LST REVIEW

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THE RIGHT TO LIFE AND THE WRIT OF *HABEAS CORPUS*

CODE OF CRIMINAL PROCEDURE (SPECIAL PROVISIONS) ACT NO. 15 OF 2005

REFORM OF THE 1861 POLICE ACT OF INDIA

LAW & SOCIETY TRUST

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Editor's Note ... ...

Where constitutional provisions appear to be unyielding, it has long been the duty of conscientious judges to engage in efforts to make the best of such rigidity in order that rights of victims are redressed. The oft worked phrase that the Constitution is a living document gives expression to this most onerous burden cast on those who decide the law and the manner in which it must develop.

In recent times, the omission of the right to life in Sri Lanka's Constitution has been met by judicial decisions granting a lawful heir or dependant of a person dying in state custody as a result of torture, the right to move court and be awarded relief where the victim is unable to do so personally.

Such are the intricacies of the law that though this expansion may seem commonsensical and naturally logical to many, it took Sri Lanka's Supreme Court several decades to recognise this implied right. This was due, not only to the omission of the right to life in the Constitution but also to the fact that only an aggrieved person or an attorney at law could come before court on the violation of a specified fundamental right, as constitutionally decreed. Both these aberrations were not evidenced in the Indian Constitution enabling lawyers and judges in that country to develop a rich jurisprudence of rights that made its legal system noted throughout the world.

On this side of the Palk Straits, the reality was different, aggravated as this was by a judicial system worked by judges unduly obsessed by colonial notions of what judging was all about as well as the oftentimes casual bypassing of rights related jurisprudence. It was well into the eighties when the old conservatism began to change. From that point onwards also, it took an excruciatingly long one and a half decades to bring about a judicial articulation of an (implicit) right to life.

The decisions in which these principles were articulated in the years 2003 and 2004 in reference to Article 13(4) of the Constitution ("no person shall be punished with death or imprisonment except by an order of a competent Court"), are now relatively well known (see *Silva* vs. *Iddamalgoda*, 2003 [2] SriLR, 63 (the *Durage Sriyani Silva case)*_per judgement of Justice Mark Fernando and *Wewalage Rani Fernando (wife of deceased Lama Hewage Lal) and others vs OIC, Minor Offences, Seeduwa Police Station, Seeduwa and eight others*_SC(FR) No 700/2002, SCM 26/07/2004, per judgement of (Dr) Justice Shiranee Bandaranayake). These decisions asserted the right not to be tortured and thereafter deprived of life.

Significantly advancing the above jurisprudence acknowledging the right to life in the context of the right not to be 'disappeared, the Review publishes the yet unreported Supreme Court decision in *Kanapathipillai Machchavalavan vs OIC, Army Camp, Plantain Point, Trincomalee and Others* (SC Appeal No 90/2003, SC (Spl) L.A. No 177/2003, SCM 31.03.2005, (per judgement of (Dr) Justice Shiranee Bandaranayake with Justices N.K. Udalagama and Raja Fernando agreeing).

The case centered round an ordinary habeas corpus application lodged in the Court of Appeal by a father who had, along with his two sons, been arrested in a cordon and search operation conducted by the Plantain Point Army camp in 1990. While the father was released thereafter, his sons continued to be kept in the custody of the army camp and thereafter 'disappeared.' This case was one of the legion cases in this regard that are still pending before the Court of Appeal in this country testifying to the misery of past decades.

Particular features of this case however distinguish it from the others. The Court of Appeal dismissed the applications filed by the father on the basis that the father had not succeeded in discharging the burden of proof laid on him to show that the army officer cited in his petition was in fact, responsible for the arrest and detention of his sons. Ordinarily, the matter ought to have ended there.

However, in granting special leave to appeal, the Supreme Court put an exceedingly novel ground in issue; namely whether at the time that the Court of Appeal made the instant order, there was *prima facie* evidence of infringement of the fundamental rights of the corpus under Article 13 (4) of the Constitution for which the State or a State officer was liable, necessitating therefore a referral of the case by the Court of Appeal to the Supreme Court under Article 126 (3) of the Constitution;

Earlier, such an argument could not have been brought as the right to life or, (negatively put), the right not to be deprived of life had not been recognised by the judges. However, recent judicial advances as discussed above had changed the old conservatism. Further reflecting the same creatively interpretative principles, Justice Bandaranayake, writing for the court, held in the Kanapathipillai Machchavalavan case that a referral from the Court of Appeal to the Supreme Court was constitutionally called for as it was 'beyond doubt' that there was an infringement of Article 13(4) of the Constitution by some state officers at the time that the Court of Appeal made its order.

An analysis of this decision by ***V S Ganeshalingam***, written on invitation of the Review, is published along with the judgement itself. The analysis engages in a comparative examination of both this judgement as well as the reasoning of the United Nations Human Rights Committee in the Jegetheeswaran Sarma Case (Communication No 950/2000 (Sri Lanka, 31/07/2003) CCPR/C/78/D/950/2000 (Jurisprudence) in so far as protection from enforced or involuntary disappearances in Sri Lanka is concerned. The *Sarma Case* was published in a previous Issue of the Review (see volume 14, Issue 190, August 2003).

The writer highlights specific dereliction of the duties of the State, (particularly where prompt investigation into complaints of disappearances is in issue), evidenced in the factual context of both these cases

We are appreciative, in addition, of a detailed review of Sri Lanka's Code of Criminal Procedure (Special Provisions) Act, No 15 of 2005 contributed by Justice ***P.H.K. Kulatilaka***. Particularly useful for legal practitioners, this paper sums up the objectives of the special provisions act under examination and pinpoints lacunae arising from imprecise language used by the drafters of the act.

Providing a comparative element in these discussions pertaining to a range of issues relevant to the protection of civil and political rights is the concluding paper containing a forceful argument for reform of the old Police Act of India by the New Delhi based Commonwealth Human Rights Initiative (CHRI).

Currently, the Government of India has constituted a Review Committee to draft a new Police Act to replace the antiquated Police Act of 1861. The CHRI argues that it is imperative that a new legislative basis that establishes a more accountable, transparent and democratic police organisation is created through these reform processes.

Priority areas have been identified for inclusion in the draft Bill; these include creation of a specialised body to exercise oversight of the police; appointment of heads of state police forces through a merit based procedure, ensuring multiple levels of accountability through an independent body to receive and investigate public complaints against police officers. It is also urged that human rights violations (such as arbitrary arrest, illegal detention, excessive use of force etc.) should be included as offences under the Police Act.

The prevalent debates in this regard in India have their own relevance to Sri Lanka given domestic efforts to achieve these same objectives through the creation of the constitutionally protected National Police Commission (NPC). Further efforts to empower the Sri Lankan NPC to fully realise its constitutional objectives may have interesting parallels with the Indian exercise.

Kishali Pinto-Jayawardena

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. Appeal No. 90/ 2003
S.C. (Spl.) L.A No. 177/ 2003

Kanapathipillai Machchavallavan,
46/4, Linganagar
Trincomalee

Petitioner – Appellant

Vs.

1. Officer-in-Charge
   Army Camp
   Plantain Point
   Trincomalee

2. Army Commander
   Trincomalee

3. Ranjith Ranaratnam
   Grama Niladhari
   Palaiootu
   Trincomalee

4. Hon. Attorney-General
   Attorney-General's Deparment
   Colombo – 12

Respondents-Respondents

BEFORE : Shirani A. Bandaranayake, J.
N.K. Udalagama, J. &
Raja Fernando, J.

COUNSEL : Dr. T. Thirunavukarasu for the Petitioner-Appellant
Shyamal A. Collure for the 1st Respondent-Respondent
Riyaz Hamza, State Counsel, for the Attorney-General

ARGUED ON : 22.09.2004

WRITTEN SUBMISSIONS TENDERED ON :

For Petitioner-Appellant on	-	19.10.2004
For 1st Respondent-Respondent on	-	10.01.2005
For Attorney-General on	-	16.03.2005

DECIDED ON : 31.03.2005

Shirani A. Bandaranayake, J

This is an appeal from the judgment of the Court of Appeal dated 01.07.2003. By that judgment, the Court of Appeal refused to grant a Writ of Habeas Corpus as prayed by the petitioner-appellant. On an application by the petitioner-appellant (hereinafter referred to as the appellant), the Supreme Court granted Special Leave to Appeal on two questions which are set out below:

1. At the time the Court of Appeal made the order to respect of which Special Leave to Appeal was sought, there was *prima facie* evidence of infringement of the fundamental rights of the corpus at least under Article 13 (4) of the Constitution caused by the 1st respondent, or by another State Officer, for whose act the State was liable. In those circumstances, it is arguable that the Court of Appeal should have referred the entire matter for determination by this Court under Article 126 (3) of the Constitution;

2. Whether the 1st respondent and or the State are liable for the arrest and the subsequent presumed death of the corpora.

The facts of this appeal, *albeit* brief, are as follows:

The appellant, being the father of the corpora, filed two Habeas Corpus Applications (HCA 244/ 94 and HCA 245/94) in respect of his two sons, namely Machchavallavan Arumugam and Machchavallavan Mahendrarajah, who were arrested at a cordon and search operation conducted by Plantain Point Army, Trincomalee. At the time of the arrest which took place on 06.07.1990 they were aged 22 years and 25 years, respectively.

The Court of Appeal on 11.09.1995, referred the two applications to the Chief Magistrate, Colombo to inquire into and report upon the said arrest and alleged imprisonment or detention in terms of the 1st proviso to Article 141 of the Constitution. The learned Chief Magistrate held an inquiry and submitted his findings to the Court of Appeal on 14.03.1997. In his report, the learned Chief Magistrate had concluded that there was no evidence to establish that the 1st respondent-respondent (hereinafter referred to as the 1st respondent) either took part in the round-up operation during which the said corpora were alleged to arrest and detention of the said corpora. However, the Court of Appeal, being satisfied that the corpora were detained at the Plantain Point Army Camp after arrest, issued a Rule Nisi on the 1st respondent on 19.07.2000 directing him to bring up the bodies of the said corpora before the Court of Appeal on 17.05.2001.

In response to the aforementioned position, the 1st respondent filed an affidavit dated 15.05.2001 denying the arrest and detention of the corpora by him. He filed another affidavit on 04.10.2001, further clarifying his defence. The Court of Appeal on 01.07.2003, delivered its judgment discharging the Rule Nisi issued on the 1st respondent and dismissed the applications filed by the appellant, holding that the appellant had not succeeded in discharging his burden of proof.

Having set down the factual position in this appeal, I would now turn to examine the two questions on which Special Leave to Appeal was granted.

1. **The Court of Appeal should have referred the entire matter for determination by the Supreme Court under Article 126 (3) of the Constitution.**

Article 126 of the Constitution, deals with fundamental rights jurisdiction and its exercise and Article 126 (3) specifically refers to the application received by the Court of Appeal and reads thus:

"Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of habeas corpus, certiorari, prohibition, procedendo, mandamus or quo warranto, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court."

Thus common ground that the appellant preferred his application to the Court of Appeal seeking a mandate in the nature of a writ of habeas corpus directing the respondents who were responsible, for the alleged arrest and the detention of the corpora referred to in the nature of a writ of habeas corpus directing the respondents who were responsible, for the alleged arrest and the detention of the corpora referred to in the application to produce them before Court.

The 1st and the 4th respondents however were of the view that there was no basis for the Court of Appeal to have referred the application made by the appellant to the Supreme Court. Their position was that, the petition, or the supporting affidavits did not contain any averment or material against any of the respondents cited in the petition. Further it was submitted that, in paragraph (a) to the prayer to the petition, a writ of habeas corpus was prayed for with a direction to the responsible respondents to produce the corpora before the Court of Appeal. In support of this position, learned Counsel for the 1st and 4th respondents relied on the decision in *Shanthi Chandrasekeram v D.B. Wijetunga and others* ([1992] 2 Sri L.R. 293) and submitted that, there was no *prima facie* evidence of an infringement of the fundamental rights of the corpora by a party to the said applications for the Court of Appeal to refer the instant application to the Supreme Court.

Learned Counsel for the 1st and 4th respondents, also submitted that, the appellant in his original habeas corpus applications has not raised the question of any violation of fundamental rights and did not do so even in his application for Special Leave to Appeal. Further it was submitted that no allegations based on terms of Articles 11,13 (1), 13 (2) or 13 (4) were taken up by the appellant at any stage.

Learned Counsel for the 1st and 4th respondents, also took up the position that the appellant had not made the applications within the stipulated time, in terms of Article 126 (2) of the Constitution.

Article 126 (3) of the Constitution, referred to earlier, does not state that all applications in the nature of obtaining writs from the Court of Appeal be referred to the Supreme Court. Such reference is necessary only if there is evidence to the effect that there is an infringement or an imminent infringement of fundamental rights. Article 126 (3) of the Constitution is quite precise in its position and the said Article states clearly that if it appears to the Court of Appeal, while in the course of hearing an application for orders in the nature of writs of *habeas corpus, certiorari, prohibition, procedendo, mandamus or quo warranto*, that there is **prima facie evidence of an infringement or an imminent infringement of fundamental rights**, such matter should forthwith be referred to the Supreme Court for determination. In Shanthi Chandrasekeram's case (Supra), in the course of hearing of the habeas corpus applications filed by three petitioners, the Court of Appeal considered that there was *prima facie* evidence of the infringement of Articles 11, 13(1) and 13(2) of the Constitution and made reference to the Supreme Court. Considering the infringements referred to above, in that case, this Court held that the alleged infringement of Article 11 could not have been the basis of reference under Article 126(3), firstly, because there was only an assertion and no *prima facie* evidence that the infringement were by a party to the habeas corpus applications. With reference to Articles 13(1) and 13(2), the Supreme Court held that the detainee had been arrested in violation of Article 13(1) and had been detained in violation of Article 13(2).

Accordingly, the notable feature in this provision is that there should be *prima facie* evidence of an infringement or an imminent infringement in the matter before Court of Appeal. It would also be necessary that there is an averment or evidence that the infringements were by a party to the habeas corpus application. A question arises at this point as to whether it is necessary that the petitioner should bring it to the notice of the Court of Appeal of such an infringement. Article 126(3) does not refer to any such requirement casting the onus on the petitioner to move Court with his application. Instead, what the article professes is that, if it appears to the Court of Appeal, that there is *prima facie* infringement or an imminent infringement in terms of fundamental rights, then the Court should forthwith refer such matter for determination by the Supreme Court. The burden therefore lies with the Court of Appeal and it would be the duty of the Court to decide, in the course of the hearing of a writ application, as to whether there is an infringement of a fundamental right in relation to the complaint by the petitioner.

There is one other matter that I wish to state briefly. Learned State Counsel had stated in his written submissions that –

> *"if every habeas corpus application, which invariably refers to the arrest and disappearance of a corpus, is to be referred to the Supreme Court in terms of Article 126(3) of the Constitution, it could lead to an abuse of this provision and a mockery justice".*

It is to be borne in mind that, it is not every habeas corpus application that would be referred to the Supreme Court in terms of Article 126(3) of the Constitution. Provision is made in terms of Article 126(3) for the Court of Appeal to refer to the Supreme Court the writ application only when it appears to such Court that there is *prima facie* evidence of an infringement or an imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application. Therefore it would not be correct to say that all habeas corpus applications would invariably be referred to the Supreme Court by the Court of Appeal as such reference should strictly be in terms of Article 126(3) of the Constitution.

In the instant application, the complaint made by the appellant related to the arrest, detention and the subsequent disappearance of the corpora. The appellant, being the father of the corpora, had made a complaint to the Civilian Information Office on 21.09.1990 giving information regarding missing persons (P2). In that, the appellant had stated that on 06.07.1990, the Army Officers at Linga Nagar took two of his sons, referred to in his appeal, into custody along with him and several others and later they were taken to the Plantain Point Army Camp at Trincomalee. According to the appellant, he was released with two others around 5.00 p.m. in the evening. The appellant had stated in the information sheet that his sons were not released at any stage and that on inquiring from the Plantain Point Army Camp, he was informed that his sons are not in the said Army Camp. The appellant had also sent a letter to His Excellency the President on 21.09.1990 informing His Excellency of the disappearance of his sons. In the communiqué (P5) the appellant had described how they were arrested on 06.07.1990. According to him the corpora and the appellant were at home on 06.07.1990 and there was a cordon and search operation around 6.00 a.m. Thereafter they were taken to Palaiyoothu College until the arrival of the Commander. The appellant had stated that the Grama Niladhari of the area had taken down the details of the persons who were so arrested and a copy of that document was given to the Commander. Thereafter the Army personnel took all of them to the Plantain Point Army Camp. The appellant and two others were released around 5.00 p.m. on the same day, but not the corpora. The appellant had repeated the aforementioned details in a statement made to the Police Station, Trincomalee on 09.12.1992 (P1).

The appellant had cited the Officer-in-Charge of the Army Camp at Plantain Point Trincomalee as the 1st respondent in his appeal. At the time the Rule Nisi was issued on the 1st respondent, requiring him to bring up the bodies of the corpora before the Court of Appeal on 17.05.2001, he had filed an affidavit before the Court of Appeal on 15.05.2001. In that he had averred that he was not the Commanding Officer of the Plantain Point Army Camp during the time material to this application claimed by the Rule Nisi, but only the Officer-in-Charge of the Military Police Section of the said Camp during the said period. In a further affidavit filed on 04.10.2001, Major Channa Etipola averred that, at the time material to this complaint, he was only a Lieutenant attached to the Plantain Point Army Camp and the late Brigadier C.L. Wijeyarante functioned as the Commanding Officer. He further averred that Plantain Point Army Camp was the Headquarters of the 22nd Brigade of the Sri Lanka Army and that there were two major units at the said Plantain Point Army Camp, namely, the Operational Staff and the Logistic/ Administrative Staff and the Military Police Camps had come under the supervision of the latter. He had further averred that as a Military Police Officer he has no authority whatsoever to arrest civilians under any circumstances and hence he had not arrested the corpora referred to in this appeal.

It is clear on the evidence that the corpora were arrested and detained in or around 06.07.1990 at a cordon and search operation. According to the appellant this was carried out by the Plantain Point Army Camp. The 1st respondent denies any knowledge or involvement in such an arrest but admits that he was attached to the Plantain Point Army Camp situated in Trincomalee. He had further submitted that the said camp consisted of the Headquarters of the 22nd Brigade of the Sri Lanka Army, the operational unit and the Logistic/ Administration Branch. Therefore on an analysis of the material placed before this Court, although the 1st respondent may not be responsible for the arrest and detention of the corpora and/ or that he has no knowledge whatsoever with regard to the arrest and detention, there is a possibility in all probabilities that the corpora would have been arrested and detained by officers in one or both of the other units of the said Camp. This fact is clearly supported by the information given in the complaint made to the Trincomalee Police (P1), complaint made in Colombo to the Civilian Information Office (P2) and in the letter sent to His Excellency the President in September 1990 (P5). It is inconceivable that civilians would have been permitted to stay in the Plantain Point Army Camp without permission/ knowledge of the Army authorities, especially at the relevant time where hostilities were high. Therefore it is reasonable to conclude that the corpora were kept in the Army Camp with the knowledge and connivance of the Army officers. Hence Army authorities are responsible to account for the whereabouts of the two sons of the appellant. In such circumstances, would it be correct to say that the appellant had no right to move the Court for grant of writ of habeas corpus? The writ of habeas corpus is a writ of remedial nature and is available as a remedy in all cases of wrongful deprivation of personal liberty. The basis of the writ of habeas corpus is the illegal detention or imprisonment, which is incapable of legal justification and the appellant's complaint involved the liberty of the corpora.

In the instant application, the complaint made by the petitioner related to the arrest, detention and the subsequent disappearance of the corpora. Whilst Articles 13(1) and 13(2) refer to the arrest and detention of a person according to the applicable procedure laid down by law, Article 13(4) of the Constitution states that no person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The aforementioned Articles are contained in Chapter III which deals with fundamental rights and falls within the category which speaks of freedom from arbitrary arrest, detention and punishment and prohibition of retroactive penal legislation.

It is therefore evident that the appellant was complaining of an infringement of the provisions contained in Chapter III of the Constitution. Moreover, it is to be borne in mind that the complaint

was against the officers attached to the Plantain Point Army Camp who had carried out the cordon and search operation. Therefore the allegations were made against the State which involved the liberty of the corpora.

According to the appellant, the corpora and others along with him were taken to the Plantain Point Army Camp. Although the appellant and some others were released later, he had not thereafter heard anything about his sons. In fact, he had referred to this position in all his communications regarding the arrest, detention and disappearance of his sons and therefore it was not factually correct for the Court of Appeal to have stated that nearly 6 years after the alleged incident, the appellant had at the inquiry whilst giving evidence had stated for the first time that he too was taken into custody. The Court of Appeal had taken the view that the appellant's evidence must fall on the promptness test.

The Chief Magistrate, Colombo who held the inquiry on the reference made by the Court of Appeal, in his report dated 19.11.1996 (P7) has clearly stated that the appellant had submitted that the corpora were arrested by the Plantain Point Army Camp. A witness by the name of Titus Jesudasan, had said that he too was taken to the Plantain Point Army Camp and had also stated that the said operation was conducted by one Colonel Tennakoon and that one Ajith Kumara had questioned them at the time of the arrest. The 1st respondent of course has denied any involvement. Based on the evidence of the 1st respondent the learned Chief Magistrate had come to the finding that 1st to 3rd respondents are not responsible for the disappearance of the corpora.

Considering the evidence of Titus Jesudasan referred to by the learned Chief Magistrate, Colombo in his report, I am of the view that the said witness has corroborated the position taken up by the appellant.

In the light of the above position, it is abundantly clear that the appellant's main ground was that of the disappearance of his sons. Considering the totality of the circumstances of this appeal, the only reference that could be drawn in that both of them must have met an unnatural death. *Prima facie* such deaths would have to be taken as offences of murder and the important fact would be not to cast any aspersions on as to who had committed the crime, but as a first step to come to the conclusion that the corpora are not alive and they have met unnatural deaths. In fact in *Sebastian M. Hongray v Union of India* (AIR 1984 S.C. pg. 1026), where a writ of habeas corpus was issued to produce C. Daniel and C. Paul who were taken to Phungrei Camp by the Jawans of 21st Sikh Regiment, Desai J. referring to the persons who were missing stated that,

> *"Prima facie, it would be an offence of murder.... It is not necessary to start casting a doubt on anyone or any particular person. But prima facie there is material on record to reach an affirmative conclusion that both Shri C. Daniel and Shri C. Paul are not alive and have met an unnatural death."*

In the aforesaid circumstances, it is beyond doubt that at the time the Court of Appeal made the order, there was *prima facie* evidence of an infringement of the fundamental rights of the corpora at least in terms of Article 13 (4) of the Constitution caused by some State Officers. Article 13(4) of the Constitution does not deal directly with right to life, but states that,

> *"No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person pending investigation or trial shall not constitute punishment."*

Considering the contents of Article 13(4), this Court has taken the position that no person should be punished with death or imprisonment except by an order of a competent court. Further, it has been decided in *Kotabadu Durage Sriyani Silva* v *Chanaka Iddamalgoda* (S.C. (FR) 471/ 2000 – S.C. Minutes of 10.12.2002 and S.C. Minutes of 08.08.2003) and in *Rani Fernando's case* (S.C. (FR) 700/ 2002 – S.C. Minutes of 26.07.2004) that if there is no order from Court, no person should be punished with death and unless and otherwise such an order is made by a competent court, any person has a right to live. Accordingly Article 13 (4) of the Constitution has been interpreted to mean that a person has a right to live unless a competent court orders otherwise.

In such circumstances it was apparent that there was an alleged violation of Article 13(4) of the Constitution.

Therefore, for the reasons aforementioned, I hold that the Court of Appeal should have referred the entire matter of determination by the Supreme Court in terms of Article 126(3) of the Constitution.

2. Whether the 1st respondent and/ or the State are liable for the arrest and the subsequent presumed death of the corpus

The appellant stated that his sons were taken into custody on 06.07.1990 by the Plantain Point Army Camp in the course of a cordon and search operation. According to the appellant after the arrest, his sons were detained in the Plantain Point Army Camp and since then he has not received any information of his sons.

Learned Counsel for the 1st respondent made several submissions to indicate that the 1st respondent is not responsible for the alleged disappearance of the corpora and that the appeal should be dismissed.

In support of his submissions, learned Counsel for the 1st respondent has relied upon the following positions:

(a) The appellant in his original application for the writ of habeas corpus did not take up the question of violation of his fundamental rights in terms of Article 13(4) of the Constitution; and
(b) The appellant has not made the complaint within the stipulated time limit of one month from the disappearance of his children.

(a) <u>The appellant in his original application for the writ of habeas corpus did not take up the question of violation of his fundamental rights in terms of Article 13(4) of the Constitution;</u>

The appellant, it is to be borne in mind, preferred an application for a writ of habeas corpus to the Court of Appeal, on the basis of the arrest, detention and the subsequent disappearance of his two children. The appellant therefore did not come before the Court of Appeal and later to the Supreme Court on the basis of an infringement of Article 13(4) of the Constitution. Whilst the appellant's chief and only contention was on his application for a writ of habeas corpus, it was this Court which had granted leave on the question of an infringement in terms of Article 13(4) of the Constitution. The Supreme Court has the jurisdiction to look into such a question in terms of Article 126(3) of the Constitution. In terms of Article 126(3), it is obvious that the purpose of that Article was to prevent persons from filing different applications in the Supreme Court and the Court of Appeal on the same transaction. Referring to the purpose of the provisions in Article 126, Justice Mark Fernando, in <u>*Shanthi Chandrasekeram* v *D.B. Wijetunga and others*</u> *(Supra)* stated that,

"Since those provisions do not permit the joinder of such claims, the aggrieved party would have to institute two different proceedings, in two different courts, in respect of virtually identical 'causes of action' arising from the same transaction unless there is express provision permitting joinder. The prevention in such circumstances, of a multiplicity of suits (with their known concomitant) is the object of Article 126(3)."

It would therefore not be correct for the 1st respondent to take up the position that, as the appellant has not taken up the infringement of Article 13(4) at the initial stage, that now he cannot urge such violation before the Supreme Court. In fact, it is also to be borne in mind that, the appellant could not have combined a violation of Article 13(4) with an application for a writ of habeas corpus in the Court of Appeal and in the event he had proposed for an application in terms of Article 13(4) of the Constitution, he should have made the application to the Supreme Court and not to the Court of Appeal and in any event, the sole purpose of Article 126(3) of the Constitution is to avoid such multiplicity of actions and therefore the 1st respondent cannot now take up the position that the appellant has failed to urge the infringement in terms of Article 13(4) of the Constitution. On a careful consideration of the provisions of Article 126(3), I hold that, it is the duty of the Court of Appeal to decide whether there is *prima facie* evidence of an infringement or an imminent infringement of the provisions of the Articles contained in the Chapter on fundamental rights of the Constitution and if so to refer such matter for determination by the Supreme Court. In such circumstances, there is no requirement or a need for the appellant to take up the question of an infringement of Article 13(4) of the Constitution in his application for a writ of habeas corpus in the Court of Appeal.

(b) <u>The appellant has not made the complaint within the stipulated time limit of one month from the disappearance of his children</u>

Learned Counsel for the 1st respondent submitted that, there was no basis on which the Court of Appeal could have referred the appellant's application in terms of Article 126(3) of the Constitution within one month since the alleged incident as stipulated in Article 126(2) of the Constitution. His position is that the appellant's children were alleged to have been removed from their residence and were taken to Plantain Point Army Camp in June or July 1990, whereas his application praying for mandates in the nature of writs of habeas corpus were filed only in June 1994.

Learned Counsel for the 1st respondent considered that, in a long line of cases, the Supreme Court has consistently held that the limit of one month stipulated in Article 126(2) of the Constitution is mandatory. He took up the view that the intention of the legislature with regard to the mandatory time limit specified in Article 126(2) of the Constitution is re-emphasized in section 13(1) of the Human Rights Commission of Sri Lanka Act, No.21 of 1996 which states that,

"When a complaint is made by an aggrieved part in terms of section 14 to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint in pending before the Commission shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution."

Learned Counsel for the 1st respondent also drew our attention to the decision in *Shanthi Chandrasekeram* v *D.B. Wijetunga and others (Supra)* where he submitted that, the detainees were

arrested on or about 03.07.1991 and that the applications praying from the writs of habeas corpus were filed in August 1991.

Admittedly, the corpora were taken into custody in July 1990 and the appellant had come before the Court of Appeal only in June 1994. The appellant had stated in his petition that he had made inquiries and had searched for his sons with government and non-governmental organisations (P1-P5).

Habeas corpus, unlike other prerogative orders still remains as a writ. It is not discretionary and therefore it cannot be denied because there may be some alternative remedy. As pointed out by Wade (Administrative Law, 9th Edition, 2004, pg.594)

> *"The writ may be applied for by any prisoner, or by anyone acting on his behalf, without regard to nationality, since 'every person within the jurisdiction enjoys the equal protection of our laws'. It may be directed against the gaoler, often the appropriate prison governor, or against the authority ordering the detention, e.g. the Home Secretary. It is not discretionary, and it cannot therefore be denied because there may be some alternative remedy.* ***There is no time limit****. The defence will not always be statutory."*

It is also to be borne in mind that the writ of habeas corpus potentially has a very wide scope as it is directly linked to the liberty of citizens. Blackstone referring to the writ of habeas corpus, had stated that, (Commentaries, BK III, 12th Edition, 1794, pg.131)

> *"the King is* ***at all times entitled to have an account****, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."*

Although the learned Counsel for the 1st respondent has referred to the provision in Article 126(2) of the Constitution, the appellant had not moved the Court in terms of that provision. It is this Court which had granted Special Leave to Appeal to consider the question of any violation in respect of Article 13(4) of the Constitution. Therefore it would not be correct to say that the appellant had to strictly adhere to the mandatory time limit stipulated in Article 126(2). The application made by the appellant was on the basis of obtaining a writ of habeas corpus and was not in terms of the fundamental rights jurisdiction of the Supreme Court. Although I am in complete agreement that a long line of cases of this Court had decided that an application on the basis of obtaining relief in terms of any infringement or imminent infringement of his fundamental rights will have to be filed within 30 days of the alleged infringement, subject to a few exceptions, it is my view that this condition does not apply to the appellant in this case as he had moved the Court of Appeal on an entirely a different premise. In such circumstances, it would not be relevant to consider the application of Article 126 in relation to the time bar with regard to this appeal.

The next question that has to be gone into is whether the 1st respondent and or the State are liable for the arrest and the subsequent presumed death of the corpora.

The appellant's position was that in or around 06.07.1990, two of his sons were taken into custody by the Army Officers attached to the Plantain Point Army Camp. The appellant had made a complaint to the Trincomalee Police on 09.12.1992 about the said arrest. In the said complaint and in the subsequent complaints made by the appellant with regard to the arrest of his sons, he had mentioned that his sons were arrested by the officers attached to Plantain Point Army Camp. However, the appellant had made no direct allegation against the 1st respondent to the effect that he and he alone is responsible for the arrest of his sons. The appellant's contention was that the corpora were arrested by

the officials of the Plantain Point Army Camp and they were last seen at the said Camp. This position was substantiated by witness Jesudasan who was also arrested at the time the corpora were arrested, but released after a few days of arrest.

Habeas corpus could be applied for and granted in many occasions such as when there is excessive delay in bringing a prisoner up for trial (*R* v *Brixton Prison Governor, ex-parte Walsh* (1985) A.C.154) or in executing an order for his deportation (*R* v *Durham Prison Governor, ex-parte Hardial Singh* (1984) 1 WLR 704). However, it is to borne in mind that the writ has served and has a remarkable reputation as a bulwark of personal liberty although it has failed to measure upto the standards of the European Convention on Human Rights (Wade, Administrative Law, 9th Edition pg.596).

In such circumstances the question arises as to the burden of proof in habeas corpus cases. Considering this question Wade (*Supra*) is of the view that it is the responsibility of the detaining authority to give positive evidence of the circumstances. As pointed out by Wade (*Supra* at pgs. 294 – 295),

> *"In cases of habeas corpus there is a principle which 'is one of the pillars of liberty', that in English Law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act.*
>
> *Accordingly the detaining authority must be able to give positive evidence that it has fulfilled every legal condition expressly required by statement, even in the absence of contrary evidence from the prisoner..... This rule is indeed an example of the principle stated at the outset, since unjustified detention is trespass to the person. It is particularly important that the principle should be preserved where person liberty is at stake".*

The existence of the Plantain Point Army Camp is not disputed by the 1st and 4th respondents and the appellant as well as witness Jesudasan refers to the cordon and search operation conducted by the said Army Camp.

Although the 1st respondent denies his involvement with such an operation, he himself has stated that Plantain Point Army Camp was the Headquarters of the 22nd Brigade of the Sri Lanka Army and moreover that there were two major units at the said camp which consisted of the branches dealing with the operations and administration of the area. The Military Police Camps had come under the supervision of the latter. He had also admitted that he had no authority to arrest civilians under any circumstances and that there were other high ranking officers in charge of the Army Camp. All the documents filed by the appellant give a clear indication that he had been referring to the Plantain Point Army Camp as the place from which the cordon and search operation was conducted, the arrests made and was the place where the corpora as well as the appellant (for a short period) were detained. As has been pointed our earlier, it is reasonable to conclude that corpora were kept in the Army Camp with the knowledge and connivance of the Army Officers. In such circumstances, it was the duty of the Commanding Officer who had the authority to arrest and detain, to discharge the burden as to what took place on or about 03.07.1991. As pointed out by Wade, one cannot ignore the cardinal principle laid down in English Law with regard to habeas corpus applications that every imprisonment is *prima facie* unlawful and that it is for a person directing imprisonment to justify his act. Since there is no evidence against the 1st respondent I cast no liability on him, but I hold that the State is responsible for the disappearance of the corpora while they were in detention at the Army Camp and the subsequent presumed death.

For the aforementioned reasons, I answer both questions raised by the Court at the time of Special Leave to Appeal was granted in the affirmative. The appeal is allowed and the judgment of the Court of Appeal dated 01.07.2003 is set aside.

On a consideration of the circumstances referred to above, this Court must consider the kind of relief that should be granted to the appellant. In a similar situation, Desai J. in *Sebastian M. Hongary v Union of India* (*Supra*) had held that exemplary costs from the respondents are permissible in such cases. As we have held that the 1st respondent is not personally responsible, there cannot be any exemplary costs payable to the appellant. However, as has been referred to earlier, the Commanding Officer has the authority to arrest and detain and was in overall charge of such operations. In the circumstances, the State is responsible for the infringement of the fundamental rights of the corpora governed in terms of Article 13(4) of the Constitution, which rights have accrued to and/ or devolved upon the appellant. It is to borne in mind that respect for the rights of individuals is the true bastion of democracy and State has to take steps to redress the infringement caused by its officers to the corpora. I therefore direct the State to pay a sum of Rs.150,000/- each for the two sons of the appellant, who had disappeared in detention as compensation and costs.

Thus Rs.300,000/-, being the total amount to be paid to the appellant within 3 months from today.

Judge of the Supreme Court

N.K. Udalagama J.

I agree.

Judge of the Supreme Court

Raja Fernando J.

I agree.

Judge of the Supreme Court

Disappearances in Sri Lanka - Relevance of *Sharma's Communication* to the Geneva based United Human Rights Committee[1] and the Judgement of Sri Lanka's Supreme Court in *Machavallavan's Case*[2]

V.S.Ganesalingam ♦

Introduction

Disappearances in Germany under Hitler could have been explained; he was a dictator who ruled without a constitution or indeed, a judiciary that could question him. But the same cannot be said when the campaign of enforced disappearances is by a democratic elected government with a constitution that guarantees basic human rights and a judicial system to which recourse could be made in the event of violations.

In Sri Lanka, well over 60,000 persons disappeared during a relatively short period at the hands of security forces and the police. Three Zonal Presidential Commissions of Inquiry that inquired into disappearances that occurred since January 1988, and another Commission appointed in 1998 with island wide jurisdiction inquired into complaints left unattended by the Zonal Commission.

The Government that was unwilling to inquire into the 300 reported cases of disappearances that occurred in the Jaffna region during 'the take over of Jaffna by the security forces" in 1996 and after it, instead appointed a Board of Investigation of Defence Ministry officials whose report has not been made public. However, these disappearances were inquired into by the Human Rights Commission of Sri Lanka and it appears that no follow up has been taken on its recommendations.

It is in this back drop that the decision of the Human Rights Committee of the United Nation (hereinafter referred as the Committee) in Communication No. 950/2000 submitted by S. Jegatheeswara Sarama whose son Thiyagaraja Sarma disappeared after arrest by the army (referred to as Sarma's Communication) and the decision of Sri Lanka's Supreme Court in SC Spl LA No. 177/2003 in the habeas corpus applications filed by Machchavallavan whose two sons namely Arumugam and Mahendrarajah disappeared after arrest by the army (referred to as Machavallavan's Cases) becomes relevant and important.

It so happened that all these three complaints relate to disappearances of Tamil youth in the District of Trincomalee during cordon and search operations by security forces in June 1990 .According to the report of the Zonal Presidential Commission that inquired into the disappearances in the North East, June 1990 to September 1990 had been the worst period of disappearance in the Eastern Province of Sri Lanka. The complaint forwarded to the Committee in the *Sarma case* was after arrest of the 'disappeared person' on 23.06.1990 while the complaint of the two 'disappeared brothers' in the *Machchavallavan case* were after their arrest on 06.07.1990.

♦ Executive Director, Home for Human Rights

[1] Views of the UN Human Rights Committee in Communication No 950/2000 (Sri Lanka, 31/07/2003) CCPR/C/78/D/950/2000 (Jurisprudence – The Jegetheeswaran Sarma Case. This Communication of Views was in pursuance of the UNHRC acting under the individual communications procedure in terms of the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)

[2] SC Appeal No 90/2003, SC (Spl) L.A. No 177/2003, SCM 31.03.2005

Since the applicants in all these cases were also arrested along with their sons, the applicants had no difficulty in identifying the perpetrators. In fact in their communication/petition, the perpetrators have been identified by name. The arrest was in broad day light in the presence of hundreds of people who were rounded up and brought for identification on suspicion that they were terrorists. There was evidence that all three arrested were taken to Plantain Point Army Camp which was under Brigadier C. L. Wijeratne who was then the Commanding officer and the arrest operations were headed by one Colonel Tennakoon.

There was evidence before then North East Zonal Disappearance Commission to establish that those arrested in Trincomalee District during this period were taken to Plantain Point Army Camp. However, at the inquiry, the Commission was told by an army officer that Commanding Officer C.L. Wijeratne who was in possession of the records of arrest had died in a LTTE bomb blast and that records of arrest are not available for them to be produced before the Commission.

Efforts by the Victims to Obtain Justice

It is interesting in this context, to see as to how Sarma, the applicant in the communication to the Committee bypassed the resort to domestic remedies and sought the assistance of Committee for information about his son by just a letter addressed to UN. He did not follow the model communication. He was not aware of the provisions and procedures of the ICCPR and did not refer to any violations of rights.

In his letter addressed to Mirta S. Teitelbaum, Secretary, UN Centre for Human Rights, Geneva, dated 25.10.1999 he states as follows:

> *"During the Army search and round up operation by the Sri Lankan Army on 23.06.1990 at Anpuvalipuram, Trincomalee, my son Thevarajah Saram was removed by Corporal Sarath in my presence. Regarding this matter, promptly I informed the Police, Peace Committee International Red Cross, His Excellency the President, Presidential Commission Inquiring into Missing Persons, Human Rights Commission but up to now I am not benefited.*
>
> *I complained to the present President by letter on 20.07.1998 for this I received a reply from Army Head Quarters Brigadier stating that they have not taken into custody by that name.*
>
> *Therefore, please inquire into this matter and hand over our son to us from army custody".*

The Committee responded to his letter and prompted forwarded it to the State Party for its comments. Thereafter, on Sarma's appeal, he was assisted by Home for Human Rights, a non-government organization in his additional submissions.

In so far as Manchallanayagam was concerned, the father of the two sons who had "disappeared", failed in his attempt to get any information from the army, Trincomalee Police and the Civil Affairs Office in Colombo to whom he made written appeals. Thereafter, he wrote to the President on 21 September 1990 as follows:-

"Your Excellency Sir, I the undersigned Kanapathipillai Machchavallavan of the above address beg to bring the following facts to Your Excellency kind notice and beg for redress.

That on 06.07.1990 my two sons namely M. Mahendrarajah, aged 25 years, carpenter by occupation, married and M. Arumugan, aged 22 years, a mechanic by occupation, and myself were taken into custody when we were at our house in the morning about 6 O' clock along with others during the roundup and were taken to the Palaiyoothu School and kept there. Thereafter the Commander came there and asked the Grama Sevaka Niladhari Mr. Ranjith Wijeratna to write the particulars of the persons kept in the school and thereafter the Commander he himself took a copy of what the Gramasevaka Niladhari written down and went away. Thereafter, we all were taken to the Plantain Point Army Camp by the other Army personnel. When we went there we saw the Army Commander, there but after sometime he left the place. After making inquires, myself and two others were released at about 5 p.m. But my aforesaid two sons and others were not released. Thereafter, I went several times to see my two sons but I was told by some Army Personnel that they were not there..As such I beg of Your Excellency to help me get my sons back."

However no action was taken. The failure of these authorities to take any action to supply information as to the fate of the arrested sons of a distraught father, when compared with the action taken by the Committee on an incomplete letter addressed to its Secretary by Sarma, demonstrate the concerned response by the Committee to an appeal addressed to it by a citizen of a State which is a signatory to the ICCPR on the one hand and the unwillingness of the organs of the government of Sri Lanka to protect human rights of its own citizens on the other.

In his additional written submission submitted by his legal counsel, Sarma pointed out that:

"The enforced disappearance of the Applicant's son took place in a context where such disappearances were not anomalous but a matter of systemic practice. A pattern of abduction was compounded by a complex system designed to preclude relatives from ascertaining information as to the whereabouts of disappeared persons, or any information as to those responsible. The 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of persons in the Northern and eastern Provinces' (The Department of Government Printing September 1997) concludes that: 'youth in the North and East disappeared in droves in the latter part of 1989 and during the latter part of 1990. This large scale disappearance of youth is connected with the military operations started against the JVP in the latter part of 1989 and against the LTTE during Eelam War II beginning in June 1990..... It was obvious that a section of the Army was carrying out the instructions of its Political Superiors with a zeal worthy of a better cause. Broad power was given to the Army under the Emergency Regulations which included the power of the dispose of the bodies without post – mortem or inquests and this encouraged a section of the Army to cross the invisible line between the legitimate Security Operation and large scale senseless arrests and killings"

The response of the Government of Sri Lanka (GOSL) to the Communication was the raising of objections to the admissibility of the communication on various grounds. It asserted that the Optional Protocol does not apply *ratione temporis* to this case in that the said involuntary removal took place on 23rd June 1990 and subsequent disappearances was in May 1991 and this events occurred before the entry into force of the Optional Protocol for Sri Lanka.

The submissions of the government also raised the question of exhaustion of local remedies and took the view that the applicant had failed to resort to the following remedies: viz a writ of Habeas Corpus to the Court of Appeal, by which the Court could have ordered the detaining authority to present the alleged victim before it; a writ of mandamus on the police under Article 140 of the Constitution; directly to institute criminal proceedings in the Magistrate's Court, pursuant to section 136 (1) (a) of the Code of Criminal Procedure.

However, the rejection by the Committee of these submissions by the Government and its consequent holding that *"the author has used the remedies that were reasonably available and effective in Sri Lanka"* is significant. This indicates that the Committee was of the view that, in the specific context of the Sarma communication, all the claimed local remedies were ineffective and /or were unreasonably prolonged.

Failure to Investigate Complaints

What is of remarkable note in both the *Sarma case* as well as the *Machchavallavan case* is that there had been no meaningful investigations into the enforced disappearances complained of despite the fact that the applicants had repeatedly drawn the attention of the relevant authorities to the same.

In *Sarma's case*, the State commenced an investigation in 2000, after ten years whereas in *Machchavallavan's case*, there was no evidence to show any investigation took place at all. Information provided by the victims in regard to the context of the arrest to the authorities had been prompt. Had the authorities taken action, the lives in issue in both cases could have been saved. This failure indicates the unwillingness of the State apparatus to investigate and to uphold either the responsibility of the State or individual responsibility of those who committed those acts. Neither did the State consider the implications of the chain of command where the responsibility of superior officers was concerned.

It is also quite obvious from the conduct of State agencies that there was an attempt to cover up the fact that these disappearances occurred at the Plantain Point army camp. In *Sarma's case*, a witness was arrested by the army, taken with the victim and detained at this camp. Another witness was dropped from the vehicle in route to the camp whose statements were recorded by the police. However, these witnesses were not found to be material witnesses for the prosecution.

In *Machchavallavan case*, the victim's father was also arrested along with his sons, detained with them and later released. He asserted that a list of person arrested was prepared by the Grama Sevaka of the area and a copy of it was handed over to the Commander and it was thereafter that they were taken to Plantain Point Camp. However, there was no serious attempt to follow up on his complaint.

In this context it may be pertinent to refer to the evidence before the NE Zonal Presidential Commission of Disappearance of DIG Anandarajah, (then in charge of Trincomalee District) and Brigadier Tennakoon, (then at Army Head Quarters, Trincomalee) regarding the arrests in Trincomalee and subsequent detention of the arrested persons at the Plantain Point camp

The DIG told the Commission that he was kept completely out of the operations even though the police assisted the operations. Instead, the police assistance was directly under the late Richard Wijesekera and ASP Chandra Perera. Brigadier Tennakoon told the Commission that the late Brigadier Wijeratne was in command during the period and that no records are available for the whole of 1990. He also said that the late Wijesekera SP was conducting the operations along with the late Brigadier Wijeratne.

Machavallavan having filed in his attempt to get any information as to the fate of his two sons, filed two Habeas Corpus Applications (HCA 244/94 and HCA 245/94) in respect of Machchavallavan Arumugam and Machchavallavan Mahendrarajah, who, at the time of the arrest were respectively aged 22 years and 25 years, citing the Officer in Charge of the Plantain Point army camp as the first respondent.

The Court of Appeal on 11.09.1995 referred the applications to the Chief Magistrate, Colombo to inquire into and report on the said arrest and alleged imprisonment or detention in terms of the 1st proviso to Article 141of the Constitution.

The learned Chief Magistrate held an inquiry and submitted his report to the Court of Appeal. The report took the view that there was no evidence to establish that the 1st respondent either took part in the round-up operation during which the said corpora were alleged to have been taken into custody or was in any manner responsible for the alleged arrest and detention of the said corpora.

However, the Court of Appeal, being satisfied that the corpora were detained at the Plantain Point Army Camp after arrest, issued a Rule Nisi on the 1st respondent on 19.07.2000 directing him to bring up the bodies of the said corpora before the Court of Appeal on 17.05.2001.

In response, the 1st respondent filed an affidavit dated 15.05.2001 denying the arrest and detention of the corpora by him. He filed another affidavit on 04.10.2001, further clarifying his defence. The Court of Appeal on 01.07.2003, delivered its judgement discharging the Rule Nisi issued on the 1st respondent and dismissed the applications filed by the appellant, holding that the appellant had not succeeded in discharging his burden of proof.

Machchavallavan applied for Special Leave to Appeal to Supreme Court against the judgment of the Court of Appeal and the Court granted leave upon two questions, viz; whether the Court of Appeal should have referred the entire matter for determination by the Supreme Court under Article 126 (3) of the Constitution and whether the 1st respondent and or the Sate are liable for the arrest and subsequently presumed death of the Corpora

Persistent Denial of Arrest and Detention

In all the three cases in this analysis, the arrest took place in broad daylight in public place in the presence of several persons and after an army round up. In the *Machchavallavan case*, as mentioned earlier, the father was also taken along with his two sons, was detained with them and released after few hours of detention. In *Sarma's case*, there were two material witnesses, one who was arrested and detained for few days along with the victim and the other dropped in route to Plantain Point camp. Yet the authorities denied the arrests.

Presumption of Responsibility

The Committee in *Sarma's case*, rejected the attempt by the State party to avoid State responsibility by maintaining that the abduction of the victim by a Corporal was "distinctly separate and independent "of the operations carried out by the army and that the responsible officer were unaware of the conduct of the army corporal impugned in the case.

The Committee held that,

"The Committee considers that, for purposes of establishing State responsibility, it is irrelevant in the present case that the officer to whom the disappearance is attributed acted ultra vires or that superior officers were unaware of the actions taken by that officer (19). The Committee therefore concludes that, in the circumstances, the State party is responsible for the disappearance of the author's son."

In this Communication of Views as well as in the judgement of the Supreme Court in *Machchavallavan's case*, similar reasoning is evidenced. In the latter case, despite the denials of the Officer in Charge of the Camp, the Court drew the presumption that the corpora would have been arrested and detained by officers in one or both of the units of the camp. The court (in the judgement of Justice Shiranee Bandaranayake) held that -

"It is clear on the evidence that the corpora were arrested and detained in or around 06.07.1990 at a cordon and search operation. According to the appellant this was carried out by the Plantain Point Army Camp. The 1st respondent denies any knowledge or involvement in such an arrest but admits that he was attached to the Plantain Point Army Camp situated at Trincomalee. He had further submitted that the said camp consisted of the Head Quarters of the 22nd Brigade of the Sri Lanka Army, the Operational unit and the Logistic/Administration Branch. Therefore on an analysis of the material placed before this Court, although the 1st respondent may not be responsible for the arrest and detention of the corpora and/or that he has no knowledge whatsoever with regard to the arrest and detention, there is a possibility in all probabilities that the corpora would have been arrested and detained by officers in one or both of the other units of the said Camp.

This fact is clearly supported by the information given in the Complaint made to the Trincomalee Police (P1), complaint made in Colombo to the Civilian Information Office (P2) and in the letter sent to His Excellency the President in September 1990 (P5). It is inconceivable that civilians would have been permitted to stay in the Plantain Point Army Camp without the permission/knowledge of the Army authorities especially at the relevant time where hostilities were high. Therefore, it is reasonable to conclude that the corpora were kept in the Army Camp with the knowledge and connivance of the Army officers. Hence Army authorities are responsible to account for the whereabouts of the two sons of the appellant. In such circumstances, would it be correct to say that the appellant had no right to move the Court for grant of writ of habeas corpus? The writ of Habeas corpus is a writ of remedial nature and is available as a remedy in all cases of wrongful deprivation of personal liberty. The basis of the writ of Habeas corpus is the illegal detention or imprisonment, which is incapable of legal justification and the appellant's complaint, involved the liberty of the corpora."

Promptness Test

The Court of Appeal in dismissing Machchavallavan's petitions held that the evidence of the petitioner failed on the "promptness test" and also on the omission of a material fact in his original statement.

It was pointed out that in his original petition, he had omitted to mention that he too was in detention and it was only in his evidence after 6 years, (on 01.02.1996) that he informed the Magistrate about

this fact for the first time. The court held that "this makes his evidence inconsistent and affects the testimonial trustworthiness or credibility."

However, the Supreme Court having considered the position taken by the petitioner in his communications to various authorities held on appeal that.

> *"According to the appellant, the corpora and others along with him were taken to the Plantain Point Army Camp. Although the appellant and some others were released later, he had not thereafter heard anything about his sons. In fact he had referred to this position in all his communications regarding the arrest, detention and disappearance of his sons and therefore it was not factually correct for the Court of Appeal to have stated that nearly 6 years after the alleged incident the appellant had at the inquiry whilst giving evidence had stated for the first time that he too was taken into custody. The Court of Appeal had taken the view that the appellant's evidence must fail on the promptness test."*

Time Bar

It must be recalled that both before the Committee in the *Sarma case* as well as before the Supreme Court in the *Machchavallavan case*, the State's objections included the urging of the time bar as an obstacle to granting relief.

In *Sarma's case*, it was argued for the State that the alleged incident of removal took place on 23rd June 1990 and the subsequent disappearances in May 1991 occurred before the entry into force of the Optional Protocol for Sri Lanka. However, the Committee held that if the alleged violation is "confirmed on the merits, it may have occurred or continued after the entry into force of the Optional Protocol.

In the other instance, the argument of the 1st respondent was that Machchavallavan's children were alleged to have been removed in June 1990 whereas the applications were filed only in June 1994 and that therefore the application was time barred. The Supreme Court rejected this submission however.

The Court held that the applicant had moved the Court of Appeal on an entirely difference premise and it would not be relevant to consider the applicability of the one month time bar in filing applications relating to violations of fundamental rights..

Constitutional Importance

In *Machchavallavan's case*, the Supreme Court had the opportunity to interpret Articles 13 (4), 126, 141 of the Constitution in a manner that renders the judgement of considerable constitutional importance. This approach reflects the innovation and the willingness of that Bench of judges to interpret the fundamental rights provisions of the Constitution in order that full effect is given to the protection of human rights.

It is relevant to state at this point that the petitioner had not, either in the application for the writ of Habeas Corpus nor in his application for Special Leave to Appeal to the Supreme Court, alleged violations of any of the fundamental rights enshrined in the Constitution. In the Habeas Corpus applications, he had prayed for orders to bring up the body of the corpora while in the application for Special Leave to Appeal to Supreme Court, his prayer was to set aside the judgement of the Court of

Appeal and to hold the 1st Respondent and the State liable for the arrest and disappearance of the corpora.

The issue of the violation of fundamental rights was not raised by the Petitioner. It was the Court acting *ex mero motu* which raised that issue. The Court allowed leave to consider the issues whether the Court of Appeal considering the circumstances of this case should have referred the matter for determination by Supreme Court under Article 126 (3) and whether the 1st Respondent and or the State are liable for the arrests and the subsequently presume death of the Corpora. Thus, the pro-active approach on the part of the Court is welcome.

Article 126 (3) reads thus;

> *"Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a Writ of habeas corpus* certiorari, *prohibition, procedendo, mandamus quo warranto, it appears to such Court that there is prima-facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court."*

The Officer in Charge of the Army camp (1st Respondent) and the Attorney General were of the view that there was no basis for the Court of Appeal to refer the application for the reason that the Petitioner for the supporting affidavit did not contain any averments for material against any other respondents in the Petition and also took up the position that the appellant had not made the applications within the stipulated time limit of one month, in terms of Article 126 (2) of the Constitution.

Further more, the state counsel stated in his written submissions that –

> *"if every habeas Corpus application, which invariably refers to the arrest and disappearance of a Corpus, is to be referred to the Supreme Court in terms of Article 126(3) of the Constitution, it could lead to an abuse of this provision and a mockery of justice."*

However, Justice Bandaranayake clarified these two issues in the following manner;

> *"Article 126 (3) does not cast such an onus on the petitioner to move court with his application and that if there is an averment or evidence of infringement by a party to the Habeas Corpus application and if it appears to the Court of Appeal that there is a prima facie infringement or an imminent infringement of fundamental rights "the court should forthwith refer such matter for determination by the Supreme Court, The burden therefore lies with the Court of Appeal and it would be the duty of the Court to decide, in the course of the hearing of a Writ application, as to whether there is an infringement of a fundamental right in relation to the complaint made by the Petitioner."*

In dismissing the submission that referring every habeas corpus application could lead to abuse, it was her considered view that it is not that every habeas corpus that would be referred to the Supreme Court in terms of Article 126 (3) but only applications where it appears to Court that there is *prima facie* evidence of an infringement or imminent infringement of fundamental rights strictly in terms of the said Articles.

Conclusion

Freedom from involuntary removal or disappearance is not a recognized right under our Constitution. In *Machchavallavan's case*, the court held that if the detention by the security forces is established and if the victim has disappeared thereafter, the only inference that could be drawn is that he had met an unnatural death caused by some State officers and further held that punishment with death without an order of competent court is in violation of Article 13 (4) which states;

> *"No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment."*

This reasoning has now has had made it possible to bring the cases of disappearance within the ambit of Article 13 (4) in certain circumstances and had expanded the ambit of that constitutional article. For that reason, the judgement is of seminal importance.

Taken together with the decision of the Committee in the Sarma Case, basic principles relating to protection of life and liberty of individuals whether in the North/East or in the South of Sri Lanka can now be affirmed. It is hoped that decisions such as these will lead to a new culture of rights accountability on the part of state officers though such thinking may well turn out to be incurably optimistic.

Sri Lanka's Code of Criminal Procedure (Special Provisions) Act, No 15 of 2005; An Analysis

*P. H. K. Kulatilaka**

Introduction

The aforesaid Act (hereinafter referred to as the New Act) has been drawn up with a view to introduce changes to the existing procedure relating to the conduct of non-summary inquiries in the Magistrate's Court.

However, it must be kept in mind that when introducing such important legislation, the draftsmen must be mindful of the fact that hitherto, our criminal courts have not only acted in terms of the provisions ensconced in the statues but also have interpreted the provisions and in the process, brought in judge - made laws.

It is a pre-requisite that when crafting enactments of a legal nature, the draughtsmen should have expertise, know-how and the experience in the discipline that they are dealing with. Otherwise it will offend the fundamental principle that a statute should be so expressed and to be readily understood by those who are affected by them. An amateurish approach would result in confusion and uncertainty.

The General Purpose of the New Act

The main purpose in introducing the New Act is to introduce provisions to dispense with the conduct of non-summary inquiry into the offences specified in the Second Schedule to the Judicature Act No.2 of 1978.

Directions have been given in a number of sections in the New Act in wide general terms to disregard provisions of the Code of Criminal Procedure Act No.15 of 1979 using the following phrase:

> *"Notwithstanding anything contained in the Code of Criminal Procedure Act No.15 of 1979....."(see sections 2, 3, 4 and 6 of the New Act).*

At the same time, the New Act uses the following phrase:

> *"The provisions of Chapter 15 of the Code of Criminal Procedure Act No.15 of 1979 shall mutatis mutandis apply to any preliminary inquiry held under the provisions of this Act."*

This sort of approach, without specifying the particular section or provision in the Code of Criminal Procedure Act which is to be disregarded or applied, puts the Magistrate into a confused state of mind.

A significant feature in the New Act is the pivotal role played by the Attorney General. He is the supreme authority in deciding whether to forward a direct indictment or not in respect of offences specified in the Second Schedule to the Judicature Act No. 20 of 1978.

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* Deputy Director Sri Lanka Judges Institute, former judge of the Court of Appeal

Even in cases where the Magistrate decides to proceed under the provisions of Chapter 15 of the Code of Criminal Procedure Act No.15 of 1979, the Attorney General has power to call for the record of proceedings to consider whether to forward indictment directly to the High Court. When such an order comes from the Attorney General, the Magistrate should forthwith suspend proceedings and forward the record of the proceedings to the Attorney General (vide Section 4(3) of the New Act). The Magistrate merely plays a passive role in these proceedings.

In terms of Section 3(1) of the New Act, without any recourse whatsoever to the Magistrate, the Attorney General has power to forward indictment directly to the High Court where there are aggravating circumstances or circumstances that give rise to public disquiet in connection with the commission of an offence specified in the Second Schedule to the Judicature Act,

There is no mention of the source from which the Attorney General obtains information relating to the offence. It may be that the Attorney General takes this decision after perusing the investigation report forwarded to him by the Police. In doing so the Attorney General acts *ex mero motu.*

In terms of section 4(1) of the New Act, where there are aggravating circumstances or circumstances that give rise to public disquiet, the Magistrate should, without holding a preliminary inquiry in terms of Chapter XV of the Code of Criminal Procedure Act forthwith forward the record of the proceedings to the Attorney General. One has to assume that the phrase "record of the proceedings" means the two certified copies of the notes of investigations and all the statements recorded in the course of the investigations which were furnished to the Magistrate by the Officer-in-charge of the Police Station where the information book is kept.

It is interesting to note that irrespective of the opinion of the Magistrate to the effect that there are aggravating circumstances or circumstances that give rise to public disquiet, the Attorney General superimposes his own opinion or view regarding what are aggravating circumstances or circumstances that give rise to public disquiet when he returns the record to the Magistrate directing him to hold a preliminary inquiry (in terms of section 4(2)(b) of the New Act). This shows the state of confusion that arises by not having a definition clause in the Act as to what are the "aggravating circumstances or circumstances that give rise to public disquiet". It is a *lacuna* or a gap in the Statute.

In terms of section 4(3) of the New Act, where the Magistrate decides to proceed to hold an inquiry under Chapter XV of the Code of Criminal Procedure Act, the Attorney General has power to call for the record of the proceedings for the purpose of considering forwarding indictment directly. This section does not refer to the requirement of "aggravating circumstances or circumstances that give rise to public disquiet." The stage at which the direction to forward the record would necessarily be after the commencement of the preliminary inquiry with reading over to the accused the charge or the charges in terms of Section 145 of the Code of Criminal Procedure Act.

Under the New Act, in respect of offences specified in the Second Schedule to the Judicature Act, the Magistrate has power to hold a preliminary or non summary inquiry into only those offences which do not fall into the category of offences where there are there are aggravating circumstances or circumstances that give rise to public disquiet. Therefore, the Magistrate holds the preliminary inquiry into the following categories of cases:

1. Where under section 4(3) of the New Act, the Magistrate proceeds to hold a preliminary inquiry in terms of Chapter 15 of the Code of Criminal Procedure No. Act 15 of 1979 and the Attorney General does not call for the record to forward direct indictment to the High Court.

2. Where under section 4(2)(b) of the New Act, the Attorney General is of the opinion that the circumstances do not warrant the forwarding of direct indictment to the High Court.

3. Apart from these two instances, there is a further category where the Attorney General is of the opinion that it is necessary to have a preliminary inquiry as a prelude to the preparing of indictment in respect of any offence specified by him within 3 months of the commission of the offence in terms of section 145B read with section 393 (7) of the Code of Criminal Procedure Act No.15 of 1979 as amended by (Amendment) Act No.52 of 1989. The New Act lays down that the proceedings have to be concluded within ninety days from the date of commencement of proceedings in terms of Chapter XV of the Code of the Code of Criminal Procedure Act.

Commencement of Proceedings

Section 6 of the New Act deals with the provisions relating to the taking of statements of persons who know the facts and circumstances of the case where a Magistrate proceeds to hold preliminary inquiry in terms of Chapter XV of the Code of Criminal Procedure Act No.15 of 1979. There is no provision specified in the New Act relating to the reading over to the accused, the charge or charges in respect of which the inquiry is being held. The non inclusion of the provision creates some confusion because section 6(14) of the New Act refers to reading of the charge or charges to the accused after the conclusion of the recording of statements of witnesses produced by the prosecution (which provision is contained in Section 150 of the Code of Criminal Procedure Act, No.15 of 1979).

Depositions

Section 6 of the New Act deals with the provisions applying to the taking of statements of persons who know the facts and circumstances of the case. These are based on statements recorded in terms of Chapter XI Code of Criminal Procedure Act, No.15 of 1979. This is a departure from the procedure spelt out in the latter.

Before a witness is produced by the prosecution against the accused, he or his pleader is permitted to peruse in open court, the statements made by the witness to the Police (vide section 6 (6) of the New Act). The case for the prosecution commences with the Magistrate reading out or causing to be read out to every witness produced by the prosecution, in the presence and hearing of the accused the statements made by the witness in the course of investigations conducted under the Chapter XI of the code of Criminal Procedure Act. Thereafter the Magistrate should ask the witness whether such statement is an accurate record of what he stated to the Police. The witness may take any of the following options:

1. To state to the Magistrate that the statement made to the Police is an accurate record of what he stated to the Police in which event, the Magistrate shall record that fact.

2. To state that he desires to make additions or alterations to his original statement in which event, the Magistrate will permit him to do so and once additions or alterations are done the Magistrate should record such additions and alterations.

3. To state that the original statement in its entirety or in part is not an accurate record of what he stated to the Police. Then the Magistrate has to permit him to give an account of the circumstances relating to the offence or make such alterations or additions in the original statement.

Right to Cross-examination – Prosecutor's Role

Any cross-examination of the witness by the accused or his pleaser is not permitted. (vide section 6 (3) (b) and 6 (5) (b) of the New Act).

Nevertheless, having considered the nature of the material contained in the statement made to the police, the prosecutor may tender the witness for cross-examination by the accused or his pleader (vide proviso to Schedule 6(3)(b) and 6 (5) (b). Apart from this, the prosecutor has no role to play in these proceedings.

Clarification

The accused or his pleader is permitted to seek any clarification of any matter arising from the statement made to the olice or any additions or alterations (vide section 6 (3) (b) of the New Act) or any matter arising from the account of circumstances relating to the offences of additions or alterations made under section 6 (5) (b) of the New Act.

It is only through the Magistrate that the aforesaid matters for clarification are put to the witness. Likewise, if the Magistrate himself needs clarification in respect of any of the above matters, he can put such matters to the witness (vide section 6(3)(b) and 6(5)(b) of the New Act). The Magistrate has to record the additions, alterations or the account given by the witness.

Affirmation by the Witness

Once the above procedure is followed, the Magistrate must require the witness to swear or affirm to the truth of the matter so recorded. Thereafter the Magistrate has to sign a certified copy of the statement made by the witness to the police and also cause the witness to sign the same. This document will be filed of record as part of the record of the inquiry.

Reports of the Expert witnesses and affidavits of police officers

The procedure relating to aforesaid matters are found in section 6 (8), 6 (9) of the Act. The Magistrate need not summon any expert witness or police officer. But if he decides to summon them, he has to give reasons for his decision and to obtain prior sanction of the Attorney General.

When such expert witness or Police officers appear in Court, no cross-examination will be permitted but if any clarification is sought by the accused or his pleader relating to any matter arising from such report or affidavit, such clarifications will be put to the expert witness or the Police officer by the Magistrate. Apart from this, the Magistrate himself may seek clarifications from the witness or Police officer if necessary. Such clarifications have to be recorded.

Depositions admissible under Section 33 of the Evidence Ordinance

The deposition of witnesses who are tendered for cross-examination by the prosecution and statements made by the expert witness or police officer will be admitted in evidence in terms of Section 33 of the Evidence Ordinance (vide Section 6(10) of the New Act).

But other depositions made by the prosecution witnesses will not be admissible evidence in terms of section 33 of the Evidence Ordinance. The Rule of Evidence is that the adverse party in the first

proceedings should have had the right and opportunity to cross-examine vide – *Subramaniam* v.*I.P. K.K.S.*[1] *King* v. *Appuhamy.*[2]

Right of representation

A new feature that has been introduced in the New Act is that, in terms of section 6(13), every witness produced against the accused is entitled to be represented by an attorney-at-law. An accused, as of right, is entitled to be represented by a pleader.

Procedure when accused is absent

In the case of an absent accused, the procedure found in section 11(a) will apply. But an absent accused is entitled to be represented by an Attorney-at-law (vide Section 11(b) of the New Act).

Discharge of the accused

After conclusion of the recording of the depositions of the witnesses produced by the prosecution against the accused, if such evidence is not sufficient to call for a defence, in terms of section 153 of the code of Criminal Procedure Act No.15 of 1979 the Magistrate should forthwith discharge the accused. But in such a case, he has to give reasons for his order.

Calling for Defence

If the accused is not dealt with in accordance with the provisions of section 153 of the Code of Criminal Procedure Act, the Magistrate shall read the charge and inform him of his right to call the witnesses and if he so desires to give evidence on his own behalf[3] –

Having specified the provisions relating to calling for the defence, the New Act is silent as to how the defence witnesses are to be dealt with. This results in a perplexing situation as immediately after section 6(14), section 6(15) brings in the provisions of Chapter XV of the Code of Criminal Procedure Act No.15 of 1979 into operation and states that "The provisions of the Code of Criminal Procedure Act No.15 of 1979 shall *mutatis mutandis* apply to any preliminary inquiry held under the provisions of this Act."

Since the new Act does not set out any special procedure where the Magistrate decides to call for the accused's defence, the provisions of the Code of Criminal Procedure Act, No. 15 of 1979 as prescribed in sections 150, 151, 152 and 153 will apply.

The normal rules of evidence relating to examinations-in-chief, cross-examination and re-examination will also apply if the accused opts to give evidence on his own behalf and / or call witnesses. However, this appears to result in an anomalous situation when compared with the procedure set out in section 6 of the New Act relating to the "taking of statements of witnesses produced against the accused."

At the end of the defence case, if the Magistrate considers that the evidence against the accused is not sufficient to put him on trial, the Magistrate will forthwith discharge the accused. He should give

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[1] 71 NLR 204
[2] 22 NLR 35
[3] Vide Section 6 (14) of the New Act.

reasons. But if he considers that the evidence is sufficient to put the accused on trial, the Magistrate will commit the accused for trial before the High Court.

Extension of detention period

Provisions relating to extension of the detention period in police custody of persons arrested in connection with offences specified in the schedule to the New Act are found in Section 2 of the New Act. On production of a person arrested in respect of any aforesaid offences prior to expiration of 24 hours as provided for in the Code of Criminal Procedure Act No.15 of 1979, if a certificate by a Police officer not below the rank of Assistant Superintendent of Police is submitted stating that it is necessary to detain such person for the purpose of further investigation, the Magistrate has power to extend the period of detention for a further period of 24 hours. The aggregate period of detention cannot exceed 48 hours.

The duration of the Act is for a period of two years from 31st May 2005.

The 1861 Police Act of India: Why we need to replace it?

*Maja Daruwala, G.P Josh & Mandeep Tiwana**

Introduction

Any discussion on police reform in India eventually gravitates towards the demand for replacing the Police Act of 1861 with legislation that is more in keeping with the times and prevailing democratic values. The Police Act, 1861 was legislated by the British in the aftermath of the Mutiny of 1857 or the First War of Independence. The British, naturally at that time wanted to establish a police force that would suit the purpose of crushing dissent and any movement for self government. This Act continues to this day in most states of India despite far reaching changes in governance and India's transition from being a colonised nation to a sovereign republic. The government and its police today are obliged to respect political diversity and guarantee a climate of peace in which people feel secure in the exercise of their rights and the protection of their freedoms. Because these sentiments are not reflected in the legislation governing the police, it has contributed to the police remaining outside the loop of prevailing democratic values. It is also the primary reason for the police being perceived by many as the handmaiden of the political elite rather than as an organisation that provides essential services through ensuring peace and security to the people.

The Police Act of 1861 governs most police forces in India. Some states like Maharashtra, Gujarat, Kerala and Delhi have indeed enacted their own Acts but even these closely resemble and are modeled on the Act of 1861.[1] The National Police Commission, 1979-81 (NPC) was alive to the need for reform in legislation governing the police and went on draft a Model Police Act. in its Eighth Report submitted in 1981. Unfortunately, this proposed bill, which was developed as a response to the context of the times, and addressed to end some of the ills that plague policing has not been adopted by any state. Nevertheless, it has served as the template for nascent initiatives for many who are trying to replace the out of date Police Acts in their states with more relevant legislation.[2]

However, these initiatives, coming by and large from within the police establishment itself, have borrowed selectively from the NPC Model in ways that have the effect of strengthening the police establishment without the guarantee of accountability or responsiveness to the public. None of these initiatives has ever crystallised into an Act in any state in India.

This paper outlines the principles that must govern police legislation in a democratic country. It highlights the shortcomings of the Police Act, 1861 and identifies proposals for addressing these in the NPC Model; the proposed Bills of Punjab, Madhya Pradesh, Rajasthan and Andhra Pradesh. The paper also borrows ideas and best practices from the Riberio Committee on Police Reforms (1998-99); the Padmanabhaiah Committee (2000); and police legislation from the Commonwealth jurisdictions of U.K, British Columbia (Canada), South Africa and Northern Ireland.

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*paper by the Commonwealth Human Rights Initiative, New Delhi, India, July 2005

[1] Like the Bombay State Reserve Police Act, 1951 in Maharashtra and Gujarat; State Armed Police Forces Act, 1952 in Andhra Pradesh; Madhya Pradesh Special Armed Forces Act, 1958 in Madhya Pradesh; Sikkim Armed Police Forces Act, 1981 in Sikkim; Tripura State Rifles Act, 1983 in Tripura Nagaland Police Act, 1985 in Nagaland etc.

[2] For instance Punjab Police Bill 2003, Madhya Pradesh Police Vidheyak 2001, Rajasthan Police Bill 2000, Andhra Pradesh Police Bill 1996

Democratic Principles to govern Police Legislation

Insulation from illegitimate political interference

Principle: any new formulation of policing in India today, must ensure that the police have functional autonomy combined with high performance and strong mechanisms of accountability. Insulating the police from illegitimate political control while retaining executive oversight has to be a singular objective.

Problem: too much unfettered discretion over appointments and transfers

The Police Act, 1861 vests the superintendence of the police directly in the hands of the political executive i.e the state government. At the present time, the Head of Police (Director General/ Inspector General) enjoys her/his tenure at the pleasure of the Chief Minister. S/he may be removed from the post at any time without assigning any reasons. Such a state of affairs has resulted in wide-spread politicisation of the police where increasingly, allegiance is owed not to the law but to the ruling political elite. The pervasiveness of this influence over the rank and file, as much as senior police officers in ways that are not keeping with police regulations means that there is lesser obedience to the law, chain of command and established procedures.

The upshot being, a situation where police officers are functioning with a greater willingness to obey unwritten and informal orders to subvert legitimate democratic processes in lieu of personal gain and political patronage. This interferes with the exercise of democratic freedom by those who are opposed to the party in power. It is well demonstrated that political interference in the investigative work of the police hinders rule of law. Officers are often pressured to use their investigative powers to pursue political vendettas or shield those who enjoy the patronage of politicians belonging to the ruling party. The registration or non-registration of cases to favour or harm or to manipulate crime statistics for political expediency creates a deep sense of discrimination and uncertainty in the public. On the other hand, officers who resist illegitimate political interference are subject to frequent transfers and in extreme cases, departmental inquiries and even false legal proceedings.

All this has the cumulative effect of impairing any ability of the police force to perform its main function to provide the community with a safe and secure environment. Rather, the police has become highly vulnerable to abuse of power, corruption and criminality the very things it is expected to fight.

The Solution

- oversight through a special body

The NPC's Model Bill recognised that the superintendence of the police must vest with the state government. But to counter the existence of undue dominant influence, it suggested the creation of a statutory body called the State Security Commission. The State Security Commission would be comprised of the Minister in charge of the police (chair); two members from the State Legislature, one from the ruling party and the other from the opposition; and four members to be nominated by the Chief Minister after approval by the State Legislature from amongst retired judges of the High Court, retired senior government servants, social scientists or academicians of public standing and eminence.

- ensure that oversight will guarantee good performance and legality

The Model Bill also limits the power of superintendence of the state government over the police to ensuring that police performance is strictly in accordance with the law. At the same time, the State Security Commission is responsible for laying down broad policy guidelines and directions for the performance of the preventive and service oriented functions of the police, evaluating as well as keeping under review, the functioning of the police. The Commission is also mandated to be a forum of appeal for police officers of and above the rank of Superintendent of Police for disposing representations from them about being subject to illegal or irregular orders in the performance of their duties.

- appoint the police chief through an open procedure; on merit, not on whim

To counter the prevailing practice of subjective appointment of the Head of Police - which is based more on political considerations rather than merit of the candidate - the Model Bill provides an alternative procedure. It recommends that the selection of the Head of Police will be made from a panel of not more than three Indian Police Service (IPS) officers of the state cadre prepared by a Committee consisting of the Chair or Member of the Union Public Service Commission, Union Home Secretary, the seniormost amongst the heads of the Central Police Organisations, the Chief Secretary of the state and the existing Head of Police in the state.

- assure the police chief, a stable tenure

To avoid the present situation that allows powerful political lobbies to appoint and remove the police chief at will, the Model Bill lays down a fixed tenure of three years for the Head of Police. To minimise the scope for arbitrariness, it also clearly lays down the grounds on which the Head of Police may be replaced. In order to ensure that the police chief will do her/his job without fear or favour, the Model Bill also makes the Head of Police ineligible for any post retirement employment under the government or in any public undertaking in which the government has a financial interest.

- assure a fixed tenure for cutting edge posts

Frequent transfers and unstable tenures are seriously undermining the efficiency of the police in India. The threat of transfer is often used by the political executive to make officers subvert adherence to procedures and facilitate indulgence in questionable practices. Police officers who resist illegitimate political pressure frequently find themselves transferred on account of .administrative expedience. To make way for others who are willing to act on dubious political dictates with greater alacrity. Not only does this lower the morale of upright officers but also prevents the proper carrying out of policing plans and strategies. It is therefore essential to prescribe fixed tenures particularly at the cutting edge posts of Superintendent of Police and Station House Officer in the police act itself. The law must lay down the conditions under which an officer can be transferred before the expiry of tenure, which must be strong, cogent and justified.

Accountability of the police

Principle: The police are a responsible arm of the State and are accountable for their conduct and for the service they are expected to provide.

The Problem: the lack of effective accountability mechanisms and periodic review of performance is causing the police to lose confidence of the public.

Police misconduct and the failure to effectively respond to situations are undermining public confidence in the system. These are issues whose gravity is not being addressed in any really serious way. The widespread belief that the police functions with impunity - and officers are rarely held to account for their acts of omission and commission is breaking the faith of the public in the police.

The question that is often asked is that why do we need additional accountability mechanisms when we have an elaborate system of courts and internal disciplinary procedures. Firstly every act of police misconduct may not necessarily be a criminal offence that can be tried by the courts. Additionally, registering a criminal case against a police officer is a long and cumbersome process. Further, Sections 132 and 197 of the Code of Criminal Procedure (CrPC) prevent courts from taking cases of alleged offences in the discharge of official duty, for various categories of public servants including police officers, without the prior sanction of the government. This sanction is sparingly granted which explains the overwhelming reliance on internal disciplinary mechanisms which unfortunately do not inspire public trust and confidence. General public distrust stems from a variety of beliefs such as an innate desire for the department to protect its image; some questionable practices finding widespread acceptance within the police; inquiry officers not wishing to be seen as turncoats and inimical to the feeling of camaraderie; the feeling that disciplinary action will lower the morale of the force and blunt its edge in dealing with special situations like militancy or organised crime; and the likelihood of the person under scrutiny being personally known to inquiry officer/s.

The Solution: Multiple levels of accountability

The Police Act, 1861 does not put in place any mechanism to ensure external accountability unlike police legislation in the U.K, South Africa, Canada and Northern Ireland. The NPC's Model Bill limits itself to prescribing as functions of the State Security Commission, evaluation of the performance of the police and generally keeping in review, the functioning of the police. The Punjab Police Bill, 2003 addresses the issue of accountability only so far as by prescribing redress of grievances of the public against police officers as a function of the State Security Commission.

In the absence of any dedicated body to look into complaints against the police, human rights commissions have assumed the role of exercising civilian oversight of police performance. Perhaps, because the largest numbers of complaints received by the National and 16 state human rights commissions are against the police. But human rights commissions have a wide mandate and are expected to look at a variety of human rights concerns. With their limited resources they can barely do justice to very serious complaints against the police such as those involving extra judicial killings, custodial death, torture or extortion. The unusually high number of police related complaints nationwide and the general public dissatisfaction with police performance demand the creation of separate dedicated bodies to receive police related complaints and evaluate police performance.

Establishing an independent complaints body

Here we can borrow and adapt from international experience where police acts themselves provide for these independent bodies. In the UK, the Independent Police Complaints Commission (IPCC) supervises and investigates public complaints against the police and can take over the supervision or investigation of any complaints case. The Head of Police must by law give the IPCC access to police documents and premises. Complaints can be made by persons other than victims or even via a third party or through independent organisations like the citizens advice bureau. Complainants have the right to appeal to the IPCC if their complaints are not registered. Complainants are kept informed about the progress and conduct of the investigation into their complaint and given a summary of evidence, explaining how conclusions were reached. If the complainant is not satisfied, s/he can appeal.

South Africa has independent complaints authorities that investigate police misconduct at both national and provincial levels. The Independent Complaints Directorate functions independently and has its own staff. It looks at deaths in police custody and deaths occurring as a result of police action; police involvement in criminal activities such as assault, robbery, theft of motor vehicles etc.; and police conduct or behaviour which is prohibited by the police regulations, such as violation of the code of conduct or neglect of duties; and failure to protect victims of domestic violence under the Domestic Violence Act. All these situations are very relevant to our own circumstances in India. The Minister in consultation with the Parliamentary Committees nominates the head of the Directorate. S/he is appointed to the post only when the nomination is confirmed by the Parliamentary Committees. S/he is required to submit an annual report to the Minister within three months of the end of the financial year, which has to be tabled in Parliament by the Minister within 14 days. All these procedures allow for wide debate on issues relating to policing at the level of peoples representatives, which is expanded by public knowledge and understanding of police functioning and year on year police performance evaluations.

The Police Act in British Columbia provides for the appointment of a Police Complaint Commissioner to oversee the handling of complaints against the police. S/he is appointed on the unanimous recommendation of a special committee of the Legislative Assembly. The police complaint commissioner cannot be a Member of the Legislative Assembly but is considered to be an officer of the Legislature, who holds office for a term of six years. S/he can appoint staff to assist in performing the duties of the office and must report annually to the Speaker of the Legislative Assembly on the work of her/his office.

Specialised performance evaluation

As affirmed earlier, the police must be held accountable for the service they are expected to provide and for which huge amounts of tax payers' money are spent. The National Police Commission had strongly recommended continuous monitoring of police performance and pointed to the creation of an independent cell in the State Security Commission for this purpose. The NPC Model Bill provides for a Director of Inspection to evaluate the performance of the police and report to the State Security Commission.

In Northern Ireland, the Policing Board which is an independent public body made upof 19 political and independent members sets objectives and targets for police performance following a consultation with the Police Chief and uses these to monitor progress. The Board, set up under the Police (Northern Ireland) Act 2000 publishes an annual report of performance against these objectives. In addition, the Board monitors trends and patterns in crime and devises ways for the public to cooperate

with the police to prevent crime. In the U.K, the performance of different forces is measured and compared by a Police Standards Unit, which grounds its evaluation in the Police Performance Assessment Framework (PPAF) prepared each year by the Home Office. The PPAF assesses police performance on a number of factors, including: satisfaction of victims of domestic burglary, violent crime, vehicle crime and road traffic collisions with respect to police handling of their cases; people's perception about their local police doing a good job in the British Crime Survey; satisfaction of victims of racist incidents to the service provided by the police; representation of women and minorities in the force; incidence (per 1000 population) of domestic burglaries, violent crime, robberies, vehicle crime, life threatening and gun crime; number and percentage of offences brought to justice; action taken in domestic violence incidents; statistics regarding fatalities or serious injuries in road accidents; people.s perception about the fear of crime, anti-social behaviour, local drug use/selling in the British Crime Survey; percentage of officer time spent in frontline duties; delivery of internal efficiency targets; and time lost due to sickness of police officers.

Offences by police officers

Principle: The police are custodians of the law and must respect it all costs. Duty cannot be furthered through the adoption of illegal means.

The Problem: Widespread indiscipline and cavalier attitudes towards law and procedures are eroding the faith of people in the police.

The Police Code of Conduct requires officers to respect and uphold the rights of citizens guaranteed in the Constitution and other laws. It also requires officers to maintain the highest standards of integrity. Unfortunately, not a day goes by without police excesses being reported in different parts of the country. The rising number of complaints, coupled with strong public perceptions about the police being brutal and corrupt point to a crisis of discipline in the department.

The Solution: Enforce the highest standards of personal and professional conduct through the law.

Offences

The list of offences committed by a police officer under the Police Act, 1861 includes wilful breach or neglect of any rule or regulation or lawful order; withdrawal from duties of the office or being absent without permission or reasonable cause; engaging without authority in any employment other than police duty; cowardice; and causing any unwarrantable violence to any person in her/his custody. The penalty for these offences is fine up to three months' pay or imprisonment up to three months or both. The NPC Model recognises all these offences but adds many new ones to the list, like being found in a state of intoxication while on duty; malingering or feigning illness or voluntarily causing hurt to self so as to render oneself unfit for service; being grossly insubordinate to superior officers or using criminal force against superior officers; and engaging in or participating in any demonstration, procession or strike or abetting any form of strike or coercion or physical duress to force any authority to concede anything. All such offences are punishable with imprisonment up to one year or fine up to five hundred rupees or with both.

In addition to the offences committed by a police officer against the department, there are also offences against citizens in the NPC Model. A police officer is guilty of an offence punishable by imprisonment up to one year and/or with fine up to Rs 500 if s/he:

(a) without lawful authority or reasonable cause enters to search or causes to be entered or searched any building, vessel, tent or place; or
(b) vexatiously and unnecessarily seizes the property of any person; or
(c) vexatiously and unnecessarily detains, searches or arrests any person; or
(d) offers any unnecessary personal violence to any person in her/his custody; or
(e) holds out any threat or promise not warranted by law.

The Bill also makes vexatious and unnecessary delay in forwarding an arrested person to the magistrate, an offence punishable with imprisonment up to one year and/or with fine which may extend to one thousand rupees. All these listed offences in the NPC Model address common instances of rampant and frequent abuse of power present in policing today. They are intended to curb particular acts of misconduct by making them explicitly punishable under police legislation. Perhaps a significant inclusion into the above list of offences should be malafide refusal to register an offence or "burking" which is one of the common public complaints against the police.

Disciplinary penalties

The Police Act, 1861 authorises the Inspector General, Deputy Inspectors General, Assistant Inspectors General and District Superintendents of Police to dismiss, suspend or reduce any police officer of the subordinate ranks who are found to be remiss in the discharge of their official duties. Subordinate officers mean officers of and below the rank of Inspector of Police or negligent in the discharge of duties or unfit for the same. They are also authorized to impose the following punishments:

(a) fine not exceeding one month's pay
(b) confinement to quarters not exceeding 15 days
(c) deprivation of good conduct pay
(d) removal from any office of distinction or special emolument.

The NPC Model increases the number of disciplinary penalties that may be imposed on police officers. These are:

- Out right dismissal
- removal from service
- reduction in rank
- forfeiture of approved service
- reduction in pay
- withholding of increment
- withholding of promotion
- fine not exceeding one month's pay

The Model also states that a police officer may be placed under suspension:

- where disciplinary proceedings are contemplated or are pending against the officer
- where the officer in the opinion of the suspending authority has engaged in activities prejudicial to the security of the State
- where a case against the officer in respect of any criminal offence is under investigation, inquiry or trial and in the opinion of the suspending authority, there is a *prima facie* case

Disciplinary provisions in the Andhra Pradesh, Madhya Pradesh, Punjab and Rajasthan Bills are more or less similar to the provisions included in the NPC's Model Bill.•

Duties and responsibilities

Principle: For police legislation to be effective and responsive, it is essential that it contains a charter of duties and responsibilities of the police. Police officers must be aware of the standard they will be held to. It is therefore essential that this charter is elaborate and specific.

The Problem: the police are still functioning as a colonial style regime police, vastly removed from ground realities.

The Police Act, 1861 was enacted with a limited purpose. Its preamble mentions that –

> *"it is expedient to reorganise the police and to make it a more efficient instrument for the prevention and detection of crime."*

This has led to frequent assertion by the police that they have no other societal role to play, given their duties under the Act, which are to:

i. obey and execute all orders and warrants *lawfully* issued by any competent authority;
ii. collect and communicate intelligence affecting the public peace;
iii. prevent commission of offences and public nuisances;
iv. detect and bring offenders to justice; and
v. apprehend all persons whom the officer is legally authorised to apprehend and for whose apprehension sufficient ground exists.

The Solution: Expand the charter of the police and attune it to uphold constitutional rights and maintain the rule of law

The NPC's Model goes far beyond the 1861 charter and takes into account not only the changes which have occurred within the organisation during this period but also in the environment in which the organisation is required to function. The Preamble to the Model stresses that –

> *"the police has a paramount obligation and duty to function according to the requirements of the Constitution, law and the democratic aspirations of the people",* and requires it *"to be professional and service-oriented and free from extraneous influences and yet accountable to the people."*

The Model therefore prescribes the following duties for individual police officers:

i. Promote and preserve public order;
ii. Investigate crimes, and where appropriate apprehend the offenders and participate in subsequent legal proceedings connected therewith;
iii. Identify problems and situations that are likely to result in commission of crimes;
iv. Reduce the opportunities for the commission of crimes through preventive patrol and other prescribed police measures;
v. Aid and co-operate with other relevant agencies in implementing the prescribed measures for prevention of crimes;

vi. Aid individuals who are in danger of physical harm;
vii. Create and maintain a feeling of security in the community;
viii. Facilitate orderly movement of people and vehicles;
ix. Counsel and resolve conflicts and promote amity;
x. Provide necessary services and afford relief to people in distress situations;
xi. Collect intelligence relating to matters affecting public peace and crimes in general including social and economic offences, national integrity and security; and
xii. Perform such other duties as may be enjoined on them by law for the time being in force.

Some distinctly new features of the police role can be identified from the abovementioned list of duties. Firstly, the preventive role of the police has been enlarged and given a more positive proactive shape than the one envisaged in the 1861 Police Act. The police are required to identify problems and situations that are likely to result in commission of crimes, and to reduce the opportunities for such commission through appropriate measures. They are required to help people who are in danger of physical harm and thereby help in creating and maintaining a feeling of security in the community. The police are required not merely preserve but to promote public order. Secondly, the police are required not merely to investigate crime and apprehend offenders, but also to participate in subsequent legal proceedings connected therewith. Item (ii) of the above list is intended to give legal scope for police to be associated with the process of prosecution and have effective interaction with the prosecuting agency. Thirdly, the National Police Commission has emphasised the need for the police to maintain effective working relationship with other sub-systems of the Criminal Justice System and with community services. Item (v) of the list of duties is intended to afford scope for police to be associated with the other wings of the Criminal Justice System for preventing crime. Fourthly, items (ix) and (x) of the list of duties are intended to facilitate the performance of service-oriented functions and also recognise a counseling and mediating role for the police in appropriate situations.

In addition to the above, fourteen additional duties of the police towards the public, particularly towards women, children, poor and other disadvantaged segments of society have also been prescribed. These additional duties again emphasise the preventive and service-oriented role of the police. Some of these duties require the police to register all cognizable offences, assist in preventing the poor from being exploited, prevent harassment of women and children in public places, refrain from causing needless inconvenience to the members of the public, ensure that arrested persons are not denied their rights and privileges, see that victims of road accidents are given prompt medical aid without waiting for formalities etc.

Another feature of the NPC Model is to prescribe *"emergency duties of the police...* The Model empowers the State Government to declare any specified service to be an essential service to the community and makes it "the duty of every police officer to obey any order given by any superior officer in relation to any employment" in connection with the specified service.

The Rajasthan Police Bill, 2000 includes as a duty of police officers, to ensure safe custody of a person under arrest and in case a sick or wounded person comes or is brought to a police station, to promptly make available, necessary medical help. The Andhra Pradesh Police Bill, 1996 mentions as a duty of the police to prevent ragging in educational institutions and hostels.

Consultation with the community

Principle: The police in a democracy must be a provider of service to the community and cannot be a force to subdue and subject people. As such, it must be a trusted ally of the community in ensuring safety and security for the public at large.

The Problem: little trust, understanding or consultation between the police and the people

As the work of the police essentially involves serving communities, it is essential that police organisations be responsive to the needs of communities. Therefore, active consultation and working with and through communities are essential elements of democratic policing. Unfortunately policing in India has been by and large, a one sided affair with communities having little or no say in policing plans and strategies that affect them the most. The idea that the police is part of the community and therefore accountable to it, has not taken root in the country.

The Solution: institutionalised role for the community in policing

The Police Act, 1861 is silent on the issue of community consultation. Rather, it focuses on the responsibility of communities to ensure that they do not step out of line and penalises them for disturbance of order. The NPC Model Bill also does not specifically require the police to consult with communities. It limits itself to authorising the Superintendent or Commissioner of Police to constituting defence societies for the protection of persons, security of property and public safety. The Punjab Police Bill, 2003 offers a slight improvement over this by mentioning that the Director General of Police shall frame rules for the implementation of community policing and the establishment and working of community police resource centres.

In South Africa, the Constitution itself makes it the "political responsibility" of each province .to promote good relations between the police and the community and to appoint a commission of inquiry into any breakdown in relations between the two. The South Africa Police Act, 1995 prescribes the establishment of Community Police Forums at police station level to act as liaison between the police and the community. The liaison helps establish and maintain community police partnerships; it promotes communication and co-operation; improves the rendering of services by the police in the community; increases transparency in police functioning and strengthens accountability to the local community; and promotes joint problem identification and problem solving.

In addition to forums, the South African Act establishes community police boards at area and provincial levels. The area community police boards are expected to consist of representatives of community police forums in each area, while provincial community police boards are expected to include representatives of all area community police boards in that province.

In the U.K, the police are required by law under the Police Act, 1996 to make arrangements in each police area to find out the views of the local people about matters concerning the police and also to involve people in cooperating with police in preventing crime.

The Police Reforms Act, 2002 of the UK allows exercise of police powers by civilians. It enables the chief officers of police to appoint suitable support staff from amongst citizens to function as

community support officers and gives them powers to deal with anti-social behaviour. Community support officers may also have powers to confiscate alcohol and tobacco in defined circumstances, seize vehicles used to cause alarm and direct traffic for certain specific purposes among other things.

Again, in Canada, community involvement in policing is required by law. In British Columbia, police committees may be set up for promoting a good relationship between the residents and the police and to bring to the attention of all concerned including the Minister, matters concerning the adequacy of policing and making recommendations on those matters. Members of the committees are to be selected after consulting municipal councils.

Conclusion

The Police Act, 1861 needs to be replaced with legislation that reflects the democratic nature of India's polity and the changing times. The Act is weak in almost all the parameters that must govern democratic police legislation.

1. The Act has made it easier for others to abuse and misuse the police organisation. It has been possible for people in positions of power to do so because of the following reasons:

    i. The Act gives the government, the authority to exercise superintendence over the police, without defining the word "superintendence" or prescribing some guidelines to ensure that the use of power will be legitimate;
    ii. The Act does not establish any institutional and other arrangements to insulate the police from undesirable and illegitimate outside control, pressures and influences;
    iii. The Act does not recognise the responsibility of the government to establish an efficient and effective police force;
    iv. The Act does not make it necessary to outline objectives and performance standards, nor does it set up independent mechanisms to monitor and inspect police performance;

2. The Act is antiquated in its charter of duties, which is narrow and limited.
3. The Act does not mandate the police to function as a professional and service oriented organization
4. The Act is not in consonance with the requirements of democratic policing. These requirements insist on the existence of a police force that:

    (a) is subject to the rule of law, rather than the whims of a powerful leader or party;
    (b) can intervene in the life of citizens only under limited andcontrolled circumstances; and
    (c) is publicly accountable.

In short, the Act has obstructed the establishment of the rule of law and retarded the growth of a professional system of policing.

The NPC Model makes a valiant effort to address some of the shortcomings in the Police Act of 1861 but it is deficient in two fundamental aspects:

(i) It does not put in place, mechanisms for police accountability. It is here that we must borrow and adapt from international experience.

(ii) The NPC Model also does not provide for institutionalised police community engagement. Here too, we must look at international experience and adapt it to Indian conditions.

Another area where the NPC Model requires work is the sections dealing with offences. A number of changes have taken place since May 1981 when the Eighth Report of the National Police Commission in which the NPC Model is laid out, was tabled. The punishments for offences need to be reviewed. The fines are based on the price index of 1981, which make the amounts negligible today. In some cases, punishment by fine is accompanied by punishment with imprisonment, which may also be reviewed.

The NPC Model provides a useful template to base new police legislation upon. Many provisions in the NPC Bill are relevant but they need to augmented by provisions that will ensure multiple levels of police accountability, means of evaluating police performance, involvement of the community in policing and police oversight at the local level.

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