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DISCIPLINARY CONTROL OF THE SRI LANKA POLICE

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Editor's Note ... ...

The paper that the Review publishes in this Issue, offers different (though admittedly contested) perspectives in regard to the vexed question of disciplinary control of the police.

Currently, the failure of such disciplinary control has resulted in decreased public respect for the country's law enforcers. Apart from heightened conflict resulting in the repeated occurrence of grave human rights violations involving police officers as perpetrators, ordinary law enforcement itself has failed in perceptible respects. Failures in effective criminal investigations, coupled with the failures in effective prosecutions, have had startling consequences for the deterrent effect of the law; thus the conviction rate for grave crimes was recently officially conceded to be as low as 4% (in *The Eradication of Laws Delays'*, Committee Appointed to Recommend Amendments to the Practice and Procedure in Investigations and Courts, Final Report, 2nd April, 2004).

The creation of the National Police Commission by the 17th Amendment to the Constitution was one recent effort to address these problems. Efforts by the NPC during its first term in office, such as the interdiction of police officers indicted for torture, and the prevention of political transfers of police officers during pre-election periods, were met with strenuous objections in equal measure from the political establishment. This had its inevitable result: members of the constitutional commissions, including the NPC in their second term, were unilaterally appointed by the President disregarding the condition of nomination of such members having to be made by the Constitutional Council. The unconstitutional nature of such appointments is too widely known to be reiterated here.

Suffice it to state that the unilateral appointments impacted adversely on the public legitimacy of the NPC in its second term, though (as constitutionally mandated) it did put into place a Public Complaints Procedure in terms of Article 155G (2)) of the 17th Amendment. The practical impact of such a Procedure, in regard to the improvement of disciplinary control of the police, is however extremely uncertain, as pointed out in the analysis that this Issue publishes.

In this context, the paper by former Inspector General Frank de Silva, written on invitation by the Law and Society Trust, is very relevant, though many of its perspectives may be highly contested. It is in the spirit of encouraging open discussions on these issues that these views are published. Its overriding theme is that disciplinary control of police officers has little meaning without administrative control; consequently, the author argues that the separation of administrative authority from disciplinary authority in much of current discourse is not an

admirable precedent. He illustrates this point of view by systematic analysis of the various contexts in which disciplinary control has been stripped from the police command structure.

Particular critical emphasis is laid in this respect on the judicial review of alleged fundamental rights violations. He advances the view that though judgments by the Supreme Court, delivered in terms of its jurisdiction under Article 126 of the Constitution, have had a salutary effect on police conduct - inasmuch as they have, in instances, issued severe reprimands to erring police officers - there have also been dysfunctional consequences. It is the writer's view that determination of culpability, consequent to assessment of affidavit evidence, carries with it certain risks that may rebound unfairly upon a respondent police officer.

This view, of course, reflects a long standing grievance of the police hierarchy, which at one point established separate funds to provide for legal costs and expenses in regard not only to providing legal representation for a respondent police officer but also in making payments of compensation determined by the Court. The great tussle between the Court and the police establishment was explicit in this regard. The Court has often expressed its own frustration with the consequent situation, where judicial orders to enforce disciplinary action against particular police officers have been ignored outright. Pertinently, it has been asked thus;

> *It is a lamentable fact that the police who are supposed to protect the ordinary citizens of this country have become violators of the law. We may ask with Juvenal, 'quis custodiet ipsos custodies?' Who is to guard the guards themselves? (Kemasiri Kumara Caldera 's case, S.C. (F.R.) 343/99, SCM 6/11/2001).*

Indeed, the resistance of the police hierarchy to any form of supervision has extended to any action taken by the NPC as well, in this respect. This divergence of views in regard to the appropriate disciplinary action that ought to be taken is well illustrated in this paper itself, when the author discusses the NPC's recent countermanding of a transfer order by the IGP, of an officer from the PNB (Police Narcotics Bureau) to the Police Training College.

Whatever may be the resistance of the police establishment and whatever the theoretical merits of a closely intertwining relationship between the administrative and disciplinary control of the police, there is no doubt that it was due to the failure of the old order that prompted constitutional changes such as the 17th Amendment to the Constitution. The NPC was thus vested with the powers of appointment, promotion, transfer, disciplinary control and dismissal of all officers other than the Inspector General. Yet, the 17th Amendment envisages a spirit of consultation and not confrontation between the IGP and the NPC. In fact, Article 155J empowers the NPC to delegate its powers of appointment, promotion, transfer, disciplinary control

and dismissal of any category of police officers to the IGP or, in consultation with the IGP, to any police officer. Practically however, as the author points out, the manner in which this delegation is practiced has led to further aggravation of the line between disciplinary control and administrative authority. Meanwhile, his caution that public expectations behind the creation of the NPC, namely the containment of political influence on the police function, may not be effectively translated into action is worthy of further thought. As he observes;

> *It was thought that independently determined promotions transfers and appointments would effectively address the problem of politics in the police. The possibility that such appointees, promotees or transferees could thereafter be politically influenced in the course of their duties finds no expression, either in the law or in actual practice. In other words, (beyond the initial appointment), there is little administrative control over dubious operations which should have been the very purpose of these Commissions.*

A related issue is the structure of promotions. The writer's view is that promotions within the police service should be effectively linked to performance. Yet, as he points out, the emphasis is not on positive work achievement but on absence of adverse conduct, which is deleterious to overall improvement of the police service.

A useful focus of this paper is on existing disciplinary regulations and departmental orders. Though there is no express concession to this effect in the current analysis, it does appear that these Departmental Orders are presently not being implemented to their fullest extent. The concluding recommendations of the writer are that disciplinary control of police should be forged through community participation. It is axiomatic however that community policing (in any event, not a novel concept) can necessarily be to the common good only as supplementary to a disciplined police service.

Ultimately, the best way in which the police establishment could effectively demonstrate its *bona fides* to the public is by placing on record the actual improvement of its internal disciplinary mechanisms and consequential deterrence of abusers. Even given current constraints such as the overt and covert politicisation of the policing function, much can still be demonstrated by way of effective disciplinary control by the police itself.

In conclusion, the Review publishes a relevant excerpt from the Police Commission Report of 1970. Even though its findings have been stringently critiqued in the accompanying paper, the Report illustrates how problems associated with the concept of good policing in Sri Lanka still remain agonisingly relevant many decades later.

Kishali Pinto Jayawardena

The Sri Lanka Police: Disciplinary Control and Questions Thereof

Frank de Silva[*]

1. Introduction

Disciplinary control is a concept that is possessed of clear and sufficient meaning. A study of disciplinary control over the Sri Lanka Police however entails a consideration of several aspects relating to the subject. This paper will deal with the subject of disciplinary control while identifying the many features, inherent or attendant, in respect of the same. The attendant features are many and defining disciplinary control in itself is difficult. The approach to the study of disciplinary control will therefore advance certain themes that underline the subject.

1. At the base of the consideration of discipline is the aspect of sanction. Conventional writing on this subject is focused on sanctions which are invoked upon breach of discipline. Sanctions are applied to enforce control. Comprehensive codes of discipline are formulated to cover many exigencies of indiscipline and violations of rules and regulations. Yet, violation of the rules and breach of the code of discipline suggests the crux of the problem. The above detailing of sanctions has a negative perspective;

2. Sanctions, however, have also a positive aspect. In practical terms, discipline is also ensured by the positive inducement of work through administrative control. Performance ensured as a result of administrative authority and control achieves disciplinary control more effectively. Thus diligence and efficiency directed by administrative authority makes for disciplinary control in a positive sense. Disciplinary control as a process is incidental to an administrative authority process which drives work performance. Violation of rules and breach of discipline have little room within effective administrative control of the process;

3. There is then a close relationship between administrative control and disciplinary control. Administrative authority and disciplinary control are closely intertwined in concept and in the practical day to day working of the police. Administratively advanced performance reinforces discipline. Due performance is better ensured when administrative and disciplinary authority are fused in the supervisory and directing staff. Politics, touted as the bane of policing, has much relevance to the conundrum of want-of-work and want-of-discipline. Political influence exerted over the functioning of the police department goes hand in hand with poor performance and want of discipline;

4. Judicial review of police action provides sanctions in response to the breach of law and discipline. The law affords several remedies for breach of law and discipline. Currently, judicial control over police indiscipline is largely constituted by determinations by the Supreme Court of violation of the fundamental rights of citizens by police action. There are other remedies which are, however, of little practical use in effecting disciplinary control. There are the criminal sanctions for violation of the penal law. There are also the common law remedies for tort and wrongful restraint. Damages claims are considerable in many other jurisdictions. These are of minimal effect in Sri Lanka in exercising disciplinary control;

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5. The effect of judicial review of police action is twofold. On the one hand, judicial review relates to very serious violations of rights such as murder, disappearances and torture. These are extreme forms of indiscipline. Rights determinations in respect of these cases have had a salutary effect on police conduct seen from the viewpoint of disciplinary control. However, the problem in regard to disciplinary control through rights determination arises also in many other cases of alleged rights violations. Rights determination in this category of cases is replete with dysfunctional consequences for disciplinary control. This question will be dealt with later in this analysis;

6. It is the theme of this paper that disciplinary control of the police through the departmental and judicial means needs to be supplemented by other initiatives. The point advanced here is that disciplinary control of the police should be forged through community participation. Citizens' involvement in the form of citizens' rights watch committees, is discussed below. This device has the merit of dealing with disciplinary control of police and rights violation at the incipient stages;

The discussion hereafter will draw together the following lines of inquiry, affording different perspectives to conventional writings on the subject:

2. The definition of disciplinary control

Initially, some definition of disciplinary control is useful to this analysis. Disciplinary control is the subject covered by the Establishments Code (EC) Volume II. Chapter XLVII deals with general conduct and discipline. Chapter XLVIII deals with dismissal and disciplinary control. 'Disciplinary Authority' in the EC refers to the authority empowered to dismiss and exercise disciplinary control over officers.

It is useful to note the qualitative difference spelt out by the two chapters. Chapter XLVIII deals with sanctions to be applied in the event of breach of discipline. Chapter XLVII deals with discipline as an aspect of general conduct. General conduct and discipline is something to be promoted in a positive sense, a matter to be advanced before breach of discipline occurs. More importantly, advancement of good conduct and good discipline is tied up with work performance. Disciplined conduct flows, in that regard, from the stipulations to give undivided allegiance, discharge duties with diligence and efficiency, behave with courtesy to the public, safeguard the repute of the office and service, avoid conflict of interests and similar directions listed, in Chapter XLVII section 1, under General Conduct and Discipline. The comment bears repetition that stipulations in the EC for good conduct are underpinned by an administrative standard.

Good conduct.

The above stipulations regarding good conduct and discipline are matters of administrative control. They induce performance in a positive mode. Disciplinary control is instrumental to the administrative control of work. The two are closely intertwined and intermixed. Administrative authority and disciplinary authority are in effect, two sides of the same coin. This is the fundamental principle which governs public service and the police service. Separating the two drains the principle of its meaning. This separation of administrative from disciplinary authority also has practical consequences. Administrative authority wielded from outside the performing body cannot relate its exercise directly to performance in the manner envisaged by the governing principles for Good Conduct and Discipline at Chapter XLVII: 1 of the Establishment Code. Therefore when that administrative authority is distanced from work performance - when work is done by one and authority wielded by another – the positive advancement of disciplined performance is inhibited. The matter of discipline, of disciplinary control and disciplinary authority is then framed by an essentially negative mode of enforcement.

Disciplinary control can be projected out of context unless considered in conjunction with administrative authority. Disciplinary control is an integral component of administrative authority. In fact, the two are bound together in constitutional terms. Discussion of disciplinary control as a discrete category is fraught with distortion. For instance, there is the emphasis on the negative which applies equally to departmental procedures as well as to judicial sanctions. Infirmities are rife in both these processes. In the case of court sanctions, the perceived inadequacies are termed as 'dysfunction' in the criminal justice system. Where disciplinary control is wanting at the departmental level, the search is for oversight mechanisms outside the organisation. The problems, however, have not abated. According to some reports, torture is endemic to the police force. Problems of discipline persist despite the volume of literature churned out in these reports. The search for control continues with limited vision.

Disciplinary control in practice

Disciplinary control in practical terms extends to administrative power and administrative control. This statement necessitates further elaboration. It is clear that supervision and direction of subordinates in the course of their work is critical to control. Inspection and supervision by superiors in administrative authority carries with it the possibility of disciplinary action and administrative sanctions. This principle applies, *mutatis mutandis*, to the directing staff whose supervisory task is itself called to account in the same terms. Subordinates at all levels recoil at the possibility of superior staff exercising administrative authority. There is a self disciplining process inbuilt in the hierarchy. That has been a structural framework of administrative and disciplinary control in the police organisation, from its inception.

Restatement of this basic principle is unavoidable in the context of the recent discourse which pulls apart the disciplinary and the administrative processes. The two aspects must merge at every level of the organization. The composite nature of administration, which includes disciplinary control, is crucial at every hour of the day and at every place in the island where it is exercised. This perspective entails a tight intertwining of administration and discipline. This is necessary to meet with day to day realities. The danger is that this close arrangement might be disturbed; whereas there is a need for administration and discipline to be connected all the more closely. Implementation of this requirement has never been easy. Administrative control coupled with disciplinary control has often faltered. Yet the principle persists. Recent history shows that matters are in some disarray due to the disjunction evidenced between the two. The tasks of administrative control and maintenance of discipline are processed disparately, one not reinforcing the other. In fact their separation is increasingly being institutionalised. Much of the disorder can, in truth, be traced to this negative development.

Disciplinary control with administrative control

Administrative orders carry disciplinary content. In certain instances, there has been a conflict of administrative authority and disciplinary control, between the National Police Commission (NPC) and the police department.[1]

[1] By way of recent illustration (see The Sunday Island, 10th September 2005), a transfer order of the Inspector General of Police (IGP) of an officer made under his administrative authority for disciplinary control being countermanded by the National Police Commission (NPC) may be appropriate. It is this writer's view that such countermanding has had a negative impact on the establishment. The authority of the NPC has been invoked through an appeal made by the officer. Reportedly the NPC had held an inquiry and concluded that 'there was no reason for the Inspector to be sent to Kalutara'. "The Commission found no justification for his removal from the PNB (Police Narcotics Bureau) to the Police Training College as he did not need to brush up his skills

Questions of a serious nature arise in these instances; in countermanding transfer orders issued by the Inspector General of Police (IGP), what is the nature of the inquiry held by the NPC? What evidence did it consider? What is the basis of its order? Was the NPC aware of the exigencies inherent in transfer orders in as much as the Supreme Court,[2] on occasion, has indicated the need for sufficient awareness of such?

Of critical concern is the impact of this countermanding order of the NPC on the disciplinary control of the IGP over his body of officers. The intervention by the NPC consequently may have the effect of undermining the administrative and disciplinary authority and control of the IGP. Moreover, the reaction of the officer concerned in the light of this order must be taken into account. The effect of all this administrative and disciplinary confusion on the rest of the body of police officers cannot be encouraging. At the end of the day, the responsibility for getting the work done by the officers remains with the IGP. The NPC will not take responsibility for disciplinary and administrative consequences beyond the order it makes.

Police Commissions of Inquiry

Disciplinary control has invariably been the subject of concern through successive Police Commissions of Inquiry. Their approach to the issue has not sought a single nexus of administrative control and disciplinary control. The two are in fact dealt with under separate chapters. Recommendations for reform are offered separately.

The 1948 Police Commission adverted to this matter in an incidental reference. Justice Soertsz, quoting Lord Lee of Farnham, said "It would be a wholly mistaken policy to limit by hard and fast regulations the exercise by Constables of the individual discretion vested in them"[3]. The context of this remark was different. There is however a germ of an evident principle underlying the exercise of disciplinary control, an element lying beyond the rules and regulations which are not *ipso facto* irregular or illegal. Rather, the idea implicit in that statement is that such discretionary exercise in the performing of duty positively contributes to the objective of discipline. There is no clear statement to this effect. The suggestion is however clear that disciplinary control is not simply a function of rules and regulations.

The finding of the Basnayake Commission was that there was much favouritism and political influence in the matter of promotions and transfers. The problem was one of administration and the need for administrative control. As a matter of personal observation, it may be stated in very general terms that, that finding may have been influenced by the nature of the testimony of many of the witnesses listed in the report. Many of these witnesses were officers who failed to obtain promotion in the normal course through regular processes. On the other hand, there was no finding by the Commission in respect of many officers who had gained the promotion merited to them through performance and discipline. These officers, who had no complaint with the system, did not come before the Commission to contest the assertion of favouritism and influence in promotions. This is nothing unusual; the possibility of officers who merited promotion tendering evidence to counter the charge of the whole promotion system being plagued with external aid and influence, is remote.

The Basnayake Commission's finding on the matter of discipline stressed that "a strict code of discipline should be prescribed and strictly enforced."[4] Their further consideration was that the Code of Discipline and regulations do not appear to have been published in the Gazette, and 'will not have the legal force

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[2] S.C Application No.192/95 dated 30th October 1996.
[3] Ceylon Sessional Paper VIII – 1947, p 19.
[4] Ceylon Sessional Paper XXI – 1970, p 27 section 28.

which flows from publication.'[5] On the matter of relations within the Police Service, the Commission noted that breach of discipline by way of insubordinate or oppressive conduct was rampant. Training and better recruitment were to be the means of dealing with such breach of discipline, apart from strict enforcement of the disciplinary code. The problem of administrative control, according to the recommendation of the Basnayake Commission, was to be sorted out through a special Commission to deal with appointments, transfers, promotions and disciplinary control of the police service. This recommendation planted the seeds of oversight of administration and discipline by an outside body and the question as to whether the solution lay within the organization, with administration and discipline linked on a day to day basis, was not considered.

> "The evidence before us shows that the exercise of the delegated powers in the Police Department has been a source of dissatisfaction....It would also appear that appointments and promotions are subject to political interference."[6]

The problem stated thus hinted at the solution: the remedy must come from outside. The recommendation for the appointment of a Police Ombudsman[7] to deal with complaints by the public against the Police was also in accordance with this mode of thinking, that the whole exercise is best executed from outside.

The WT Jayasinghe Committee Report[8] dealt with the matter of disciplinary control under the subject 'Complaint against Police Officers.' The important observation in this Report was that the Department did not have a mechanism to keep track of complaints against the police by the public, to enable follow up action. From the viewpoint of disciplinary control, this observation is pertinent. This Committee saw the problem in a different manner than the Basnayake Commission. This Committee was not preoccupied with separate consideration of disciplinary control and administrative control. In their view, there was no need to differentiate the two. The different approach of the WT Jayasinghe Committee from that of the Basnayake Commission view can perhaps be explained by the suggestion that the Basnayake view took only a legal perspective while the WT Jayasinghe view encompassed practical and administrative thinking.

Different perspectives in regard to enforcing sanctions for disciplinary control is evidenced from the review of Police Commissions cited above. The relevance of work performance to disciplinary control has not been a substantive focus. The emphasis was rather that administrative control and disciplinary control are separate and distinct, one barely relevant to the other. Their fusion of the two, at each level of the organization, in that one control reinforces the other in the course of policing, has been lost in the calculation.

It was inevitable therefore that in course of time the separation would be institutionalised. Plainly the 17th Amendment was construed to this effect: administrative authority, including promotion and transfer, was removed to a realm apart, along with some aspects of disciplinary control. The Directing Staff, particularly, was relieved of effective administrative authority over those by whom the work is to be done.

Police Ordinance

"The administration of the police in Sri Lanka shall be vested in the Inspector General of Police, Superintendents and Assistant Superintendents, Inspectors, Sergeants and Constables."[9] In this Ordinance

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[5] Ibid.
[6] Ibid p. 29 section 35.
[7] Ibid p. 30 section 41.
[8] Committee Report of August 1995, Ministry of Defence p 42:10.
[9] Police Ordinance No. 16 of 1865 as amended, Section 20.

or any other written law 'Inspector General' shall be deemed to include a Deputy Inspector-General of Police.[10]"

The vesting of administrative authority and control in this manner is clearly for the purpose of performing the statutory duties prescribed in Section 56 of the same Ordinance. Good conduct and good discipline inheres to the administrative authority. Duties and obligations were prescribed by the same Ordinance in section 56. Negligence in duties was to be dealt with under the same Ordinance through rules made under section 55 and 81 of this law. Administrative and disciplinary control was fused together under one authority and one control. There was one single clear purpose underlying these provisions, namely that they are closely related to work performance. That is the ultimate objective. The Police Ordinance therefore laid down an intrinsic principle that authority carries with it responsibility.

Police Departmental Orders

Police Departmental Orders (DO) enforcing disciplinary control were framed under provisions in Section 55 of the Police Ordinance. The formulation of these rules was against the background of the constitutional provisions governing administrative and disciplinary authority and control. The principle that authority was vested in the Public Service Commission was firm. The principle that the administrative and disciplinary authority are one and the same, that one was contained in the other and each implicit in the other, was enshrined. The regulatory and the appellate functions were retained by the Commission. That did not violate the unitary principle. That arrangement was managerially valid. That arrangement prevailed through the later Constitutions, including the 1978 Constitution. The 17th Amendment to the 1978 Constitution however, comprised a departure from that principle.

The DO at A8 section 15 had provision for a *Ladder of Appeal* within the scope and control of the single authority. Thus, a disciplinary order by an ASP could be reviewed by the SP and by the relevant DIG. The Police Departmental Orders for disciplinary control were sufficient in themselves. Problems of discipline, as they increased over time, were not for want of institutional rules and arrangements. The breakdown, if at all, was due to the undermining of the structure and the resilience of the administrative and disciplinary order as well as the impairment of its cogency.

3. Complaints by the Public

The thrust of the WT Jayasinghe Committee approach to the problem was that improvements to disciplinary control over the police could be made gradually. This was qualitatively different to other approaches. The Jayasinghe Committee approach sought a revision within the existing arrangement, rather than an overhaul. It was of the view that complaints by the public, which gave rise to the problem, had to be addressed. The critical concern of the Committee was was that although complaints by the public were entertained, there was no follow up. The implication was that public complaint did not impact on the administrative authority because of the lack of follow-up. This was a prescient diagnosis of the problem which could have been the core of a solution.

The National Police Commission (NPC) dealt with this problem differently. The NPC had recourse to the terms of the 17th Amendment which stated: 'The Commission shall establish procedures to entertain and investigate public complaints and complaints of any aggrieved person made against a police officer of the police service, and provide redress in accordance with the provisions of any law enacted by Parliament for such purpose.[11] Rules have been made by the NPC to entertain and investigate complaints by the

[10] Ibid Section 21 (3).
[11] Section 155 G (2) of the 17th Amendment to the Constitution.

public against the police.[12] This was the first instance in which such procedure to entertain complaints by members of the public against the police was prescribed. These rules make provision for complaints to be entertained by a body outside the police. There is positive merit in this provision. Certain preliminary observations are, however, warranted. The nature of complaints to be received and investigated by the NPC relate mainly to criminal offences.

i. The Criminal Procedure Code would plainly apply. The NPC cannot exercise these powers under the Criminal Procedure Code. Thus, deaths in police custody cannot be investigated by the NPC. They must be enquired into by a magistrate;

ii. In terms of the Criminal Procedure Code, a criminal investigation is conducted by the Officer in Charge of a station who is designated the officer in charge of the investigation. The NPC does not come within this category, nor can any officers working under the NPC function under an officer in charge of a station. Neither would police officers assigned to the NPC function under an officer in charge of a station;

iii. Directions to officers assigned for investigation of criminal offences cannot be given to Directors of the NPC. Directions for criminal investigation can be given only by the Attorney General, then too to the police investigating under the Officer in charge of the station and so of the investigation;

iv. There is also the pertinent consideration that a vital aspect of these constitutional provisions has been omitted in the notification issued by the NPC in the Gazette, spelling out the procedures for entertaining complaints against police from the public. This is the issue of redress at the end. Redress has to be provided in accordance with laws passed by Parliament. There has been no law passed to empower the NPC to provide redress to the aggrieved person. All the other directions do not lead to the desired end and are therefore of no effect. The result is that the NPC initiative to record complaints from the public against the police is an effort with no effect or meaning.

Additionally, the workings of the new system entail other problems. A considerable bureaucratic arrangement has been installed, at much public expense, to establish regional offices to receive public complaints. These complaints are merely referred to the police. In effect, there is little independent action following the receipt of these complaints. The results are not in keeping with the objects of these provisions and are not commensurate with expenditure. These complaints from the public were entertained by the regionally distributed arrangements but were simply referred to the regional police authorities for action. There was no control or follow up from these NPC arrangements. In effect, the results of the NPC arrangement have been nil and the process made nugatory. They do not serve even as an effective public relations exercise.

4. Rights and Breach of Discipline

Disciplinary control and disciplinary authority in respect of the Police has recently assumed a new dimension in its exercise. The regime of rights determinations involves disciplinary authority and control over the police arising from the executive action of the police in terms of the law. The constitutional aspect of rights in cases of breach of discipline on the part of the police adds to the legal sanctions that earlier prevailed. Criminal sanctions, liabilities in tort or the administrative law had long provided judicial review over police discipline. The fundamental rights system has nearly displaced the methods of disciplinary review which prevailed. There is then, in the current scene, a considerable shift in the

[12] Government Gazette No 480/8 of 17th January 2007.

method of disciplinary control over the police, arising from the regime of rights determinations. The shift in disciplinary authority is also linked to this shift of control. The following questions are therefore pertinent.

Operation of the Criminal Law and Constitutional Law Principles

First, the operation of criminal law has to be looked at in the context of the determination of rights. Arrest in performance of duty under the criminal law involves rights of the individual. Speaking from experience of arrests made in the course of criminal investigation being taken before courts as alleged violation of fundamental rights, there have been disquieting differences between the two due to the different nature of the legal forum in question and the consequent disparities in procedure including the nature of the evidence and so on. Arrests made have been found to be in violation of rights yet these very same petitioners (appearing in the capacity of an accused in criminal courts of law) have been convicted.

Moreover, the rights determination is taken up for decision immediately in terms of the constitutional provisions, while the criminal case takes its normal course of time. The effect of one on the other, in legal terms, merits further discussion. The point made here relates to the matter of disciplinary control of police action. There is hesitation on the part of policemen to make arrests for fear of judicial sanctions in regard to actions taken in performance of duty. The administrative authority of the police in this respect is substantially constrained.

Constitutional determinations considers whether there is infringement of rights in regard to the arrest and detention. Judicial conflict on what constitutes reasonable suspicion for an arrest (as the critical issue in rights infringement allegations as well as in the validity of an arrest under the criminal law) has however been manifest from period to period. In some cases the arrests were held to be without reasonable suspicion and were found to be in violation of rights.[13] In other cases the arrests were held to be on reasonable suspicion and not in violation of rights.[14]

This matter cannot be discussed at length here in the context of disciplinary authority and disciplinary control. Such differing judicial attitudes are however pertinent to the matter of disciplinary control over police. Disciplinary authority over the police is now between the Police Departmental Authority, the National Police Commission as a disciplinary authority and the disciplining authority of judicial review. Often the authority of one is abdicated to the other.

Search and entry into premises is, secondly, the other area in which the criminal law provisions are inhibited by the operation of rights law. An illustration is expedient. The search and entry into premises in pursuit of a suspect in a murder case was held to be in violation of rights of the occupier of the premises.[15] The search was conducted with the consent of the owner/occupier of the premises. Yet police action in the course of criminal investigation was found to be in violation of rights, on the grounds that the suspicion entertained was not reasonable. A heavy penalty was imposed on the officer alleged to have violated the rights, a penalty fine that could not have been paid by that officer's known income. The finding and the imposition of penalty was an act of disciplinary control. The operation of the criminal law and rights law as means for disciplining police action floundered inelegantly on the question of the state of mind of the officer entertaining the suspicion. The issue was, simply, whether in the entertaining of reasonable suspicion, the relevance was of the state of mind of the officer or that of the court.

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[13] *Namasivayam v. Gunawardene* (1989) 1 Sri L.R. 394.
[14] *Joseph Perera v. Attorney General* (1992) 1 Sri L.R. 199
[15] *Anura Bandaranayke v. WB Rajaguru IGP et al.* [1999] 1 Sri L.R. 104

Thirdly, intelligence is a substantial component in the process of criminal investigation. Yet, the cogency of this order for criminal investigation was seriously undermined in the case of Anura Bandaranayke, cited above.

Litigation

Apart from the legal aspects of the problem of rights and breach of discipline, there is, consequent to the regime of rights law as it is administered, a brake on effective police action. Police action is inherently confrontational. The police are the only authority mandated to use force. Police action therefore incurs a reaction on the part of the person at which it is directed, who resists and recoils from the action taken against him. Much of this arises from action taken by police in the performance of duty. Complaints made or litigation entered into, are therefore invariable. The impact of much rights adjudication in cases of alleged rights violation in the performance of duty has been referred to above. Illustrations from other countries, as for example, the effect of tort litigation in New South Wales (NSW) Australia in a parallel context is useful to the analysis.

In NSW, a surfeit of tort litigation had taken its toll on effective policing. The problem had been simmering for a long time and had deleterious effect on law and order. This compelled the Police Association to represent matters to the NSW Parliament. The problem was debated in Parliament resulting in a unanimous vote in support of an amending law to address this problem. The terms of the amending legislation were, in summary, that:

- A person may not make a police tort claim against the police officer concerned, but may instead make the claim against the Crown;

- A person who makes a police tort claim against the Crown may join the police officer concerned as a party to the proceedings only if the Crown denies that it would be vicariously liable for the alleged tort;

- A person cannot directly sue a police officer for a police tort claim. Section 9B (2) provides that in such cases, the plaintiff can only sue the Crown;

- This restriction does not apply where the plaintiff is suing the police officer for something the officer did in a personal capacity. The practical effect is to prevent an individual officer from being directly sued, unless the vicarious liability of the Crown is ultimately an issue in dispute;

- The relevant texts are in the Police Legislation Amendment (Civil Liability) Bill 2003 NSW Parliament.

These provisions of the NSW and their purpose are comparable, in very general terms, with the manner of application of the rights law in the local context. Differentiation in the NSW law between claims against the Crown and against the individual officer, between acts committed in the course of duty and acts in his personal capacity, and the question of vicarious liability of the Crown, are significant. In the local context however, there is little such differentiation. Personal liability and state liability are mixed up freely in local determinations. Penalties and punishments follow as a result. The purpose behind such differential application of liability on the basis of the Parliamentary debates in the NSW context is revealing.

Thus, Mr John Watkins (Ryde—Minister for Police) said.

> 'Our police need and deserve the community's full support in tackling crime and making the community safe. They need to know that in carrying out their challenging duties—in a fair and impartial manner—they will not be subject to spurious claims that will put them and their

families at risk. They need to know that if a criminal tries to abuse the system to escape justice, the system will back them up. That is why the Police Legislation Amendment (Civil Liability) Bill is so important. It will provide protection against legal claims for police and swing the balance back in their favour. The bill strikes the necessary balance. It protects police from personal legal claims, while still ensuring officers who have engaged in serious and willful misconduct can be held accountable. The bill is governed by a fundamental principle: no police officer should ever fear that their home or other personal assets are at risk simply because they have done their job. It (a Police Association) found the incidence and nature of civil litigation by members of the public against police is a growing issue of concern. Although New South Wales has laws to prevent individual police and other public officers from being personally liable for damages arising from their acts or omissions, the Government believes these additional measures are needed. There is no organisation with greater responsibility for the protection of persons or property than NSW Police. In 2002-03, 44 of the 186 police tort claims involved claims against individual officers as well as the Crown, with a total of 82 officers being individually sued. Clearly, some of these claims against individual officers are lodged as revenge for the entirely appropriate apprehension of criminals. Although individual officers may not be personally liable to pay damages at the end of civil proceedings, joining them as a defendant is a significant cause of stress—often over an extended period of time. '

These observations are telling in respect of the parallel situation in Sri Lanka. The problem is not one of law reform *per se*, but regarding its impact on the community. Control is purposeless unless directed to the larger end. The manner in which tort litigation in NSW proceeded in regard to the ultimate issue of law and order, is important to the debate. The legal process there, for all its worth, did not achieve the desired end. In the Sri Lankan context, it is easy to perceive the oblique line in rights determination against the ultimate objective.

The litigation discussed above in the preceding segment of this paper is in respect of cases filed against the police in Sri Lanka. Since the fundamental rights regime of law came into operation in this country, there has been another development which has a bearing on disciplinary control and administration. Litigation from within the police features prominently in the current scene, namely cases of fundamental rights filed by police officers relating to transfers, promotions and other administrative decisions. Litigation is embarked upon by officers who feel aggrieved by administrative decisions. These decisions are not only those made within the police department but also against such decisions made by the NPC. The grounds for litigation allege unequal treatment which is a fundamental right. Such matters then come within the jurisdiction of the Supreme Court. The alleged violation of the right to equal treatment is petitioned by officers who were not selected. Their claim is that they were more deserving of promotion than some of those selected. The Supreme Court is confronted with the task of determining the validity of these disputing claims.

The problem arises when the court holds that one of the officers in the rejected list had good grounds to support his allegation of being unequally treated. Vindicating that claim affects the position of others ahead of him on the rejected list. In certain instances, the Supreme Court applying the principle of equal treatment has ordered the promotion of all these others. The court was not stayed by the lack of cadre provision when making the blanket decision. In some cases, officers falling in between included some who did not come before court. Those who did not even expect promotion found that they were promoted.

In general, considerable effort and time is expended by officers who failed to get promotion. There is a fair expectation on their part of succeeding in their claims through judicial decision rather than through administrative decision. Expenses which these attempts entail are considerable but are considered worthwhile. Other effects from such process are the recognition that there are now two categories of

promoted officers, one set promoted through the department and the other promoted by court. Their authority, (administrative and disciplinary, over their subordinates), is on a differential basis.

Corruption and breach of discipline

Corruption is another important aspect of police discipline which requires efficient authority in regard to disciplinary control. There was a time when corruption and honesty were entirely matters within the police disciplinary control as they led to breach of the disciplinary code or were within the ambit of the Penal Code as the impugned acts were penal offences.

This position changed with the enactment of the Bribery Act. Matters relating to bribery and corruption in the police department earlier came within the purview of the police itself. This meant that the police were responsible for the investigation of bribery allegations. In effect, the responsibility for dealing with bribery in the police service rested squarely on the administrative and disciplinary authority of the police. Police action in this respect was not confined to investigation, but also extended to assessing officers in regard to their reputation to honesty. Later, with the enactment of the Bribery Act, action in cases of corruption was debarred to the police, in express terms. All such matters had to be referred to the Bribery Commission. As the police were debarred in this way, the police were also relieved of the responsibility of dealing with the matter of bribery and corruption within the police service. The administrative and disciplinary authority of the police over their officers, in this area of corruption, was restricted and reduced, in consequence. Complaints made and petitions received were merely passed on to the Bribery Commission. The mechanisms for assessing the reputation for the honesty of officers that earlier existed within the administrative authority of the police was reduced thereon.

Under the current dispensation, what matters is the result of cases filed in court. Acquittal provides a clean slate. As a result, the idea of preserving a reputation for honesty is relegated to near oblivion. Promotion and career advancement have in fact proceeded in such cases without let or hindrance. Some of the promotions so gained were outrageous. Worse still is the effect of such questionable promotions on others in the service.

The theme advanced at the outset was that disciplinary control had little meaning without administrative control; the separation of administrative authority from disciplinary authority in much of current discourse is unimaginative and wanting in prescience. The above discussion in regard to bribery and corruption casts into clear relief the intrinsic connection between administrative authority and disciplinary control; and more importantly the near symbiotic relationship between the two. This same principle applies, *mutatis mutandis*, in some other areas too. That is in fact the theoretical aspect of the problem. In practical terms the question is pertinent: in respect of matters of police corruption, is there a division of responsibility, perhaps a dilution of the principle of clear responsibility in respect of corruption, between the Police Department exercising administrative authority and the Bribery Commission exercising a quasi-judicial authority? Whatever the answer be, the evidential fact is that police officers do not fear their administrative superiors as their powers are decreased. The administrative authority of the supervisory ranks carries little disciplining effect on corrupt conduct of subordinates. The body politic of the police officers possesses a sense of immunity from corruption charges in their day to day business.

Sanctions

Sanction is the thrust of the exercise from the view of disciplinary control. There is little consideration of a focus outside that angle of vision. It is in this mode of thinking that there is the call for the imposition of sanctions on police officers dealt with by courts in rights cases. One instance may be cited. "Public Officers who have been found guilty of such violations should suffer mandatory termination of

employment and awards of punitive damages as the penalty for their misdeeds"[16] This statement, oft repeated elsewhere, warrants close examination.

Disciplinary control through imposition of sanctions, is what is urged in these assertions. However, it could be said that the use of the word "guilty', in this statement, is inappropriate. Its direction is misguided. Its invocation is infelicitous. The word 'guilty' is used interchangeably with conviction. A finding of guilty and the entering of a conviction has a precise meaning in law. A due process is inherent in that finding. Yet, it is this author's view that an affidavit procedure for rights determinations is not due process for the finding of guilt and the entering of a conviction. Visiting of sanctions, through a process inadequate for the purpose, is misplaced. Confusion of process is at the core of this problem. A conviction entered after criminal proceedings of the elaborate nature in criminal courts has a firm base for further disciplinary sanctions. That was according to the old order. Guilt and conviction meant what they said. In rights cases, the end is not a finding of guilt, but a declaration of violation of rights. This difference is lost in statements calling for sanctions as a consequence of rights determinations.

There is the added problem that even upon conviction through regular criminal proceedings, the officer is asked to show cause as to why disciplinary sanction should not be imposed. Conviction and guilt take their meaning as the law intends. Conviction is entered at the end of elaborate criminal proceedings. Upon conviction, there is little to contest. The officer is interdicted when arrested or remanded. He remains under interdiction during appeal. The Establishment Code provisions bear this out. Against this rationale, a declaration of violation of rights is not a conviction. Besides the process for conviction and for the declaration are different in scope and in effect. Regular evidence and affidavit evidence can yield different results.

The case of Tissa Kumara[17] illustrates the difference clearly. In this case, the police officer was found by the Supreme Court, following affidavit procedure, to have violated the rights of the petitioner through torture. The officer was indicted in the High Court on the same charge of torture. The High Court found the officer not guilty. After the regular trial, the Court held that the evidence of the witnesses to the torture was unreliable; the testimony of the complainant was untrustworthy. The correctness of the High Court decision can be assailed in some respects, possibly relating to the summing up of the law as well as other misdirections. However, the High Court did have the advantage of directly observing the witnesses. The High Court also had the advantage of determination of the facts of the case through an elaborate adjudicatory process rather than the making of a finding only on affidavit evidence.

One matter may be cited here. The Supreme Court finding was based on the number of injuries inflicted, amounting to about 31 injuries, one injury of a grievous nature. The conclusion was that more than minimum force had been used. The JMO listed these injuries in his report. There was no question or issue in the Court proceedings of how many blows would have been given to inflict the 31 injuries. Thus if the number can have been 10 or 15 perhaps, then the quantum of force could have been differently determined, even perhaps to have constituted an assault less than torture. Affidavit procedure apparently did not invite expert medical evidence to this point. For the present purpose, it is sufficient to note the danger from abbreviated proceedings which does not test the evidence sufficiently. It is consequently reiterated that the call for imposing disciplinary sanctions immediately, on declaration by Supreme Court of a violation of rights, is fraught with danger. That call confuses a conviction with a court declaration on rights and does not commend itself.

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[16] H.L. de Silva in '*Moral Integrity in Public Life*' text of speech.

[17] *Tissa Kumara v. Premalal Silva* S.C. (FR) Application No 121 / 2004 of 17. 02. 2006; Kalutara High Court case no 444/2005, of 19. 10. 2006.

Disciplinary control is a matter of applying sanctions upon a breach of rules or the law. The problem arises with the regime of rights determinations and the view that such determinations constitute a mechanism for disciplinary control. More specifically, sanctions are the desired end. Rights determination as a disciplinary control measure incurs problems other than want of due adjudication as experienced in the *Tissa Kumara case*. Violation of rights does not involve breach of discipline in all cases. These situations arise in cases of performance of duty which does not entail moral turpitude. Thus action taken by police to stop a procession in terms of the law was held[18] to be illegal on the grounds that the law itself was illegal! The promotional prospects of that officer were affected as a result. The matter of representation of the offending officer is another issue. Since individual and personal sanctions are imposed in the normal course of these cases, the question of representation arises. Official representation on behalf of the state and the required representation on behalf of the individual officer are proceeded with differently. This prospect has consequences for disciplinary control. Even more grave is the situation that sometimes arises when personal liability and penalties are imposed. There are many instances where the quantum of penalties imposed is not within the means of the officer's known income, as stated above.

Tension

Disciplinary control over the police is problematic in the face of rights issues arising from acts in the execution of duty. The tensile nature of statutory obligations as in arrest comes to the fore under the rights regime. Thus, it may be said that in some cases, the concept of arrest for purposes of rights determinations is assessed differently to the notion of arrest in terms of the criminal law. There is tension between these two perspectives. Under the criminal law, intention to arrest is a vital requisite of a valid arrest[19] whereas this may not be so clear in terms of rights determinations. In the case of Piyasiri,[20] the intention to avoid arrest for pragmatic reasons, out of prudence and in consideration of rights, was considered to be immaterial. When the subject was 'required' to come to the police station without being accosted or arrested since the grounds for arrest were insufficient, the court held the action constituted an arrest in violation of rights.[21] The actions of the police officers were visited with disciplinary sanctions in these cases. These instances indicate that the execution of duty can be differently construed, adversely or otherwise, much later by courts exercising judicial review. From the point of view of disciplinary control, such disconcerting prospects can only induce a tentative response in police officers confronting such situations. This cannot be the purpose of disciplinary control or the exercise of any disciplinary authority.

Then again search with consent, without the use of force, would barely offend the criminal law but would be construed a violation of rights.[22] Public order situations entail decisions of a disciplinary nature akin to the throwing of a dice. Invariably police action is faulted.[23] There was one decision which held with the police action.[24] Certain critical issues inform the difference between two categories of cases in this regard. In the first group of cases where the police were faulted, there was no breach of peace. In the later Bandara case (see above), there was a serious breach of peace. The issue of breach of peace could have weighed in the scales to explain the difference in the rights determinations. Secondly, it is difficult to

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[18] *Senasinghe v Karunatilleke Senior Superintendent of Police Nugegoda et al.* [2003] 1 Sri LR 172; SC No. 431/2001 (FR) of 3rd December 2002 and 6th January 2003

[19] Dr Glanville Williams, in (1954) *Criminal Law Review* 6, 8, et seq.

[20] *Piyasiri v Fernando ASP* [1988] 1 Sri LR 173.

[21] *Namasivayam v. Gunawardene*(1989) 1 Sri L.R. 394.

[22] *Anura Bandaranayke v. WB Rajaguru IGP et al.* [1999] 1 Sri L.R. 104

[23] *Vivienne Gunawardene v. Perera* [1983] 1 Sri.L.R. 305; Athukorale v T.P. F. de Silva IGP [1996] 1 Sri Lanka 280;*Senasinghe v Karunatilleke Senior Superintendent of Police Nugegoda et al.* [2003] 1 Sri LR 172; SC No. 431/2001 (FR) of 3rd December 2002 and 6th January 2003.

[24] *Bandara et al v. Jagoda Arachchi et al.* [2000] 1 Sri LR 225.

prove what has been prevented, or to evaluate the action in terms of a breach of peace that has been averted.

The implication is that in the absence of a breach of peace, determination of violation of individual rights is unencumbered. Thirdly, the fact is that rights of the general public in such situations have no representation where the contention is between the petitioner and the responding police officer. The idea that effective action to prevent a breach of peace has served to secure the rights of many, rights to public order and public peace, does not figure in these equations. The question is therefore scarcely rhetorical: whose rights are we talking of? This question will be dealt with in detail later.

Disciplinary control founded on these indeterminate premises hardly makes for competent disciplinary authority exercising due control. Negative response substitutes itself for the aggressive prevention of crimes, offences and disorder. '*Bella dik koloth funda ekak watai*' ('if you stick your neck out, a fundamental rights case can fall on you' being a translation of the colloquial term) are expressive words of warning in this regard. Administrative authority and administrative control is helpless to marshal disciplinary authority and control towards the ultimate objective of performance.

This cynical view prevails to a great extent. There are a host of reasons for this attitude. Adjudication in rights cases has caused some disquiet. Apart from the instances referred to above, other problems attend. Only a few instances will be cited here as they are relevant to the matter of disciplinary control. An officer is found to have fabricated a case by giving false evidence. In this case[25] the ground of falsity was that his evidence - that he witnessed the petitioners seated in a circle inside a hall engaged in conspiratorial activity - was untenable. The court held, as one of the grounds of falsity, that even as the officer could see through the half open window, the persons inside seated in a circle could also have seen the officer watching from outside. Police evidence was determined to be false.

This finding is however contestable on a number of grounds, had there been cross examination. The author's personal experience is one where he with another officer in full uniform went into a gambling hall and was unobserved for nearly a full minute by about 40 persons who were seated in a group engrossed in the gambling. Further, the court added that the vehicle in which the police came could have alerted the conspirators, unmindful of the fact that police would be discreet enough to have parked the vehicle a distance away.

Prejudice

Rights determinations, as instruments of the disciplinary control of police officers, face further problems resulting from unequal treatment by the law. Equality before the law is the theoretical principle. However, the practice is different. Disciplinary control of the police through rights determination is impaired in its worth through unequal treatment. In a case before courts, personalities are immaterial. That is the theory. That is the claim. Yet in the operation, the principle may apply differentially. The personality and standing of the petitioner can weigh unequally as against the respondent. In some of the rights cases, the judicial determination makes much of the standing of the petitioner. The standing of the respondent officer pales into insignificance in the light of that projection of the petitioner. In these cases the court determination records the standing of the petitioner with no equivalent standing of the respondent officer. In one case,[26] the determination recorded that the petitioner was the son of two Prime Ministers etc. while the responding police officer had (presumably) insignificant parentage. In the other case,[27] the petitioner was described as a leading politician and public figure with considerable

[25] *Channa Pieris et al. v Attorney General et al.* [1994] 1 Sri LR 1.
[26] *Anura Bandaranayke v. WB Rajaguru IGP et al.* [1999] 1 Sri L.R. 104
[27] *Gunawardene v. Perera et al.*, [1983] 1 Sri LR 305

achievement in public life. There was no corresponding citation of the standing of the respondents, one, an Inspector of Police and the other an Inspector General of Police. The latter weighed little.

5. Administrative control of the police; some preliminary thoughts

Disciplinary control is only an aspect of administrative control. Administrative authority and administrative control over the police has suffered in the same manner as disciplinary control with the coherence of its structure affected in many ways over time. Constitutional provisions since independence have been to institute administrative authority and to define the process of administrative control. Disciplinary control was instituted in undifferentiated manner, along with administrative control

The terms of the 1946 Constitution stipulated that; "The appointment, transfer, dismissal and disciplinary control of public officers is hereby vested in the Public Service Commission."[28] Administrative and disciplinary authority and control were spelt out in one breath, along with appointments, transfers etc. In terms of the 1972 Constitution, the power of appointment of state officers was exercised by the Minister, under delegated authority from the Cabinet, after receiving the recommendation of the State Services Advisory Board section 115 (2). Dismissal and disciplinary control over state officers had separate provision to be exercised by the Minister - s. 118 (1).

Under the 1978 Constitution, the relevant provisions are that "The Cabinet of Ministers may from time to time delegate its powers of appointment, transfer, dismissal and disciplinary control of other public officers to the Public Service Commission."[29] The separation of disciplinary from administrative authority as in the 1972 Constitution was not continued in the 1978 constitutional order.

The 17th Amendment to the 1978 Constitution provided for a National Police Commission, instead of the Public Service Commission, to deal with matters relating to the Police. The 17th Amendment provided: "The appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector General of Police, shall be vested in the Commission. The Commission shall exercise its powers of promotion, transfer, disciplinary control and dismissal in consultation with the Inspector General of Police.[30]" Administrative authority over the police, together with disciplinary control, runs on the same lines as right from the beginning. The corresponding provisions in regard to the administrative authority and control of the public service under the 17th Amendment read exactly the same; "The appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the Commission.[31]" The observation is then warranted that the vesting of the powers is the same for the public service as for the police. Their separate provision is only consequential to the separation of the Police Commission from the Public Service Commission. The unity principle of power and authority, administrative and disciplinary, that had prevailed since 1946, except in 1972, continued. The point of significance is that the very same provisions for appointment, transfers etc. under the 17th Amendment are construed differently in respect of the police from the rest of the public service.

Delegation

Delegation of administrative powers and control also followed generally on the same lines. Delegation was incidental to administrative authority.

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[28] Section 60 (1).
[29] Section 55 (3).
[30] Section 155G (1) (a) of the 17th Amendment to the Constitution.
[31] Section 55 (1) of the 17th Amendment to the Constitution.

Under the 1946 Constitution "The Public Service Commission may, by Order published in the *Government Gazette* delegate to any public officer, subject to such conditions as may be specified in the order, any of the powers vested in the Commission by subsection (1) of Section 60.

Under the 1972 Constitution, delegation of power of appointment to state officers may be made by the Minister. Disciplinary authority was with the Minister. Delegation of disciplinary powers of the Minister to state officers was provided at section 119 (1) of the 1972 Constitution. Delegation of administrative powers and delegation of disciplinary powers were separately provided for under the 1972 Constitution following the separation of administrative from disciplinary power.

Delegation of powers to state officers was provided for under the 1978 Constitution at section 58 (1) without the separation of the administrative from the disciplinary powers. The principle of the closeness of administrative and disciplinary powers, and thus the unity of the authority of the administrative and disciplinary functions, were restored in the 1978 Constitution.

The 17th Amendment to the 1978 Constitution had provision for delegation of authority. In respect of the police, delegation of the powers of the Commission is provided for; "The Commission may, subject to such conditions and procedures as may be prescribed by the Commission, delegate to the Inspector General of Police or in consultation with the Inspector General of Police to any Police Officer, its powers of appointment, promotion, transfer, disciplinary control and dismissal of any category of police officer.[32]" Similarly, the provision for delegation of these powers to a public officer other than police officers, reads the same. "The Commission may delegate to a public officer, subject to such conditions and procedure as may be determined by the Commission, its powers of appointment, transfer, disciplinary control and dismissal of such category of public officers as specified by the commission.[33]"

6. The separation of administrative authority from disciplinary control

The working of the 17th Amendment, however, resulted in administrative authority being separated from disciplinary control. Delegation of administrative powers proceeded on different lines from the principle that prevailed right from the beginning. Many of the powers were not delegated. In the interpretation of the 17th Amendment, concerns about politicisation loomed larger than other imperatives. Consequently delegation of administrative authority was disjoined from disciplinary authority and control, in the new order. Thus administrative authority was retained with the Police Commission without delegation, over a section of the police organisation. This section is that of the category of police officers above the rank of Chief Inspectors, in respect of whom administrative and therefore disciplinary control is not delegated. In respect of the section below that of Chief Inspectors, the delegation was complete. Problems of administrative authority divorced from operational responsibility and disciplinary control through effective performance of the superior ranks became evident.

Political influence

The reason for this differential delegation is said to be, to contain political influence. Political influence has been considered the bane of the public service and the police service in particular. This is the popular conception. The 17th Amendment is said to have been enacted to insulate the police service from political influence. That is also a popular idea. The appointment of independent commissions is said to be directed to rid the body politic of political influence. The manner in which the independent commissions would rid the police of political influence is not specified in the law. It is presumed that the problem of politics can be avoided through control of appointments, promotions and the like.

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[32] Section 155J (1) of the 17th Amendment to the Constitution.
[33] Section 57 (1) of the 17th Amendment to the Constitution.

It was thought that independently determined promotions transfers and appointments would effectively address the problem of politics in the police. The possibility that such appointees, promotees or transferees could thereafter be politically influenced in the course of their duties finds no expression, either in the law or in actual practice. In other words, (beyond the initial appointment), there is little administrative control over dubious operations which should have been the very purpose of these Commissions. Disciplinary authority and disciplinary control were separated from administrative authority and set adrift in this new order. The responsibility for disciplinary control was made to rest neither with the Commission nor with the judiciary, nor with the department of the police. Responsibility and control of discipline were not firmly bonded together in a single administrative authority. Instead matters were left to ride with action taken depending on other pressures.

This is a far cry away from the old order where disciplinary control went with the administrative authority in law and in fact. It is this author's view that their separation is misconceived and managerially inappropriate. This is the reason why the recommendation of the Basnayake Commission for a Police Ombudsman outside the single administrative and disciplinary authority was not recognised. Significantly, that idea of a separate authority did not commend itself to the later WT Jayasinghe Committee. In the wake of these shifting attitudes, it is expedient to reiterate the original order. Then disciplinary control was with the administrative authority in the police department. Matters of a criminal nature were referred to courts and disciplinary action followed. The provisions of the Establishment Code applied. The appellate and regulatory aspects of disciplinary control were retained by the Commission. Administrative authority and disciplinary authority were one and the same. Administrative control and disciplinary control went hand in hand.

The manner in which administrative authority and control went with disciplinary authority and control needs some illustration. Administrative decisions on promotions, transfers, training and scholarship offers, along with other perks were dependent on disciplinary considerations. Disciplinary control was induced by such administrative devices. In fact, good performance stayed disciplinary action at times. Disciplinary decisions and punishments were heavily influenced by good performance. On the side of control, inspection and supervision by superiors over subordinates conducted in their administrative authority had a clear disciplinary thrust to its exercise. Such intermeshing of the administrative and disciplinary functions is not possible when these functions are separated and exercised by different authorities. The exercise of administrative powers by another body cannot merge with the authority responsible for performance.

Political influence was contained somewhat, even then, through the parallel exercise of administrative and disciplinary authority. Since the administrative and disciplinary structures were very much in place, political influence was contained somewhat through internal practices. There was fear that the invocation of aid from outside influences in regard to administrative matters would mark them out and put them at a disadvantage. On the other hand, there were instances when the department was forced to yield to political pressures for the transfer of certain officers. Some of these officers, depending on their performance and good conduct, were posted to higher stations with better prospects for promotion.

It is the view of this writer that the current thinking that independent commissions can insulate the services of politics is unrealistic. A shrewder approach would have been to manage it as best within the system. From the point of view of disciplinary control, it is as well to remember that as much as politics had a deleterious effect on policing as in the Wayamba and Uda Talawinne episodes, politics had a positive role making due representation when it should. In the event of police misdemeanour or neglect of duty involving discipline, politicians made representations. The budget debates of old were full of complaints made by members of Parliament during the committee stage of the budget proceedings which actively engaged the police to respond. These exercises were in effect means of disciplinary control.

They served well. For a host of reasons, these practices have fallen by the way. Little is said about management of political influence through administrative and disciplinary means within the department.

Ultimately, the good of the past has been thrown aside with the bad. Yet, a balance of contending aspects should be the desired end. There is no indication that the provisions of the 17th Amendment call for such balance. The workings of the independent commissions have no idea of such balance.

7. Schemes for Promotion

Schemes for promotion were touted as a means to decrease politicisation of the process. Schemes for promotion were simply an exercise in administrative control required through the whole public service. Various policies for promotion had been adopted by the Police Department over the years. The Police Departmental Orders framed under section 55 of the Police Ordinance had schemes for promotion that were clearly detailed. Inherent in these schemes was a process of selection and grooming which was an integral part of the schemes. The selective process was active at every stage of an officer's career. It was the endeavour of officers to perform to the satisfaction of his superiors. Encouragement was returned at any available stage of administrative control, be it through transfers, scholarships, training offers or other means at the dispensation of the superior officers.

The workings of these schemes were sometimes inconsistent. In the main, however, these schemes held good. An attempt was made to systematize the schemes in 1984.[34] However, there was no substantive revision of the scheme of promotion. The guiding criteria were the ability to combine *acceptable performance with acceptable conduct* and *actual acts of performance and initiative claimed.*

In more recent times, the belief that the whole process was riddled with political interference held sway. Formulation of schemes of promotion suffered an upheaval. Since 2001, the police experience is of a constant change of promotion schemes. These changes are not of a substantive nature. They relate in the main, to the period stipulated to qualify for promotion. Stagnation and frustration were also offered as a rationale for changing the qualifying period for promotion. There is some merit in this consideration. The bulk however stagnated due to their own inefficacy. In fact, schemes for 'time promotions' have been introduced. These were said to have been introduced on direction from the President.[35] The problem was however not so much one of external influence in either promotions or schemes of promotion as the fact that performance was deprived of its critical component in the determination of promotions.

Criteria for promotion

Criteria for promotion were conceived in the current thinking as means to avoid politicisation. Eligibility for promotion under these new schemes prescribed an 'unblemished record and good conduct.' These are the criteria laid down by the administrative authority under the 17th Amendment. These criteria are nothing new as that has been the basis of promotion from the beginning. The prescription is only in broad terms. These are vague terms for defining record and conduct for practical purposes. The criteria were also set down in negative terms. Therefore the absence of any specific marks of an adverse nature was all that was required to confer eligibility. Average and routine work became sufficient to meet the criterion. Similarly, the absence of black marks in conduct was sufficient. At the same time, this bare formulation for qualification for promotion did not demand leadership qualities to be demonstrated, qualities displayed through meritorious performance at work. Much more importantly, routine time promotions had a debilitating effect on the total police work force when those so promoted did not and could not

[34] Sri Lanka Police Gazette Part II No 323 of 14th November 1984; Director Establishment Reference 814 E. 295/26 CB.
[35] Secretary Defence letter No 03/268/2006 dated 30 January 2006.

command the respect and recognition of their subordinates. In any case, these time promotion schemes were implemented to address the 'perceived frustration and mental dissatisfaction from long stagnation'. That was the declared purpose of these schemes for promotion. This stated purpose is however highly questionable.

The expectations from these new schemes for promotion were said to be directed towards constituting an enterprising and motivated body of officers to meet the challenges of the times. It is plain however, that no organisation can aspire to any degree of achievement which allows for routine compliance with work requirements. It is equally evident that these new policies did not heed the long history of police administration and rules and regulations which strove to enhance performance at every level. In fact, the pre-selection process for promotion has been discontinued altogether in favour of other considerations. The new measures may have been populist in their devising. Yet, the result was a grave effect on work and the motivation of policemen. The concept of criteria for promotion in this mode of thinking yielded two criteria, one of merit and the other of seniority. This brought with it a queer conundrum, of merit without seniority and seniority without merit.

The departure in this respect from a long tradition is now complete. As a consequence, the emphasis is not on positive work achievement but on absence of adverse conduct. An unblemished record of service is defined by the absence of punishments imposed after disciplinary proceedings and where there have been no court orders against the officer to pay compensation in fundamental rights applications. Some comment in this respect is warranted. These comments are based on personal interviews and observations. The first general comment is that disciplinary action and inquiries initiated by superior officers is lacking. This is because of a breakdown in the administrative structure, the command and control by the directing staff of the subordinates working under them. The reason is that administrative authority and administrative control over these supervisory grades are for all intents and purposes, vested with the Police Commission. The promotion and career advancement of the supervisory grades are not dependent on the Inspector General of Police within the Department. Non-performance and malfeasance of subordinates are not held against their immediate superiors, nor weighed against them in their own career prospects. There is in fact no burden on these superior grades to prove their worth, in the manner that prevailed of old. The task of direction and supervision, of inspection and control, are all but abandoned by the directing staff in the new order. This matter can be better appreciated against the principle laid down in Section 20 of the Police Ordinance which situated administrative control and discipline of officers within the police organization itself. The current departure is from that principle of a unified administrative structure to discharge work responsibility as spelt out in Section 56 of the Ordinance.

A second comment in respect of fundamental rights decisions is also warranted. In the main, the fundamental rights regime is eminently desirable. This needs to be stressed. However, as stated above, there are some disquieting circumstances that attend quite a few rights cases issuing from unsympathetic judicial assessment of work performance. These adverse findings have become a firm basis for the determination of the unblemished record and good conduct criteria in adjudging the desirability of promotions.

8. Transfers

The discussion so far has been on promotions as a matter of administrative control. Transfers are as much an important function of administrative control as promotions. As with promotions, transfers too have a disciplinary aspect. Negative sanctions and positive sanctions in transfers are important tools for disciplinary control. Exigencies in effecting transfer have a disciplinary component. Currently, the IGP does not have administrative and disciplinary control over this higher grade of officers. Thus, the IGP cannot exercise these powers over these higher officers in order to influence their performance. The

officers in these higher grades are very conscious of this fact. Their supervision, their inspection and their direction of their subordinates are, as a result, negatively affected. The breakdown of the structure is precisely in this context. Problems of administration and of discipline and even of violation of rights can be, in a large measure, attributed to the dismantling of this arrangement.

The earlier example cited of the NPC countermanding a transfer order made by the IGP in respect of the transfer of an officer from the Narcotics Bureau to the Police College at Kalutara in 2005, is a case in point. The most disturbing consequence of such cases is their negative impact on disciplinary control, the debilitating effects of which permeate into the body of police officers and sets the tone for further acts of challenge. A more recent attempt by an officer to challenge an order made by the IGP transferring an officer out of the Narcotics Bureau, following possibly the same strategy in a case reported in 2008[36] is good illustration. These matters are discussed in greater detail below.

9. Enforcing Accountability

The discussion thus far has been focussed on disciplinary control and administrative control, as subjects discrete but interrelated. On their own terms, administrative and disciplinary authority and control bear little meaning in themselves. They are just means to a larger purpose, namely to serve accountability. The structure and mechanisms of administrative and disciplinary authority and control are meaningful as they contribute to the larger objective of accountability.

Discussion of disciplinary control in regard to police officers has the potential to be immensely productive if the analysis is made from the perspective of accountability. This accountability is to the political executive, to Parliament and the legislative authority, to the law, to the courts and to the community. The requirement therefore is that the administrative authority and disciplinary authority should be structured to give accountability to these supervening entities. It is pertinent then to take each of these entities in turn, particularly to identify the problematic areas which affect the administrative and disciplinary structures in giving account.

Accountability to the *Minister* in charge of the police is accountability to the Executive. This line of accountability is the constitutional arrangement which has long prevailed. That line of responsibility appears now to have been deflected by the operation of the Police Commission (NPC). The administrative and disciplinary authority over the police is now divided as between the line Minister and the NPC. At times, the operation of each has been seen to be in conflict with each other. The respective authorities act in parallel relation to one another. Their practical effect is more insidious. Administrative and disciplinary control ensuring accountability has been split leading to lack of coherence in its exercise. . There is a renouncing of duty, in effect, by the Minister and the NPC in regard to administrative and disciplinary control over the police. Failure then of the supervening authority over the police brings untoward consequences. Administrative and disciplinary control for accountability is left by default to the police. That adds to general ineffectiveness.

Accountability of police administration and disciplinary control may have been squarely vested in the NPC to clear the lines of responsibility. The NPC, however, does not call for due accountability from the police. The fact is that the NPC exercises some form of administrative authority over the police, by way of appointments transfers etc. and some vague form of disciplinary control over the police. Other aspects of this authority and control are left to the police, in the absence of direction. In short, the administrative and disciplinary structure for authority and control has been seriously disturbed. Problems of due performance and good discipline in the current scene can also be attributed to the dismantling of these structures. This is a matter of recent experience.

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[36] The Island Vol. 27 No. 104 at p. 1.

Accountability to *Parliament* in respect of the police through the line Minister has been a hallowed constitutional arrangement. Recent changes have reduced this principle to a near fiction. There are other reasons for this situation. The evident fact, however, is that the police hardly gives account to Parliament for their exercise of administrative and disciplinary authority. The responsibility of the Minister to Parliament for the administrative and disciplinary functioning of the police may have effectively been abdicated. Parliamentary oversight of the police, tangibly experienced in the past, is lately of little effect.

Accountability to the *law* and to the courts adds another perspective to the issue of accountability through administrative and disciplinary control of police. The earlier order looked to penal and other legal sanctions which had their commensurate disciplinary effect on the police administrative and disciplinary authority. Judicial review of police action in the performance of duty brings another dimension to the disciplinary control of the police. Arrests made in the course of investigation, searches conducted, action taken in public order situations and even action following intelligence, are now the subject of judicial review.

As already stated, there are many such cases in which adverse findings by court have had disciplinary consequences for the officer concerned. Rights determinations have had salutary effect in disciplining the police, particularly in the area of serious rights violations. Incidences of murder, torture and the like have been effectively contained by judicial review of police action. However, judicial review, (in a disciplinary mode), of acts in the course of performance of duty has had serious consequences for disciplinary control and accountability. Plainly, many of these judicial review decisions have had the effect of inhibiting diligent exercise of the powers and duties which fall on the police. There is no overstatement here. A fear of judicial sanctions visited on officers acting in performance of duty lurks beneath the surface. Disciplinary control has acted in reverse in this area. Accountability is in grave disorder as a result.

Accountability to the *community* is equally important alongside these other spheres recounted above. The requirement of the community is for effective action. Where the administrative and disciplinary structures are in disarray, account given to the community through effective action would suffer. This aspect needs further discussion. It is sufficient at this point to note that disciplinary control structures can have counterproductive effects which do not add to accountability. An initiative was taken some time back to set up Citizens Rights Watch Committees (CRWC) to involve the community more closely in safeguarding the rights of the community and to exist as a form of disciplinary control over the police. Greater accountability was the objective of this arrangement. This initiative will be discussed later.

The Relevant Environment

Control of indiscipline and misconduct by the police must necessarily be taken in context. Disciplinary control is a problem mainly in the work-related areas. Many of the misdemeanours occur in the course of the performance of duty. These transgressions of the disciplinary code do not involve moral turpitude. These aberrations in behaviour are not motivated by personal reasons. These are to be contrasted with other acts of indiscipline which are ill motivated and driven by personal agendas. Differentiation is expedient since discussion in this respect takes into account all forms of indiscipline as subjects for disciplinary control.

That approach occludes the consideration of the environment in which the particular breach of discipline takes place. There is the socio-political environment that sets the context. These change as the conditions change. Reference here is to the legal environment which has a great bearing on breaches of discipline which arise in the course of duty. These include violations of rights, in certain categories. The criminal process constitutes the main area of the legal environment in relation to breach of discipline. There is very little discussion of the relevance of the criminal process to police indiscipline and the need for

disciplinary control. There is a clear popular perception that much of the indiscipline and misconduct takes place at police stations. Clearly these are work-related problems. There is also a prevalent notion that incivility and aggressive conduct, including assault and torture, are perpetrated to extort confessions in pursuit of evidence.

The issue of the law and related police misconduct is a large issue which cannot be discussed sufficiently within the scope of this paper. For purposes of clarity, two areas in which the legal environment pertains to police discipline are identified in respect of breach of discipline and violation of rights. In these two areas only, lapses of discipline which are work related will be discussed. The more serious violations of rights and breach of the code unrelated to work will be left out for the present. Thus, murder, torture, bribery and corruption cannot in any way be condoned or explained away as work related. Police are in the front line of the criminal process. This is freely admitted. Police action has however to be served through courts and the judicial process. Where the criminal process works effectively, the problems for police are greatly relieved. Where however the judicial process is dysfunctional, the burden of law and order and crime control and prevention is added onto the responsibilities of the police. The weight shifts where one leg is limp. The burden on the police is greater when the criminal process is thwarted. The dysfunctional aspects of the criminal process contribute to an added burden on the police. Misconduct and breach of discipline are occasioned in the milieu of a failure of the criminal process. Such misconduct is sometimes described as due to over zealousness and disregard of legal niceties.

The other area relates to rights. Rights are generally considered only within the ambit of rights law. However, rights are rarely considered in relation to normal law and the criminal law in particular. The implication is that failure in the criminal process has the result of violating or denying rights to those concerned. The victim of crime is often at the centre of such rights violation or denial. This time, denial of rights is due to the criminal process itself. There is a double jeopardy aspect to the victim's lot, initially at the hands of the accused and then at the hands of the courts. These have their concomitant effect on the community and the public rights. Others whose rights are violated or victimized, respond or suffer their deprivation in silence. A dysfunctional legal environment is almost the order of the day. Police action in such disorder takes on additional burdens, during which violations of rights by police are occasioned.

The sad fact is that police are often exhorted not to take the matter before courts but to deal with it themselves. Violation of rights at the hands of the police is often the result. Keeping the peace and maintaining public order is the other area in which the legal environment is not conducive to effective action. The relevant cases have been discussed above.

At this point, mention needs to be made of the rights of the public. The regime of rights law considers the case between the petitioner and the responding police officer who takes action to prevent a breach of peace and therefore to secure the rights of the public in that location. Their rights whether violated by the demonstrators or secured by effective police action are not in issue in the rights determination. The concerned public in such disorder situations are not represented at the court adjudication. In effect, in many cases it is the police that represent the rights and interests of the public, at the scene. In fact breach of peace is not the dominant issue in so many of these cases[37]referred above. The case of Bandara[38] was an exception where breach of peace damage and mayhem was the dominant consideration. Effective action by the police representing the public interest and rights at the scene was vindicated by court decision.

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[37] *Vivienne Gunawardene v. Perera* [1983] 1 Sri.L.R. 305; *Athukorale v T.P. F. de Silva IGP* [1996] 1 Sri Lanka 280;*Senasinghe v Karunatilleke Senior Superintendent of Police Nugegoda et al.* [2003] 1 Sri LR 172; SC No. 431/2001 (FR) of 3rd December 2002 and 6th January 2003.

[38] *Bandara et al v. Jagoda Arachchi et al.* [2000] 1 Sri LR 225.

A desultory criminal process as relevant as it is to police discipline is then a large area which is not within the scope of this paper. Brief references and connections will instead be made to indicate the lines on which the matter may be further explored.

i. Confessions to police are not admissible in evidence. Yet, if the law is amended to make confessions to police, sufficiently corroborated by independent particulars, then it could be argued that allowing the problem of extracting confessions by the use of force is obviated. The best evidence is that of the accused. The best evidence is shut out. Truth is irrelevant. Community concern for a credible criminal process in pursuit of the truth has not been compelling;

ii. The validity and admissibility of witnesses' statements is severely discounted in the law. Adjudication goes awry on this matter in many ways. Such orders accrue to the benefit of the accused with no advantage to the victim. There was an instance of this being corrected under the 1974 Administration of Justice Law where witnesses' statements had a greater validity with double signatures to attest to its greater validity. That provision was discontinued in 1979 as a result of changed political compulsions. The task of the police, made easier by the earlier provisions, was burdened due to reasons which were not credible;

iii. Witnesses in the criminal process have a parlous standing in court proceedings. Witnesses would avoid courts if they can. Witness protection is in a perilous state. The result is that witnesses will not volunteer evidence. The prospect of testimony of independent witnesses has been effectively written off for reasons of the court criminal process, apart from other reasons. The criminal law is dysfunctional as it dissuades and deters witnesses contributing to the process. The police task of investigation and bringing offenders to justice is disabled and handicapped to the extent of that dysfunction. We are confronted by the stark fact that witness protection schemes are elaborately formulated against a background where the system itself is impaired;

iv. The adversarial system of adjudication inhibits confessions being made. It deters witnesses. The system of contest is a clear disincentive to the offering of confessions or volunteering of evidence. The problem of due criminal process then falls on the police. Law does not avail. Extra legal pressures intrude where the law does not help. Disciplinary problems emerge in those circumstances to contribute to the lot of the police. The rule that applies is simply the law and the code;

v. There is no solution. The evils of the adversarial system can, however, be ameliorated somewhat. A category of cases which involve crime and offences can be diverted from the adversarial process and its evil effects obviated by recourse to processes other than the instituted adversarial criminal process. A good proportion of criminal offences can be diverted from the formal instituted legal process, to be dealt with otherwise;

vi. Mediation, reconciliation, recompense, restitution, conciliation and resolution of disputes are the alternatives to adjudicatory positioning of disputing parties.* Mediation is feasible in a category of criminal cases which are more in the nature of interpersonal disputes than offences against the state. Adjudication of an adversarial nature is counterproductive in these

*Ed. Note; for a view that strongly disputes this opinion of mediation as a viable strategy to address laws delays in criminal matters, see *'Laws Delays' as Abuse of Process; Fresh Perspectives and Critical Analysis'* in LST Review, Volume 17 Issue 236, June 2007

cases, where the objective is law and order and control of crime. Mediation by the police directly or with citizens' assistance, by the Attorney General directly or through a panel of advisors, and also by courts through empanelled conciliators drawn from the community, is expedient. All these cases can be reported to the Judiciary for reference and for statistical purposes. A 40% reduction of cases from the adversarial process could have great significance for the total process and the larger objective.

Public rights

The environment in which the police function evokes disciplinary sanction is the context of public rights. The specific context involves public order situations in which police are to act to preserve the public peace. This matter has been briefly referred to above. It is expedient however to consider the matter from the perspective of public order, public peace and the public good. Disciplinary sanctions attach to police action taken in such situations. In point of fact, it is the police who represent the public interest at the scene of disturbance. Prior to the rights regime, incidents of this nature were treated differently. Under the rights law, there is a complete shift of position. The question as to whether peace and order is maintained is incidental to the question of infringement of rights. Thus in the Senasinghe case (cited above) the actions of the police officer did not avail him, for he acted under a law which law was held to be invalid later by the Supreme Court. The validity of that law was constitutional question, but was decided by a single bench. The consequent quandary posed for police officers called upon to respond to a particular situation of public order is manifest.

One does not hear the question as to 'Whose human rights are we talking about?'[39] posed by others apart from police officers. Lawyers do not ask this question. Judges do not have to pause to consider such questions. The question raises no issue to judges to whom the consideration is confined to the matters in the petition laid before them in courts. The petitioner comes before court alleging violation of his individual rights. Community rights are not petitioned in this way. Legal scholars may find such question inane or of no relevance. The leading cases on fundamental rights in this country have not found this issue pertinent. Human rights activists are still further away from this issue. Yet, the quandary of the constable arises from his experience in the field, in actual action. Neither judicial opinion nor legal determination nor legal texts offer the constable on the street any clarification on this point. He is befuddled. 'Whose rights are all these luminaries talking about?' asks the policeman but receives no clear answer.

On the street, this question confronts the constable in various ways. In the courthouse, such questions do not merit judicial determination. The difference is one of context, expressed in many ways. Sometimes the difference is described as the law in books and the law in action. Or that crime in the street appears not the same as it is seen in a court house. This question asked by the constable has been framed in the heat of action to keep the peace. He asks, 'whose rights are we talking about?' The constable's question is even more relevant in a situation of confrontation. In situations of public disorder or threatened breach of peace, the constable has to decide and to act between two contending positions on rights. This is invariably the quandary which confronts police action, that of the individual right of the demonstrator and the right of the community to peace and order. Both the demonstrator and the community are fully represented on the street, face to face in most situations. In the courthouse, the demonstrator is well represented to claim his rights. The community is not so represented. The representation of the community by the state attorney or community interest upheld by the court is at best theoretical. The voice of the community and their collective interest is silent in a courthouse.

[39] 'Sir, whose Human Rights are we talking about?' asked the constable in the article in The Island 17th September 2007, by Mr. Gamini Gunwardene.

Whose right are we talking about? Are they the rights of the demonstrators in the street or the rights of the community with an equal claim? Who is to decide and when? The question is in the mind of the constable. He has to decide and he has to act. The problem is that there is no one other than the policeman to assess the situation and decide. Substituted assessments of the context by courts in retrospect are insufficient in their definition. Judicial assessment is generally not in context. Court decisions can be in quiet repose, with air-conditioned detachment. In contrast, the constable's action is essentially in context and must be decisive and instant. He cannot move for postponement. He may not defer his decision. The constable is now placed between two sets of rights: the rights of those demonstrating on the street exercising their right and freedom of expression on the one side. On the other side, there are the rights of the regular users of the highway, exercising their right to freedom of movement. The constable has to consider the individual rights on the one hand and the collective rights on the other; the right of assembly against the right to public order and public peace. These rights contend with each other. A decision has to be taken immediately and between the two, not by court but by the constable. This is the situation in which the constable asks the question: whose rights are to prevail.

Is the question of the constable astute? The officer has been no doubt dealing with these public order situations over the years and has acquired a wealth of experience and insight. Each experience adds to the next, honing the policeman's skills to make competent assessment of the unraveling public order situation and to determine the action appropriate in the circumstances. Assessments of such volatile situations, with neither experience nor consideration of the context of decision and action, in review are prone to be in the realm of the abstract and the impractical. Foreign decisions have cautioned against substituting judicial opinion for practical decision. *Bubbins* was a case, decided in the European Court of Human Rights in which the police had fired at and killed a person who had aimed a pistol at the police. The pistol was found later only to be replica. The killing was held to be lawful. The Court observed: "Moreover, the Court could not substitute its own assessment of the situation for that of an officer who had been required to react in the heat of the moment...."[40]

> "One of the prime duties of the police is the maintenance of public order....The common law powers are preventive in nature and are available to the police (and to the citizen) irrespective of whether or not an offence has occurred. The common law imposes an obligation upon both police and citizen to deal with breaches of peace. The freedom to protest is circumscribed by the preventive power of the police and by statutory offences as wilful obstruction of the highway. Despite the terms of the ECHR, Article 11, there are no rights to assemble and protest. These are residual freedoms which exist only to the extent that they are not affected by any positive law or obstruction of the highway."[41]

Howell[42] (1982) was a case in which police attempted to disperse a group of disorderly persons who had spilled on to the street, disturbing the neighbourhood. This case held;

> "To deny him, therefore, the right to arrest a person whom he reasonably believes is about to breach the peace would be to disable him from preventing that which *might cause* serious injury ....is about to breach the peace would be to disable him from preventing a breach of peace...."

The court recognised that;

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[40] *Bubbins v The United Kingdom* 134 Of 17.3.2005, Chamber Judgment.
[41] Marston John and Ward Richard, in 'Constitutional and Administrative Law', [1991] p269, 128 Long Acre, London.
[42] *R v Howell* [1982] QB 416; [1981] 3 All ER 383.

'A comprehensive definition of the term 'breach of peace' has very rarely been formulated so far ....The older cases are of considerable interest but they are not a sure guide to what the term is understood to mean today, since keeping the peace in this country in the latter half of the 20th century presents formidable problems which bear upon the *evolving process* of the development of this breach of the common law.'

Duncan (1936)[43] was a case in which Mrs. Duncan was charged with willful obstruction by refusing to heed the instructions of the constable and was then arrested. Here it was a refusal to heed the police that was construed as willful obstruction. *Thomas*[44] was a case explicit in the description of this duty:

"It goes without saying that the powers and duties of the police are directed, not to the interests of the police, but to the protection and welfare of the public."

Developing this further, the court asserted thus;

"I am not at all prepared to accept the doctrine that it is only when an offence has been, or is being, committed, that the police are entitled to enter and remain on private premises. On the contrary, it seems to me that the police officer has *ex virtute officii* full right to so act when he has reasonable grounds for believing that an offence is imminent or is likely to be committed..."

In the case of *Piddington*[45] (1961), it was said as follows;

"I think that a police officer charged with the duty of preserving the Queen's peace must be left to take such steps on the evidence before him he thinks are proper...Finally, I would like to say that all these matters are so much matters of degree that I would hesitate, except on the clearest evidence, to interfere with the findings of the magistrates..."

The case of *O'Kelly*[46], arose from dispersing a meeting which the defendant officer "believed and had reasonable and probable grounds ...that a breach of the peace would occur..."

The UK courts have gone further: judges have supported the proposition that resistance to a police order to disperse may constitute the offence of obstruction of the police in the execution of their duty.[47]

"Just as important is what is likely to happen in practice. On this latter point it is extremely difficult to generalize. Much depends on the policeman at the spot'..."[48]

These observations of the courts in the UK make plain the answer to the question: whose rights are we talking of? Public peace, public order and public interest are the paramount considerations. The obligation of the police to maintain public order is clear. The nature of the duty cast on the police to engage in preventive action to avoid breach of peace is firmly cast. The manner in which this duty may be obstructed and the action to be then taken, is unmitigated. Above all, at which point is the action to be taken? Who is to decide? What circumstances attend? All these are made plain; they are within the decision of the policeman at the spot. The UK courts guard themselves against second guessing and

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[43] *Duncan v Jones* [1936] 1 KB 218; [1935] All ER Rep 710.
[44] *Thomas v Sawkins* [1935] QB 249; [1935] All ER Rep 655.
[45] *Piddington v Bates* [1961] 1 WLR 180; [1960] 3 All ER 600.
[46] *O'Kelly v Harvey* (1883) 15 Cox CC 435, 10 LR Ire 285, 14 LR Ire 105, Court of Appeal in Ireland.
[47] *Duncan v Jones* [1936] 1 KB 218, King's Bench Divisional Court.
[48] Bailey SH, Harris DJ and Jones BL in 'Civil liberties: case and materials' Third Edition 1991 215, Butterworths London

substituted opinion, for obvious reasons. The constable on the beat in the UK is not in any quandary about the scope of his duty. The policeman in the UK does not have to ask the question: whose rights are we talking about? The courts in the UK and the law in the UK have made that plain to the constable there.

The situation is however somewhat different in regards to judicial opinion in Sri Lanka. Thus in the case of *Vivienne Goonewardene*[49] the matter of an illegal call for a permit mattered more than the fact that a procession was conducted of which notice was not given and was such as might lead to a breach of peace. The arrest and dispersal of the procession were held to be a violation of rights. In a similar vein, the call for a 'formal application' was held to be an 'afterthought' in another rights case.[50] Such requirement could hardly be an 'afterthought' if that had been the practice for well over seventy five years, a practice that prevailed calculatedly to regulate conduct of processions and prevent breach of peace. Contrast the case of *Duncan*, above, with the local case of *Senasinghe*.[51] In the *Duncan* case, willful failure to heed instructions by the police was construed as obstruction to police duty. In the *Senasinghe* case, pleading, entreaties, directions and verbal orders of the police to prevent a breach of peace were all disregarded. These were not considered as obstruction to police duty. Practicality was never a consideration in these local determinations, much less the concern of breach of peace and order.

The difference in the tenor of UK decisions from that of the local decisions, referred above, is that local decisions are determined much on the post facto situations. As stated previously, where violence and damage to property has taken place, action taken by police receives more favourable judicial review. Conversely, where no violence is caused and damage was averted, police action is impugned on seemingly substantive grounds, as the above examples illustrate. Violence prevented or breach of peace averted is less easy to demonstrate than events that take place. The space for other grounds for review is increased when damage and violence are not in issue. In the UK cases, the focus is on the preventive stage, giving ample scope for action at that stage.

The peaceful aftermath of police action weighed much in the local cases discussed above. There are some exceptions in the local scene. The case of *Bandara*[52] is an instance of review of police action taken in the aftermath of serious violence and damage to property. The Court recognised in this case that "an assembly crosses the line of being peaceful when the general behaviour of those assembled leads to a reasonable apprehension that they are likely to cause a disturbance of the public peace."[53] In all these cases, the situation *ex post facto* was a factor in the determinations.

The UK cases reflect anxious concern to avert potential violence before such is perpetrated. The UK courts are acutely conscious that peaceful demonstrations may take an ugly turn, or even be calculated to produce mayhem. Such calculations are essentially political in nature. The UK courts have adopted the Latin phrase, *sic utere tuo ut alienum non laedas*, which means that one cannot arrogate a right in order to hurt another person. It means that one is not permitted to use legal rights for illegal purposes.

Keeping the peace in this country in the latter half of the 20th century presents formidable problems which bear upon the *evolving process* of the development of this breach of the common law. The local cases do not express such concerns for that which might take place, having regard for the evolving process of the

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[49] *Vivienne Goonewardene v. Perera* [1983] 1 Sri.L.R. 305
[50] *Athukorale v T.P. F. de Silva IGP* [1996] 1 Sri Lanka 280
[51] *Senasinghe v Karunatilleke Senior Superintendent of Police Nugegoda et al.* [2003] 1 Sri LR 172; SC No. 431/2001 (FR) of 3rd December 2002 and 6th January 2003.
[52] *Bandara et al v. Jagoda Arachchi et al.* [2000] 1 Sri LR 225.

nature of breach of peace. The case of *Senasinghe*[54] passed judgment on police action with little concern for eventualities. In fact, the police using lethal force at a parallel feeder procession at a point several kilometers away, at the same time, had a dampening effect on this procession, which was the subject of the *Senasinghe* case. This fact was not even considered by court. The facts of the case were held to indicate a peaceful protest, not a breach of peace.

> "There is no evidence of any such interference or infringements (of the rights of other users of such streets) and whatever inconvenience was caused could have been *probably* [emphasis added] avoided if the police had allowed the march to proceed....as indeed they do to many processions, peraheras, marches and walks..." (p 189/190)

10. A recent local initiative

The Supreme Court is 'the protector and guarantor of fundamental rights' as has been constantly reiterated.[55] This assertion has been clarified by Wanasundera J[56] since the Supreme Court has no jurisdiction to declare that an Act of Parliament violates any fundamental rights. The Supreme Court is not "*the* protector and guarantor of fundamental rights (but it is) "*a* protector and guarantor of fundamental rights." There are in fact other remedies for violation of rights under the common law. The Human Rights Commission of Sri Lanka Act No. 21 0f 1996 provides at section 13, that where a complaint is made by an aggrieved person, investigation can be made by the Commission. These provisions are oriented to serve from above. There are certain problems which attend a top-down process. Expense is involved. Access is limited. From the point of view of the citizen, a readily available means of dealing with rights violations of an elementary nature, which will bring in some resolution and reconciliation, is desirable. Dealing with rights violations or denials at the incipient stages has the prospect of preventing more serious violations.

A recent initiative termed Citizens' Rights Watch Committees (CRWC) was conceived to function along these lines. Certain principles were invoked in the translation of the broad idea of Citizens' Watch in respect of their rights. Initially this programme of work was drawn up from the perspective of the police in their interaction with the community. Attention was given to the protection of human rights which figures in the course of police action with citizens in the community. The project therefore did not extend to the subject of rights in general. Secondly, there was the recognition that the citizens were the most effective instrument for securing their own rights.

Thirdly, it was acknowledged that citizens from the immediate community were more effective to wield influence on behalf of the community for remedial measures in the event of breach of rights through police action. Community influence was directed both at the citizens and over the police in a form of social sanction over the process. This method was more effective than other impersonal arrangements to secure rights.

Following this idea, it was imperative that members of the watch committees had to be carefully selected. Selection was made by GAA / AGA from among persons who had a high standing in the immediate community, and thus would wield a benign influence over all immediately concerned. Intervention by persons of such eminence and social standing in the event of breach of rights was effective as it conditioned the conduct of the parties concerned, through the resolution of the problem. The Committees

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[54] *Senasinghe v Karunatilleke Senior Superintendent of Police Nugegoda et al.* [2003] 1 Sri LR 172; SC No. 431/2001 (FR) of 3rd December 2002 and 6th January 2003.
[55] *Palihawadana v A.G.* [1978] 1 Sri LR 65. 66.
[56] *Jayanetti v The Land Reform Commission* (1984) 2 Sri L.R. 172, 179.

were conceived as functioning on an informal basis, collectively and individually. Citizens have access to the Committees even on a 24 hour basis. The procedure was informal, as a guiding principle. Consequently, intermediaries had less of a role and therefore less influence over the proceedings. The idea was clear that the process for disciplinary control does not simply have to be one that is institutionalised in a formal mechanism.

The considered opinion of those who framed this initiative was that no costs should be incurred. The underlying consideration was that financial inducement or influence should not be permitted to direct the process. Watch Committee members functioned on a voluntary basis. The government did not have to incur any costs. Sittings were at their selected venues, except for the monthly meeting of the Committee at the police station.

There was a fundamental - though unarticulated principle - which ran through all these considerations. The expectation was that the increased effectiveness of such Committees in the resolution of rights disputes and breaches of the peace would win for itself increasing acceptance by all concerned. The process nourishes itself. Another principle which influenced thinking was that there was another perspective to the matter of rights administration than the conventional legalistic frame would yield. In the case of the latter, the legal regime for rights enforcement and securing rights was through penal sanction and relief after adjudication. The stance was of a negative form. Citizens Rights Watch Committees constituted an approach from another angle to securing rights. These Committees dealt not only with breach of rights through resolution and reconciliation, but also secured rights in the event of denial of rights through failure of police action. Some measure of success was evident in this respect too. Influence peddling was avoided in this context. The start was promising but the expectations were not entirely as projected. The time itself was too short to measure progress. It remains to be seen as to whether these efforts will bear substantive fruit.

11. Some summary reflections

A few comments will be offered here in summary;

1. There is a heavy influx of interventions by non-governmental organisations (NGOs) in rights cases in this country. This is a fairly recent feature of the last decade. Although there may be organisations working with genuine intentions, this may not be the case in all instances;

2. Locally too, quite a few cases are manoeuvred through the practice of champerty. There is significant success achieved by the manipulators in this manner. Allegations of rights violations are brought about despite the reluctance of the petitioner. The author is personally aware of cases which could not be so instituted because certain honourable lawyers involved in the impugned incident declined to sign affidavits prepared by the petitioner's lawyer;

3. Adjudication of facts in some rights cases has been problematic, perhaps due to the abbreviated affidavit procedure;

5. Operation of the normal criminal law has been stymied in the application, with arrests brought under review as violations of rights. There have been cases were immediately upon arrest, rights were held by the Supreme Court to have been violated. That same arrest in the criminal case constituted no problem when those criminal proceedings ended in conviction. Arrests in criminal investigations are avoided by police for fear of rights litigation. Arrests to enforce effective performance have been avoided for fear of judicial sanction imposed in the cause of rights protections;

6. Effective action in public order situations is also affected as a result. The police have adjusted themselves to evade facing up to such situations, to avoid the possibility of court decree, which has the effect of holding up their promotional advancement. The decision of the administrative authority in the NPC is that compensation awards in rights cases should stand in the way, as blemished record and conduct, of promotion;

7. The exercise of the statutory duty of police in respect of intelligence is, at times,[57] mixed up with the process of investigation in judicial determinations;

8. Delayed process of the law, through manoeuvre and manipulation, clouds the legal environment with regard to the credibility of the process.* Official parlance terms this 'laws delays' in the passive sense. Delay is the means to 'play the game' when there is little other defence. Police action through investigation and preventive action is nullified through faulty court process. Crime is then not controlled. This rebounds on the police burden. Other means of control are inveigled into the process, many of which fall foul of the disciplinary code and the law. Offenders are not restrained. Conviction rate is low. The standard of police investigation is said to be the reason.

   That explanation cannot hold in indictable cases where the investigation has been to the satisfaction of the Attorney General before indictment was filed. This explanation of poor investigation does not hold in bribery cases where police investigation is closely directed and supervised by legal officers and retired judges before indictments are filed. These cases constitute a considerable number. The low conviction rate covers all these. Fault is then not only with police investigation. Problems arise also with adjudication in court. Delay is the device used in many of these cases to wear down the parties. This is a means of subverting the process. The practice is deployed when personalities weigh in. The insinuation that only small fry get trapped in bribery cases and the sharks escape resonates through this cloudy legal environment. The fact is that only the particulars of those convicted are listed in the Bribery Commission annual administration reports. Those who escape conviction after indictment are not detailed nor are particulars given of their standing. Disciplinary control of the police arising in the course of employment, as an issue, pales into insignificance in the face of the legal environment which is not conducive to their work. Police indiscipline needs to be weighed in the scales in the larger perspective of the denial to the police of the means to discharge their statutory obligations. In fact, the subject of this article, 'Disciplinary Control in the Sri Lanka Police', can hardly avoid the limited view and narrow focus often adopted in writings on this subject.

A recount therefore of the circumstances which attend disciplinary control over police reflects considerable complexity, as discussed above. The attendant problems are daunting.

12. Conclusion

Disciplinary control regarding the Sri Lanka Police has been a matter of concern from the time of independence. Successive Police Commissions of Inquiry that periodically considered this question have had the matter of discipline in the police as a clear point of reference. These reviews adopted different standpoints from which the problem of discipline was viewed. Originally, problems of discipline were seen as arising from poor public relations. Courtesy and community relations were the thrust of the recommendations made by the earlier Commissioners. The problems of discipline took the form of

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[57] *Anura Bandaranayke v. WB Rajaguru IGP et al.* [1999] 1 Sri L.R. 104

*Ed. Note; see *'Laws Delays' as Abuse of Process; Fresh Perspectives and Critical Analysis'* in LST Review, Volume 17 Issue 236, June 2007

incivility and oppressive conduct in relation to the public. Wanton neglect of duty and disobedience to orders followed the earlier transgressions of the disciplinary code. Later assault and torture figured more prominently. Finally violations of rights, firstly of a serious nature and subsequently of violations of rights in the performance of duty, frame the nature of police misconduct that has figured in the recent times.

This is a very general picture of the progress of the problem over the years. In a sense, the historical nature of disciplinary problems can be related to the socio-political developments over time. The insurgencies and the security situations had tremendous impact on the manner in which police dealt with the public. Corruption in breach of the disciplinary code was a persistent problem through this period. Challenges to the police organisation arising from the differential impacts of external conditions were responded to as appropriate to the context. Police involvement in rural development ventures had a calculated effect on crime prevention as well as developing community relations. These factors resulted in some impact on the problem of discipline in the 1950s. There was an attempt to revive the initiative in the 1970s, in the context of recurrent social disturbance and insurrections but these efforts were not continued. The conclusion may be reached that disciplinary control over the police was in large measure contingent on external factors outside the control of the police.

Disciplinary control of the police remains a yet predominant concern. The public expectation is of a disciplined body of police which acts in an acceptable manner through all the vicissitudes of socio-political development. In other words, the public expectation relates to an organisation which meets with the aspirations of the community, through vastly changing political scenarios. The need therefore is for a police organisation that is resilient in the face of these varying challenges, to deliver a disciplined performance. Integrity and soundness of the organisation and the coherence of it internal structure is the basic requirement to meet these challenges. A body deconstructed of its integrity and denuded of its capacity to meet the external challenges finds its power to contain discipline impaired.

The effectiveness of the criminal law and the validity of the criminal process to serve the objectives of law and order are equally vital for the effectiveness of the police organisation to discharge its statutory obligations in a restrained and disciplined manner. The bribery law as it is implemented does not induce discipline. Particularly, higher police officers returning from bribery cases, with acquittals and clean slates of honesty and integrity, to the administrative and disciplinary structure of the police organization, have a debilitating effect on administration and discipline.

Disciplinary control over the police assumes meaning only as it is discussed in the above composite perspective. The above account of all the relating developments, ever since independence, makes clear that the composite nature of disciplinary control has lost much of its meaning through a series of changes. Evidently a more and more legalistic view came to be adopted of the concept of disciplinary control. Sanctions, independent review, breach of rules or code and judicial review constituted the essence of disciplinary control. The heavy legal overlay in the Commissions of Inquiry which examined disciplinary control and related matters can account for this development. The WT Jayasinghe Committee represented a departure in this respect from the earlier trend. That Committee was more administratively oriented. Work performance rather than disciplinary control by itself constituted the overall observation in this instance. Mediation as a means of enhancing work performance was recommended, a process which had a therapeutic effect on disciplined relations with the public. The earlier instance is contained in the rider in the Soertsz Commission where one of the Commissioners, Mr. Sri Nissanka, albeit a lawyer, had a different approach to the subject of policing than the conventional disciplinary approach. The thrust of his report was to consider the policing function as one with long antecedents. The merit in this was that it recognized the composite nature of the policing function, including the disciplinary component in the composite. Unfortunately, the potential in this approach was not developed in later years.

Disciplinary control and administrative authority over the police were thereafter repeatedly dealt with as separate issues rather than composite matters. It was inevitable therefore that, in due course, responsibility would be gradually removed from the source of authority and from the police command structure itself. Instead the trend was set in which administrative authority and disciplinary control came increasingly to be vested with an authority not charged with the responsibility for performance of statutory duties and obligations. Historically great efforts had been made to weld together administrative authority, disciplinary control and work performance. Whatever was achieved was achieved with difficulty. Developments of an extraneous nature had the effect of detracting from the cohesion of the administrative structure and its effectiveness. Much of that effort is now increasingly being abandoned.

Excerpt from the Final Report of the Police Commission of 1970*

CHAPTER VI: RELATIONS WITH THE PUBLIC

General Comment

53. If the police is to secure a greater measure of public co-operation and confidence, it is necessary that the public should feel that their complaints against the police receive the consideration that they deserve.

54. The police do not enjoy the goodwill of the public. The public image of the police is not at all what it should be. The fear of battery by the police is in every citizen. Several cases of torture have come to light in the courts. The police have therefore to win the public confidence by a long period of correct behaviour before public co-operation can be gained. The outlook and attitude of mind towards the public has to change. Courteous attention and civility must replace the rude and militaristic attitude that is characteristic of a police station. No laws can effect the change. Even after public attention has been focused on a number of incidents in which the police have belaboured the public, reports of police violence still continue to appear in the press. We think that this attitude of mind of the police is largely due to the fact that the machinery for investigating complaints by the public against the police at present is unsatisfactory and does not command the confidence of the people.

The Present Procedure of Inquiry

55. The present procedure for receiving and inquiring into complaints made by the public against members of the Force is prescribed in Appendix D to Departmental Order A7.

56. The Departmental Order provides that complaints against the police may be made—

(a) by petition, telegram or telephone message, or
(b) in person at any police station and recorded in the Information Book, or
(c) in person at any police office and recorded by any police officer.

57. A member of the public who wishes to make a complaint against a police officer has a right to be accompanied by one or two friends if he so desires. The friend or friends accompanying the complainant should be persons unconnected with the matter of the complaint. As soon as a complaint against a police officer is received, the Assistant Superintendent of the area in which the police officer against whom the complaint is made is stationed is required to notify the Superintendent of the fact of the complaint.

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* Editors Note; Sessional Paper XXI-1970. The Commission was headed by a former Chief Justice of Sri Lanka, Hema Basnayake. The other members were Messrs NJL Jansz, D.B. Ellepola and S.A. Wijayatilake. The 1970 Commission drafted a Police Act incorporating the Commission's recommendations which was not implemented. The Report of the 1970 Commission, as well as the Report of the Police Commission of 1948 and the Police Service Report of 1995, are available at the Law and Society Trust for public perusal.

58. In the case of a complaint made by petition, the petitioner is required to attend the nearest police station or police office and to acknowledge its authorship and the contents of the petition.

59. Under the present procedure, there is a "preliminary" or "fact finding " investigation into a complaint. If the preliminary investigation discloses a *prima facie* case, charges are served on the officer concerned and he is given an opportunity of providing an explanation. After the explanation is received, a Board of Inquiry is set up to investigate the complaint.

60. The Board consists of the Assistant Superintendent in charge of the District as Chairman, the Officer-in-Charge of the Station to which the accused police officer is attached and a member of the public.

61. In the event of the Officer-in-Charge of the Station being himself a witness, the next senior Inspector or Sub-Inspector of the Station or any other Officer-in-Charge of a Station in the District will be the second member of the Board.

62. When the complaint is against the Officer-in-Charge of a Station. the superintendent of the Province or Division is the Chairman and the second member is the Assistant Superintendent in charge of the District.

63. The member of the public is selected by the Superintendent from a Panel consisting of residents in the area who are willing to serve on such a panel. The panel is drawn up from a list of persons recommended by the Government Agent and the Assistant Superintendent of Police of the area and is finally approved by the Inspector-General of Police.

64. At the inquiry, the complainant is not allowed to be accompanied by or receive assistance from a friend; but the police officer against whom the complaint is made is permitted the assistance of a friend or another officer in the police service. The unofficial member of the Board has power to question the complainant, the accused officer and their witnesses.

65. The findings of the Board are recorded by the Chairman and communicated to the unofficial member. He may either assent or dissent. If he dissents, his dissent has to be forwarded with all relevant papers to the Deputy Inspector General of Police of the area.

66. The venue of the inquiry is required as far as possible to be a place which is neutral.

67. Above we have briefly described the prescribed procedure for dealing with complaints by members of the public. The evidence discloses that in fact these Boards do not act impartially and that by their very constitution their weight is on the side of the police.

68. The unofficial member of the Board selected by the Superintendent is generally a person chosen by the Police themselves and will not go against the accused officer either because he dares not or is not inclined to do so. In this matter, the evidence is that precept and practice are far apart. In fact one witness, Mr. Bandara, a planter who appeared before us, gave a graphic description of an inquiry. We are satisfied that the present procedure must change in the interests both of the police service and of the people.

69. The complainant, appearing as he does without assistance legal or otherwise, is at a great disadvantage and rarely gets a fair hearing.

70. These Boards do not enjoy the confidence of the public, and rightly so their constitution does not inspire confidence and should be done away with. A complaint by a member of the public against the police is a serious matter both from the police officer's point of view and from that of the public. Police officers should be protected against false complaints. At the same time, the public should have the satisfaction of knowing that their complaints are not dealt with indifferently but are given the hearing that they deserve. It is not easy to provide the machinery, especially in the provincial areas, for these inquiries to be held by judges in whom the public have confidence. But the difficulty of providing such machinery and the expense to the State of establishing such impartial tribunals, should not stand in the way of a complete re-organisation in view of the outcry against excesses by the police. The absence of an impartial body which can promptly deal with complaints against the police seems to have encouraged some police officers who are not so conscious of their responsibilities and duties to the public to treat the public in a way that is not becoming of the guardians of the peace. The evidence before us discloses that members of the public are humiliated and assaulted by the police for no reason at all.

71. On account of the unsatisfactory nature of this procedure, we have endeavoured to set up entirely new machinery for investigating complaints against the police. It is designed to win public confidence in the tribunal which hears the complaints.

Ombudsman

72. We, accordingly, recommend the setting up of a Police Ombudsman to whom the public may make complaints against the police. This officer should be independent and have power both to investigate charges and to try them. He should be able to act promptly and dispose of complaints expeditiously. He should have all the powers necessary to achieve that end. We have accordingly made provision, in the draft Police Act which we have prepared, for a complete machinery for receiving and disposing of complaints against the police.

73. The Police Ombudsman should be a person with judicial training and experience. He should be beyond the pale of executive control but subject to the supervision of the Supreme Court. We have provided that this officer should be drawn from the highest class of the Judicial Service. As work increases he should be provided with deputies who too should be drawn from the Judicial Service. He and his deputies should be appointed by the Judicial Service Commission and have all the powers of a Magistrate.

74. A member of the public should also be free to make a complaint against the police to any Magistrate or Judge. We have made provision in the draft Police Act accordingly.

75. As the finding of the Police Ombudsman will have far-reaching consequences, we have given the parties the right to be represented by counsel, and made the decision of the Ombudsman subject to an appeal to the Supreme Court. To prevent undue delay in the disposal of complaints, we have given the Police Ombudsman power to inflict any punishment that the law provides.

76. As for the venue of the inquiry, it should not be the police station or the office of any police officer. The language of the proceedings should be the official language. For the benefit of those who do not understand the official language, there should be interpreters,

77. We recommend that in the case of members of the public who are unable to get legal aid, the State should provide legal aid, both at the inquiry and in appeal. This legal aid, if it is to be effective, should be available before the Ombudsman proceeds to hear the matter of complaint. We, therefore, wish to empower the Ombudsman to assign counsel. Their fees should be met by

the State. The recommendations we have made should go a long way in reducing the uneasiness of the public in regard to the conduct of the Police and their attitude towards the public at present.

78. Although this machinery would involve additional expense to the State, it would be amply repaid by the public confidence it would enjoy, the protection the people would receive, and by the deterrent effect such a machinery would have on police officers inclined to take the law into their own hands.

Corruption

79. The evidence furnished not only by witnesses from within the police force but also by those representing the outside public, and some of those persons who were at one time in the police force, is that corruption in the police force is widespread and varied.

80. The police witnesses gave the following examples of corruption:—

(a) that Rs. 50 was levied for giving bail to a person in custody;
(b) that two bottles of toddy from certain taverns were given daily to the Police Constables;
(c) that officers of high rank and rankers were in league with those who faked currency;
(d) that there were officers who received regular payments from kasippu dealers, bucket-shop keepers and boutique keepers;
(e) that the members of the police force visited so-called social clubs and restaurants and obtained free drinks;
(f) that illegal detention of a person could be secured for as low a payment as Rs. 50
(g) that raids on kasippu dealers who paid regular bribes were made only after prior notice to them;
(h) that large-scale kasippu dealers got off scot-free while the small men were detected and punished;
(i) that police officers who were engaged in building houses obtained their sand, bricks, timber, etc., free from the dealers in those goods;
(j) that police constables had to provide their superiors not only with foodstuffs but also with attractive young women;
(k) that police constables were used to collect the bribes from kasippu dealers, bucket-shop keepers, etc.;
(l) that regular payments were made by timber contractors engaged in transporting timber;
(m) that in certain areas all the kasippu dealers had joined to pay regular monthly bribes to all ranks from the highest to the lowest;
(n) that those who did not give bribes had to face trumped up charges; and
(o) that information books were falsified for a payment.

81. They stated that in some areas, the kasippu dealers and bucket-shop keepers exercised such great influences in high places that both officers and the ranks refrained from raiding their dens of evil for fear of adverse repercussions. Some of the witnesses stated that certain bucket-shop keepers were so powerful that they could even get police officers transferred over the telephone. The witnesses even ventured to give names. They mentioned Krishnan of Kotahena; and Chelliah of the Pettah. Though the situation may in fact not be so bad as pictured to us, it is dangerous that such an impression should prevail in the ranks.

82. A police force which is corrupt fails to serve its purpose. Where corruption prevails, the police cannot get the co-operation of the public. Without the co-operation of the public, the police cannot perform their task as satisfactorily as they could if they had their co-operation.

Some of the Causes of Corruption

83. The increase of corruption cannot be put down to any one cause. Corrupt men are to be found-in all walks of life, but when there are too many such men in the police force, then society is in peril. The causes of corruption in the police force are too numerous to be exhaustively catalogued. We venture to state here some of them:

(a) the existence of illicit trades such as the receiving of illegal bets and illicit sale of liquor in which the profits are large enough to enable those engaged in them to pay large bribes in keeping with the status of the bribed. The statement of the 18th century British Prime Minister Walpole "Every man has his price" is not untrue in the generality of cases;
(b) the difficulty of detection of corruption as neither party to a corrupt act is willing to disclose the act, and there are rarely other witnesses to a corrupt act;
(c) the absence of safeguards against corruption;
(d) the defects in the law for the punishment of corrupt men;
(e) the defects in the machinery of justice;
(f) the law's delays;
(g) political interference brought about by the influence that those in illicit trades exercise;
(h) the weakness of the administrative machninery;
(i) the inadequate salaries and allowances paid to members of the police having regard to the high cost of living;
(j) the absence of a proper authority with adequate powers to whom complaints against the police can be made;
(k) the absence of a proper set up for hearing and expeditiously disposing of complaints made by the public;
(l) the ignorance of their legal rights by the vast majority of the people;
(m) the ignorance of the law on the part of police officers of all ranks;
(n) intemperate living on the part of some police officers brought about by wrong notions as to status and style of living;
(o) decay of moral standards in the country at large due in no small way to the indifference and not seldom the immorality of some of those in the seats of power;
(p) the desire on the part of unprincipled men to make money at any cost;
(q) the servile obedience to the higher ranks that is now demanded of the rank and file;
(r) the methodical crushing of the spirit of those men in the ranks who show independence and a desire to conform to the law and respect the rights of citizens;
(s) the corruption of the newcomers by corrupt old stagers with the result that the newcomers lose all sense of honesty and integrity and abhorrence of corruption;
(t) the faliure of the police to attract young high-souled men of good education owing to the false popular notion that the Force needs men of brawn and not brain;
(u) the impression abroad, that only dishonest men who are a match for toughs and bullies can get on in the force, prevents men who wish to lead an honest life from seeking admission; and
(v) the undue emphasis laid on prowess in athletics and sport has sometimes brought in men who think that brute force is the best way of maintaining peace and good order.

All the causes of corruption in the police force enumerated above cannot be eradicated unless the corrupter and the corrupted undergo a process of moral purification or a course of moral re-armament. Although eradication of corruption is not possible, measures can be devised to reduce it and reduce it appreciably.

Remedies

84. In the draft Police Act, we have introduced several measures designed to achieve that end. In Sections 60 and 61 we have provided that every police officer, from the Inspector-General or the Commissioner of Police (as he will be known if our recommendation as to designation is accepted) down to the meanest ranker should make an annual declaration of his assets and (if married) of those of his wife and children. We have also provided that any officer who makes a false declaration of his assets shall be guilty of an offence and be punished with a fine or imprisonment or both such fine and imprisonment and shall also be dismissed.

85. We have also provided for the forfeiture of undeclared assets. If the safeguards against corruption we have provided in the draft Police Act are accepted by the Government and enacted, corruption is likely to be greatly reduced. Attention should also be drawn to the Sections of the Draft Act which punish the giving to and the acceptance by a police officer of a bribe designed to deflect him from the path of duty. That provision is bound to have a deterrent effect on corrupt men.

86. The machinery of a Police Ombudsman which we have provided in the draft Act will have the effect of complaints of corruption being expeditiously heard and dealt with by an impartial tribunal. That machinery is bound to win public confidence and complaints against the police will be made in the future in the faith that they will be heard and decided by an impartial Judge, and not as at present by a tribunal with a police bias sitting in a Police Station or in the office of an Assistant Superintendent. The existence of such a tribunal, we are confident, should act as a deterrent against corruption.

87. The corruption that is fostered by the influence that men in illicit trades exercise over politicians can only be removed by Ministers and Members of Parliament setting higher standards of public conduct for themselves. A police officer who seeks the assistance of a Minister or Member of Parliament to secure or stop a transfer or to obtain a promotion at once loses his independence. He cannot be expected to act impartially in any matter in which the particular Minister or Member of Parliament is concerned. He will not be able to turn down requests made by the Minister or Member of Parliament for the show of special favours. The result is that the officer is rendered incapable of performing his duty with that degree of detachment which is necessary.

Other Influencing Considerations

88. We have asked ourselves: Why do men in the police force invoke external aid? The answer is: it is because—

(a) transfers are made without any plan or rule and often without reference to the hardship caused or likely to be caused to the officer,
(b) promotions are arbitrarily decided, and
(c) there is no appeal to a body that is willing to give an officer aggrieved by a transfer or by the denial of a promotion an impartial and full hearing and remedy his grievance if he has been wronged.

Once a decision has been made it is adhered to even by those above. The Constables and Sergeants who gave evidence before us gave full expression to the sense of frustration that prevails among the rank and file. It is not surprising in these circumstances to find the men invoking the aid of politicians, a course which is not at all in the public interest.

89. When the above-enumerated defects in the present system have been remedied there should be no need to seek the aid of Ministers and Members of Parliament in the matter of transfers and promotions.

90. A good many of the existing grievances in regard to transfers and promotions should disappear with the establishment of the Police Service Commission which we recommend and the setting up by that Commission of a Transfer Board and a Promotions Board. These matters are provided for in the draft Act. Once that machinery is set up and transfers and promotions are in the hands of bodies that cannot be influenced, and from whose decisions there is an appeal to a higher body, influential men in illicit trades will no longer be able to exert over the Service the influence that they now wield.

Ignorance of Rights and the Law

91. The ignorance of their legal rights by the vast majority of the people encourages corruption. This is not a matter that can be easily remedied. With the progress of education, this cause of corruption may perhaps be reduced if we can build up the moral standards of the country. Apart from that if legal aid were available to the ordinary man either free or at a price he could afford, he would be able to know what his rights are. But today legal assistance is beyond the reach of the ordinary man, and free legal aid is not widespread. Corruption brought about by the ignorance of one's legal rights could be remedied by providing free legal aid on a much larger scale than at present. Lawyers' associations could assist in this direction by opening legal aid centres in those areas of large cities where people of slender means live.

92. The ignorance of law on the part of police officers will to a certain extent be remedied by the adoption of our recommendation that there should be examinations for promotion up to the level of Assistant Superintendent of Police.

93. Regular refresher courses with incentives to those who attend and qualify would take the matter of legal knowledge of the men in the force a step further.

94. The servile obedience to the higher ranks that is said to exist now should change with the institution of the Transfer Board, the Promotions Board, and the right of appeal from the decisions of the two abovementioned bodies to the Police Service Commission. With the establishment of those bodies men of all ranks will no longer fear to complain if their superiors are corrupt or oppressive. The fear that their subordinates will expose such corruption will act as a deterrent to the superior officers.

Measures Necessary to Attract Men of Superior Quality

95. The failure of the police to attract men of good education and integrity is due partly to the popular notion that brawn and not brain is needed in the force and partly to the present method of recruitment.

96. As the minimum educational qualification, a pass in the Junior School Certificate Examination which was once the lowest public examination is still accepted. The recommendation we made in our first Interim Report that a reasonably high standard of education should be the minimum has not yet been accepted and large numbers of men of poor education have been recruited as Constables and Sub-Inspectors.

97. In that Report we recommended that—

(i) a recruit Constable should have passed at least the G.C.E. (O.L.) in six subjects passed at not more than two sittings including an ordinary pass in Arithmetic or Pure Mathematics and a credit pass in Sinhala or Tamil language;

(ii) a recruit Sub-Inspector should have, as the minimum educational qualification, of a pass in the G.C.E. (O.L.) in six subjects passed at not more than two sittings including an ordinary pass in Arithmetic or Pure Mathematics and credit passes in Sinhala or Tamil language and in two other subjects, and the University of London or Ceylon G.C.E. (A.L.) in at least three subjects passed on not more than one occasion or in four subjects passed on not more than two occasions.

98. In order to draw better recruits the current notion that brawn and not brain is most needed must be dispelled. The prospects available in the Service should be publicised among students in the higher classes of the Secondary Schools. The necessary publicity could be given by distributing in all Secondary Schools an attractive booklet giving the qualifications needed for entering the force and the prospects available in the Service. It should also contain brief life sketches of those who have risen from the ranks to the highest offices in the Service. Visits to schools by officers of high rank, such as deputy heads of the Service and Superintendents, may inspire the young to choose a police career. Their visits should be accompanied by a lecture illustrated by a film depicting the life of a police officer from the day he enters the Service till he reaches the highest rank. Such propaganda is likely to fire the young minds with a desire to join the force and be an example to others.

99. The undue emphasis hitherto laid on athletics and sport should also be removed. Athletics and sport are in themselves not harmful and the concept of "mens sana in corpore sano" should be encouraged. But past experience teaches us that mere attainments in the field of sport were so much emphasized that sportsmen kept out deserving men of good character and education who had not achieved prowess in sport. In the future that emphasis should be removed. Men with both brain and brawn are the ideal; but brain should not have to yield to brawn in the future. In our first Interim Report we recommended that Ju Jutsu should be taught in the Police Training School. If it is taught, subtle physical techniques can replace brawn where there is need to control obstreperous offenders.

100. We recognise the importance of good physique in those seeking admission to the police. Accordingly, in our second Interim Report we drew attention to the omission to refer to this in our first Interim Report on 'Recruitment' and recommended as follows —

"At present, a Constable has to be 5' 4 in height and 31 inches chest (deflated) and his vision not less than 6/12 with each eye. If vision is 6/6 with one eye, vision of 6/12 with the other eye, he is disqualified. Some of the witnesses have expressed the view that it was necessary to prescribe a less severe physical qualification but the majority of the witnesses said that practically all the recruits who were selected —with one exception—possessed the physical qualification now prescribed. We see no reason to recommend any variation of the present minimum standards. We, therefore, recommend that the physical and visual qualifications be not altered. The physical and visual qualifications of those recruited for training as Sub-Inspectors are higher than those seeking training as police constables.

They are as follows:—

Height ..... 5'6 (minimum).

Chest ..... 34" normal (deflated).
Eye-sight ..... Colour vision normal. Any candidate who requires the use of glasses will not be eligible.

We do not recommend any variation of these qualifications and recommend that they should be made to apply to those seeking appointment to the rank of A.S.P.

These recommendations will ensure the minimum of brawn that the Service will require.

101. Policemen are too often exposed to danger with no protection afforded. Riot squads are now provided with wicker shields. But that alone is not sufficient. The most vital parts of the body such as the head and the pectoral region should be provided with protective wear such as steel or duraluminium headgear and steel jackets to protect the heart and lungs. With such protective armour men can face riots with confidence.

Need for High Moral Standards

102. A police officer, if he is to exercise influence, must lead an exemplary life and not be given t intemperate habits. He should not be addicted to liquor or gambling. He should not frequent clubs or restaurants. In such places he falls an easy prey to corruption. That corrupt police officers receive free drinks from restaurant-keepers and tavern-keepers is well known. The ideal is that every police officer should be a total abstainer. He would then not fall a prey to the kind of corruption referred to above.

103. In the matter of moral behaviour too, a police officer should set a high standard; he should not go after women or associate with women of questionable character. Some recent cases disclosed that certain police officers were inclined to violate the rules of conduct which men of their position should observe.

104. The intemperate ways of men and officers can be checked if their seniors and superiors show their disapproval in a marked way. At present there appears to be too tolerant an attitude which encourages evil-doers. This aspect of corruption can be effectively controlled only by those above visiting with the strictest reproof all those who stray from the path of propriety and enforcing rigidly the rules of the Disciplinary Code. The rule regarding drunkenness is not always adhered to. A policeman is not permitted to drink or solicit a drink of intoxicating liquor while on duty, nor may he render himself unfit for duty by the consumption of intoxicating liquor. The evidence before us discloses that this rule is not enforced. Living beyond ones means is another aspect of intemperate living over which those above should be vigilant. A man who lives beyond his means is tempted to get money by crooked means such as bribery and questionable gifts.

105. The same may be said of the rule regarding gambling. A policeman may not gamble in barracks or in quarters attached to a police station. But that rule is all too often violated. A stricter supervision of a policeman's life is needed.

106. The corruption of the new comers by the old stagers can be reduced if during the probationary period the probationers are made to go on their rounds perform their other duties with men picked for their integrity. The evidence given before us disclosed the fact that is not the general practice at present. Some of the constables that came before us explained how very early in their official life, they were taught corrupt ways by corrupt and hardened seniors.

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