of the communication inadmissible under article 2 of the Optional Protocol.

6.4 The authors also claim to be victims of a violation of article 14 of the Covenant by virtue of the unreasonable length of the proceedings in the domestic courts and the lack of public hearings. In the State party's view, the complaint should be declared inadmissible in this regard on the grounds that domestic remedies have not been exhausted. The Committee recalls that the author of a communication must have brought a substantive complaint in the domestic courts in respect of any allegation subsequently brought before the Committee and that mere doubts about the effectiveness of an available remedy do not absolve the author of a communication from exhausting it.[4] These elements of the complaint are thus inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol of the Covenant;

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

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report.]

Notes

[1] *Paul Triboulet v. France*, Views adopted on 29 July 1997.

[2] Judgement of 7 September 1994, p. 2.

[3] *Michael Meiers v. France*, Decision of 16 July 2001.

[4] See, for example, communication No. 661/1995, *Paul Triboulet v. France*, para. 6.4.
