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# THE WRIT OF *HABEAS CORPUS* (PART 1) – REFLECTING ON THE STATE OF THE LEGAL REMEDY IN SRI LANKA, BANGLADESH, NEPAL AND PAKISTAN

LAW & SOCIETY TRUST

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*Editor's Note ... ... ...*

Inheriting common legal traditions and laws in South Asia, the jurisdictions of this region have often reflected acute struggles of common people with remedies provided by law in a political context which does not allow for the successful realization of those very same remedies. The writ remedy of *habeas corpus* occupies a special place in this context. This Double Issue of the LST Review, (September-October 2010 – focus on Sri Lanka, Bangladesh, Nepal and Pakistan), along with a forthcoming companion Single Issue of the Review, (November 2010 – focus on India and for comparative value, Myanmar), examines the relevance and the efficacy of this writ remedy in South Asia from a variety of perspectives.

With this objective in mind, we publish firstly extracts from a forthcoming 186 + page publication by the Law & Society Trust which comprehensively examines the functioning of the *habeas corpus* remedy and the judicial response thereto from pre-independence times up to date. It highlights several positive developments in the law as well as severe challenges posed to its effectiveness. Formally the writ of *habeas corpus* is not suspended in our legal system. However, it appears pertinent to question whether, in the light of this exhaustive analysis of the judicial response thereto, the practical effect is, in fact, as if this most fundamental of liberty rights is virtually in limbo given its lack of practical efficacy.

As complementary to this discussion, we publish a reflection on the findings in this Study combined with a pungent commentary by **Basil Fernando** on the politics of *habeas corpus* in Sri Lanka written on invitation by the Review. His central argument is that the country cannot hope to see improved access to this remedy in a context where the Constitution enthrones the executive president as above the law. The writer's point is powerfully made that improved legal procedures or even improved laws may accomplish only so little so long as the overall constitutional structure remains authoritarian and pro-executive. Validly, his question is as to what the end result would be if the seminal *Bracegirdle case* (1937) came up for decision making before the courts of today, (as the judges would be legally enjoined to do), under the 1978 Constitution which confers absolute impunity on official acts of the Executive President?

Three other papers also written on invitation of the Review meanwhile brings in views from the region which illustrates one common factor, namely the intransigence of political rulers in Sri Lanka, Nepal, Pakistan and Bangladesh to

enable a full realization of this most fundamental remedy that safeguards the right to life.

**Mara Malagodi** deliberates on the context of the remedy in Nepal amidst the considerable political turmoil that the country has been subjected to during its transition to democratic rule from monarchic despotism and bewails the fact that despite significant rulings by the apex court in the land on the importance and relevance of *habeas corpus*, there have been no practical steps taken to give effect to judicial directions in this regard. On their own part, **Md Majid Bashir** and **M. Shamsul Haque** discuss comparable situations and the ineffectiveness of the writ remedy in Pakistan and Bangladesh. In this respect, the observation made in the former paper applies to other countries in the region with equal force;

> *"The judiciary must step out of its colonial formalism and traditional common law conservativeness, and translate itself into a robust, enlightened and progressive mechanism. ...Pakistan's legislative framework is fairly well developed to deal with the issues of missing persons. However, what is lacking is the administrative will to enforce the available and applicable laws, perhaps because of the Government's own complicity. The Supreme Court needs not only to discover the whereabouts of the missing persons but also to ensure the restoration of their constitutional rights of security of a person and protection of law through impartial and fair trials of these persons in accordance with established legal procedures. Public interest demands not only restitution in this grave matter but retributive justice as well as to preclude such events from happening in the future."*

The failure of the Rule of Law is a central question in Sri Lanka today as much as it is across South Asia. Measures to redress the question of legal impunity, including revision of the prosecutorial and investigative process and the initiation of an effective witness protection system are necessary in order to give effect to laws such as *habeas corpus*. Regional lobbying around these common issues combined with a diligently researched and soberly responsible accounting of how remedies such as *habeas corpus* function and their practical impact on the question of impunity may therefore be a starting point in challenging pervasive failure in accountability in our countries.

***Kishali Pinto-Jayawardena***

# EXCERPTS FROM THE INTRODUCTION AND EXECUTIVE SUMMARY OF 'LIBERTY RIGHTS AT STAKE: THE VIRTUAL ECLIPSE OF THE *HABEAS CORPUS* REMEDY IN RESPECT OF ENFORCED DISAPPEARANCES IN SRI LANKA'

**(Law & Society Trust, 2011, Forthcoming)***

***Kishali Pinto-Jayawardena and Jayantha de Almeida Guneratne****

The protection of liberty is an essential component of the right to life and is fundamental to the realisation of all other human rights. One of the antecedents to the right of judicial review of an enforced disappearance is the writ of *habeas corpus*—literally meaning, "to bring up the body"—the basic objective of which is to 'test the legality of any prisoner's detention at his own or some friend's instance.'[1] While each country has had its own peculiar history in relation to this right, the English law development of the ancient prerogative writ of *habeas corpus*, (enshrined in an Act of 1679, which continues to date with amendments), has perhaps the most far reaching influence in the Commonwealth.

Traditionally, the legal standards regarding the application and issuance of the writ reflect the special recognition given to this remedy. Anyone may apply for the writ without any restriction regarding nationality. The writ is not discretionary,[2] but rather, it is issued 'as of right.'[3] Therefore, unlike in the case of other writs available under the common law, the writ cannot be denied on the basis of the availability of an alternative remedy.[4] Moreover, there is no time bar to seeking a writ before the court.[5] Yet the question of on whom the burden of proof lies does not seem to have received an unequivocal response.[6] The grounds for granting the writ of *habeas corpus* are considered to be as wide as the grounds on which the writ of *certiorari* may be granted.[7] For

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** The co-authors acknowledge the valuable assistance rendered by Gehan Gunatilleke, attorney-at-law in this regard. Attorneys-at-law Brian Thambo, Kosalai Kosi, Keerthi Rajapakse, W. Rupasinghe, C. Goonetilleke and community based worker Antoney Lorance facilitated and conducted the research and advocacy in the provinces. The team acknowledges the contributions and participation of attorneys-at-law belonging to the Provincial Bars of Badulla, Galle, Kandy, Trincomalee, Ampara, Batticoloa and Vavuniya as well as the most useful perspectives obtained through discussions with retired and serving judicial officers of the appellate and subordinate courts in Sri Lanka.

[1] H.W.R Wade. & C.F. Forsyth, *Administrative Law*, (9th Ed. 2005), at 591.

[2] However, as discussed later, a contrary school of judicial thought appears to have emerged in Sri Lanka.

[3] *R* v *Home Secretary ex p Khawja* [1984] A.C. 74 at 112.

[4] *R* v *Pentonville Prison Governor ex p Azam* [1974] A.C. 18 at 31 and 41.

[5] Wade & Forsyth, *supra* note 1, at 594.

[6] Lord Atkin is of the view that '...in English law every imprisonment is *prima facie* unlawful and that it is for a person directing imprisonment to justify his act.' See *Liversidge* v *Anderson* [1942] A.C. 206 at 245 (minority opinion). See, however, the majority decision in this case and generally the academic lament by Wade and Forsyth, *supra* note 1, at 294.

[7] Wade & Forsyth, *supra* note 1, at 596; *R* v *Governor of Brixton Prison ex p Armah* [1968] A.C. 192; *R* v *Home Secretary ex p Khawja* [1984] A.C. 74 at 105, 110.

instance, the courts will consider not only the basis on which the detention was ordered, but also the 'validity of preliminary steps, so that any legal flaw in those steps will invalidate the detention.'[8] The standard therefore is that any illegality related to the detention would attract the writ.[9]

The Human Rights Act of 1998 in the United Kingdom took these developments further by providing for a similar remedy in line with the dictates of the European Convention on Human Rights.[10] This development led analysts to predict that the new remedy would, in time, replace the *habeas corpus* writ.[11] However, in recent times, both in the United States and the United Kingdom, the universal applicability of this writ has been negatively affected by prevention of terrorism laws in the context of a harsher protection of national security in the global war against terrorism.

**1. The Nature of the Study**

Insofar as Sri Lanka is concerned, the writ remedy of *habeas corpus* has been exercised traditionally before the Court of Appeal in terms of Article 141 of the Constitution. Since 1990, the jurisdiction over the granting of the writ has been extended to the Provincial High Courts.[12] Protections afforded by this remedy are of special importance in the Sri Lankan context. The country's civil and ethnic conflict over the past several decades has resulted in the enforced disappearances and extrajudicial executions of thousands of civilians of both majority and minority ethnicity.

On the one hand, civilians of minority Tamil and Muslim ethnicity have been the victims of the conflict between the separatist Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lankan state, which took place for much of the last three decades. Up until the military defeat of the LTTE in May 2009, both government forces and the LTTE were responsible for numerous atrocities throughout the conflict. On the other hand, thousands of Sinhalese civilians were victims of state and antigovernment terror during the early 1970s and late 1980s, as a result of two attempts by the Janatha Vimukthi Peramuna (JVP) to overthrow the state by armed force.

While the abuses committed by non-state agents during these periods of conflict were numerous, the focus of this Study is on *state responsibility* and the consequent efficacy of the legal remedies available to victims. This focus is primarily due to the overriding responsibility of a state in this

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[8] *Ibid.* at 597; *R* v *Governor of Brixton Prison ex p Armah* [1968] A.C. 192 at 234 and 254.

[9] *Ibid.* at 597.

[10] See European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5; 213 UNTS 221. Under Art.5 of the European Convention, the liberty of a person can be deprived only for identified cases and according to the due process of the law. The identified cases include lawful detention after conviction by a competent court and the lawful arrest or detention of a person for the purpose of bringing him before a competed legal authority. Art.5 of the European Convention is reproduced in the first schedule to the Human Rights Act of 1998 (United Kingdom).

[11] See Wade & Forsyth, *supra* note 1, at 600. The authors comment: 'A wide-ranging right to liberty and security of the person is conferred by Article 5 of the European Convention on Human Rights, enforced by the Human Rights Act of 1998...it may be predicted that the clear and concise provisions of this Article will supplant habeas corpus with its unhappy judicial history.'

[12] High Court of the Provinces (Special Provisions) Act No. 19 of 1990 vested the High Courts with the power to issue orders in the nature of writs of *habeas corpus* in respect of persons illegally detained within the province.

regard, as opposed to terrorist or dissident entities. During these times, people were simply "disappeared" under the cover of emergency laws, which conferred extraordinary powers on police and the armed forces. Paramilitaries acting with the direct or indirect blessings of the government were also responsible for a significant percentage of these violations. Violations of the rights to life and liberty, including arrest and *incommunicado* detention without valid reasons and for unreasonably long periods of time, were common during these times. Additionally, arbitrary arrests and detention, most often accompanied by the infliction of torture and cruel, inhumane and degrading treatment or punishment, occurred even during the short periods of time in which there was no active conflict in the country.[13]

In this context, the writ remedy *of habeas corpus* should have been of central importance in safeguarding the liberty rights of persons. However, the practical efficacy of this remedy appears to have faltered. Applications for writs of *habeas corpus* in Sri Lanka have not generally yielded positive results in the Appellate Courts or in the Provincial High Courts, except in a few specific cases. Manifold factors explain this predicament including the severe dysfunction of the legal and judicial process. The deliberate negation of this remedy by the respondents to the applications, primarily army and police officers, has also been a contributory factor in this regard. Moreover, common features that encourage impunity are evidenced even when grave human rights violations are brought to the attention of the court.

Such features include the release of the suspect perpetrators on bail, intimidation of witnesses and family members of the victims, and transfers of the cases to courts in Colombo at the instance of the alleged perpetrators. Such transfers often result in severe disadvantages to the petitioners due to financial costs as well as the difficulties of travelling from locations in the North and East to the capital. Delays in the court process, oftentimes stretching to ten years and more are also common. Such delays *per se* could defeat the *habeas corpus* remedy. A common requirement in many jurisdictions is that any application made on behalf of a detainee must expressly or impliedly be disposed of with reasonable expedition.[14]

Despite the above, the collection of credible data as well as detailed analyses relevant to the erosion of the *habeas corpus* remedy in Sri Lanka has been lacking amongst academia and activists. Observations made in this regard have been perception-based rather than founded on hard facts that depict an indisputably clear picture of the judicial, legal and prosecutorial systems in extreme crisis. This Study attempts to fill this most significant *lacuna* by examining the efficacy of the writ remedy of *habeas corpus* in the context of enforced disappearances in Sri Lanka. The Study analyses 880 bench orders and substantive judgments in *habeas corpus* cases, as well as the pleadings thereto, from the pre-independence period up to date.

Though inevitably legalistic in its nature, an effort was made in this work to bring a practical mind to bear on the manner in which this remedy may be effectively used by

[13] See Kishali Pinto Jayawardena, A Praxis Perspective on Subverted Justice and the Breakdown of the Rule of Law in Sri Lanka in Jasmine Joseph (ed.), *Sri Lanka's Dysfunctional Criminal Justice System* (2007). The author discusses several cases of torture and grave human rights violations documented by activists during the post 2002 ceasefire period when emergency law had been withdrawn and the ordinary law was in force.

[14] See for example, Art. 22(5) Constitution of India.

lawyers, activists and victims in this country. The Study makes a sustained case for more sensitive judicial attitudes in relation to the protection of a right that is essential for the wellbeing of individuals, communities, societies and the very country itself.

Certain relevant questions informed the nature of this research. These included the following:

- What are the patterns of invocation of this remedy throughout the time period examined?
- What is the general nature of the court's response?
- What is the degree of proof that a court should look for when a petitioner makes an allegation of disappearance or involuntary, unlawful removal?
- Should not an initial burden in the nature of an evidential burden suffice where a petitioner seeking *habeas corpus* invokes the jurisdiction of the court?
- Is there a role for the Attorney General to fulfil in this context?
- Is there a need for a *Habeas Corpus* Act for Sri Lanka?
- What other reforms of the law are warranted?
- Are there (and if so what are the) defects in the present implementation of the writ of *habeas corpus*?
- Has the absence of a witness protection mechanism in Sri Lanka had an adverse impact on the process of inquiry into *habeas corpus* applications and the effectiveness of the remedy?
- Are there delays in the hearing and determining of *habeas corpus* applications, and if so, what are the causes for it?
- How has this affected the prosecutorial justice system as a whole?

**2. Methodology**

The methodology adopted for this Study involved a detailed examination of judgments, briefs and court documentation obtained from bound records maintained at the Court of Appeal. The provincial documentation was obtained through attorneys-at-law appearing in those cases. This document review was supplemented by interviews with judges, lawyers and court officials who wished to remain anonymous due to the contentious nature of this Study in the current context in Sri Lanka.

Certain obstacles in accessing data for this Study were evident. As frequently highlighted in research of this nature, there is no Right to Information Act and consequently no right of access to information in court registries or information in the hands of the Attorney General. Access to court records in Sri Lanka is not "of right"; court registries only entertain requests for information on a particular case from a lawyer appearing in the case or a party proven to have a sufficient interest. Hence applications made in the public interest are generally disallowed. Moreover, the reporting of cases is *ad hoc*[15] and many important decisions are not included in the law reports published by the

[15] i.e. irregular and intermittent law reporting. The Sri Lanka Law Reports published by the Ministry of Justice include only selected decisions relevant to public law and constitutional law and are typically characterised by delay in the publishing of its reports. An e-base of decisions maintained by the government has also had a short lifespan. There are also law reports published by individuals or by

Ministry of Justice. Thus judicial decision making often takes place in a vacuum and the use of legal precedent is inconsistent, which adversely affects judges and lawyers. The lack of a reliable system of official or unofficial law reporting is a major obstacle to principled development of the law and the achievement of legal consistency—a major requirement of the Rule of Law.

Though statistical information regarding prosecutions for grave human rights violations is available in the periodic reports submitted to United Nations treaty bodies and Special Rapporteurs, this information is, at times, incoherent and disjointed. This makes the collection and analysis of credible data all the more vital in order to be effectively used as a tool for better advocacy. Sri Lanka's legal and judicial systems have attracted national and international scrutiny in recent years. Thus it is deplorable that obstacles to obtaining credible data continue to persist, making the critical analysis of the performance of these systems and processes near impossible. Efforts should be taken to address this situation if such obstacles to obtaining basic data are not thought to be deliberate. A Right to Information law was drafted by representatives of the government and the media community in 2003 which, *inter alia* secured this right as an express part of a new information regime. Despite Cabinet approval, this draft law still remains to be enacted. The first step of obtaining such documentation was therefore, by itself no easy task. It was only through the most diligent of efforts that researchers involved in this Study were able to obtain the court orders, briefs and judgments vital to the analysis.

Furthermore, it is unfortunate that many serving judicial officers in the High Court and the Magistrate's Court exhibited either ignorance of the writ remedy of *habeas corpus* or indicated reluctance to discuss their practical experiences due to fear of official sanction. We are grateful indeed to the many others who collaborated with us, albeit confidentially, in the hope of better improving the functioning of the remedy.

### 3. The Historical Background to the Writ Remedy of *Habeas Corpus*

Early jurisprudence appeared to be conservative, as reflected in the case *W. A. De Silva*[16] (1915). In this case, the Court concluded that it had no power to review by *habeas corpus* the acts of military authorities in the exercise of their martial law powers, such as the legality of arrests and detentions. Yet in the celebrated case of *Bracegirdle*[17] (1937), the Court categorically held that the Governor's powers were not absolute and that the power may be exercised only under emergency conditions, which were subject to judicial scrutiny. Further advances were made in *Thomas Perera*'s *case*[18] (1926), where the Supreme Court held the view that although it lacked the power to review the order of a Commissioner of Assize in issuing a warrant of commitment remanding a prisoner to custody, it could still order the discharge of the prisoner where such warrant is found to be *ex facie* defective.

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organisations (for example, the Law & Society Trust publishes the Appellate Law Recorder) as well as case books (for example, see R.K.W. Goonesekere, *Fundamental Rights and the Constitution-I* (1998) and *Fundamental Rights and the Constitution-II*, (2003)). Sri Lanka's digital law library (Lawnet.lk) also does not include links to unreported judgments of the Court.

[16] Application for a Writ of *Habeas Corpus* for the production of the Body of W. A. De Silva (1915) 18 NLR 277.

[17] *In re* Mark Antony Lyster Bracegirdle (1937) 39 NLR 193.

[18] In the Matter of the Trial of Thomas Perera alias Banda (1926) 29 NLR 52.

## 4. Judicial Responses during 1948-1977

The Study discusses several key decisions during this period. In *Thamboo v. the Superintendent of Prisons*[19] (1958), it was held that a writ did not lie against an order of committal that is based on a judgment of the Supreme Court or against a committal after trial by an inferior Court acting within its jurisdiction. The decision clearly limited the scope of the remedy to *ex facie* illegal detentions, thereby rejecting more liberal American jurisprudence on the subject. This conservatism gained an added dimension after 1971, following the promulgation of Emergency Regulations under the Public Security Ordinance[20] (1947). Accordingly, in cases such as *Hidramani v. Ratnavale*[21] (1971), it was held that where a detention order that is valid on its face is produced, the burden to prove facts necessary to controvert the matter stated in the detention order falls on the petitioner. It was, however, held that despite the good faith of the Permanent Secretary being essentially non-justiciable, an ouster clause contained in Emergency Regulations did not preclude a court from granting a remedy where the detention was unlawful.

A more liberal view was adopted by the Court in *Gunesekera v. De Fonseka*[22] (1972). The Court held that where the arresting officer was not personally aware of the actual offence for which the suspect was arrested, such arrest was liable to be declared unlawful. Greater caution was observed in *Gunesekera v. Ratnavale*[23] (1972), as the application under consideration was against the Secretary of Defence. In this case, the affidavit of the respondents that the detention was under Emergency Regulation 18(1), and the absence of proof of an ulterior motive or collateral purpose, led the Court to hold that the detention order was *ex facie* valid. It was further held that the impugned Regulation 18(1) was *intra vires* of the Public Security Ordinance (1947), and not subject to judicial review, which essentially undid the only positive feature of *Hidramani v. Ratnavale*.[24] Based on the above analysis, the Study concludes that early jurisprudence on *habeas corpus* was primarily marked by excessive conservatism and a manifest reluctance by the courts to challenge the executive.

## 5. The Supreme Court's Response under the 1978 Constitution

The Study first analyses several key judgements of the Supreme Court. In the case of *Rasammah v. Major General Perera*[25] (1982), it was held that where a *prima facie* case is made out by the petitioner in an application made under Article 141 of the Constitution, the Court of Appeal had a wide discretion to determine the stage at which the détenu should be produced. It was further held that when the Court of Appeal directs a judge of any court of first instance to inquire and report in terms of the proviso to Article 141, it is lawful for the Court to require the détenu alleged to be illegally or improperly detained to be brought up before such court at the earliest opportunity.

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[19] (1958) 59 NLR 573.
[20] Ordinance No.25 of 1947.
[21] (1971) 75 NLR 67.
[22] (1972) 75 NLR 246.
[23] (1972) 76 NLR 316.
[24] *Supra* note 21.
[25] [1982] 1 Sri L.R. 30.

Another key case during this period was the case of *Chelliah*[26] (1982), where there was disagreement between the judges with regard to what constituted "unlawful activity" under the Prevention of Terrorism Act[27] (1979). Justice Weeraratne was of the opinion that the words "unlawful activity" included not only acts that were not lawful, but also offences that are triable in a court. Justice Wimalaratne, however, expressed the view that the words "unlawful activity' did not include offences for which a person could be taken to a court, but only acts connected with or concerned in the commission of an offence. Justice Victor Perera was of the opinion that there was evidence of the commission of a specified offence and that therefore the détenu concerned could not be detained for unlawful activity, but was liable to be charged with the offence. These divergent views resulted in the détenus facing different consequences. One of the détenus in particular was held to be in unlawful custody, as a cognizable offence was applicable in his case, which subjected him to the regular criminal justice system.

In the landmark decision of *Juwanis v. Lathif*[28] (1988), Justice Mark Fernando further developed the scope of *habeas corpus*. It was held that where the respondents denied the arrest and detention of the détenu or denied having the détenu in their custody or control, it was not necessary for the Court of Appeal to satisfy itself in the first instance that the détenu was within the custody of, or detained by, or in the control of, the respondents, before referring the matter to the Magistrate's Court for inquiry. This marked a significant step towards improving the efficacy of the remedy, as the mere denial of the respondents did not preclude the Court from ordering a further inquiry into the matter.

In *Shanthi Chandrasekeram's case*[29] (1992), the Supreme Court discussed the ambit of Article 126(3) of the Constitution, under which the Court of Appeal is required to refer a matter to the Supreme Court where there is *prima facie* evidence of an infringement of a fundamental right by a party to the application. Consequently, it was held that the jurisdiction of the Supreme Court extends not only to the question of infringement, but also to the entire application. A critical development in this regard took place following the Supreme Court decision in *Machchavallavan*[30] (2005). In this case, the Court was confronted with the question of whether a petitioner had the burden of invoking the Supreme Court's jurisdiction when evidence of the infringement of a fundamental right came to light. It was held that the burden instead fell on the Court of Appeal to invoke such jurisdiction. Moreover, despite a doubt as to who might be responsible for the disappearance of the détenus, it was concluded that the state was responsible for the infringement of the fundamental rights of the détenus guaranteed by Article 13(4) of the Constitution, since the commanding officer had authority to arrest and to detain and was in charge of operations.

Though the Supreme Court has been responsible for some developments in the law during the past decades, it has still failed to categorically defend the *habeas corpus* remedy when confronted with the exigencies of emergency. Legal commentators including L.J.M. Cooray question the possibility of suspending the writ of *habeas corpus* through regulations under the Public Security

[26] [1982] 1 Sri L.R. 132.
[27] Act No.48 of 1979.
[28] [1988] 2 Sri L.R. 185.
[29] [1992] 2 Sri L.R. 293.
[30] [2005] 1 Sri LR 341.

Ordinance.[31] As pointed out by Cooray, the Court had occasion to consider this question in the case of *Weerasinghe v. Samarasinghe*[32] (1966), but unfortunately chose not to, despite the fact that it was a case where the doctrine of separation of powers was directly at issue. Since, *Weerasinghe*,[33] no clear opportunity has been presented to the Court to make a pronouncement on the matter. In light of recent U.S. jurisprudence, as seen in the trilogy of liberty cases, *Hamdi*,[34] *Hamdan*[35] and *Boumediene*,[36] and longstanding legislative prohibitions in the U.K., it is clear that Sri Lanka requires the immediate reaffirmation of the inviolability of the *habeas corpus* remedy.

## 6. The Response of the Court of Appeal

The conservative judicial approach in Sri Lanka, which weakens the protection of liberty, owes its genesis to the conservative thinking of some English judges. Yet, despite Sri Lanka's faithfulness to such conservatism, subsequent English cases have deviated from this approach. It must, however, be observed that with the change of political regime in 1994, the Court of Appeal appeared to show a more sympathetic response to writs of *habeas corpus*, particularly during the second insurrection in the South. However, this judicial empathy was short-lived, as from 1997 onwards, judges began to revert to conservative attitudes, particularly in the context of the ethnic conflict.

### 6.1 The 1981-1993 Period

In *Senthilnayagam v. Seneviratne*[37] (1981), the Court held that the statutory requirement that a person making an arrest shall inform the arrested person of the nature of the charge or allegation upon which he is arrested was mandatory. Furthermore, in interpreting the Prevention of Terrorism Act (PTA), the Court opined that there must be objective grounds for the minister to authorise the arrest and the continuing acts of detention. However, despite stating these admirable principles, the Court failed to apply such principles to the actual facts of the case, resulting in the dismissal of the application.

The Court adopted a more liberal stance in *Paramasothy v. Delgoda*[38] (1981), where for the first time, an application was made before the Court of Appeal by way of a *habeas corpus* application seeking revision of an order of conviction and sentence imposed by the Magistrate's Court. The Court held that although ordinarily, grounds for the award of a writ of *habeas corpus* are limited to jurisdictional errors and the writ cannot be used as a device for collaterally impeaching the correctness of an order made by a Court of competent jurisdiction, a writ would still lie where a committal is *ex facie* bad.

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[31] See L.J.M Cooray, *Reflections on the Constitution and the Constituent Assembly* (1971).
[32] (1966) 68 N.L.R. 361.
[33] *Ibid.*
[34] 542 U.S. 507 (2004).
[35] 548 U.S 557 (2006).
[36] 553 U.S. 723 (2008).
[37] [1981] 2 Sri L.R. 187.
[38] [1981] 2 Sri L.R. 489.

Some retrogression may be observed in the case of *Susila de Silva v. Weerasinghe*[39] (1987), where the crucial question of whether a writ of *habeas corpus* would lie in respect of an arrest without warrant under Emergency Regulations was considered. Breaking from previous views expressed in *Gunesekera v. De Fonseka*, the Court held that the police officer making the arrest need not have firsthand knowledge and that it was through the conduct of his superiors that the police officer making the arrest became possessed of such sufficient material and information. It is noted that the Court did not even insist that such material be presented for verification. Although public disclosure of the material could be prejudicial to public or national security interests, it is further noted that the Court ought to have required such material to be disclosed *in camera* so that the Court could convince itself that the authorities had acted objectively and not arbitrarily.

This pattern of judicial conservatism was observed throughout the rest of the period. However, in the unique case of *Dhammika Siriyalatha v. Baskaralingam*[40] (1988) the judges observed that there was no material to substantiate the opinion which the detaining authorities purportedly formed against the détenu. The Court insisted that even though the provisions empowering the authority to hold the détenu were subjectively couched, an objective state of facts should be alluded to in order to justify the arrest and detention. These objective facts must be such that if the person is not so detained, he is likely to act in a manner prejudicial to national security. The Supreme Court in *Hidramani v. Rathnavale* had already dismissed a *habeas corpus* application in similar circumstances. Yet, remarkably, the Court of Appeal rejected this precedent by adverting to recent progressive developments in the realm of public law.[41]

### 6.2 The 1994-2002 Period

A total of 844 case records during this period were analysed. The total number of applications dismissed was 676. By contrast, in 163 applications, the détenus concerned were released. Moreover, writs of *habeas corpus* were issued in 19 applications. The year 2002 is taken as an approximate closing point in this period of examining case records of the Court of Appeal because from about this year, *habeas corpus* applications were increasingly lodged in Sri Lanka's Provincial High Courts rather than in the Court of Appeal.

Some key decisions upholding the merits of the applications during this period warrant discussion. *Leeda Violet's case*[42] (1994) was perhaps the most important decision amongst them all. It was the first occasion on which the Court recognised a presumption of liberty in respect of disappearances against the relevant authorities, and awarded exemplary costs to the Petitioner. Deriving support from the Indian case of *Sebastian M. Hongray*[43] (1984), the Court held that some affirmative action is necessary from a Court invested with jurisdiction to issue writs of *habeas corpus* when confronted with a case of an obvious disappearance of an individual held in custody and a false denial of such custody by a person in authority. This crucial precedent was followed in a number

[39] [1987] 1 Sri L.R. 88.
[40] C.A. (H.C.) 7/88, C.A. Minutes of 7 July 1988.
[41] See C.A. (H.C.) 7/88, at 13-14 for a response to Professor H.W.R. Wade on *Administrative Law* and the case of *Ridge v. Baldwin* 1964 AC 40 (House of Lords). Also see *Sunil Rodrigo (On Behalf of B. Sirisena Cooray)* v. *Chandananda De Silva and Others* (1997) 3 Sri.L.R. 265, per Amarasinghe J., for comparable developments in fundamental rights jurisprudence.
[42] *Supra* note 25.
[43] AIR (1) 1984 (SC) 1026.

of subsequent cases including *L.S. Perera's case*,[44] *Vajira Ranjani's case*,[45] *G.D. Ranjani's case*[46] and *Gonsul Wasan Tilakasena's case*,[47] all of which were decided in 1995.

In *Vajira Ranjani's case*,[48] the Court was confronted with the question of whether delay in making the first complaint against the perpetrator could be held against a petitioner. The 1st respondent, the Officer in Charge (OIC) of the police station involved with the arrest and detention, was implicated three years after the alleged incident in the petition. However, it was held that one could not fault the petitioner, placed as she was in the circumstances, for her failure to implicate the OIC in the statement made to his own police station. Similarly, in *L.S. Perera's case*,[49] it was held that no person could be faulted for not making a complaint where the allegation is directly levelled at the police being the lawful authority to carry out such investigations.

The concept of Institutional Responsibility was also indirectly dealt with in the cases of *Vajira Ranjani*[50] and *L.S Perera*,[51] as evidence clearly established that officers of a particular police station had caused the initial arrests resulting in the subsequent disappearances. The question arises, however, as to what the position would have been had the identity of the OIC not been established and only the particular police station responsible for the arrest was known. This is certainly an area of the law that invites judicial response in the future.

The principle regarding exemplary costs in *Leeda Violet's case*[52] was sporadically followed in subsequent cases such as *Murin Fernando*[53] (1997) and *Ranmenike v. Senaratne*[54] (2002). However, a significant issue remains in respect of monitoring due compliance with the Court's directives. Notable executive avoidance or indifference may be observed in respect of the payment of exemplary costs against those found to be responsible, and the IGP's and Attorney General's responsibility to peruse the evidence and initiate further investigations where there may be a cognizable offence involved, as starkly highlighted in the analysis.

The examination of cases during the period 1994-2002, revealed an overwhelming trend of applications being dismissed. The judicial attitudes towards these applications were generally unsympathetic, which is evident by the sheer numbers of dismissals. The Study also distinctly reveals a laxity on the part of counsel appearing in some of these applications, which also accounted for a significant portion of the dismissals. The Study categorizes these dismissals according to the purported grounds for dismissal.

390 of the applications examined were dismissed upon withdrawal on the basis of the détenu being indicted. A further 21 applications were dismissed upon withdrawal on the basis of the production

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[44] H.C.A./13/91, C.A. Minutes of 15 September 1995.
[45] H.C.A./103/ 91, C.A. Minutes of 15 September 1995.
[46] H.C.A. /255/89, C.A. Minutes of 13 January 1995.
[47] H.C.A. /67/92, C.A. Minutes of 13 January 1995.
[48] *Supra* note 46.
[49] *Supra* note 45.
[50] *Supra* note 46.
[51] *Supra* note 45.
[52] *Supra* note 25.
[53] [1997] 1 Sri L.R. 281.
[54] [2002] 3 Sri L.R. 274.

of the détenu before a Magistrate or his or her placement in fiscal custody. In these instances, the Court appeared commonly to accept the word of counsel for either the petitioner or the respondent(s) as to the fact of indictment. A rare exception to this trend was in HCA/157/94,[55] where the Court rejected the state counsel's mere *ipse dixit* that the détenu was indicted, and held that there was no authority whatsoever to justify the continued detention of the détenu. This salutary approach, however, was not followed in the overwhelming number of later applications that were dismissed on this same ground. In HCA/31/95[56] for instance, counsel for the petitioner stated that the détenu was indicted in the High Court of Colombo and moved to withdraw the application. State counsel appearing on behalf of the Attorney General, stated that he was unaware of the position. The Court, however, allowed the application for withdrawal and consequently dismissed the application. The question therefore is whether the Court should insist on documentation as to the fact of the indictment to be filed before court rather than prefer to rely on the verbal assurances given by state counsel or counsel for the petitioner as the case may be.

In the analysis it is seen that several applications were dismissed upon withdrawal on the basis that the détenu was released or discharged. It is noted, however, that "released" would mean release from custody without any proceedings being instituted. Under such circumstances, should there be legal consequences visited upon the authorities when an individual's personal liberty is violated without any reason? The Court of Appeal appears to have held a contrary view by summarily dismissing such cases without considering the wider implications of such detentions, including the violation of fundamental rights as envisaged in Article 13(1) and (2) of the Constitution.

49 applications examined in this Study were dismissed on the basis of the petitioner being absent and unrepresented. It appears that when the Court of Appeal dismisses such applications, it does so on the perception that *habeas corpus* is a discretionary remedy. In *Heather Mundy*[57] (2004), it was held that orders in the nature of writs, as contemplated in Article 140 of the Constitution, constitute one of the principal safeguards against excess and abuse of power, mandating the judiciary to defend the sovereignty of the people enshrined in Article 3. By extension of such judicial thinking to Article 141, it may be argued that since the writ of *habeas corpus* concerns an individual's liberty, the Court of Appeal should consider the merits by reference to the pleadings of parties and depositions where the petitioner is absent and unrepresented. In such circumstances, there may be a need to legislatively vest the Court with a power, and consequently, a duty to appoint an *amicus curiae* to assist the Court.

At least 32 applications analysed in this Study were dismissed by the Court of Appeal after considering the merits. In *Nadarajah Sasikanth's case*[58] (2002), the Court dismissed the application stating that in terms of the report of the Magistrate, it appears that there were contradictions in the Petitioner's testimony and that his evidence was therefore unacceptable. But should accepting and acting on the findings of the Magistrate, *ipso facto*, with no independent analysis and evaluation of the evidence led at the magisterial inquiry be regarded as being a proper discharge of the constitutional jurisdiction conferred on the Court of Appeal? In the context of this particular case, a strong probability that the Magistrate had overlooked a notorious practice on the

[55] C.A. Minutes of 9 August 1994.
[56] C.A. Minutes of 3 of July 1995.
[57] S.C./ 58/03, S.C. Minutes of 20 January 2004.
[58] H.C.A./32/99, C.A Minutes of 17 September 2002.

part of the police not to record statements in their full content, particularly when the allegation is against the police itself, is a relevant factor.

Similarly, in *Nadarajah Puthiyarajah's case*[59] (2002), the Court of Appeal found that the identity of the respondents had not been established. The omission on the part of the Magistrate of Colombo when he refused an application for a transfer of the case to the Magistrate's Court of Jaffna is pertinent however. It is clear that given the geographical and financial constraints in travelling to Colombo and procuring witnesses to travel to Colombo, the petitioner in the case may have been in a position to prosecute her application more effectively in the Magistrate's Court of Jaffna. Furthermore, given the explicit reference to "the most convenient court" in the proviso to Article 141 of the Constitution, it is relevant to query as to why the Court of Appeal referred the matter to the Magistrate's Court of Colombo in the first place. This case may be compared with *Murin Fernando's case*[60] where a "totality of the evidence" established that the détenu had been at the police station during a certain period. It is this "totality of evidence" that the petitioner in *Nadarajah Puthiyarajah's case*[61] might have been able to provide had the matter been transferred to the Magistrate's Court of Jaffna.

Several other issues arise for consideration as well. For instance, as many as 65 applications were dismissed upon withdrawal by the petitioner or the petitioner's counsel for *inter alia* inability to come to Colombo or inability to contact the petitioner or for undisclosed reasons. A perusal of the relevant orders reveals that, subject to a few exceptions, the liberty to re-invoke the appropriate High Court's jurisdiction was not retained. Rule 3 of the Court of Appeal (Appellate Procedure) Rules of 1990 effectively rules out a plea of *Res Judicata* in *habeas corpus* applications, thereby rendering an order that grants liberty to file a fresh application redundant. However, could it yet be maintained that it is incumbent upon the Court to grant such a right, given the fact that a citizen's personal liberty is at stake? In certain applications, as in HCA/11/95,[62] the Court dismissed the application for failure to name a respondent properly and afforded the liberty to file a fresh application.

In HCA/ 411/93,[63] the application was dismissed on the ground that the caption was defective, as the Christian name of one of the respondents had not been specified. This was a peculiar instance where the Magistrate's Court deemed that the army officer concerned was responsible for the abduction. Yet the Court of Appeal reversed the magisterial finding. In HCA/48/97,[64] the Court appears to have disregarded the provisions of Rule 5(2) of the Supreme Court Rules of 1990, which permitted the naming of respondents *officio nomini.* Under the Rule, it was sufficient to describe such public officer in the caption by reference to his official designation or office. Accordingly, the respondent concerned was described as "Director, (CID)". However, the Court thought it fit to dismiss the application on the ground that "Director, (CID)" was not a legal persona.

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[59] H.C.A./21/99, C.A Minutes of 31 July 2002.
[60] *Supra* note 54.
[61] *Supra* note 60.
[62] C.A. Minutes of 12 December 1997.
[63] C.A. Minutes of 4 May 1998.
[64] C.A. Minutes of 2 February 1998.

A further 37 cases were dismissed on the basis that the détenu has been sent for rehabilitation. The findings of this Study suggest that the submission of the state counsel that the détenu has been sent for rehabilitation has been accepted almost mechanically. Rehabilitation regimes often sideline ordinary criminal proceedings and fair trial related due process and fair trial rights and there is no doubt that judicial officers should be sensitive to such a possibility.

At least 10 cases under review were dismissed by the Court of Appeal despite a magisterial finding that a writ ought to be issued. For instance, in cases such as *Ratnaweera*[65] (1997), *Alankarage Tulin*[66] (1997) and *Appuhamilage Sriyawathie*[67] (1998), the Court thought it fit to reverse the Magistrate's finding with regard to the identification of the respondents. In each of these cases, the Magistrate held that the respondents were liable for the disappearance of the détenus either directly or on the application of the Command Responsibility doctrine. However, unfortunately the Magistrate's Court proceedings are not accessible in order to discover how precisely the Magistrate may have come to such conclusion. Another example is the case of *Gurusinghe*[68] (1997), where the Magistrate found the evidence of the petitioner's witnesses as being credible and truthful. The Court of Appeal did not find anything perverse in the Magistrate's findings with regard to the evidence of the witnesses. Yet the Court proceeded to dismiss the application on the basis that the identification of witnesses failed to comply with the principles laid down in the case of *Regina v. Turnbull*[69] (1977). This misconceived application of evidentiary rules relevant to criminal trials to *habeas corpus* proceedings once again demonstrates the need for clarifying legislation.

Another illustrative example is that of *Indrani Dagampala*[70] (1998), where the Court dismissed the application merely on the basis that the petitioner spoke of an army jeep in which her husband was removed, whereas the other three witnesses referred to a van. Could such inconsistency be held to amount to a material contradiction in law affecting the petitioner's testimonial credibility?

In the case of *Gampola Paddeniyage Gedera Cecelia*[71] (1998), the Court went to the extent of holding that an ordinary citizen making a serious allegation against a state official, which if true would amount to a crime, must prove such allegation "beyond reasonable doubt". It is noted that a "balance of probabilities" is a standard which is far more appropriate in *habeas corpus* applications, since the cumulative effect of the definition of proof contained in sections 5 and 100 of the Evidence Ordinance[72] (1895) seems inadequate to cater to *habeas corpus* applications. The casual treatment of the state's responsibility in registering the deaths of détenus while they were in the custody of police or army officials is also of singular account. The blatant disregard of the requirements under the Births and Deaths Registration Act[73] (1951) also revealed the overpowering nature of the Emergency Regulations in Sri Lanka. Such Regulations permitted state

[65] H.C.A./04/91. C.A. Minutes of 2 April 1997.
[66] H.C.A./ 438/89, C.A. Minutes of 2 May 1997.
[67] H.C.A./76/92, C.A. Minutes of 17 July 1998.
[68] H.C.A./45/ 92, C.A. Minutes of 22 September 1997.
[69] 1977 (Q.B.) 224, at 230.
[70] H.C.A. 77/92, C.A. Minutes of 30 July 1998.
[71] H.C.A./69/90, C.A. Minutes of 10 March 1998.
[72] Ordinance No. 14 of 1895.
[73] Act No. 17 of 1951.

authorities, both police and armed forces, to dispose of dead bodies of persons in any manner that departs from the stipulations and safeguards prescribed in the ordinary law.[74]

## 7. The Response of the Provincial High Courts

This Study further reveals some disquieting aspects of the functioning of the *habeas corpus* remedy at the provincial level. This is illustrated in the examination of 37 briefs and preliminary inquiry orders of the Provincial High Court of the Northern Province from the year 2002 onwards as well as through a number of consultations conducted with attorneys-at-law of the Provincial Bar Associations of Badulla, Galle, Kandy, Trincomalee, Ampara, Batticaloa and Vavuniya during 2010 and early 2011 for the purpose of uncovering some of the critical contemporary issues faced at the provincial level.

The primary analysis concerns the functioning of the Provincial High Court of the Northern Province in respect of enforced disappearances in the mid nineties. During the period between February 1996 and December 1996, some 900 persons were arrested by the army and thereafter "disappeared". Thirty-seven *habeas corpus* applications were filed in respect of these persons in the Provincial High Court of the Northern and Eastern Province in Jaffna. In 22 of the applications, the arrest was carried out on 19 July 1996 in an operation conducted by the army together with the local police. In all cases, the inquiry at the Magistrate's Court was concluded with the finding that army personnel were responsible for the arrest of the détenu. The subsequent whereabouts of the détenus were not evident.

Common amongst the barriers to the efficacious disposal of these cases was the trend of applications being made by the respondents to transfer the matters to the appeal court situated in Colombo or the High Court of Anuradhapura. The main reason for such applications was that the respondents found it difficult or hazardous to attend court sittings in the North and East. The extreme perils faced by the petitioners during that period in travelling to Colombo for court hearings in the Court of Appeal were, however, not taken into consideration.

The Study reveals that inordinate delays often took place due to systemic lapses and also attempts by petitioners to exhaust other remedies. In 22 of the cases reviewed, the inquiry in the Magistrate's Court was concluded eleven years after the date of arrest. In most of these cases, the Magistrate found that army personnel were responsible for the arrest of the détenu. This predicament is further exacerbated by the fact that in many cases, the détenu is the breadwinner of the family. Thus the family is often left destitute as a result of the disappearance. Counsel appearing for the respondents routinely requested postponements and transfers so that the evidence of the respondents could be led. In all the cases examined, the Magistrate rejected the request for postponement, mainly in view of the indigent circumstances faced by the petitioner resulting from the disappearance of the détenu.

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[74] See Regulations 54 to 58 of Emergency Regulations No.1 of 2005 published in Gazette Extraordinary No.1405/14 of 13 August 2005. The impugned Regulations were subsequently repealed in 2010 by virtue of Regulations published in Gazette Extraordinary No.1651/24 of 2 May 2010.

Yet a further barrier arose due to army authorities summarily denying the arrests. One of the common defences raised was that even though the entire operation (during which the détenu was arrested) was carried out by the Military Intelligence Corps and the local police, all persons arrested were handed over to the relevant police station on the same day and that none were detained by the army. This denial of the arrest *in toto* and the consistency in which this position is taken in almost all the cases analysed demonstrates the degree of impunity with which the respondents usually acted.

There were also delays due to prevailing political conditions, which significantly frustrated the writ remedy. Moreover, in some instances, non-appearance of the counsel and respondents were formally attributed to security concerns. Such applications were usually rejected by the Magistrate, which suggests that the security concerns raised by the defence were not serious enough to validate a postponement. This leads us to the question as to whether such requests were a ploy to consistently undermine the purpose and objective of the inquiry.

The continuation of many of these problems in current times emerged from the provincial consultations held in 2010 and early 2011. One issue concerned *habeas corpus* applications where detention orders in respect of the detenu are non existent or have lapsed. In such circumstances, the Court is obliged to make order that the détenu be released immediately. However, the usual practice on the part of court appeared to be to grant another date to produce a validated detention order which, in some cases, extended well over several months upon the application of state counsel. This practice is contrary to established Commonwealth jurisprudence[75] and requires urgent attention, perhaps through the formulation of clear procedures either in the proposed *Habeas Corpus* Act or in the form of a Rule framed under Article 136 of the Constitution.

Another issue that arose from the consultations related to the need for a Special Division of the High Court to deal with surrendees on an expedited basis. Approximately 6000 surrendees had been placed under arrest following the conclusion of military operations by the Sri Lankan government against the Liberation Tigers of Tamil Eelam (LTTE) in May 2009. Thousands of *habeas corpus* applications were filed in respect of these surrendees. Yet less than 100 judges serve in the High Courts at present, which raises a critical issue in terms of capacity. Thus, an interesting suggestion that emerged from the provincial consultations was that a Special Division of the High Court be created to expeditiously determine the cases of these surrendees. Surrendees are still entitled to be treated as equal citizens in terms of the Rule of Law and should be afforded the same constitutional rights and safeguards afforded to ordinary citizens.

The discussions also revealed that there were instances where the Vavuniya High Court had ordered that pending *habeas corpus* applications would be heard and determined by the High Court without any need for referral to the Magistrate's Court. Though some voiced opposition to this practice, it appears that the practice is permissible under the proviso to Article 141 of the Constitution, which remains an enabling and not a mandatory provision.

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[75] For further discussion, see David Clark & Gerard McCoy, *The Most Fundamental Legal Right, Habeas Corpus in the Commonwealth* (2000; Published on Oxford Scholarship Online: January 2010).

Disturbingly, it became clear that a spate of applications filed in Jaffna, Vavuniya and Mullaitivu were routinely transferred to the Anuradhapura High Court at various stages of the proceedings. Such transfers were made at the application of the Attorney General with scant regard for the petitioner's interests and therefore offended the notion of the Rule of Law. Such anomalous practices also require urgent attention.

A further problematic practice was the tendency for state counsel to move the Magistrate not to release to the petitioner the report formulated in terms of the proviso to Article 141. Furthermore, during consultations held in Mutur, Trincomalee and Jaffna, it was revealed that, as a result of this practice, many petitioners were totally unaware of the status of their cases after giving evidence in the Magistrate's Court. Due to significant delays in the High Court, many years often lapsed before the matter was referred back to the High Court and ultimately taken up. Until such time, the petitioner was left unaware as to the fate of the application that had been filed.

As highlighted during the provincial consultations, the efficacy of legal remedies for victims appears to be in serious doubt due to a variety of reasons including the lack of political will in pursuing investigations and prosecutions. This predicament is aggravated by a chronically dysfunctional legal system with serious problems of laws' delays, lack of witness protection and a manifest lack of sensitivity towards victims.

**8. Imperative Legal Reforms**

As highlighted during the provincial consultations, the efficacy of legal remedies for victims appears to be in serious doubt due to a variety of reasons including the lack of political will in pursuing investigations and prosecutions. This predicament is aggravated by a chronically dysfunctional legal system with serious problems of laws' delays, lack of witness protection and a manifest lack of sensitivity towards victims.

The Study calls for a complete reform package on the law relating to *habeas corpus* in Sri Lanka. Such amendments in summary should include the following:

**Specific legal provisions to be made in an Act of *Habeas Corpus*:**[76]

i) Provision should be made to embody the jurisprudential principle that 'where (an) arrest and detention of (a) corpus falls into the category of cases where a person has been arrested and detained by the authorities and disappears thereafter, exemplary costs should be ordered.'[77]

ii) In cases where the arrest and detention have been proven to be illegal or unjustified, thus forming the basis for the award of exemplary costs against a respondent state official who had been found responsible for the illegal or unjustifiable deprivation of personal liberty, and where that respondent is

[76] It is noted that if bail is refused by the original court, revision would lie to the High Court and thereafter to the Supreme Court.
[77] See *Leeda Violet's Case* [1994] 3 Sri L.R. 377.

deceased, the respondent's estate must stand charged with the exemplary costs awarded as a debt.

iii) Where in a proceeding for a writ of *habeas corpus*, it is claimed that a prisoner is held on an order or warrant committing the prisoner to remand after a return of an unacceptable verdict by a jury for acquittal, to await further trial by a fresh jury, such order or warrant should be made available to the court to enable the court to ascertain whether it is *ex facie* defective. If a defect is found, it should result *ipso facto* in the discharge of the prisoner.

iv) Explicit provision must be made to prevent the suspension of the writ of *habeas corpus* particularly in view of the definition of the law given in Article 15(7) of the Constitution, which allows the remedy to be restricted by emergency regulations.

v) There should also be a clear enunciation of the legal principle that despite the *habeas corpus* jurisdiction of the Court of Appeal being couched in language that is discretionary, the fact of delay in instituting proceedings should not be held as a bar to the grant of relief in cases where extraordinarily grave human rights violations are in issue.

vi) It is necessary to give explicit statutory recognition to the principle of "Institutional Responsibility" and/or "Command Responsibility" to ensure that an element of responsibility attaches to army officers or police officers of a particular army camp/police station which had caused the initial arrest of a person resulting in subsequent disappearance of that person.

vii) It should be provided that material must be placed before a court to substantiate the position that the détenu had been indicted or released before an application for writ is dismissed. This is imperative on account of inconsistent judicial approaches to this question as highlighted in this Study.

viii) Provision should be made to award compensation to a détenu who was incarcerated without legal justification and then released. Such provision is analogous to the principle regarding payment of exemplary costs on the basis that the détenu was arrested and detained by state authorities, and subsequently disappeared while in the custody of state authorities.

ix) In cases where the détenu had been kept in police or military custody on a detention order, the court should be obliged to record what took place from the time of the initial arrest to the time that the indictment was filed or until the détenu was produced and an order to remand secured.

x) In the interest of greater certainty of the law, explicit provision should be made specifying that orders of lower courts in relation to a dismissal upon withdrawal of a *habeas corpus* application are appealable at all times.

**Connected principles:**

i) The period that a détenu is held in custody before releasing or producing him before a Magistrate, must be exempted from the limitation periods envisaged in Article 126(1) of the Constitution and section 9 of the Prescription Ordinance No. 22 of 1871.

ii) Legislative provision must be introduced to place the burden of proof on the authorities who are responsible for suppressing the individual's liberty, to justify, on the standard of balance of probabilities at least, that there was reasonable suspicion that the détenu had committed or was involved in an attempt to commit a crime. The burden should revert to the petitioner only where his case is based on an allegation of bad faith, breach of natural justice, fraud or some such vitiating element.

In addition, the following amendments to the Constitution and Supreme Court Rules may be contemplated as part of this package of law reform.

**Constitutional Amendments:**

Article 141 to be amended to read as follows:

> "Any person may apply to the Court of Appeal for the grant and issue of orders in the nature of writs of habeas corpus to bring before such Court –
>
> a) The body of any person to be dealt with according to law; or
>
> b) The body of any person illegally or improperly detained in public or private custody."

**The following Rules may also be made under Article 136 of the Constitution:**

The Supreme Court may formulate rules under Article 136 of the Constitution setting time limits for state functionaries to comply with orders, decrees and directives made by the Court of Appeal in *habeas corpus* proceedings. Furthermore, the Supreme Court and the Court of Appeal may be enabled to:

i) Monitor and determine whether orders, decrees and directives made by the said courts have been complied with; and

ii) Charge such functionaries for contempt of court where such orders, decrees and directives have not been complied with.

Meanwhile, it is clear that a shift is required in the judicial mindset. As demonstrated in this Study, the same meticulous attention paid by the Court of Appeal in reversing or departing from findings

of Magistrates fixing liability on police and army personnel has not been shown in regard to findings of Magistrates concerning the non-liability of officials. Areas warranting greater judicial sensitivity in this regard include the following:

i) Judicial practices relating to dismissal upon withdrawal with no reasons disclosed in *habeas corpus* applications should be reconsidered given the attendant dangers that such withdrawals may be for extraneous reasons including intimidation or coercion by interested parties.

ii) In *habeas corpus* applications in respect of persons resident in villages far away from the capital, whether in the North and East or in the South, greater judicial sensitivity should be exhibited in respect of dismissing these applications for want of appearance or ordering the transfer of cases to the courts in the capital city. The Court of Appeal *ex mere motu*, should direct a transfer of cases to the appropriate High Court to hear and determine such cases.

iii) Greater judicial sensitivity should be exhibited regarding the dismissal of *habeas corpus applications* on account of failure to name the respondents correctly.

iv) When a petitioner names and avers the alleged abductors, the court must inquire into the truth of the facts set forth in the respondents' affidavits and not act on a mere denial of the petitioner's allegations or on what may be conceived as the "contradictory" or "unsatisfactory" nature of evidence led by the petitioner.

v) In any event, and as a matter of general practice, the petitioner being absent and unrepresented should not result in an automatic dismissal of a *habeas corpus* application. The relevant court must consider the merits as contained in the petitioner's pleadings and depositions and then dispose of the matter. Moreover, the court must appoint an *amicus curiae*, should it feel that assistance is necessary.

Thus, apart from the enactment of a *Habeas Corpus* Act and the introduction of certain amendments to the Constitution and the Supreme Court Rules, it is strongly recommended that greater judicial sensitivity be shown towards victims and the petitioners that represent their interests, particularly given the attendant dangers of intimidation or coercion by various parties. Hence reform efforts should reflect legislative advances as well as judicial sensitising in order to strengthen the *habeas corpus* remedy and re-establish it as one of the pillars of a functional democracy based on liberty and the Rule of Law.

# SRI LANKA: THE POLITICS OF *HABEAS CORPUS* AND THE MARGINAL ROLE OF THE SRI LANKAN COURTS UNDER THE 1978 CONSTITUTION

***Basil Fernando*** *

*"LIBERTY RIGHTS AT STAKE: THE VIRTUAL ECLIPSE OF THE HABEAS CORPUS REMEDY IN RESPECT OF ENFORCED DISAPPEARANCES IN SRI LANKA"* is a study of 880 judgments of various courts of Sri Lanka on *habeas corpus* applications from pre-independence times up to the present period by Kishali Pinto-Jayawardena and Jayantha de Almeida Guneratne. The effort examines an impressive number of judgments on *habeas corpus* during this period.[1] This preview of this forthcoming publication is based on their findings.

Their basic conclusion is that, by and large, the Sri Lankan legal system has demonstrated significant failings in giving effect to *habeas corpus* as a judicial remedy. The decisions of the courts are markedly different from the way that *habeas corpus* was dealt with in the pre-independence period, as evidenced, for example, by the famous *Bracegirdle case,* [2] which demonstrated the will of the Supreme Court at the time to defend the freedom of the individual as against the arbitrary actions of the state. It also demonstrated the Court's power to stand up against the state to protect the freedom of the individual.

This Study concludes that in recent decades the approach of the courts has changed substantially. In almost all cases studied, with a few exceptions, courts have dismissed cases rather casually and shown little sympathy for the applicants.[3] *Habeas corpus* as a judicial remedy for the protection of the freedom of the individual has failed in Sri Lanka, and as the title of the Study suggests, this important writ may disappear altogether from the country. This failure is not due only to factors such as scandalous and shocking delays but also due to much more important changes of attitudes on the part of lawyers and judges (effectively the legal community) towards the remedy itself.

The failure of the remedy of *habeas corpus* in Sri Lanka as evidenced by this Study needs to be examined against the background of the political changes that have come about in the country since the 1978 Constitution in particular. Most persons on whose behalf these cases have been filed in this period fall within the category of 'disappeared' persons. The most important judgments come from the Court of Appeal from 1994 to 2002. Out of a total of 844 cases for this

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[1] The cases for the Study were not selected from various sources but taken from a book that was bound and maintained at Sri Lanka's Court of Appeal, constituing therefore the official record for all intents and purposes.

[2] *In re* Mark Antony Lyster Bracegirdle (1937) 39 NLR 193.

[3] According to conversations had by this writer with the two authors during 2010; 'The analysis combines an academic and in-depth analysis, arriving at particular conclusions which show that, in the generality of cases, the courts' response has been marked by a lack of judicial sympathy for the petitioner.' The court dismisses applications of petitioners across the board for various reasons—and all the reasons are looked at in the Study—ranging from failing to name a respondent correctly in the petition, failure to put a surname of the respondent in the petition etc.

period there were 368 applications for 1994; 127 applications for 1995; 142 applications for 1996; 137 applications in 1997; 31 applications in 1998; 6 applications in 1999; 11 applications in 2000; 7 applications in 2001, and 15 applications in 2002.[4]

The study of *habeas corpus* in Sri Lanka cannot be delinked from a political understanding of the forced disappearances that took place during this time, and the approach of the state in dealing with certain issues of perceived security in which the use of forced disappearances was an approved practice for curbing insurgency. On the one hand, mass disappearances were a result of a political approach to national security during which the use of forced disappearances was an approved practice. On the other hand, the courts, which are also a branch of the state, were called upon to examine this phenomenon from a legal and judicial perspective. The Study finds that in the application of legal principles, the courts have tended to favour the state over the liberty of the citizen when determining many of these cases. This seeming legal problem, if seen within the political atmosphere in which the disappearances were carried, out seems less of a surprise, as the courts would have had to go against this approved policy of causing disappearances if they were to protect the rights of the individual as against the interests of the state.

In a classical sense the remedy of *habeas corpus* is meant to protect the individual against the abuse of authority by the state. If there is a failure in this regard it is a failure of the very concept of the protection of the individual. However, the assumption that the courts could have protected the rights of the individual in a situation where there was an approved policy of the state relating to causing forced disappearances is to expect the courts to be at loggerheads with the state on a very important issue of policy at a time that it is impossible for them to be in this position.

Here we see a fundamental contradiction. On the one hand if Sri Lanka is a liberal democracy and if its Constitution is based on the principle of the rule of law, then it is the obligation of the courts to uphold the rights of the individual even against an approved policy of the state to the contrary. Within a liberal democracy where the law and the policy contradict one another, it is the duty of the courts to uphold the law as against policy. But this is possible only if we assume that the 1978 Constitution gives precedence to democratic norms and that Sri Lankan democracy is based on the rule of law. However, is this assumption itself correct? This is the issue that we should first examine as regards the 1978 Constitution.

### 1. Article 35 and its Impact on the Constitutional Structure

For almost 32 years, there has not been a discussion of the impact of Article 35 of the Constitution of Sri Lanka on constitutional law and constitutionalism as a whole. Much of the discussion has

[4] From 1987 to 1991, the South of Sri Lanka underwent extreme political violence. According to the reports from a number of presidential commissions of inquiry, the total number of involuntary disappearances during this period was around 30,000 persons. From 1978 up to May 2009, there was military action in the north and east, where there was a continuous insurgency. Arrests, detentions and other forms of repression were commonplace throughout that time. From 1994 to 2002 the orders in *habeas corpus* cases were primarily concerning Sinhalese caught up in the southern insurrection, but there were a fair number also from the ongoing conflict in the north-east as well. From that point onwards, probably from about 1998 onwards, the majority of the cases were from the North and East.

been confined to the issue of the immunity from prosecution granted to the president without consideration of the actual impact of this immunity.

Article 35 reads as follows:

> *"35. (1) While any person holds office as President, no proceedings shall he instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity."*

The Executive President is Head of the State, the Head of the Executive, Head of the Government, and is Commander-in-Chief of the armed forces. Under the earlier Constitutions, though the President was head of state, the prime minister was head of the cabinet. The prime minster was answerable to court. Under the 1978 Constitution, the head of the executive, who is also the head of the government, is not answerable to court. All decisions relating to national security are those of the head of the executive. All policy decisions relating to national security are also those of the head of the executive. Under Article 35, the executive president as head of the executive is not answerable to the courts.

The executive president of Sri Lanka is not subjected to any controls by cabinet or any other constitutional body. In fact, the executive president controls the ministers and all public authorities. The entire aim of the 1978 Constitution was to place the president in charge of everything. He has the right to appoint the ministers and to control the ministries themselves. In view of this, the public institutions that are run by the ministries are under his direct control. When Article 35 made the president unanswerable to the courts of Sri Lanka, it placed all decisions on the governance of the country attributable to him outside the control of the judiciary.

Within a rule of law-based system, a nation functions through its public institutions and the manner in which they are subjected to control constitutes the discipline that controls the lives of the people. The laws that govern these institutions, the laws that are developed and the commands that are given by those who are responsible to these authorities are important aspects of the system by which people of the country are governed. Undoubtedly, the internal running of the country and the institutions must have an independent life of its own based on a legal process that is not subjected to the control of those in political power. The running of this internal structure of public institutions needs the supervision of the public to ensure that basic notions of protection of peoples' liberties and freedoms are superior, while governance is carried out from day to day.

The protection of the freedoms of individuals and the functioning of public institutions are therefore deeply linked. The public institutions, if they are managed for the achievement of various goals of the government, such as development, national security and the like, should at all times protect the freedoms of individuals. Therefore there are two factors to consider in the management of public institutions. On the one hand there are the objectives of the government, which tries to achieve various targets at a particular time. This may be a particular development target in relation to various public institutions such as the speedy recovery of taxes, or projects such as roads or markets or housing projects. Or it may be national security objectives such as ensuring that

political sabotage or insurgent activities are not interfering with or obstructing the smooth functioning of the institutions to achieve their normal objectives.

On the other hand and at the same time, constitutional institutions must protect the liberties and the freedoms of individuals, who have certain entitlements and expectations. The public institutions at all times should respect these entitlements, even in a conflict over the performance of a public institution working towards any development or security objective.

If there is a conflict between the freedoms of the individual by way of denial of entitlements then it is the function of the courts to intervene and to deal with this problem in order to safeguard the freedom of the individual. The executive pursues various objectives, such as national security. It is the judiciary that protects the freedoms of individuals so that the objectives of the state will not crush the entitlements of the people.

Yet by placing the executive president of Sri Lanka, (who is the controller of public life under the 1978 Constitution), outside the jurisdiction of the courts, what was in fact achieved was the removal of the judicial function to protect individual liberties. The idea was that the president, as the driver of national objectives through various development and security projects, like anti-terrorism activities, is not under the control of the judiciary. Therefore, the protection of the individual, as opposed to the pursuit of objectives of the government, was removed through Article 35. What can be construed from this Article is that if an attack on the freedom and liberties of an individual can be attributed to the decisions of the executive president, such actions are outside the jurisdiction of courts. In such instances, the courts are functionless.

The 1978 Constitution itself removed the basis for the protection of the freedom of the individual from the jurisdiction of the courts. It is the character of this fundamental attack on the idea of constitutionalism under liberal democratic government, in which the protection of the individual is a primary objective of the constitution, which has been lost sight of amid public debates relating to the 1978 Constitution.

Article 35 was a profound deviation from the notion of constitutionalism as understood within the liberal democratic discourse. In the liberal democratic discourse, protection of the liberties of the individual is a primary objective. Whatever other objectives the executive may aim to achieve in a particular context and at a particular time, it cannot infringe on the liberties of the individual in the manner made possible under this section of the 1978 Constitution.

Consequently, the role of the Sri Lankan courts on constitutional matters, including those relating to the protection of individuals, became marginal. The courts no longer had the position they enjoyed under the 1948 and 1972 Constitutions. The role of the executive president was enlarged and the role of the courts reduced. Many Sri Lankans still imagine a situation in which the courts enjoy similar powers, authority and prestige as in the past. However the actual situation has changed substantially. In an earlier publication entitled *The Phantom Limb: Failing Judicial*

*Systems, Torture and Human Rights Work in Sri Lanka*,[5] I have explained this situation. The protective power of the judiciary over the freedoms and the rights of the individual has diminished, while the power of executive to encroach on their rights has increased enormously through the constitutional invention of the executive president.

Article 126 of the 1978 Constitution was a new creation:

> *"126. (1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV."*

This jurisdiction does not extend to executive and administrative actions attributable to the executive president as the head of the executive, since Article 35 covers such actions.

The addition of judicial remedies such as the fundamental rights jurisdiction under Article 126 was no substitute for the removal of liberties by Article 35. The fundamental rights jurisdiction does not extend to the executive president. Its jurisdiction is limited to certain rights that are called fundamental and therefore it is binding on certain acts of the administration, which may affect those rights. However, this jurisdiction does not extend to the acts of the executive president, who is the total controller of the entire apparatus of the government without any kind of limitations to his power and without checks and balances.

**2. If the *Bracegirdle case*[6] were heard under the 1978 Constitution?**

M.A.L. Bracegirdle was a young Australian planter in Sri Lanka who became an activist in a leftist party, the Lanka Samasamaja Party, because he supported workers' struggles. The colonial government issued an order of deportation on him in 1937, which required that he leave the country in 48 hours. He resisted and went into hiding. A writ of *habeas corpus* was filed before the Supreme Court and the Court quashed the governor's order. It established *habeas corpus* as prestigious remedy for the protection of the individual against the state.

If the *Bracegirdle case* were heard before a court under the 1978 Constitution, the state would raise an objection under Article 35. As the executive president now occupies the place that the governor once took, it would be argued that the courts have no power to hear the case. The courts would uphold the objection as it has upheld similar objections when they have been raised.

The Bracegirdle judgment was based on the principles of the Magna Carta. As stated by Abraham CJ,

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[5] By Basil Fernando and Morten Koch Andersen, published in 2009 jointly by the Asian Human Rights Commission, Hong Kong and the Rehabilitation and Research Centre for Torture Victims, Denmark.

[6] *Supra* note 2.

*"There can be no doubt that in British territory there is the fundamental principle of law enshrined in Magna Carta that no person can be deprived of his liberty except by judicial process. The following passage from The Government of the British Empire by Professor Berriedale Keith, is illuminating and instructive. In Chapter VII of Part I., he discusses 'The Rule of Law and the Rights of the Subject' p. 234. He says: -*

*'Throughout the Empire the system of Government is distinguished by the predominance of the rule of law. The most obvious side of this conception is afforded by the principles that no man can be made to suffer in person or property save through the action of the ordinary courts after a public trial by established legal rules, and that there is a definite body of well known legal principles, excluding arbitrary executive action. The value of the principles was made obvious enough during the war when vast powers were necessarily conferred on the executive by statute, under which rights of individual liberty were severely curtailed both in the United Kingdom and in the overseas territories. Persons both British and alien were deprived legally but more or less arbitrarily of liberty on grounds of suspicion of enemy connections or inclinations, and the movements of aliens were severely-restricted and supervised; the courts of the Empire recognized the validity of such powers under war conditions, but it is clear that a complete change would be effected in the security of personal rights if executive officers in time of peace were permitted the discretion they exercised during the war, and which in foreign countries they often exercise even in time of peace.'"* [7]

What is disturbed by Article 35 is the basic principle underpinning *habeas corpus* that is contained in the Magna Carta itself, which is the rule of law that

*"no man can be made to suffer in person or property save through the action of the ordinary courts after a public trial by established legal rules, and that there is a definite body of well known legal principles, excluding arbitrary executive action."*

By the operation of Article 35, the executive president became empowered to arbitrarily remove rights of subjects and deprived them also of recourse to court. Under a rule of law system, deprivation of personal and property rights can be done only through courts, which are obliged to adhere to due process. Under the 1978 Constitution however, this very principle has been rejected. There are things that the executive president can do which also include the deprivation of life and liberty of subjects without any legal process and the judiciary can be deprived of the right to intervene on such matters by excluding its jurisdiction via Article 35. The 1978 Constitution thus violates the basic principles underpinning *habeas corpus* in the Magna Carta.

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[7] From the judgment of the Supreme Court, reproduced in *The Bracegirdle Affair: An episode in the history of the Lanka Samasamaja Party*, edited by Wesley S. Muthiah and Sydney Wanasinghe, Young Socialist Publication, 1998.

The design of the executive presidential system is such that government objectives, for example, those for the achievement of various development projects or national security, could infringe on the liberties of the individual by the removal of the possibilities of judicial intervention into these areas. The very notion of the centrality of the liberties of the individual as a primary aspect of the national life and a primary aspect of constitutionalism was removed from the Constitution of Sri Lanka in 1978.

### 3. Structural Contradictions in the Constitution

The judicial failure to protect the remedy of *habeas corpus* in Sri Lanka is the result of the structural contradictions in the 1978 Constitution, which removed the idea of the freedom of the individual as a fundamental aspect of the constitution while claiming to do the opposite.

The protection of rights has been confined to a minor area with enormous limitations and the judiciary can operate only within that limited area for the protection of rights. Therefore, within the 1978 Constitution, the judiciary has only a marginal role in the protection of individual liberties. The executive president is at liberty to pursue whatever objectives and policies he thinks fit without the burden of having to be concerned with the freedoms of the individual, which would otherwise be protected by the judiciary. The judiciary is granted the power to interfere in only a marginal way.

It is these structural contradictions in the 1978 Constitution that have not been brought into constitutional discourse in any meaningful way and since the Constitution was passed this discourse has in fact been greatly diminished. This is despite the fact that in recent times the structural contradictions whereby fundamental rights are ostensibly protected but judicial intervention is denied in many important matters affecting personal and property rights, have been glaringly obvious.

Witness the whole issue of displaced persons in the North and East, who were placed outside the jurisdiction of courts after the end of the military intervention in May 2009; the government's refusal to investigate alleged forced disappearances, extra-judicial killings, torture and alleged crimes against humanity and war crimes; forced evacuations of persons from properties without any legal process in many parts of the country; the manifest failure to investigate crimes in many parts of the country accompanied by a program to kill rather than prosecute alleged offenders; and, failure to implement constitutional provisions as demonstrated by way of the non-operation of the 13th and 17th Amendments to the Constitution.

The *Liberty Rights at Stake* Study looks at hundreds of *habeas corpus* applications which fall into this same category. Enforced disappearances were approved and pursued as policy for perceived security reasons at various points of time in this country's history . Forced disappearances constitute the worst form of deprivation of the liberties of individuals without any intervention of courts and without any reference to legal process. International law considers causing of such disappearances as a most heinous crime and a crime against humanity. However, such acts were/are not against the "legal order" established under the 1978 Constitution, which excludes the jurisdiction of courts on such matters by way of the operation of Article 35.

The following observation of one of the authors of this Study is relevant in this regard:

> *"(a) If Article 35 is read in conjunction with Article 44 (2) and (3)- there could arise a situation where, if he/she chooses to do so, the President will be in charge of all subjects and functions thus the jurisdiction vested under Article 126 (re. fundamental rights) in the Supreme Court being set at zero.*
>
> *(b) Despite the judicial boast by the Supreme Court in cases such as W. K. C. Perera v. Prof. Edirisinghe (1995 (1) SLR) and Heather Mundy v. CEA & Others (S.C./ 58/03, S.C. Minutes of 20 January 2004.)– that, by enhancing fundamental rights in the Constitution the Scope of Writs under Article 140 vesting jurisdiction in the Court of Appeal has been expanded (See also: Atapattu v. Peoples Bank ( (1997(1) SLR) (SC) and Moosajee v. Arthur & Others* (2004(1) ALR 1) (SC), this judicial expansion would also be rendered nugatory by reason of the immunity clause.*
>
> *(c) Additionally, the "Public Trust" doctrine which has been a driving force in these decisions (see also: Dr. Kunandandan v. University of Jaffna (2005(1) ALR 16 (CA)) would also lose its judicially expressed constitutional significance. (NB; Although, the Waters Edge Case (SC) handed down by S.N. de Silva, C.J. against President Kumaranatunge put her conduct (on Head of State/Cabinet / Govt.) on issue after she had relinquished office, in the meantime, the former president herself escaped unscathed personally."* [8]

**4. The Executive President's role as the Policymaker**

Under the 1978 Constitution, the executive president, as the head of the state as well as the head of the political ruling party, is also the chief policy maker. All matters of public security are policies that are developed by the president himself. Perceived insurgencies and all other matters of national security are under the purview of the executive president. The whole period from 1978 was marked by the extensive use of emergency and national security regulations together with legal and constitutional amendments to suit the policies that the head of state insists are necessary for the nation. This vast body of regulations by way of emergency or national security laws has imposed heavy limitations on the power of the judiciary to deal with matters concerning freedoms of the individual. A large body of rules depriving the judiciary of the power to interfere in matters of arrest and detention, and also even to enable the creation of various extraordinary places of detention and to put entire areas of the country outside the jurisdiction of the courts was built up through government policy decisions.

A vast number of forced disappearances took place during the time since the 1978 Constitution was passed into law, within the spaces created by the national security laws that follow from the executive president's role as policymaker. These laws removed the courts' supervisory role.

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[8] As contained in a personal note to this writer from Dr. Jayantha de Almeida Guneratne, December 2010.

Thus, the abductions of persons by various secret agencies with no regard for the law and normal regulations; the interrogation of these persons in detention centres with no records as required by the law; the conduct of these interrogations without any kind of supervision which gave room for torture as well as cruel and inhuman treatment; and, finally the killing and disposal of the person all happened within a policy framework that the executive president approved, and were enabled by security laws and regulations which were also designed and approved by the executive president. The courts of Sri Lanka had no jurisdiction to challenge any of these policies, whatever may be the consequences for individual liberties. Thus even completely immoral decisions that could shock the conscience of any civilised nation were made by the executive president of Sri Lanka without the possibility of these being reviewed or scrutinised by the courts. This situation continues today. This is the basis for the incapacity of the courts to deal with various illegalities that result from arrest and detention and other actions that are supposed to be addressed by *habeas corpus* applications.

A further observation is also pertinent;

*"The situation has been further aggravated by giving a clean slate to the Defence Secretary-*

*(a) To justify continuing emergency;*

*(b) Approved by a Parliamentary majority which the Govt. enjoys;*

*(c) Where, disappearances are alleged, mere affidavit by the said Secretary (viz: his ipse dixit is accepted by the courts (CA as well as the SC) that the arrest, detention (is lawful) and where a disappearance or involuntary removal (is denied) without or further ado. Thus in the context of the writ of habeas corpus, the same is rendered meaningless, whereas, if Article 3 read with Article 140 and Article 141 read with article 126(3) (as interpreted officially) in the context of article 140) is to be extended, the courts must assert their power of judicial review (in the light of Article 3 read with article 4(c) & (d) in conjunction with the aforesaid articles in pursuing an objective approach in requiring (rather than a subjective attitude); the Defense Secretary must be enjoined to place material in relation to an arrest/detention an alleged disappearance/involuntary removal"*[9];

**5. The Limitations on Law-making Processes and the Role of the Executive President**

Prior to the 1978 Constitution, the 1972 Constitution had already removed the powers of judicial review from the ordinary courts of Sri Lanka. It established a new Constitutional Court to deal with matters relating to the Constitution. The 1978 Constitution removed the Constitutional Court and removed the limits of judicial review created by the 1972 Constitution. Under the 1978 Constitution, a bill to be passed by the parliament had to be submitted to the Supreme Court, which in turn had to look into the constitutionality of the bill within a short period.

[9] Ibid,

Other than this it gave no scope for the Supreme Court to look into the legality or otherwise of a bill. Under Article 122(1), the 1978 Constitution put further limits on the power of the Supreme Court to look into a constitutional bill where the president submits a letter to the court asking for the review to be done within one to three days, if the president considers the bill important enough to be introduced through an emergency process.

When J. R. Jayawardene needed to remove the civil rights of his chief rival, Sirimao Bandaranaike, and there were certain limits due to the law relating to this in Sri Lanka, he referred to this section to introduce a bill in parliament for the amendment of the Constitution, known as the 3rd Amendment, on an emergency basis. The same procedure was later followed in 2010 when the 18th Amendment was introduced to the parliament. Thus the passing of laws to amend the Constitution itself was brought under the ambit of emergency procedure, giving the Supreme Court no more than three days to conduct judicial review. Thus, the law making process was changed to deny possibilities of consultation on legal change with the people as well as so as to limit the powers of the courts to review the possible implications of new laws.

The fundamental notion of the rule of law is that laws are made with the consent of the people. The consent of the people is given by way of public discussions within which the public express their considered views on whatever law is to be passed. This consent of law making is at the heart of the notion of the sovereignty of the people. The people cannot be sovereign when they cannot give consent to the laws by which they will be bound in the future. Thus, more than any other aspect of law making in a democracy, it is the consent of the people that makes or destroys democracy. The 1978 Constitution took away this process of lawmaking, and with it, Sri Lankan democracy and the rule of law.

**6. Some Comparative Discussions**

As against Sri Lanka, contemporary Cambodia and Burma are countries where the courts have no effective judicial power at all. These countries arrived at this situation through different historical factors, which are instructive for the purposes of comparison with countries where the courts have a marginal role.

From 1975 to 1979, Cambodian society went through one of the worst tragedies that humanity faced in modern times, when the Khmer Rouge was in power. The entirety of the urban Cambodian population was ordered to vacate the cities and move to the countryside. In the years and months that followed the Khmer Rouge pursued a ruthless collectivisation programme according to socialist ideas. The use of money was abolished, as were private kitchens. Children were separated from their parents and brought up by others. This experiment killed at least two million Cambodians out of a population of seven million.

Those who were pursued most ruthlessly were the educated classes as well as those who had any connection with the military. Although the arrival of the Vietnamese by the end of 1979 brought this catastrophe to an end, by that time the entire population was impoverished and in the coming ten years or so a large number of people lived in refugee camps along the Thai-Cambodian border.

Many who belonged to the more educated sections that had survived also fled to other countries. Doctors, lawyers, judges and all types of professionals were lost to the country.

This process also destroyed what system of justice that had existed in the country. The previous system was a short-lived one introduced by the French. The Vietnamese who took control of Cambodia assisted in the reorganisation of Cambodian society through their experts, who planned all aspects of Cambodian life at that time. They organized courts according to a socialist model which was introduced to Vietnam from the communist bloc.[10] Under their system, the interests of the government and those of the public were presumed to be in alignment. In these circumstances, the concept of the judiciary as a defender of rights against the intrusiveness of other parts of the state apparatus was an absurdity. As the architect of Soviet justice, Andrei Vyshinsky, put it,

> *"Under socialism the interests of the state and those of the vast majority of citizens are not, as they are in exploiter countries, mutually contradictory... Safeguarding the interests of the socialist state, the court thereby safeguards also the interests of citizens for whom the might of the state is the primary conditions essential for their individual well-being. Safeguarding the interests of separate citizens, the court thereby safeguards also the interests of the socialist state wherein the development of the material and cultural level of the life of the citizens is the state's most important task."*[11]

The system that was established was aimed at ensuring some form of stability for the state, and within this system the idea of the protection of the individual from the state was a totally alien concept. The interests of the individual were protected, it was presumed, when those of the state were protected. Thus, the system of courts that was introduced by the Vietnamese from around 1980 to 1993 was a system that was meant to carry out administrative functions on behalf of the state, and the very concept of the protection of the individual against the state was missing.

In May 1993 an election was held under the UN Transitional Authority for Cambodia, which created a new government. A new Constitution was adopted based on liberal democratic principles. However, the basic infrastructure of the administration remained the same and remains so even up to now. Some training was given to judges and some new laws introduced. However, almost all human rights organisations in Cambodia have observed and have mentioned in their reports that the ground reality did not change at all. Basically the Cambodian court system as it exists today cannot protect individual freedoms against the state. In fact, it is an instrumentality through which the political regime enforces its will against its opponents as seen by the prosecution of the opposition political leaders through various cases filed in these courts.[12] Thus

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[10] For an overview of the transplantation of Soviet law into Vietnam, see *Borrowing Court Systems: The experience of Socialist Vietnam*, by Penelope Nicholson, Leiden; Boston: Martinus Nijhoff Publishers, c2007.

[11] Andrei Y. Vyshinsky, *The Law of the Soviet State*, translated by Hugh W. Babb, Westport, Cn.: Greenwood Press, 1948, pages 497–98.

[12] The views of successive UN Special Representatives on human rights in Cambodia that support this statement are available on the website of the Office of the High Commissioner for Human Rights: http://www.ohchr.org/EN/countries/AsiaRegion/Pages/KHIndex.aspx.

the system as it stands in Cambodia today is unable to realise the protection of the individual against the executive in any manner.

The story of the Burmese system of courts and justice as it exists today began with the coup that brought General Ne Win into power in 1962. Prior to this, the superior courts that emerged at the time of independence in 1948 struggled hard to establish liberal democratic principles, including through the writ jurisdiction of the Supreme Court, established under the 1947 Constitution, and the appellate criminal jurisdiction of the High Court, under section 491 of the Criminal Procedure Code. The situation is described in a recent article by a researcher of the Burmese criminal justice system:

> *"In the two years immediately after independence... the courts interpreted their role liberally. Justice E Maung in the definitive 1948 G. N. Banerji ruling described the authority of the Supreme Court in issuing habeas corpus writs to be 'whole and unimpaired in extent but shorn of antiquated technicalities in procedure' (pp. 203–04). In 1950 as chief justice he stressed in the Tinsa Maw Naing case that, 'The personal liberty of a citizen, guaranteed to him by the Constitution, is not lightly to be interfered with and the conditions and circumstances under which the legislature allows such interference must be clearly satisfied and present' (p. 37). He and other senior judges ruled to release many detainees on various grounds, including that orders for arrest had been improperly prepared or implemented, that indefinitely detaining someone was illegal, and that police or prison officers were without grounds to justify arrest, be it of an alleged insurgent sympathizer or notorious criminal."* [13]

After the coup, the new regime did not remove the established laws but restructured the judicial system according to ostensibly socialist principles based on the same notions as were used in Cambodia, but according to a conservative rather than a radical agenda, so that the earlier protections for individual rights were no longer operative in the courts. Ne Win's chief jurist, Dr. Maung Maung, provided ideological justifications for the defeat of judicial independence and the supremacy of the executive powers.

The superior judiciary's writ jurisdiction fell into disuse, and was completely removed from the 1974 Constitution that established a one-party authoritarian state under military control.[14] While the courts maintained a façade of socialist legality on the one hand and continue to apply many of the same laws as before the coup, the structural rearrangement of the political and legal systems by the regime eliminated the possibility of protecting individual rights against intrusion by the state.

Although the military regime that took over from its predecessor in 1988 demolished the one-party system and made changes to the courts that were purported to bring them back into line with what existed at the time of Ne Win's takeover, in fact the system that exists today is functionally a

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[13] Citation from, "The incongruous return of *habeas corpus* to Myanmar", by Nick Cheesman, in *Ruling Myanmar: from Cyclone Nargis to national elections*, Singapore: ISEAS, 2010.

[14] For a discussion see "Ne Win, Maung Maung and how to drive a legal system crazy in two short decades", Article 2, vol. 7, no. 3, September 2008, available online at http://www.article2.org/mainfile.php/0703/

continuation of what existed in Ne Win's time, since its purpose is to incarcerate political opponents or perceived opponents of military rule and maintain social order through the threat of sanctions against persons who do not enjoy the privileges and protections of executive authority. Internally there is no capacity for the courts to protect the individual against the state, since the courts are no more than bureaucratic arms of the state and judges are also legally mere public servants under the same authorities as departmental officers. Nor will this situation change with the creation of another façade in the form of a semi-elected parliament in the near future.

### 7. Non-existence of Judicial Power *vis a vis* the Marginalization of Judicial Power

In systems like those operative in Cambodia and Burma today, the memory of a functioning justice system in the liberal democratic tradition does not exist. Law is not equated with the protection of individual rights but with transgression of any kind from any order by anyone representing authority, irrespective of the contents of that order or its degree of rationality. They are aware that any such transgression can lead to punishment, with or without judicial sanction. State authorities have full power to decide on punishment as they wish, and although there are superficially rules, procedures and structures for deciding punishment, how all these things operate in essence is completely arbitrary.

There is no serious attempt to prevent arbitrariness, and in fact the systems in these countries are dependent on it, as people are forced to adjust their habitual behaviour to respond to official whims on short notice. Why somebody in authority does something one way today and a different way tomorrow is not questioned. It is just the usual form of behaviour. Thus there is not even a conceptual basis for making a distinction between what is arbitrary and what is not. The whole notion of constancy through legality has departed from the way that the state operates.

In contrast to systems where judicial power is non-existent, the system in Sri Lanka today is one where judicial power is marginal, in that people still have memories of times when courts had greater influence than in the present. This memory often creates expectations that the system can still operate in certain ways that are in fact beyond it. People with such memories may get confused when courts act arbitrarily. The idea of law still exists, yet it is not operative to the extent or in the manner as it was in the past. Students may be educated to believe that laws are present and working. External references to law and legal habits based on various practices that had validity in former times may be repeated. This also often confuses participants in the system, who may be unable to comprehend whether law still really exists or not.

In countries where courts have no judicial power, the executive authorities have no fear of the courts at all. They consider courts as part of the same unitary system to which they belong. They are aware that they are highly unlikely to have to face contest in courts from the citizens asserting their rights, and certainly not as equals. In contrast, in courts with marginal power persons representing state authorities do fear the prospect of contests from citizens in courts, since they cannot be completely sure of the outcome of such contests.

Likewise, where courts only have administrative functions, the authorities are more secure and do not need great use of force to control persons, except in very exceptional situations, since they can

rely upon the judiciary to carry out their bidding against individuals who threaten the established order. On the other hand, where courts have even marginal power, authorities are less secure, since they cannot be certain of compliance.

This causes those authorities to resort to more extra-legal actions than might be the case as in the other situation, since they feel the need to take care of things themselves than rely upon judges to cover up crimes on their behalf. In such cases, forced disappearances in particular are more likely to occur, as the state officers are obliged to commit crimes rather than resort to judicial measures to remove threats to their authority, and then must also take a certain number of steps to cover up such crimes.

On the other hand, where courts have no effective power, the use of the judiciary for bargaining and negotiating is likely to be greater than in places where their authority is marginal. Bribery becomes the customary way of dealing with accusations in courts, other than in high-profile cases that have political qualities. Citizens, either directly or through intermediaries such as lawyers, engage in such bargains routinely and without thought to any alternative. There are no genuine legal impediments to such bargains, and on the contrary, such bargains are essential for success. In contrast, in countries where courts still have marginal power, bargaining takes place less and with less certainty of outcome. However, people do realize that space for bargaining is wide and there will be more and experiment in that direction as the courts' power wanes. Consequently, political influence extends to the courts through indirect methods, rather than through direct control of the courts as in the first category of cases.

## 8. Implications of the Study on *Habeas Corpus* in Sri Lanka

Should the courts take on the role of an external controller of police? This is a related issue to the discussion on *habeas corpus*. The judicial view at the time of the *Bracegirdle case* was that when the question of the liberty of the individual was at stake, the courts were under an obligation to intervene. Thus, on the powers of courts to control the police and military as an external controller of the police, the powers of the courts had no limit when the issue of the liberty of the individual is raised before the courts. Even the existence of a situation of war did not take away that power of the court. Once Sri Lanka became a republic, instead of being a colony, there was no reason to reduce that power of the court to intervene to protect the liberty of the individual.

In fact, the very essence of being a Republic is the sovereignty of the people. The liberty of the individual should have taken a greater significance in this context. In fact, the very idea of independence implies greater protection of freedom of the individual. However, the 1978 Constitution while retaining the formula of sovereignty of the people reduced the protection of liberty of the individual. This is the basic contradiction existing in the Constitution. Under the Constitution, executive power of the state is exercised by the president: the executive president is not under the control of courts, meaning that even when he/she violates the liberties of the individuals, the courts have no power to intervene to protect the individuals.

On matters of security, the president is in control, *in jure* as well as *de facto*. Actions done for security reasons by police and military are executive actions for which president bears

responsibility. If the courts are to question such actions even for the protection of the individual, the courts there by are questioning the actions done under the authority of the president. However, the Constitution does not allow the courts jurisdictions over the president and president is thus protected in an absolute sense.

The simple conclusion that one arrives at is that the Sri Lankan president has the power to take away the liberties of individuals without any limit, and the King of England had no such power under the Empire. The powers that courts had and in fact exercised in a colony, as shown by the *Bracegirdle* case and many other cases from many of the colonies of British empire, is not now available to courts under the 1978 Constitution of the Republic of Sri Lanka.

The courts' reluctance to intervene in cases cited in the relevant Study under consideration has made it possible for the courts not to enter into a conflict with the executive president. However, this raises questions about the possibilities in relying on courts to protect the liberty of the individual, so long as this Constitution exists. That again raises even more fundamental questions about the very reasons for the existence of the Sri Lankan courts. If the *raison d' entre* for the existence of the courts is not the protection of the individual, what is the nature of the courts and their functions under the 1978 Constitution? I have previously raised this issue in the publication entitled *The Phantom Limb: Failing Judicial Systems, Torture and Human Rights Work in Sri Lanka.* [15]

Thus, the claim that the 1978 Constitution has continuity with the constitutional tradition of Sri Lanka prior to the 1978 Constitution is a basic fallacy. Equally, the second notion that the Sri Lankan Constitution is based on the sovereignty of the people, is itself a fallacy since, there can be no peoples' sovereignty, where the protection of rights is not possible. It is the liberty of the individual that is at the core of peoples' sovereignty as against sovereignty of the monarch under the monarchy. It is the recognition of the individual through protection of individual liberties from all threats including the threats from the monarch itself that constitutes democracy.

The test is the unlimited capacity of courts to protect the liberties of the individual. No such protection exists in Sri Lanka. The dismal fate that has befallen the legal remedy of *habeas corpus* is only an illustration of that reality.

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[15] *Supra*, footnote 5.

# THE COST OF RECONCILIATION- IMPUNITY AND ACCOUNTABILITY IN POST-CONFLICT NEPAL

*Mara Malagodi*[∞]

The present paper analyses the signal importance of the writ of *habeas corpus* in regard to issues of impunity and lack of accountability in Nepal with specific reference to the crimes committed during the ten-year-long internal armed conflict that took place from 1996 to 2006 between the Communist Party of Nepal (Maoist) and the Government of Nepal, and – to a limited extent – after the beginning of the peace-process in April 2006. This discussion take place within a wider context of the relevance of the writ of *habeas corpus* in South Asia.

During the above period, the conflict claimed over 13,000 lives; hundreds of Nepali people disappeared and became victims of rape, torture, displacement and gross human rights violations (ICG 2010a: i).[1] As illustrated by the International Crisis Group 2010 report *Nepal's Political Rites of Passage*, the country's post-April 2006 transitional politics has been particularly turbulent; 'the peace process has not delivered a linear progression from conflict to stability. Instead it has prompted new conflicts and reinforced more cyclical patterns of political violence' (ICG 2010b: 2).[2] On 10 April 2008 Nepal's Constituent Assembly was elected to prepare within two years a new Constitution – the seventh in the country's history.

However, the Assembly was unable to complete its work within the established time frame and its deadline has been extended to 29 May 2011. Nepal now faces a serious political impasse due to the inability to elect a new Prime Minister after the resignation of Madhav Nepal on 30 June 2010, who has since then been acting as caretaker Prime Minister. In addition, the constitution-drafting process has been delayed by the profound differences amongst the twenty-five political parties represented in the Assembly. As a result, Nepal's peace process has reached a stalemate, while the entire country is confronted with a delicate phase of transitional politics characterised by insecurity, fear and recurring episodes of violence.

It is in this scenario that the issues of impunity and lack of accountability need to be analysed. The beginning of the peace process in 2006 was expected to open the way to the process of transitional justice in view of providing legal redress to the many victims of the conflict. In fact, the Comprehensive Peace Agreement of 21 November 2006 explicitly provided under point 5.2.5 for the establishment of the Truth and Reconciliation Commission and the National Peace and Rehabilitation Commission, and under point 5.2.3 for 'both sides to make public within 60 days of the signing of the agreement the correct and full names and addresses of the people who

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[1] See:http://www.crisisgroup.org/~/media/Files/asia/southasia/nepal/184%20nepal%20peace%20and%20justice.ashx [Retrieved 06/12/2010].

[2] See:http://www.crisisgroup.org/~/media/Files/asia/southasia/nepal/194%20Nepals%20Political%20Rites%20of%20Passage.ashx [Retrieved 06/12/2010].

'disappeared' or were killed during the conflict and convey such details to the family members'.[3] These promises were also enshrined in the Article 33 of the 2007 Interim Constitution under the Responsibilities, Directive Principles and Policies of the State. As illustrated by the International Commission of Jurists (ICJ),

> *"The problem of enforced disappearances in Nepal over the past ten years of conflict has been among the worst anywhere in the world. Between May 2000 and January 2007, the National Human Rights Commission received 2028 cases of enforced disappearance. Over 600 of these cases remain unsolved. In its report in 2005 the United Nations Working Group on enforced or involuntary disappearances stated that Nepal was the source of the largest number of urgent actions cases transmitted by the Working Group to one country in 2004".*[4]

At the time of writing – over four years since the signing of the Comprehensive Peace Agreement – very little has been done towards bringing to justice the perpetrators of human rights violations during the conflict. As the Report *Still Waiting for Justice* compiled jointly by Human Rights Watch and Advocacy Forum attests, 'no member of the security forces or the Maoists has been held to account in civilian courts for grave human rights abuses committed during the conflict; most cases that have been filed are stalled. Human rights violations committed since the end of the conflict also continue to go unpunished.' (HRW/AF 2009: 1).[5]

Crucially, the political difficulties in successfully concluding the ongoing peace process and completing the drafting of the new Constitution have put heavy strains on the process of securing justice to the victims of the conflict. Political leaders have been reluctant to pursue the perpetrators of conflict-related crimes, arguing that further investigations and prosecutions would undermine the stability of the peace process. So far this approach has translated into providing blanket immunity to the culprits from both sides. Surely an indiscriminate amnesty cannot represent a proper and fruitful basis for the resolution of the disputes at the heart of the peace process, especially at a time in which the legitimacy of the entire process is being eroded.

The ultimate goal of the peace process is to 'build a New Nepal', therefore it seems that in this context reinforcing the accountability of state institutions and political leaders through the legal mechanisms of transitional justice would foster the principle of the rule of law and contribute to re-building trust in state institutions. In this regard, confidence-building is vital for the peaceful resolution of the conflict in order to strengthen the waning legitimacy of political actors and their actions. Ultimately, Nepalis are entitled to legal redress for the wrongs suffered during the conflict, so that the much desired return to peace and democracy can acquire a substantive meaning.

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[3] See:http://www.unmin.org.np/downloads/keydocs/2006-11-29-peace_accord-MOFA.pdf [Retrieved 06/12/2010].

[4] See:http://www.icj.org/default.asp?nodeID=349&sessID=138345226@21214758164&langage=1&myPage=Legal_Documentation&id=23301 [Retrieved 06/12/2010].

[5] See: http://www.hrw.org/en/node/86023 [Retrieved 06/12/2010].

## 1. The Context of the Past

Modern Nepal – as the state entity we know today – was created between the late eighteenth and early nineteenth century through the military campaigns led by the Gorkhali rulers. Conventionally, the beginning of Nepal's modern history is considered to be the year 1769 AD when King Prithvi Narayan Shah of Gorkha conquered the Kathmandu Valley. Nepal was never colonised and remained independent throughout its history – a notable exception in the South Asian region. In 1846 the Rana aristocratic oligarchy was established, while the Shah monarchy formally preserved but devoid of any real power. Nepal was ruled for over a century under the autocratic Rana regime, which was removed only in 1951 by an alliance between the newly-formed political parties and King Tribhuvan Shah.

The country experienced a ten-year-long democratic interlude abruptly interrupted in 1960 when the new King, Mahendra Shah, staged a 'royal coup', banned the parliamentary political parties and established the so-called Panchayat regime. This arrangement of 'unmediated' political relationship between the King and the Nepali people was to last for three decades. Political opposition during the Panchayat period was carried out by the underground political parties and civil society activists at a very high cost.

The political opening which followed the re-democratisation of 1990 represents a crucial moment of radical institutional change in Nepal. The country transitioned from a monarchical autocracy to a parliamentary democracy under a constitutional monarchy. The promulgation of the 1990 Constitution – the fifth in the country's history – established the legal framework which in principle allowed for the protection of human rights and sanctioned the principle that political representatives, executive and judicial officers are subject to the rule of law and, ultimately, accountable to the Nepali people. As a result, the changes of 1990 were expected to inaugurate a new phase of Nepali history in which past wrongs had to be redressed.

Nepal's Interim Government between April 1990 and May 1991 had the opportunity to investigate and hold accountable the leaders of the Panchayat regime for the repression during the pro-democracy movement and the previous regime. As a result, the *Commission of Inquiry to Locate the Persons Disappeared during the Panchayat Period*, known as the Malik Commission, was set up under the Chairmanship of the Chief Judge of the Eastern Regional Court.[6] On 31 December 1990 the Commission presented its report to the Cabinet: the estimated death toll was forty-five, the names of the alleged perpetrators clearly stated, the recommendation was to bring criminal charges against the culprits, but no evidence was adduced nor reference made to the laws which had been breached (Hoftun *et al.* 1999: 167-168).

In February the Cabinet finally dismissed five high-level executive officers and confiscated the passports of the Ministers in the previous two governments, but announced that no action would be taken against police officers and civil servants in view of the impending general election. During the investigation most of the people interviewed claimed that they were executing orders coming from 'above', leading to infer a more of less direct involvement of the Royal Palace. Moreover, the

[6] See: http://www.usip.org/publications/commission-inquiry-nepal-90 [Retrieved 06/12/2010].

Report was kept secret for months; when it was eventually passed on to the Attorney General, he argued that it lacked the legal requirements to prosecute the accused and no further action was taken; the decision, however, was bitterly opposed, especially by the Communists (Hoftun *et al.* 1999: 168-169).

The issue of impunity has been a long term problem in Nepal due to the undemocratic nature of the governments under which Nepalis have been ruled for the majority of the country's history since its inception. As illustrated in the Report *Impunity in Nepal* compiled in 1999 with the support of the Asia Foundation, the term 'impunity' (*dandahinta*) gained currency in the 1990s following the pro-democracy movement and the state repression that accompanied it (Bhattarai et al. 1999: 1). The political transition of 1990 also meant that political parties acquired a central position in the traditional networks of patronage and the control over the security forces when in power. As a result, these comments were made in the late 1990s with regard to the lack of accountability in the country (Bhattarai et al. 1999: 13):

> *"Impunity is widespread in Nepal and worse still, it is almost taken for granted. The lack of fear of punishment, inadequate laws and ineffective law enforcement compound the problem. The problem is both cultural and structural. Cultural because of its apparent acceptance, but we do not know if this apparent cultural acceptance of impunity has resulted from the fact that people have had little opportunity to experience justice being done in order to demand for more. The problem is also structural because of the obstacles related to enforcement of laws and bringing criminals to justice. Human rights of the victims are violated because of impunity guaranteed by political protection and/or corruption."*

The legacy of Nepal's second democratisation is pivotal to the understanding of the ongoing attempts to secure the establishment of a transitional justice mechanism and the end of the current climate of impunity and lack of accountability in the country.

## 2. The Context of the Present

Nepal's process of democratisation started in 1990 and led to an extraordinary opening of the political space: the new liberties guaranteed by the 1990 Constitution allowed for an extraordinary development of Nepali civil society and the media sector. In fact, immediately after the return to democracy in 1990, Nepal became party to the main international human rights legal instruments: the Convention on the Rights of the Child (14 September 1990); the Convention on the Elimination of All Forms of Discrimination Against Women (22 April 1991); the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Optional Protocol to the International Covenant on Civil and Political Rights, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (14 May 1991).[7]

[7] See:http://www.unhchr.ch/tbs/doc.nsf/0/a1cd2664867a6b3841256324004e75c1?Opendocument [Retrieved on 07/12/2010].

Significantly, the Nepal Treaties Act 1990 explicitly provides a guarantee for the enforcement of the Convention or Treaty to which Nepal is a party. Section 9 of the Act provides that 'in case any provision of a treaty to which the Kingdom of Nepal has become a party following its ratification, accession, acceptance or approval by the Parliament, contradicts with the provisions of current laws, the latter shall be held invalid to the extent of such contradiction for the purpose of that treaty, and the provisions of the treaty shall be applicable in that connection as the law of Nepal'. In addition, the 1990 Constitution bestowed upon the Nepali judiciary – especially the Supreme Court – extensive powers in order to enforce constitutionally guaranteed fundamental rights.

The changes of 1990 were expected to inaugurate, sanction and set in motion *the* political and institutional change democratic forces in Nepal had always envisaged, but somehow many of the desired changes from the previous Panchayat regime did not take place. The Nepali state came under heavy criticism from different quarters on different issues. The 1990 Constitution progressively became an embattled document and acquired a pivotal role in the country's political debate. The document was deemed an inadequate instrument to attain the goals of democratisation and socio-political change envisaged during the 1990 People's Movement.

As a result, dissatisfaction with state performance progressively manifested itself as both disaffection and active resistance to the state itself, especially after the Communist Party of Nepal (Maoist) launched an armed insurgency against the central government in February 1996. Following the 'royal massacre' in June 2001 and the collapse of the first round of peace-talks over unwillingness of the Government to meet the Maoist demand for the election of a Constituent Assembly, the conflict escalated, leading to increased instances of human rights violations and numbers of casualties.

Nepal also faced two bouts of emergency rule: the first between 26 November 2001 and 29 August 2002, and the second between 1 February 2005 and 30 April 2005. On 26 November 2001, the Nepal government declared a state of emergency and the Royal Nepal Army was deployed on the battlefield beside the police against the insurgents who were declared 'terrorists' by the government in the wake of the 9/11 events. The declaration of the emergency under Article 115(8) of the 1990 Constitution entailed the suspension of 'many Articles of Fundamental Rights [of the 1990 Constitution] such as sub-clause (a) freedom of speech and expression, (b) freedom of peaceful assembly without arms, and (d) freedom of movement of clause (2) of Article 12; clause (1) press and publication pre-censorship of Article 13; Article 15 preventive detention; Article 16 right to information; Article 17 right to property; Article 22 right to privacy; and Article 23 right to constitutional remedies, apart from *habeas corpus*.[8] The King also promulgated the Terrorist and Disruptive Activities (Prevention and Control) Ordinance (TADO), 2001.

With the intensification of the clashes between the Army and the Maoists and the worsening position of civilians in the conflict caught up in the crossfire, the emergency was extended for a period of three more months in February 2002. In April 2002 TADO was re-enacted by Parliament as the Terrorism and Disruptive Activities Act (TADA). After TADA expired, the King re-issued

[8] The suspension of certain Fundamental Rights was operated according to Article 115(8) of the 1990 Constitution (http://www.ahrchk.net/ua/mainfile.php/2002/194/) [Retrieved on 07/12/2010].

it in the form of an Ordinance every six months (ICJ 2005: 1). In April 2004 TADA expired but was kept in force by the government as an Ordinance (TADO); then in October 2004 a new TADO was issued by the executive.[9]

Many people were arrested under the 2002 Terrorist and Disruptive Activities (Control and Punishment) Act (TADA), which gave the security forces the power to arrest without warrant and detain suspects in police custody for up to 90 days. Scores of people are reported to have been held for weeks or even months in illegal army custody without access to their families, lawyers or medical treatment. The TADA was renewed by royal ordinance, after it expired on 9 April 2004. In both 2002 and 2003, Nepal recorded the highest number of "disappearances" of any country in the world (AI 2004a). The impact of anti-terrorism laws combined with the state of emergency has been severe on civil society as freedoms and remedial measures have been heavily limited.

On 22 May 2002, following the political confrontation over another extension of the state of emergency, King Gyanendra dissolved Parliament's Lower House and called for fresh elections on the recommendation of the Prime Minister, while Deuba retained the office of Prime Minister and continued ruling the country by way of governmental decree. Without the Lower House in place, however, the democratic credibility and legitimacy of his government were progressively eroded. Additionally, Nepal faced two bouts of monarchical autocracy under King Gyanendra: the first between October 2002 and June 2004 and the second between February 2005 and April 2006. In both instances the King made use of Article 127 of the 1990 Constitution to legitimize his actions.

I subscribe to the argument put forward by Bipin Adhikari (2004: 114) that the 1990 Constitution after the King's first coup in October 2002 was 'no longer the fundamental law of the land' as the disruption of Nepal's constitutional process led to systematic violations of the principle of the rule of law, one of the key features of constitutionalism. Another Report compiled by the ICJ in 2003 concurs with Adhikari's opinion on the 1990 Constitution having become semi-defunct since 2002:

> *"The dissolution of parliament, combined with the failure to hold elections within the six-month time frame required by the Constitution, and the formation of a government consisting of unelected ministers from outside the major political parties, has placed a profound stress on the democratic and constitutional framework of Nepal. Because the principal ministers seem to be answerable only to the King, Nepal is perilously close to slipping from a constitutional monarchy towards an absolute form of monarchy. [...] At present, there exists no mechanism by which to determine the limit of the monarch's authority under the Constitution. The Constitution provides that actions of the monarch are non-justiciable. Therefore, a monarch carrying out an action arguably outside his constitutional authority or in clear breach of such authority cannot be legally challenged for such transgression (ICJ 2003: 55-56)."*

[9] See: http://www.unhcr.org/refworld/publisher,FREEHOU,,NPL,473c5513c,0.html [Retrieved on 07/12/2010].

As a result, the lack of effective constitutional remedies and guarantees available to Nepalese from late 2001 until the beginning of the peace process in 2006 further stresses the importance of creating now transitional justice mechanisms to secure to Nepalese the instruments to achieve the legal redress they were denied for so long.

The peace process began in 2006 with the restoration of the House of Representatives dissolved in 2002. The powers of the King were curtailed, while the parliamentary political parties and the Maoists initiated intense negotiations over arms management and institutional change in the country. After the signature of the Comprehensive Peace Agreement on 21 November 2006, the two sides succeeded in completing and promulgating the Interim Constitution and abrogating the embattled 1990 Constitution on 15 January 2007. Then the Maoist delegates joined the Interim Legislature and the Cabinet respectively in January and April 2007. Following a period of uncertainty in which the Constituent Assembly elections were postponed twice – in June and November 2007 – finally the Interim Government succeeded in holding peaceful elections on 10 April 2008 which resulted in the Maoist party gaining most seats out of the 601 amongst the twenty-five parties represented in the Assembly (Maoists 38.1%, Nepali Congress 19.13%, UML 17.97%, hence the three biggest parties control over 75% of the total seats).[10]

In its first meeting on 28 May 2008, the Constituent Assembly voted in favour of declaring Nepal a Federal Democratic Republic, to abolish the monarchy and create the office of President of the Republic.[11] On 18 August 2008, Maoist leader Pushpa Kamal Dahal was sworn in as Nepal's new Prime Minister. On 25 May 2009 he was replaced by Madhav Nepal following Dahal's unsuccessful attempt to sack the Chief of Army Staff. In the midst of the political instability, the Constituent Assembly strived to proceed with the task of constitution-drafting; in December 2008 fourteen Committees were created and began their work. The Constituent Assembly, however, was unable to meet its 28 May 2010 deadline and its term was extended for another year. As the Assembly's new deadline is steadily approaching and many issues pertaining to the peace process have not been agreed by the parties, the questions of investigating conflict-related crimes and initiating proceedings against the perpetrators are at an impasse.

### 2.1. A Framework for Analysis

The problem of impunity and lack of accountability in Nepal needs to be addressed in light of a detailed analysis of the historical-political developments and institutional context of the country. In particular, the current stalemate of the peace process and constitution-drafting, combined with the difficulties in moving the political process ahead, represents an additional obstacle to the creation of an effective mechanism to implement transitional justice. In fact, the Report *Nepal: Peace and Justice* prepared by International Crisis Group in January 2010 clearly elucidates Nepal's predicament:

[10] For Constituent Assembly's electoral system and results see: http://www.election.gov.np/reports/CAResults/reportBody.php [Retrieved 01/12/2010].
[11] Interim Constitution of Nepal (Fourth Amendment) Act, 2008.

*In Nepal [...] there is a temptation to ignore justice issues and focus on establishing a stable political environment. Faced with the immediate pressures of security, development and governance, constitution-writing and elections, questions of justice easily appear less urgent. Putting the unexamined past behind them is a more attractive option for many (ICG 2010a: 2).*

Therefore, it seems appropriate to analyse the causes for the denial of justice to the victims of conflict-related offences and then move on to look at the concrete proposals made to tackle the question of ongoing impunity in Nepal. In this regard, it is important to analyse the legal and institutional framework within which mechanisms transitional justice can be established and promoted in order to fulfil the promises of the 2006 Comprehensive Peace Agreement.

### 2.2. The Role of the Nepali State

Nepali citizens enjoy a number of fundamental rights guaranteed under the currently in force 2007 Interim Constitution and by virtue of the international human rights instruments to which Nepal is party. The conflict-related offences which require legal redress are, in legal terms, violations of the fundamental rights of the victims and criminal offences committed by the perpetrators. As a result, the victims now seek legal redress for the wrongs they endure during the conflict. They wish to see thorough independent investigations of the incidents, the perpetrators being held accountable for their actions and duly prosecuted by independent bodies.

So far when both sides have attempted to deal with the alleged violations, they have tended to deal with them 'internally' refusing to have 'outsiders' judging their own forces. This factor relates directly to the specific context of the armed conflict and its extreme circumstances:

*"The vast majority of crimes during the conflict were not random acts of violence or insubordination. They were the product of strong sets of beliefs, values and experiences at the core of the security forces and the Maoist Movement. These institutional cultures not only enabled the crimes to be committed, but gave both sides reason to reject accusations that they had acted unlawfully and to insist that they alone could legitimately judge their conduct. Neither side has changed its approach. In fact both have worked hard to cloud the record and protect their interests (ICG 2010a: 6)."*

This factor hints to the crux of the problem in relation to issues of impunity and lack of accountability: the political will to implement policies and create the necessary institutions deputed to the legal redress of conflict-related violence. The Nepali state established the National Human Rights Commission (NHRC), a statutory body under the Human Rights Commission Act 1997.[12] The NHRC was given the delicate task of protecting and promoting human rights in the country by conducting inquiries, petitioning the courts, conducting research and making recommendations to state bodies.

[12] See: http://www.nhrcnepal.org/legislation1.php?legisNo=3 [Retrieved 06/12/2010].

Under the 2007 Interim Constitution the NHRC was elevated to a constitutional body under Articles 131-133, making it a far more stable institution. It became far more difficult to repeal it legally. The powers of the Commission stated under Article 132 include conducting inquiries, forwarding recommendations to the concerned authorities, lodging petitions in court, reviewing existing laws relating to human rights, monitoring the implementation of international instruments concerning human rights to which Nepal is party to, and publicising the names of officials, bodies and individuals violating human rights.

While the NHRC has wide powers relating to human rights, the Commission finds itself – at this point – alone as the only state institution dealing with quite a varied array of human rights issues. In fact, as highlighted in the NHRC Strategic Plan for 2008-2010, the NHRC envisages a shift from its focus on conflict-related issues during the 2004-2008 Strategic Plan, to issues of social inclusion through law:

> *"The Commission will focus on the rights of the disadvantaged groups which include women, dalits, nationalities and indigenous people, madhesis and minorities. In addition, the NHRC is expected to address the issues of social inclusion in order to maintain equity and better respect for human rights."*[13]

In this regard, the NHRC is also involved with monitoring the current constitution-making process in the Constituent Assembly, making the five-member Commission quite understaffed to deal alone with all the various problems.

In fact, the NHRC plan states that the 2006 Comprehensive Peace Agreement provides for the establishment of specific transitional justice mechanisms that are competent and specialised in dealing with conflict-related violations: the Truth and Reconciliation Commission (TRC) and the Commission for Peace and Reconstruction (CPR). Regrettably, the Truth and Reconciliation Commission Bill introduced in August 2007 is still pending and has not yet become law; the draft was, however, criticised for a number of reasons.[14]

Similarly, the Disappearances of Persons (Crime and Punishment) Bill is devised to create a Commission of Inquiry into Disappearances and is still not in force, notwithstanding the order of the Supreme Court analysed below. Moreover, its latest draft prepared in August 2009 was criticised for non-compliance with a number of international legal standards.[15] The Nepali state has so far not implemented any of the provisions regarding the establishment for mechanisms of transitional justice stipulated in the Peace Agreement, leaving the country with a weak and over-burdened institutional framework to tackle the issue of accountability for conflict-related crimes.

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[13] See: http://www.nhrcnepal.org/publication/doc/books/SP_2008-10.pdf [Retrieved 08/12/2010].

[14] See:http://nepal.ohchr.org/en/resources/Documents/English/pressreleases/Year%202007/AUG2007/Comments%20on%20draft%20Truth%20and%20Reconciliation%20Bill_03_09_07.doc.pdf [Retrieved 08/12/2010].

[15] See: http://www.hrw.org/en/news/2009/08/31/nepal-joint-memorandum-disappearances-persons-crime-and-punishment-bill [Retrieved 08/12/2010].

## 2.3 The Role of the Courts

The promulgation of the 1990 Constitution marked an extraordinary transformation of the Nepali judiciary, especially with regard to the newly-acquired extensive powers of the Supreme Court on the basis of the Indian model. The current Interim Constitution maintained intact the framework of the 1990 Constitution regarding the judiciary. The Supreme Court under Article 107(3) of the Interim Constitution has appellate and original jurisdiction. Article 107(1) grants to the apex court the power of judicial review of the constitutionality of legislation and to void such legislation on grounds of unconstitutionality, hence departing from the traditional Westminster principle of parliamentary sovereignty.

Under Article 107(2), the Supreme Court is empowered to exercise its extraordinary jurisdiction in Public Interest Litigation (PIL) cases. PIL as developed in the India has become a new kind of constitutional litigation *tout court*, which abandons the adversarial system as the Court can proceed *suo motu* or entertain the petition of any individual acting out of public concern. Significantly, Article 32 on the Right to Constitutional Remedy directly links the protection and enforcement of fundamental rights to judicial intervention. In this regard, the Supreme Court has also been empowered to issue directive orders and prerogative writs. Under Article 107(4) the Supreme Court is not bound by its previous decisions and is permitted to review its own judgments and final orders.

However, the suspension of Fundamental Rights under the two bouts of emergency significantly curtailed the role of the courts and the array of legal remedies available to Nepali citizens in the second half of the conflict. Moreover, due to the conflict, the majority of Supreme Court case-law in this period concerns petitions of *habeas corpus*, excessive use of police force, cases of disappearances, illegal detention and so on. The dominance of the executive branch in post-2002 Nepal also seriously compromised the position and capability of the judiciary. Moreover, even when judges expressed themselves in favour of Fundamental Rights, orders of the Supreme Court have often not been implemented by the government, leaving the apex Court with no further means either to enforce the 1990 Constitution or guarantee the rights established by the *Grundnorm*. The ICJ (2005: 3) concluded that during Nepal's conflict and royal autocracy:

> *"The judiciary in Nepal is neither impartial nor independent. Judges are reliant on the executive branch of government to maintain their positions and are reluctant to make decisions that have unfavourable implications for the government for fear of adverse consequences. Judges face considerable pressure from the executive and the military and have received threats for making unfavourable decisions in cases concerning arbitrary detention. There are also credible accounts of both assassination attempts and actual murder of judges in areas under Maoist control."*

King Gyanendra's autocratic rule and the political tussling of the parliamentary parties had considerably weakened the position, powers and credibility of the state organs representative of the people. With no House of Representatives in place from May 2002 to April 2006 and the expiration of local bodies' terms in July 2002, the democratic component of the Nepali state had

been thwarted, while the constitutional one remained in the hands of the unadventurous Nepali judiciary, the weakest institution of the state lacking both the power of the sword and the power of the purse. In addition, the proclamation of the state of emergency in 2001 also entailed the suspension of a conspicuous number of Fundamental Rights entrenched in the 1990 Constitution and of constitutional remedies available to Nepalis.

In March 2005 Nepal's Supreme Court entered the debate regarding the thorny issue of Fundamental Rights during the emergency rule. On 1 March 2005 a single bench of the Supreme Court formed by Justice Khil Raj Regmi issued an order to the administration of the Court to provide details about the rejection of the writ petition filed by Chetendra Bahadur Singh under Article 88(2) on the basis of the non-suspended rights after the petitioner filed an application challenging the rejection of the petition.[16] Interestingly, the Human Rights Promotion and Public Concern Committee of the Nepal Bar Association organised on 5 March a seminar on *The Role of the Judiciary in the State of Emergency* with the makers of the 1990 Constitution, including former Chief Justice Bishwa Nath Upadhyaya, Justice Laxman Aryal and Advocate Daman Nath Dhungana.

> *"Drafters of the present constitution have said the constitution does not bar people from exercising their rights under non-suspended articles of the constitution, even during State of Emergency. They have argued that the apex court cannot reject any writ petition seeking legal remedy under Article 88(2) that remains non-suspended. Stressing that the apex court can even entertain writ petitions relating to suspended rights under certain grounds, they have expressed concern over the rejection of such writ petitions by the Supreme Court administration on the "pretext of emergency".*[17]

The Supreme Court then finally issued its verdict on the controversial case on non-suspended rights on 31 March 2005.[18] A Special Bench of five judges led by Chief Justice Hari Prasad Sharma held that the Court from that point in time would entertain petitions on all the Fundamental Rights in the 1990 Constitution.[19] The Amnesty International Report also highlighted another important factor with regard to the Supreme Court's decision to entertain petitions on non-suspended rights: 'for two months the only legal remedy available for victims of human rights abuses was that of *habeas corpus*. However, *habeas corpus* has been severely undermined in recent years, as security forces have consistently obstructed and misled the courts and re-arrested those released on court orders' (AI 2005: 3-4).

Nepal's Supreme Court struggled to maintain its independence in the Parajuli verdict. The Royal Commission for Control of Corruption established by King Gyanendra had been investigating former Minister and RPP Central Committee member Rajiv Parajuli on allegations of corruption and ordered his arrest. Parajuli's brother filed a petition in the Supreme Court under Article 88(2) seeking a writ of *habeas corpus* and challenging the authority of the Commission as

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[16] See: http://nepallaw.blogspot.com/2005_04_01_archive.html [Retrieved on 08/12/2010].
[17] See: http://nepallaw.blogspot.com/2005_04_01_archive.html [Retrieved on 08/12/2010].
[18] Dambar Singh Gadak, *Sarvocca Adalat Bulletin*, 2061/2005, Vol. 13, No 21.
[19] See: http://www.kantipuronline.com/kolnews.php?&nid=35854 [Retrieved on 08/12/2010].

unconstitutional. The Supreme Court granted the writ to the petitioner and recognised the Commission as unconstitutional in its verdict on 13 February 2006 (1 Phāgun 2062 BS).[20] In the second half of the conflict, the Nepali judiciary, notwithstanding the long-awaited Supreme Court decision on the non-suspended rights and in the Parajuli case, struggled to preserve its independence from the executive and, ultimately, its credibility amidst the violence of the conflict, state repression and autocracy.

The return to democracy in 2006 and the promulgation of the Interim Constitution in 2007 reinforced the position and powers of the judiciary. On 1 June 2007 the Supreme Court issued a landmark judgment on a number of petitions seeking an order of *mandamus* from the Court to compel state bodies to make known the whereabouts of over seven hundred people arrested during the conflict and then 'disappeared'. In August 2006, the Court established a Detainee Investigation Team to look into the disappearances. The Supreme Court noted that due to the fact that Nepal lacks legislation concerning disappearances, no real investigations can be carried out and no real remedies offered to the victims; therefore, it urged the government to introduce appropriate legal measures.[21]

With particular reference to *habeas corpus* writs, Nepal's Supreme Court found itself called upon to answer the two following questions in Part 2 of its judgment above: namely, which are the obligations of the state with regard to disappeared or missing persons at a time of armed conflict? And what kind of judicial remedies can courts offer under such circumstances?

The Court considered the difficulty of providing a judicial remedy in the cases of disappearances due to the fact that the relevant authorities deny having arrested these people in the first place. As a result, the traditional use of *habeas corpus* is based on evidence that the illegal detention took place and that the fact of detention is not disputed, but only its legality. Therefore, the Supreme Court assessed what alternative measures were at its disposal. On the basis of the international legal instruments ratified by Nepal, the Court maintained that the state is under a legal obligation to investigate, identify the conditions of disappeared people, make them public and initiate legal proceedings against those identified as the culprits. Additionally, the Supreme Court firmly reclaimed the competence and jurisdiction of the judicial branch in dealing with this kind of matters as the ultimate guarantor and protector of the Constitution and the fundamental rights it enshrines. The Supreme Court's decision was welcomed by many human rights activists and organisations who urged the Nepal government to implement the judicial order.[22]

However, nothing has been done to implement the decision of the Court even though . This leads to the conclusion that, no matter how much power is granted to the judiciary and how enlightened its decisions are, ultimately the political responsibility of implementation and design of adequate

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[20] English translation of *Rajiv Parajuli v. Royal Commission for Control of Corruption*, Writ No. 118 of the year 2062/2005 from the website of Nepal's National Judicial Academy at http://www.njanepal.org.np/RCCC.pdf [Retrieved on 07/12/2010].

[21] English translation of the 1 June 2007 Supreme Court decision on the issue of disappearances is available at: *Nepal Judicial Academy Law Journal* 2007, pp. 301-339.

[22] See: http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documen tation &id=23308 [Retrieved on 07/12/2010].

policies and legislation lies with the Government, including the responsibility for its failure to do so.

### 3. Proposals for Domestic and Regional Advocacy

It is recommended that human rights groups lobby the Nepal Government and influential international organisations such as UN bodies to exert pressure for the following actions to be undertaken. The Constituent Assembly should revise its proposals regarding the judiciary. The Report of the CA Committee on the Judicial System submitted in September 2009 envisions the creation of a Special Judicial Committee of the Federal Legislature, which is elected by the federal legislature amongst its members under Article 29(1) (c) and empowered to judicially review legislation under Article 29(2) (a) and appoint and discipline judges under Article 29(2) (c)-(d). The adoption of these provisions would seriously undermine the independence of the judiciary, its powers, functions, and ultimately its credibility.

The Government of Nepal should sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearances.[23] The TRC and Disappearances Bills should be enacted without any further delay and in a manner that conforms to international legal standards. The Government of Nepal should secure training in forensics to investigators in order to carry out more effective investigations in the matter of disappearances.

[23] See: http://www.icaed.org/the-campaign/nepal/ [Retrieved 07/12/2010].

# SOME REFLECTIONS ON THE CRIMINAL JUSTICE SYSTEM AND WRITS OF *HABEAS CORPUS* IN PAKISTAN

*Muhammad Majid Bashir*[*]

## 1. Background

The judicial system of Pakistan stretches beyond the medieval period and has evolved over a millennium. Notwithstanding successive changes that resulted in the socio-economic and political transformation in society, the judicial system maintained a steady growth and gradually consolidated and improved itself, without having to undergo any substantial change.[1] On independence, the Government of India Act 1935 was retained as a provisional Constitution, as a consequence; the legal system of the British period continued with adaptation and modification where necessary to suit the requirement of the new Republic.

The system underwent several distinct stages of historical development, namely: Hindu kingdom, Muslim-rule and British colonial domination. The current era, commenced with the partition of India and the birth of Pakistan as a sovereign and independent State. During this process of evolution and growth, the judicial system was not influenced by foreign doctrines, the indigenous norms and practices, both in terms of the Court structure, hierarchy, and procedures were followed. Therefore, the present judicial system is not an entirely foreign transplant, as is commonly alleged, but is instead autochthonous. Even though the system may not fully meet the local conditions, its continued application and practice has made it intelligible to the common man. The very fact that the people are resorting to the courts system for the resolution of their conflicts indicate that the system continues to enjoy a degree of legitimacy and acceptance.[2]

The source of Pakistani law has its roots in the Islamic legal tradition, local social systems and British common law tradition. Since, Islam is the state religion; it is not possible for the Parliament or provincial assemblies to make any law, which is against the Quran, Sunnah or any of the injunctions of Islam.[3] Although it may be said that customary sources date back to centuries even before the advent of Islam, no custom can survive or override any tenet or principle laid down in the Quran. On this basis in 1980, the concept of Federal Shariat at Courts was visualized by the then President Zia ul Haq.[4] Since its establishment, the Federal Shariat (FS) Court has been the subject of criticism and controversy in the society as it is viewed as an Islamisation measure by the Military Regime. The court also exercises appellate revisional jurisdiction over the Criminal Courts in deciding cases under the *Hudood* Ordinances.[5]

Further, the decisions of the FS Courts are binding on the High Courts as well as on the subordinate Judiciary. The *Hudood* Ordinances reinforced criminal laws for offences in relation to sex outside of marriage, false imputation of rape and property-related offences. The

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[1] Law Commission of India 14th Report (1958),Volume 1, Report of Law Reform Commission 1967-70.

[2] Report of the Supreme Court of Pakistan (2006-2008).

[3] Preamble of the 1973 Constitution of the Islamic Republic of Pakistan.

[4] By the Constitution (Amendment) Order of 1980.

[5] Article203-D, 1973 Constitution of the Islamic Republic of Pakistan.

implementation of the *Hudood* Ordinances has had damaging consequences on all sections of Pakistani society. Women and religious minorities, in particular, have been targeted and victimized as a result of these Ordinances.[6] Further, the imposition of the *Hudood* Ordinances, an exclusively Islamic code, on non-Muslims is also discriminatory in the manner of its application. For example, a prerequisite for the application of the *Hadd* punishment, strict evidential requirements must be satisfied. In most cases, this means a number of adult Muslim witnesses. In accordance with evidentiary requirements, while Muslims can give evidence against non-Muslims, non-Muslims are barred from giving evidence against an accused who happens to be a Muslim.

The failure to provide adequate protection to ethnic, linguistic and religious minorities in Pakistan is an unfortunate aspect of the country's chequered legal and political history. In this regard, two particularly worrying trends have emerged: firstly, the suppression of the rights of ethnic minorities such as Baluchis, Pathans, Mohajirs and Sindhis, all of whom have had their demands for greater autonomy met with severe government repression: secondly, the freedoms of religious minorities, such as Hindus, Christians and Ahmaddiyas, were curtailed as a result of harsh legislation around the issue of religious offences. Sectarianism appears to be unchecked by the government, contributing to communal clashes in addition to the ethnically rooted conflicts that have characterized Pakistan's history, recently most pronounced in Sindh and Baluchistan provinces.

Concern among Pakistan's religious minorities arises from several sources, including the continuation of the 'anti-blasphemy laws' and the *Hudood* Ordinances. During the Islamization period of the military dictator, General Mohammad Zia-ul-Haq, a series of anti-blasphemy related offences were introduced to Chapter XV of the Penal Code of 1857. Based on these laws, a person found to be critical of the Prophet of Islam or his companions could face a jail term. Subsequent amendments made the death penalty mandatory for anyone defiling the name of the Prophet Mohammed. The induction of these provisions opened the way for persecution of religious minorities under the pretext of anti-blasphemy legislation.

Since independence, Pakistan has experienced democratic as well as dictatorial regimes. Interestingly, every dictator has introduced his own system of governance through election. The country's first Constitution was adopted in 1956 but was short-lived. It was abrogated in 1958 when martial law was imposed. A new Constitution emerged in 1962 and then annulled in 1969, again under martial law. A third and current Constitution was suspended again in 1999, with the military coup of October 1999. Immediately after coming to power, the military ruler General Pervez Musharraf promised protection of the rights of religious minorities and an end to the culture of religious intolerance. However, these promises were not honoured.

**2. Present context of enforced disappearances**

Reports abound to the effect that the Pakistani government has committed human rights violations against hundreds of Pakistani and foreign nationals in cooperating with the US-led "war on terror",

[6] Hudood Ordinance and Islamic provisions, 1973 Constitution of the Islamic Republic of Pakistan.

which is a view endorsed by many others.[7] In Pakistan hundreds of people have been arbitrarily arrested and detained in secret; becoming victims of enforced disappearances. Many have been tortured, with their families subjected to harassment and threats. Amnesty International has alleged that the right to *habeas corpus* has been systematically undermined: state agents have refused to comply with court directions or have lied in court. Hundreds of detainees have been unlawfully transferred (sometimes in return for money) to other countries, including the US Naval Base at Guantánamo Bay (Cuba), Bagram airbase (Afghanistan) or are believed to have been sent to secret detention centres elsewhere. Such transfers violate Pakistan's Extradition Act and the principle of *non-refoulement* which prohibits the transfer of people to countries where there is a risk of them being subjected to serious human rights violations such as torture and other forms of ill-treatment or enforced disappearance. Agents from other countries, including the USA, appear to have known of, visited and interrogated people held unlawfully in secret places of detention.[8]

Whoever is tortured or killed in custody or in fake encounters are termed by the state as being "terrorists".[9] According to the information collected by the Human Rights Committee of the Sindh Bar Council and the Lawyers Committee for Human Rights, 878 men and women were killed under the pretext of honour, during 2006, including over 500 women, the majority of who were married, and some 20% of who were minors. Around 2100 women were molested. 3100 children were reportedly sexually harassed or abused.

Generally, enforcement agencies work under the government, but in Pakistan the situation is somewhat different. Every Enforcement agency is an institution with its own mandate and objectives. Presently, in Pakistan the Police, the Federal Investigation Agency (FIA), Central intelligence Agency (CIA), Intelligence Bureau (IB), Military Intelligence (MI) and Inter Service Intelligence (ISI) are known as enforcement agencies. After the 1971 war, a lack of trust between the elected Government and intelligence agencies, led to political and cultural turmoil and undermined efforts to maintain law and order. The height of these tensions resulted in civil unrest in 1978, where political activists who opposed martial law and policies of the Government, prisoners under trial and those in custody were either killed or held in prolonged detention. This situation was further exacerbated by people offering bribes to the police for extra judicial killings. Enforced disappearances became a convenient method to stifle dissent and to immobilize political activists and civil society actors, which paved the way for rampant lawlessness.

Illiteracy, feudalism, ethnic disputes and poverty in Pakistan fuelled the abuse of power. A lack of political will to bring about a national level solution to this issue further exacerbated the problem of enforced disappearances. There is an urgent need to build the capacity of law enforcement authorities and a need for the Government to monitor their conduct. However, over the years, the Judiciary has intervened to uphold fundamental rights and to render social justice. In 2005 *Suo*

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[7] Asian Human Rights Commission (no date) PAKISTAN: the Human Rights Situation in 2006, available at: http://material.ahrchk.net/hrreport/2006/Pakistan2006.pdf [Accessed on 15th September 2010].

[8] Amnesty International (no date) Pakistan: Working to stop human rights violations in the "war on terror", available at: http://www.amnesty.org/en/library/asset/ASA33/051/2006/en/866efdbd-d3cd-11dd-8743-d305bea2b2c7/asa330512006en.html [Accessed on 15th September 2010].

[9] Asian Human Rights Commission (no date) PAKISTAN: the Human Rights Situation in 2006, available at: http://material.ahrchk.net/hrreport/2006/Pakistan2006.pdf [Accessed on 15th September 2010].

*Moto* intervention in the Supreme Court was resorted to on a regular basis. Justice Iftikhar Mohammad Chaudhry (the current Chief Justice) revived the *Suo Moto* tradition and intervened in matters relating to human rights; environment, public policy, extra judicial killing and enforced disappearances of innocent civilian. This intervention of the Courts reassured the media and civil society. The real impetus behind this *Suo Moto* process was to redress injustices caused to individuals at the hands of authoritarian governments, unconstitutional acts of the enforcement agencies, and as a result of disillusionment with the formal legal system.[10]

### 3. State of Emergency

Violence increased significantly in Pakistan since 2007, in the wake of nationwide protests following the sacking of the Chief Justice by General Musharraf. In May 2007, 41 people were killed in days of street battles and strikes in Karachi as more people took to the streets challenging Musharraf's action and his rule. A report by the Human Rights Commission issued soon thereafter, found that the violence was incited by the provincial authorities in the province of Sindh.

The judiciary was deposed on November 3, 2007, by the imposition of a state of emergency by President Musharraf in his capacity as Chief of Army Staff (COAS) which was supra-constitutional. Around 60 senior judges were placed under house arrest. Because of the state of emergency the Constitution was put in abeyance and fundamental rights were suspended. A parallel, the judiciary was established to approve as legal, these steps of the executive. Cases concerning disappeared persons, and corruption were suspended in the courts. Under the state of emergency declared by General Musharraf on November 3, 2007, a Constitution (Amendment) Order, dated 20 November 2007, was issued. Under section 6 of this amendment, the addition of Article 270AAA to the Constitution ensured that no acts performed by any State authority or member thereof can at present be challenged in any court in Pakistan, including the Anti-Terrorism Court or the High Court. This amendment continues to grant total *de facto* impunity to all State-actors in Pakistan. A two-thirds majority in the Parliament (the Senate and the National Assembly) is required to undo this amendment. However, the new government has failed to undo the amendment, which remains an obstacle in preventing the violations of human rights regarding disappearance and arbitrary arrest.[11]

The judiciary is also at loggerheads with the parliament concerning the modification of laws put in place by the previous government. In its decision to declare the country's recent state of emergency that was imposed by President Musharraf as illegal and unconstitutional, the Supreme Court referred the matter to the parliament. President Musharraf's autobiography, '*In the line of fire*', published in September 2006 sheds significant light on Pakistan's conduct in the "war on terror" and the arbitrary use of emergency law.[12] The descriptions of raids, arrests and transfer to US custody contained in the book corroborate the allegation that arrests were carried out in breach

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[10] *State v. WASA* 200 Civil Law Cases(CLC) 471.

[11] Asian Human Rights Commission (no date) The State of Human Rights in Pakistan in 2009, available at: http://material.ahrchk.net/hrreport/2009/AHRC-SPR-006-2009-PakistanHRReport2009. pdf [Accessed on 17th September 2010].

[12] Amnesty International (no date) Pakistan: Working to stop human rights violations in the "war on terror", available at: http://www.amnesty.org/en/library/asset/ASA33/051/2006/en/866efdbd-d3cd-11dd-8743-d305bea2b2c7/asa330512006en.html [Accessed on 15th September 2010].

of custodial safeguards, under either regular criminal law or the Anti-Terrorism Act; that no criminal charges were brought against terror suspects; and that detainees were denied the rights guaranteed by the Constitution of Pakistan including to engage a lawyer of their choice and to contact their families. President Musharraf stated that national "self-interest and national self-preservation" informed his decision that Pakistan should join the US led "war on terror".

The autobiography adds:

> *"We have done more than any other country to capture and kill members of al Qaeda and to destroy its infrastructure in our cities and mountains. We have earned bounties totaling millions of dollars. Those who habitually accuse us of 'not doing enough' in the war on terror should simply ask the CIA how much prize money it has paid to the government of Pakistan".*

However, in subsequent interviews, President Musharraf stated that the money had not been paid to the government. While offering cash rewards for the capture of suspected criminals does not in itself violate international human rights standards, offering large amounts of money for the capture of people matching a vague and broadly defined profile rather than for specific individuals who can be identified, opens the door to opportunists and bounty hunters to claim the reward for the arrest of people without reasonable grounds that they committed a crime. The practice has encouraged arbitrary detention and enforced disappearances.[13]

The book claims:

> *"The policy followed by Pakistan on the extradition of foreigners has been first to ask their countries of origin to take them back. If a country of origin refuses (as is normally the case), we hand the prisoner over to the United States".*

The book further observes that one prominent terrorist, Khalid Sheikh Mohammad was held for only three days before being handed over to US custody. The speed of this transfer however does not allow for meaningful consultation with the country of origin. Moreover, the quick transfer to US custody of this and other detainees indicates that the procedures followed are in breach of Pakistan's extradition law.

Further, taking into consideration the current context of Pakistan, the escalating conflict between the State and militant Islamic forces, which has resulted in increased violence and terrorism in the country, accompanied by political wrangling and the continuing weakness of Pakistan's civilian institutions and mechanisms of the rule of law, have given rise to a very volatile situation. Added to this is the lack of effective leadership, as embattled President Zardari has been hanging on to

[13]Supra footnote 11.

power in the face of growing opposition, and the country has found itself facing dire economic circumstances.[14]

### 4. Writ of *Habeas Corpus* and the enabling provisions of law

Power is vested with the Supreme Court under Articles 184 (3) and 187, and in the High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan with regard to the writ of *habeas corpus* along with other provisions of Criminal Procedure Code. The detailed provisions are listed below for easy reference:

The Supreme Court has been conferred with the power to entertain a petition under Article 184(3) of the Constitution directly, the case involves a question of public importance; and the question involved pertains to the enforcement of any of the Fundamental Rights contained in Chapter 1 of part 11 of the Constitution.

If the above two conditions are met, provision of Article 184(3) of the Constitution confers power on the Supreme Court to make an order of the nature mentioned in Article 199 of the Constitution. The scope of Article 199 which confers jurisdiction on the High Courts is much wider than the jurisdiction conferred on the Supreme Court under Article 184(3) of the Constitution. The High Court can enforce Fundamental Rights under clause (2) of Article 199, it can also pass an appropriate order regarding matters covered by sub-clauses (a) and (b) of clause (1) of Article 199 of the Constitution.

Article 199 (1) sub-clause (b) (i):

> *"b) on application of any person, make an order:*
>
> > *i) directing that person in custody within the territorial jurisdiction of the Court be brought before it so that the court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner."*

A *habeas corpus* petition under Article 199 of the Constitution is not restricted only to cases of actual detention or confinement, but this writ is applicable as an effective remedy in all cases of wrongful deprivation of personal liberty. Thus, if any branch or part of civil liberty is taken away or abridged in an illegal manner, that can be made the subject-matter of a writ of *habeas corpus* under the Constitution. A writ of *habeas corpus* filed under Article 199 of the Constitution will cover cases of alleged illegal deprivation or curtailment of any liberty of citizens.

The right of a person to a petition for *habeas corpus* is a high prerogative right and is a constitutional remedy for all matters of illegal confinement. This is one of the most fundamental rights known to the Constitution. No limitation is placed on the exercise of this right. Actual or

[14] Asian Human Rights Commission (no date) The State of Human Rights in Pakistan in 2009, available at: http://material.ahrchk.net/hrreport/2009/AHRC-SPR-006-2009-Pakistan-HRReport 2009.pdf [Accessed on 17th September 2010].

assumed restrictions cannot be imposed by any subordinate legislation. If the arrest of a person cannot be justified in law, there is no reason why that person should not be able to invoke the jurisdiction of the High Court immediately for the restoration of his liberty which is his basic right. In all cases where a person is detained and he alleges that his detention is unconstitutional and in violation of the safeguards provided in the Constitution, or that it does not fall within the statutory requirements of the law under which the detention is ordered, he can invoke the jurisdiction of the High Court of the Constitution of Pakistan (1962) and ask to be released forthwith.[15] In the case of *Abdul Sattar v. SHO,*[16] the High Court held the detention to be illegal, ordering the detainees release and directing the SHO to pay Rs 5000 by cost to the detenu and also intimating the IG to initiate proceedings against the perpetrator.

An order in the nature of *habeas corpus* is intended to preserve the liberty of the subject and is a safeguard against unlawful or improper manner of detention. It should be so construed as to advance the remedy and suppress the mischief, and should always be construed in favour of the subject i.e., the detenu.[17] Writ jurisdiction provides a right to the petitioner, it is not a writ of course; and therefore, may be refused where there is an alternative remedy available by which, the validity of detention can be questioned. Even if a fit case is made out showing *ex facie* a want of jurisdiction in the authority making an order of commitment yet if it appears to the Court that it is purely a technical defect or the conviction is otherwise valid, the Court may not interfere with issuance of *habeas corpus*[18]

Section 491 of the Criminal Procedure Code empowers the High Court,

> *"Whenever it thinks fit, to direct:*
>
> *a) a person within the limit s of its Appellate Criminal jurisdiction to be brought before the court to be deait with according to law;*
>
> *b) a person illegally or improperly detained in public or private custody within such limits be set at liberty;*
>
> *c) a prisoner detained in any jail situated within such limits be brought before the court to be examined as a witness in any matter pending or to be inquired into in such Court;*

[15] PLD 1965 Lahore 135 (FB); 17 DLR (W.P.).
[16] 1997 UC 313.
[17] (PLD 1967 Lah. 103).
[18] (PLD 1959 Dacca 279).

*d) a person detained as aforesaid be brought before a Court Martial or any Commissioner for a trial or to be examined touching any matter pending before the purpose of trial; and*

*e) a prisoner within such limits be removed from one custody to another for the purpose of trial; and*

*f) the body of a defendant within such limits be brought in on the Sheriff's return of cepi corpus to a writ of attachment.*

*(IA) The High Court may, by general or special order published in the official Gazette, directed that all or any of its powers specified in clauses (a) and (b) of sub-section (1) shall, subject to such conditions, if any, as may be specified in the order, be exercisable also by a Sessions Judge, or an Additional Sessions Judge within the territorial limits of a Sessions Division*

*(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section.*

*(3) Nothing in this section applies to persons detained under any law providing for preventive detention."*

This provision of law at times excludes preventive detention under Section 3, of the Maintenance of Public Order Ordinance (1960)[19]and Article 245 (1) (2) (3) (4) of the 1973 Constitution in which instance, jurisdiction of the High Courts is barred under Article 199 of the Constitution. However the following provision gives immense power to the High Court to prevent any misuse of judicial or executive authority.

*"561-A Saving of inherent power of High Court-Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."*[20]

Once the High Court has assumed jurisdiction to adjudicate the matter, justifiability of the issue raised before it is beyond question, to secure the ends of justice, the Court can examine the *mala fides* of the action taken.

Section 100 of the Criminal Procedure Code relates to search of persons wrongfully confined:

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[19] Section 3 (6), Punjab Maintenance of Public Order Ordinance, 1960. The authority making such orders has been granted the discretion to refuse to disclose facts, which the authority considers to be against public interest. See proviso to Section 3 (6), id.

[20] Section 561 of the Criminal Procedure Code of Pakistan.

*"If any Magistrate of the first class has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant and the person to whom such warrant is directed may search for the person so confined and such search shall be made in accordance therewith, and the person, if found shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper."*[21]

This provision of the law is resorted to if the matter is pending before a Magistrate. This provision is mostly used when the local police detain persons without any charge or any other authority or person detains a person with any authority or reason. The relatives and family members in such instances can file a complaint before the Magistrate for the recovery of the detainee.

Historically these provisions of law had been violated by courts and the authority during martial law. The provisions of Article 245 of the 1973 Constitution states:

*"1) The armed forces shall under the direction of the Federal Government, defend Pakistan against external aggression or threat of war, and ,subject to law, act in aid of civil power when called upon to do so.*

*2) The validity of any direction issued by the Federal Government under clause (1) shall not be called in question in any court.*

*3) The High Court shall not exercise any jurisdiction under Article 199 in relation to any area in which the Armed Forces of Pakistan are, from the time being, acting in aid of civil power in pursuance of Article 245.*

*Provided that this clause shall not be deemed to affect the jurisdiction of the High Court in respect of any proceeding pending immediately before the day on which the Armed Forces start acting in aid of civil power.*

*Any proceeding in relation to an area referred to in clause (3) instituted on or after the day Armed Forces start acting in aid of civil power and pending in any High Court shall remain suspended for the period during which the Armed Forces are so acting."*

The following issues arise when courts refuse to interfere in matters of illegal detention:

1. What directions have been issued to the Armed Forces by the Federal Government under Article 245(1)?

2. Does the Court as the custodian of the Constitution have the power to question the nature of directions given by the Federal Government to the Armed Forces?

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[21] Section 100 of the Criminal Procedure Code of Pakistan.

3. Does the Court as the custodian of the Constitution have the power to interpret any direction, if it is against the Constitution or Fundamental Rights?

## 5. The writ of *Habeas Corpus* in operation

The writ of *habeas corpus* provides relief from unlawful custody. The writ itself does not, however, tell us what constitutes unlawful custody. The effectiveness of *habeas corpus* in a given jurisdiction depends on the extent to which that jurisdiction guarantees the rights of individuals. If the jurisdiction provides few or narrow rights protection, or if the proceedings are hobbled by procedural technicalities, the likelihood that relief will be granted is minimal. For the issuance of the writ of *habeas corpus* there are certain requirements that have to be met. Firstly, there must be a detention, secondly the detention must be illegal or improper and thirdly an unauthorized or improper place of confinement may also be a ground for the issuance of a writ of *habeas corpus.* When courts finds detention was without lawful authority apart from directing his release can pass any appropriate incidental order.

In Pakistan, the efficiency of court intervention in matters relating to missing persons is often questionable, especially in situations where the military is in power. The High Court is generally unable to trace the whereabouts of disappeared persons, since they lack the power to search places of detention controlled by the military. The right to *habeas corpus* has been systematically undermined as a result, and in some cases the courts have ordered that the disappeared persons be produced before the courts, but these orders have reportedly been ignored by the military. In addition, those released are warned not to speak publicly about their experiences in detention.[22]

Several instances are evidenced where the courts grant long adjournments when hearing *habeas corpus* petitions despite the urgency of such cases. Instances of accepting without question state agents' denial of any knowledge of the disappeared person's whereabouts; of failing to invoke and apply contempt of court legislation, when persons subjected to enforced disappearance re-appeared from a state agency's custody after that agency had denied in court knowledge of his or her fate or whereabouts have also been brought to light.[23]

In 1995, after the large scale arbitrary arrests and abductions of members of Mahager Qomi Moment (MQM) their family members filed petitions with the High Court of Lahore, Karachi, requesting that their relatives be brought before a Judicial Magistrate. However, such persons were never produced before the courts, or any judicial body. No information was provided to the relatives about the whereabouts of these detained persons. The perpetrators of these disappearances acted with impunity and the Government took no action against such persons, in spite of its responsibility under both national and international law.[24] The situation is not much better under civilian rule. Various cases in Pakistan bear testimony to the fact that finding the whereabouts of missing persons and giving them access to justice can be just as elusive. Executive

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[22] See, para 274, UN Doc.A/HRC/7/2 dated January 2008.

[23] International (no date) Pakistan: Working to stop human rights violations in the "war on terror", available at: http://www.amnesty.org/en/library/asset/ASA33/051/2006/en/866efdbd-d3cd-11dd-8743-d305bea2b2c7/asa330512006en.html [Accessed on 15th September 2010].

[24] See Para. 333, UN Doc. E/CN.4/1996/38 dated 15 January 1996.

authorities are generally reluctant to assist courts in matters of missing persons because of their own alleged involvement.

In a recent case, the Petitioner alleged that her husband (an Imam in a mosque) was arrested by the Station House Officer (SHO) of a Police station, and thereafter, handed over to other law enforcement agencies. His whereabouts were not known since then. However, the SHO denied arresting the petitioner's husband and handing him over. Under the circumstances the High Court directed the Deputy Inspector General (Operation) to hold an inquiry into the matter after recording statements of the Petitioner, and any other witness: to submit a detail report to the High Court. The High Court further directed the DIG to form a team to search the whereabouts of the missing person and produce him before the High Court. He was asked to at least discover the agency in whose possession the missing person was in, so that an appropriate order could be passed for his production before the High Court. No allegation was on record to the effect that some Federal Agency was holding the missing person in its custody.[25]

According to a conservative official estimate, at the end of 2008, there were 94 outstanding cases of missing persons in Pakistan reported by the United Nations.[26] However, the Pakistan Government refused to acknowledge the arrest or detention of these persons and has despite the intervention of the Supreme Court of Pakistan, been either unable or unwilling to discover or disclose their fate or whereabouts. The missing persons therefore, remain deprived of their liberty and do not have the protection of the law. Consequently, the families of missing persons prompted the Supreme Court to take up the case of missing persons, which the Court did in exercise of its original jurisdiction pursuant to Article 184(3) of the Pakistan Constitution.[27]

The Supreme Court reportedly started investigating some 600 cases of disappearances. While some of these cases allegedly concerned terrorism suspects, many involved political opponents of the government. The Supreme Court, headed by Chief Justice Iftikhar Muhammad Chaudhry, publicly stated that it had overwhelming evidence that Pakistan's intelligence agencies were detaining terror suspects and other opponents.[28] The Supreme Court's intervention in the matter, which was considered highly sensitive on account of the Government's proxy war on terror, led to the unprecedented dismissal of sixty judges pursuant to the proclamation of emergency in 2007.[29]

Following a lengthy protest campaign by lawyers, known as the Lawyers Movement, the Zardari government reinstated Iftikhar Chaudhry and other deposed Judges on March 16, 2009, through a presidential executive order. There were hopes that, following the ouster of Pervez Musharraf, democratic elections and the re-instatement of the judiciary, the human rights situation in the

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[25] *Naz Bibi v. Station House Officer*, 2006 P. Cr. L.J 1447 (Karachi).

[26] See Para. 296, report of the Working Group on Enforced or Involuntary Disappearances ,UN Doc A/HRC/10/9 dated 6 February 2009.

[27] Article 184(3) of the Constitution, "The Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the fundamental Rights conferred by Chapter 1 of part 11 is involved, have the power to make an order of the nature mentioned in the said Article".

[28] See ,para, 296, report of the working Group on Enforced or Involuntary Disappearances, UN Doc A/HRC/10/9 dated 6 February 2009.

[29] Proclamation of Emergency, Gazette of Pakistan, Extraordinary, partil, 3rd November 2007,PLD 108 (Federal Statutes) 2008.

country would improve. Currently, it is heartening to see the Supreme Court trying to make certain that state agencies respond promptly and honestly to *habeas corpus* applications which is one of the few mechanisms available to the families of persons subjected to enforced disappearances who seek redress.

However, concerns have been raised in various quarters regarding the requirement that those recently released from unlawful custody provide testimonies about their experiences as it may expose them to further human rights violations. This highlights the necessity for the Supreme Court to put in place mechanisms that will ensure their safety if they choose to give testimonies about their experiences. Missing persons have neither been formally charged, nor have they been detained as a preventive measure under any federal or provincial preventive detention laws.[30] As such, none of the constitutional or other legal procedures for either arrest/detention or preventive detention appears to have been followed.

An enforced disappearance constitutes the criminal offences of kidnapping or abduction under the Pakistan Penal Code 1860 (PPC).[31] Different forms of punishment are prescribed for different types of kidnappings and abductions.[32] A person who wrongfully conceals or confines persons who have been kidnapped or abducted is equally culpable.[33] The court within the local limits of whose jurisdiction the person was kidnapped or abducted has the power to inquire into and try the offences; this exercise of criminal jurisdiction in accordance with national laws is in addition to any jurisdiction exercisable under international law. Whenever, an aggrieved person files a writ before the High Court, he faces problems from the executive. The right to *habeas corpus* has been systematically undermined by State agents who refuse to comply with court directions to provide information about the whereabouts of detainees. It is mainly for such reasons, that many detainees have been unlawfully transferred to the custody of other countries or authorities. In many such cases in Karachi and Lahore, the Secretary of Interior on behalf of the Federal Government has filed his personal affidavits denying the whereabouts of the detainees. It is also disturbing to note that the government denies having any control over the non-civilian agencies.

After 1999, certain observations and decisions of the apex courts had further damaged the extraordinary jurisdiction of the Court. The scope of Article 199 of the Constitution, especially with regards to the writs of *habeas corpus* has been narrowed down by the recent decisions of the Superior Courts. This is reflected in the case of *Javed Ibrahim Paracha*. The said petitioner was a former member of the National Assembly from Kohat KPK, who filed a Constitution Petition under Article 199 of the Constitution challenging the illegal arrest and detention of some 57 foreigners mainly from Arab countries and 145 Pakistani citizens mainly from the tribal areas.[34] This writ petition was dismissed by the Peshawar High Court mainly on the ground, *inter alia*, that

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[30] See,e.g., Punjab Maintenance of Public Order ,1960, which provides for preventive detention in the province of Punjab.

[31] See, Chapter XVI-A regarding wrongful restraint and wrongful confinement, Pakistan Penal Code of 1860.

[32] Section 368, Pakistan Penal Code of 1860.

[33] See 363,365,367, Pakistan Penal Code of 1860, dealing with punishment for kidnapping, abduction with intent to secretly and wrongfully confine person and kidnapping or abducting in order to subject person to grievous hurt etc.

[34] See the Security of Pakistan Act (1952), which provides for preventive detention in matters relating to defense, external affairs, and the Security of Pakistan and Foreigners Act (1946).

the petitioner was not an aggrieved party. Unexpectedly, the Supreme Court of Pakistan has also adopted the same view and dismissed the appeal against the decision of the High Court on the sole ground that the petitioner was not an aggrieved party and that such petition does not amount to public interest litigation.[35]

This decision is contrary to settled law and ignores the rule laid down by the Supreme Court of Pakistan in the case of *Begum Nusrat Bhutto*.[36] In the said case, a bench of Supreme Court consisting of nine (9) Judges held that:

> *"It is true that in the case before us the petitioner is not alleging any contravention of her own Fundamental Rights, but she has moved the present petition in two capacities, namely; as wife of one of the detainees and as Acting Chairman of the Pakistan People Party to which, all the detainees belong. In the circumstances, it is difficult to agree with Mr.Brohi that Begum Nusrat Bhutto is not an aggrieved person within the meaning of Article 199"*

Reliance was also placed on the case of *Manzoor Illahi*.[37] The petitioner, Javed Paracha, was not acting as *'pro bono publico'* but was acting as a friend of the detained individual, which was sufficient compliance of the term, *'any person'* used in the Article 199 of the Constitution of Pakistan.

**6. Impact and Effect of Commissions of Inquiry**

In Pakistan, the Commission of Inquiry Act of 1956 provides for the appointment of Commissions of Inquiry and for vesting such Commissions with certain power. However, historically, the performance of these Commissions is nothing more than the mere recoding of evidence. Commissions of Inquiry are considered a very weak mechanism to pacify the grievance of aggrieved persons or victims in Pakistan. Pakistan recently experienced the holding of an inquiry into Benazir Bhutto's assassination in Rawalpindi by the United Nations. The Pakistan Peoples Party, which Bhutto had led, had lobbied the UN to investigate, as it did not believe the findings of the official inquiry carried out under former president Musharraf, which blamed Jihadists led by the then Pakistani Taliban chief, Baitullah Mehsud, for her murder.

Asif Zardari, Bhutto's husband, now president of Pakistan, had endured criticism for sending the investigation to the UN, but his stance appears, to many to be vindicated. More than two years after Bhutto's death, much evidence has been destroyed. A postmortem was never carried out. The UN commission of inquiry began work in July 2009, headed by the Chilean ambassador to the UN, Heraldo Muñoz, and supported by Marzuki Darusman, a former attorney-general of Indonesia, and Peter Fitzgerald, a veteran of the Irish police. One of the most damning parts of the report is the UN team's claim of a cover-up. It said it was "mystified by the efforts of certain high-ranking

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[35] (PLD 2004 SC 482).
[36] (PLD 1977 SC 657).
[37] (PLD 1975 SC-66).

Pakistani government authorities to obstruct access to military and intelligence sources".[38] The UN report was declared a defective document by legal experts in Pakistan. It was observed that at the end of the report the reader is left with the same questions that he had when he started to read the report to find answers. Critics of the report allege that from a strictly legal point of view, the manner in which the report has been drafted is not consistent with the way in which documents probing high-profile events are prepared.

The Commission of Inquiry for the Enforced Disappeared has started working since 10 May 2010. It was formulated by the Government of Pakistan keeping in view the desperation of the families and miseries of the Enforced Disappeared since 9/11. The government formed a judicial commission to probe cases of disappearances, which comprises one judge from the Supreme Court as its head and two retired High Court judges (the Chairman of the Commission is Justice retd. Kamal Mansoor Alam, Justice retd Fazulur Rehman and Justice retd. Nasira Iqbal).[39] It began working in June 2010, with a mandate to operate for three months, but it has only been considering 17 cases of disappearances, despite the large number of cases reported in the country. One reason for this is that the commission requires that the families of the missing persons provide it with a First Information Report (FIR) before it considers the case. However, the police typically refuse to file FIRs concerning human rights violations such as disappearances, even though the Supreme Court has issued a ruling obliging the police to do so. Furthermore, the judicial commission has reportedly never requested explanations from the State intelligence agencies concerning allegations of disappearances, and is therefore ineffectual.

Beyond this, the Government, Judiciary and the Judicial Commission on Disappearances need to ensure that justice is served for cases of grave human rights violations; by ensuring, effective, impartial investigations and prosecutions of cases; appropriate punishment of those responsible; and adequate reparation for the victims and/or their families. Meanwhile the government of Pakistan has been urged to provide a clear signal of its intention to take necessary action concerning this widespread problem by ratifying the International Convention for the Protection of All Persons from Enforced Disappearances, by criminalizing disappearances in its domestic legislation and by implementing the law to the full. The government of Pakistan has also been urged to cooperate fully with the Human Rights Council and its expert mechanisms, notably by issuing a standing invitation to the Working Group on Enforced or Involuntary Disappearances to conduct a country visit.[40]

Recently in several petitions related to missing persons[41] a three member bench of the Supreme Court of Pakistan consisting of, Justice Javed Iqbal, Justice Tariq Pervaiz, and Justice Asif Seed

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[38] Shah, S. & MacAskill, E. (16 April 2010). Pakistan to launch new inquiry into Benazir Bhutto murder after UN report, available at: http://www.guardian.co.uk/world/2010/apr/16/benazir-bhutto-murder-un-report [Accessed on 16th September 2010].

[39] Asian Centre for Human Rights. 27 Aug 2010. PAKISTAN: Thousands of persons remain missing amid government inaction, available at: http://www.reliefweb.int/rw/rwb.nsf/db900SID/EKIM-88Q7BK?Open Document [Accessed on 16 September 2010].

[40] Ibid.

[41] Human Right Cell,Nos 965/2005,4943/06, 292/071375/07,2048/07,2050/07,2051/072549/072661/073317/074504/07,Cost.ps.05/07,29/0.737/07,55/07,7679-G/09,8451-B/09,CMA.4419/09 in Const,P.5/07, HRCs,2724/07,8284-S/09,13405-P/09,527-529-N/10,530-P/10,531-534-g/10,535-N/10,536-P/10,20903-

Khan Khosa constituted a joint commission comprising of a joint secretary from the Ministry of Foreign Affairs, Ministry of Interior, Ministry of Finance, Ministry of Law and representatives from Human Rights Commission to highlight the position of Pakistani nationals who are languishing in jails in different countries specially in Thailand, Afghanistan and the Middle East, to ensure the formulation of a comprehensive programme to address their grievances.

The Court further directed the representative of different Ministries to amend the guidelines to enable these individuals to have access to legal recourse. In the same petitions, the families of the missing persons raised the point of whereabouts of the missing persons, on the point the Court also directed that the above constituted committee should be made public and some responsible officer may be deputed to perform as the liaison officer and his telephone numbers should be published, so that any aggrieved person may contact him directly to lodge a complaint in order to facilitate prompt action if any. Further, when such complaint or information about missing person's whereabouts/place of detention is received, that should be brought to the notice of the above-mentioned committee for immediate action.

Commissions of Inquiry have not been a success in Pakistan due to the following reasons:

1) the reports of the Commissions and their findings do not pressurize the Government to carry out a serious and credible investigation (*Mir Murtaza Bhutto* murder case, Lal Mosque Islamabad);

2) the reports have never been made public (Report on Ahmadis, Hamud ur Rehman report, General Zia ul Haq's plane crash report);

3) appointment of the members of the Commission under Section 3 of Pakistan Commissions of Inquiry Act ,1956(PCI) by the President of Pakistan has a limited mandate;

4) the non cooperation of enforcement agencies;

5) lack of transparency, due process of law, credibility and effectiveness;

6) the Commission chooses to be selective in interviewing people, something that contradicts the essence of fairness and due process;

7) the members do not issue an advertisement inviting people to volunteer any information that they may have about the incident; and

8) the Commission report fails to give reasons for the selective interview process

Further, the reports are generally without annexes and no material is listed to show the basis of the conclusions.

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G/09,21400-P/09,21935-S/09,1397-P/10,1399-G/10,1400-P/10,1401-P/10,3106-G/10,3107-P/10,3108-P/10,3109-P/10,534-N/10.

## 7. State's response and outcomes

The government has taken certain steps that signal its commitment to human rights and improve the situation in the country. However, more needs to be done.[42] The government of Pakistan had ratified the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) in March 2010 and ratified International Covenant on Economic, Social and Cultural Rights (ICESCR) in 2008. Pakistan claimed in its pledges to the international community as part of its election bids to the Human Rights Council in 2006 and 2008 that the creation of a National Human Rights Commission was in process, although no developments have been seen concerning this in 2009.

Following a historic protest movement by lawyers, known as the Lawyers Movement, that began in 2007 and has been at the centre of the human rights and political struggle in the country since then, the Zardari government reinstated Iftikhar Chaudhry and other deposed Judges on March 16, 2009. This important culmination gave rise to hopes that the re-instated judiciary would build on momentum and begin seriously tackling cases of grave human rights violations, such as forced disappearances.

Despite these positive steps, Pakistan needs to introduce certain legislative measures in the existing domestic procedural laws, namely:

> 1) establish the conditions under which orders of deprivation of liberty may be given;
>
> 2) indicate those authorities authorized to order the deprivation of liberty;
>
> 3) guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of detention;
>
> 4) guarantee that any person deprived of liberty shall be authorized to communicate with, and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;
>
> 5) guarantee access by the competent and legally authorized authorities and institutions to the place where persons are deprived of liberty, if necessary with prior authorization; and
>
> 6) guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representative or their counsel, shall in all circumstances, be entitled to take proceedings before a court, in order that the court may decide

[42] Asian Human Rights Commission (no date) The State of Human Rights in Pakistan in 2009, available at: http://material.ahrchk.net/hrreport/2009/AHRC-SPR-006-2009-Pakistan-HRReport2009.pdf [Accessed on 17 September 2010].

without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.[43]

## 8. Conclusion

The need of the hour is to safeguard the independence of the Judiciary.[44] With the help of the people of Pakistan, the judiciary will be enabled to change the political, economic and social landscape of the country.[45] In the past the judiciary had failed to honour democracy by allowing undemocratic traditions to take root. However, the past must not hamper Pakistan's future. The judiciary must step out of its colonial formalism and traditional common law conservativeness, and translate itself into a robust, enlightened and progressive mechanism. The Supreme Court normally intervenes to uphold fundamental rights in *Suo Moto*, Public Interest Litigation and progressive interpretation of fundamental rights. This trend must be asserted to an even greater extent in instances of 'disappeared' persons. Pakistan's legislative framework is fairly well developed to deal with the issues of missing persons. However, what is lacking is the administrative will to enforce the available and applicable laws, perhaps because of the Government's own complicity. Consequently, the only meaningful recourse that families of missing persons have is to rely on the court system in Pakistan.

The Supreme Court needs not only to discover the whereabouts of the missing persons but also to ensure the restoration of their constitutional rights of security of a person and protection of law through impartial and fair trials of these persons in accordance with established legal procedures. Public interest demands not only restitution in this grave matter but retributive justice as well as to preclude such events from happening in the future.

The Court should carry out impartial investigations against those government functionaries who are accused of ordering or carrying out enforced disappearances. If the judiciary is prepared to take the challenge and if the Supreme Court is willing to lead the way to preserve, protect and defend the Constitution by going the extra mile, we can hope to salvage freedom and gthe right to life in Pakistan.[46]

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[43] International Convention for the Protection of all Persons from Enforced Disappearance, Article 17 (2).

[44] Preamble and Article 2A of the 1973 Constitution and part of the objectives resolution (Annex to the Constitution of 1973).

[45] "On the basis of more than twenty one years of experience as a member of the superior judiciary, I can say without any fear or contradiction that none of the Governments in Pakistan during my tenure wanted an independent judiciary. They preferred pliable judges over independent judges .The government sometimes attempted to use the judiciary to suppress their opponents" A Judge Speaks Out, by Ajmal Mian, Former Chief Justice of Pakistan-OXFORD University Press ,Karachi .

[46] Muhammad Majid Bashir, Supreme Court Rescues Citizens if Constitutional Rights are Violated, published on Info-Change and Feature Network Islamabad 10, August, 2010.

# THE CRIMINAL JUSTICE SYSTEM AND WRITS OF *HABEAS CORPUS*– COMMONALITIES AND DIFFERENCES IN BANGLADESH

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Bangladesh is a low lying riverine land comprising an area of 56 square miles and having a highly concentrated population of 158,065,841. It is situated on the Northern coast of the Bay of Bengal, sharing a small common border with Myanmar. Tropical monsoons, frequent floods and cyclones wreck havoc in the country. In ancient times, during 1000 B.C. Bangladesh was known as 'Vanga' or 'Banga', and ruled by Buddhists. During the 10th century Bengal was ruled by Hindus as a part of the Mughal Empire. Approximately 200 years (1757 – 1947) ago Bangladesh was ruled by British India. Since August 1947, it continued to remain a part of Pakistan but in 1971 as a result of the Liberation War it became an independent country and thereafter a Parliamentary Democracy. Bangladesh is generally a nation of law abiding and friendly people. It is an agricultural based economy with a per capita income of 599 USD. The people of Bangladesh maintain close family ties. Although it is a predominantly Muslim nation; Hindus, Christians, Buddhists minorities co-exist harmoniously together.

The Bangladesh legal system is influenced by the British Legal System as it is in countries like India, Pakistan and other parts of South Asia. Bangladesh's transition to parliamentary democracy was the result of a prolonged struggle for representative government. While it remained a part of Pakistan, its people were subject to martial law under several regimes. The oppression of the people of East Pakistan by authoritarian Pakistani generals and political leaders led to the Language Movement in 1952, the Peoples Revolution in 1969 and culminated in the War of Liberation in 1971. Even after Bangladesh emerged as an independent nation, there has been little peace in the country. Democracy, the Rule of Law and Fundamental Rights guaranteed by the Constitution of the People's Republic of Bangladesh still remain elusive.

## 1. Concerns Arising in regard to Extra –Judicial Executions

The failure of the Government to fully investigate extra-judicial killings carried out by the security forces, including the deaths in custody of alleged mutineers from the Bangladesh Rifles Border (BDR) border force remained a serious concern.[1] Members of the security forces have been involved in a number of extra-judicial killings. The Police, the BDR, the military and the Rapid Action Battalion (RAB) on occasion used unwarranted lethal force.

According to available government statistics, there was a 3 percent increase in the number of killings by all security forces during the year 2009. It is noted that the Government did not take adequate and comprehensive measures to investigate these cases despite public statements by high ranking officials that the government would show "zero tolerance" and would be fully committed to investigating all extrajudicial killings by security forces. The number of killings by the police

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[*] Senior advocate, Bangladesh. The assistance of Ms Dilhara Pathirana, attorney-at-law is acknowledged in the formulation of this paper.

[1] 2009 Human Rights Report: Bangladesh – US State Department www.state.gov/g/drl/rls/hrrpt/2009.

and allied security forces also increased. The media and local human rights organizations reported that no case resulted in criminal punishment and in the few cases where the government framed charges, those found guilty received a lenient administrative punishment for committing a criminal offence.[2]

*Examples of cases:*

**Case 1**

Mr. Md Mohiuddin Arif, aged about 30 years, technician of Apollo Hospital was arrested on 24.1.2010 at 7.30 am by the Rapid Action Battalion (RAB) from his home at Pallabi, Dhaka (RAB says he was arrested from another place). Three members of the RAB in plain clothes entered the house of Abdul Majid, father of Mohiuddin at Pallabi Dhaka on 23.1.2010and asked for Mohiuddin who was away from home. They told the victim's father to see that his son is at home when they came next. The following morning (24.1.2010) Arif (the victim) was taken to the RAB office without giving any reason/s for his arrest. They warned majid not to disclose the fact of the arrest to anyone. On 24.1.2010 at about 8pm, a RAB officer came to the victim's house accompanied by the victim and demanded that the family members hand over the keys of the steel almirah. The family members noticed that the victim was seriously injured and could hardly stand straight. The RAB members ransacked the entire house for about half an hour but were unable to find the pistol. To save himself from being tortured further the victim had told the RAB officers to take him home and that then he would hand over the pistol. Not finding the pistol at his home, he was taken back to the RAB office and beaten further.

On 25.1.2010 Mohiuddin Afif was handed over to the local Pallabi Police Station. In the evening, the victim's family members went to the Police Station, but they were not allowed to see him The Police/RAB officers had stamped on his chest and had broken his leg. Arif was charged with robbery in the P.S. Case No 15 dated 4.1.2010 under Section 394 of the Penal Code. The magistrate disregarding his apparent state of ill-health and in spite of a certificate from the Sarwardi Hospital indicating the serious nature of the injuries of the victim, which was annexed to the report, ordered him to be remanded.

The prison authorities made arrangements to treat Arif, but it was too late and he succumbed to his injuries on 3rd February 2010. Arif died leaving behind a young wife and two minor children. The Asian Human Rights Commission requested the Human Rights Commission of Bangladesh to hold an inquiry on this matter. A three member Committee was formed by the Ministry of Home Affair. The inquiry is still going pending.

**Case 2**

Another inquiry is pending against RAB for the killing of a young journalist, Mohmud Bappy, a 42- year-old transport labourer. Muzibar Rahman was arrested by the police in civilian dress on the 1st of July 2010. Muzibar's seven year old son was with him at the time of his arrest. He was

[2] *Supra*, note 1.

mercilessly tortured by the Police in the presence of his son. However, the police flatly deny arrest/torture charges.

Mujib's brother claimed that the police had demanded a bribe of 50,000 taka, but this sum was not paid. On Friday 2nd July 2010, Mujib's dead body was discovered by the side of the river, Turag. The police alleged that Mujib was a drug trafficker. The police refused to accept any blame or guilt for Mujib's murder but instead arrested two informants named Mohibul and Kazal. Muzibar Rahman (35 years) was killed by the Gulshan Police on 29.6.2010. Babul Gazi died in police custody in the Ramna Police Station. Zakir Hossain (45) died on the 9th of March 2010 while in police custody at the Ramna Police Station. (Pratham also died in police custody on 3rd July 2010)

These cases illustrate examples of the many instances where the Rapid Action Battalion or RAB an elite anti-crime and anti-terrorism unit of the Bangladesh Police carry out killing ostensibly in the guise of national security. In both these cases, the perpetrators, the RAB officers implicated in these killings were not prosecuted and held accountable. These extra-judicial killings by the police/RAB violate the most fundamental rights and human rights norms.

**2. Political Turmoil and Human Rights Violations**

In unstable democracies such as Bangladesh the electoral system produces not stability but frequent general strikes, riots and boycotts by the opposition. In consequence, the government resorts to Preventive Detention Laws to control the situation and in most cases there is ample room for abuse and victimization of political rivals.[3]

On 27th July 2010, the main opposition BNP announced a countrywide harthal from dawn to dusk. Close to 200 people were injured and an equal number arrested throughout the country during the clashes between the police and the agitators. Some B.N.P. leaders were arrested. However, there is no evidence that the police entered the house of an opposition leader, ransacked his house and mercilessly assaulted his family.

A member of parliament, Sahiduddin Chowdry Annie and some girls of Satra Dal of Eden (Mohila) College were severely assaulted by the police.[4] This has been widely circulated in the electronic media as well.

**3. Cases of Enforced Disappearances**

In 2009, the number of enforced disappearances increased. Due to heightened condemnation by local activists and international attention being given to the hundreds of extra-judicial killings that had been committed by Bangladesh's law enforcement agencies, law enforcement officers had begun to resort to forced or enforced disappearances as this practice makes it harder to trace those killed, identify the methods used to kill them or identify the perpetrators of these crimes. In an

[3] *Commonwealth Law Bulletin* Vol. 27, No 1, 2001.
[4] The Daily Independent, 28.06.2010.

already flawed criminal justice system where the perpetrators are not held accountable, the practice of enforced disappearances makes it even harder for justice to be served.[5]

**Case 1**

Chowdhury Alam, Commissioner of City Corporation, Dhaka was arrested on 27.6.2010 by plain clothes police as alleged by family members of the victim. It is also alleged that some 5 – 7 persons carrying firearms forcibly took the victim in a Micro bus which was parked in front of the victim's house. He was not produced at any police station nor was his whereabouts known to the members of his family. A writ of *habeas corpus* was filed by the victim's son in the High Court Division. The state denied that Chowdhury Alam was arrested by the police. However, the Court by an order dated 23.7.2010 issued a direction to the Respondent –State to investigate the matter and inform the Court as to where he is detained, his general health and conditions of incarceration. The Bangladesh Nationalist Party, BNP claims that Chowdury Alam was an active member of their party.

**Case 2**

Golam Martuza, claimed to be the Welfare Secretary of the Bangladesh Islamic Chatra Sabir was arrested on 14.7.2010 from the Paltan area by plain clothes police who identified themselves as D.B. Police. They took him away in a micro bus. Thereafter the detainee's brother, A.K.M. Samuzman searched for him at Patan Motijheed and Dhanmondi Police Stations, but could not find him. The brother of the detainee went to the Court but he could not find him. Finally, his brother filed the writ of *habeas corpus* No 5660 of 2010 in the High Court Division and obtained a ruling on 21.7.2010.

**Case 3**

Mr. Mohammad Salim Mian, a fruit trader was picked up by the members of the Rapid Action Battalion (RAB) from Salim's relative's house at Pirojpur village under the jurisdiction of the Kapasia police of the Gazipur district in the early hours of the morning of February 19, 2010 together with two other persons. The members of the paramilitary RAB force handcuffed and blindfolded the three persons and forcibly took them away in vehicles. The three persons were detained in unidentified places for several days without any public records of these arrests. Later, the other two co-detainees, Mr. Mainul and Mr. Mohammad Ali Hossain stated that Salim had been held in the custody of the 4th Battalion of the RAB at Paikpara, in the Dhaka Metropolitan city jurisdiction.

On February 28, the RAB -4 officials handed over Hossain to the Kafrul Police, who fabricated a case against Hossain before producing him before the Chief Metropolitan Judicial Magistrate Court of Dhaka, who released him on payment of a monetary penalty. Mr. Mainul was handed over to the Contonement Police, who charged him with murder and illegal arms possession and detained him in prison.

[5] Asian Legal Resource Centre – www.alrc.net/doc/mainfile./php/hrc15/629.

Mr Salim's (fruit trader) whereabouts remain unknown. Upon repeated refusal by the local police to record a formal complaint concerning this incident, a *habeas corpus* writ case (Petition No 2851 of 2010) was registered with the High Court Division Bench of the Supreme Court of Bangladesh. The Court heard the case once on 15 April. The country's Attorney-General's office claimed before the Court that according to the official records of the RAB-4, Mr. Salim was not arrested or detained by them. After hearing both parties the Court issued a direction against the government and ordered the seven respondents to explain the matter before court within three weeks. However, the case has not been heard again and Mr. Salim remains disappeared to date.[6]

None of the above cases have been effectively and satisfactorily investigated by the authorities. The law enforcement agencies, particularly the RAB is considered to be implicated in many of the abductions, continue to enjoy impunity. There is no publicly available record of the arrest and detention of victims. Predictably, all the allegations of abductions or arrest have been denied by the RAB; the police stubbornly refuse to register formal complaints against the RAB regarding the disappearances and harassed the complainants and recorded false information relating to these incidents of disappearances. This prevents and obstructs attempts by relatives to locate their loved ones and seek justice for these grave violations.[7]

**4. The Writ Remedy of *Habeas Corpus* and its Effectiveness**

The writ of *habeas corpus* is a legal remedy to obtain the release of a person who has been unlawfully held in custody or police detention or to make the person/s detaining him to bring him to court and explain the reason for his incarceration. The writ's sole function is to release an individual from unlawful imprisonment. The writ tests only whether a prisoner has been accorded due process, and does not adjudicate on his guilt or innocence. The writ is regarded as a bulwark of personal liberty.[8]

It is a useful remedy in cases of preventive detention. In Bangladesh, the writ is available under Article 102 (b) (i) of the Constitution where any person is illegally detained. In such a case any person on his behalf may file a writ of *habeas corpus*. The courts have interpreted 'any person' to mean the detenu himself,[9] or his father[10] or wife[11] or son relative or even friend. Under Article 44 (enforcement of fundamental rights) and Article 102 (b) (ii) confers the High Court Division the right to hear *habeas corpus* applications.

Some of the grounds on which a detainee may be released by the High Court are where it finds that there is no legal basis for the detention; the state has failed to provide reasons for arrest/detention and the detainee has not been given an opportunity of defending himself. Thus if the High Court is satisfied that the detenu has been detained arbitrarily then the Court can decree detention illegal

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[6] *Supra*, note 5.
[7] *Supra*, note 5.
[8] Wade, H.W.R *Administrative Law* (7th edn), Clarendon Press:Oxford, 1994.
[9] *Charanjit Lal v. Union of India* AIR (1915) SC 41.
[10] *Sundarajan v. Union of India* AIR (1970) Del 29 (FB).
[11] *Farzana Haq v. Bangladesh* (Writ Petition 170 of 1990).

and order his release forthwith.[12] The High Court Division has declared 198 detentions illegal in one day. This was an instance where a huge number of detentions were declared illegal.[13]

Apart from obtaining release from illegal detention, there is no legal provision to award compensation for wrongful arrest. The Bangladesh Supreme Court does not usually give awards of compensation but in some exceptional cases like in *Bilkis Akter Hossain v. Government*[14] the Court directed one lakh to each detainee as compensation for illegal detention. Article 9 (5) of the ICCPR of 1966, which Bangladesh has ratified states that "anyone who has been a victim of unlawful arrest/detention shall have an enforceable right to obtain compensation. In awarding compensation in this case, the Supreme Court of Bangladesh gives recognition to its international obligations under international conventions.

There are many instances when this remedy is denied to the victims, especially in cases where *habeas corpus* applications cannot be registered as the law enforcement agencies do not maintain or provide any official records regarding the abduction, arrests or detention and whereabouts of the victims.[15] As there is no information or evidence regarding the victims' deaths, including dead bodies, the relatives cannot file murder charges against the perpetrators. In instances where petitions have been registered with the Magistrate Courts, misplaced loyalties cause police officers to cover up crimes committed by their colleagues thereby preventing proper investigation.[16]

**5. Preventive Detention Laws in Bangladesh, India and Pakistan**

Preventive Detention is detention by the executive without trial or inquiry. Its objective is preventive and not punitive, and during this period there is neither trial nor enquiry by a Court of Law. In India the Preventive detention law was enacted in 1950 called the Preventive Detention Act, 1950. Consequently it was amended and replaced by the Maintenance of Internal Security Act, (MISA) of 1971. In India there are other laws that deal with preventive detention such as the Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) 1974, the National Security Act 1980, the Essential Services Maintenance Act (EMS) 1981 and finally the Terrorist and Disruptive Activities (Prevention) Act of 1985.

In Pakistan, prevention detention laws are contained in the Public Security Ordinance of 1949, Public Security Act (Amendment) 1950, Public Safety Ordinance 1952 and the Security of Pakistan Act, 1952. These laws cover preventive detention in various ways. In the original Constitution of Bangladesh there was no provision provided for preventive detention. But Preventive Detention was introduced to its Constitution through the passing of the 4th Amendment

[12] Sufian, Ashraful Arafat, Preventive Detention in Bangladesh, July – August 2008, Vol. 1, Issue 2, pp 166-176.
[13] Front Page of Prothom Alo, 8 Dec, 2002.
[14] (MLR) Mainstream Law Vol. 2 (1997) p. 123.
[15] *Supra*, note 5.
[16] *Supra*, note 5.

which made possible the enactment of the Special Powers Act of 1974. This is considered to be an anti-democratic and oppressive law which arbitrarily deprives people of their liberty.[17]

Preventive Detention laws confer enormous powers on government law enforcement authorities to detain persons. In the case of *Sasti v. State of Bengal*,[18] the Indian Supreme Court elucidated the nature of preventive detention as a detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detenu by legal proof but maybe sufficient to justify his detention. The rationale behind this reasoning seems to be that national security considerations override rights of personal liberty in times of crisis and threats to the public safety. However, the Indian Supreme Court observed in the case of *Pankaj Kumar v. State of West Bengal* AIR (1970) SC 97:[19]

> *"That appears to have been done because the constitutions recognize the necessity of preventive detention on extraordinary occasion when control over public order, security of the country, etc are in danger of breakdown. But while recognizing the need of preventive detention without recourse to the normal procedure according to law, it provided at the same time certain restrictions on the power of detention, both legislative and executive, which it considers as minimum safeguards to ensure that the power of such detentions is not illegitimately is not illegitimately or arbitrarily used."*

In Bangladesh the Preventive Detention laws empower the authorities to hold in custody a person (without trial) for a period of six months. This period is considered excessive in comparison to some other countries in the region. For instance in India this time is limited to 3 months[20] and in Pakistan the initial period of detention is three months. Neither the Bangladesh Constitution nor the Special Powers Act 1974 stipulates a fixed or limited period of detention which leaves room for unlimited or indefinite periods of detention. In Pakistan the period of preventive detention is eight months.[21] The Preventive Detention laws in Bangladesh are in line with the Maintenance of Indian Security Act of 1971 and the East Pakistan Public Safety Act of 1958. However, the Bangladesh provisions relating to preventive detention is considered more draconian than these two countries.

The Bangladesh Constitution provides for certain safeguards against the abuse of preventive detention laws. Article 33 deals with the rights of an arrested person. Article 33 confers three constitutional rights or safeguards that protect an arrested person. These are the right to be told the reason of arrest, right to be produced before a magistrate within 24 hours and if detention is necessary beyond this period consent of the magistrate is essential and the arrested person is entitled to legal counsel.[22] Article 33(3), (4), (5) and (6) of the Bangladesh Constitution provides

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[17] Sufian, Ashraful Arafat, Preventive Detention in Bangladesh, July – August 2008, Vol. 1, Issue 2, pp 166-176.
[18] (1973) ISCR p. 468.
[19] *Pankaj Kumar v. State of West Bengal* AIR (1970) SC 97.
[20] Article 22(4) of the present Indian Constitution.
[21] Kapur, Anup Chand, Misra, K.K. *Select Constitutions*, New Delhi, (2001), p.103.
[22] *Supra*, note 12.

for more safeguards on the person has been detained. Article 33 (3) provides for review by an Advisory Board where the detention period exceeds six months. Thus no person can be detained for more than six months without the authority of the Advisory Board, and only if the Board rules that there is a sufficient ground for detention, only then that the suspect can be detained for a period exceeding six months. If the grounds of detention are not placed before the Advisory Board within 120 days from the date of detention, the detention will be illegal.[23]

Article 33(5) of the Bangladesh Constitution stipulates that [the corresponding Articles in the Indian Constitution being Article 22(5) and In Pakistan Article 33 (5) ] the authority must communicate as soon as maybe to the detenu about the grounds of detention. "As soon as" means a reasonable time. According to the Special Powers Act the grounds must be communicated within 5 days from the date of detention.[24] Where the person arrested is illiterate, the grounds maybe communicated to him verbally.[25] Where he is literate, the grounds of detention should be communicated in the language the detenu could understand.[26] Article 33(1) of the Constitution provides that the detaining authority must afford the detenu the earliest opportunity of making representation against his detention. The person arrested has a right to have purposeful interview with the legal practitioner out of the hearing of the police or jail staff though it maybe in their presence. [27]

The main features of preventive detention are the subjective and objective elements that have to be satisfied. The subjective satisfaction is the certainty or conviction of the detaining authority that there were sufficient grounds to detain the suspect. His subjective decision cannot be challenged in any court of law. The objective element of the detention means that the detention should be *intra vires* (within the law) and should be within the scope of the statute in question

The High Court in the case of *Ranabir Das v. Ministry of Home Observer* held that

> *"a detention order made is mala fide when it is made contrary to the object and purpose of the Act or when the detaining authority permits him to be influenced by conditions which he ought not to permit"*[28]

In the case of *Habibulla Khan v. S.A. Ahmed* the Appellate Division held that it is not only that the government is satisfied that the detention is necessary, but it is also for the Court to be satisfied that the detention is necessary in the public interest.[29] In *Krishna Gopal v. Govt of Bangladesh,* the Appellate Division held that an order which deprives a man of personal liberty cannot be allowed

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[23] *Sayedur Rahman Khalifa v. Secretary Home Affairs*, 6 BLD (1986) DB 272.
[24] *Nazir Ali v. Secretary Home Affairs* 10 BLD (1990) HCD 258.
[25] *Mrs Samirannasa v. Govt of Bangladesh and Others* 14 BLD (1994) p. 206.
[26] Section 8 (2) of Special Powers Act 1974.
[27] *Supra*, note12.
[28] 28 DLR (1976) P. 53.
[29] 35 DLR (AD) (1983) p. 78 .

to be dealt with in a careless manner, and if it is done so, the Court will be justified in interfering with such order. The Court held the detention order unlawful.[30]

In another important judgment on judicial review of preventive orders, the Supreme Court of Bangladesh emphasized that it adopted a materially different approach to the 'subjective satisfaction' provisions from the approach applied in the courts of India. Legislation authorized the government to order detention 'if satisfied... it is necessary' but such an order was not immune from judicial review; to justify the detention, the government had to satisfy the court that there were such material on record as would satisfy a reasonable person.[31]

There seems to be an excess of laws to cover the subject of Preventive Detention. The Special Powers Act, 1974 is the most controversial law, which empowers the government to detain any person and gives sweeping powers of arrest and detention). Under this law, whenever any District Magistrate/Additional District Magistrate is satisfied that the suspect is a threat to national security, he/she maybe detained so as to prevent him from doing such acts prejudicial to national security. This order cannot be called in question in any court nor does the detainee have a right to defend himself. This law is against the principles of natural justice. The only remedy lies in filing a writ of *habeas corpus* in the High Court Division under Article 102 (b) 1 of the Constitution of the Peoples Republic of Bangladesh. The High Court Division has the power under this provision to determine whether the person is held under lawful authority. The scope of this law is too narrow to ensure the liberty of the person Legal technicalities in the law to a great extent help in securing the release of suspected detainees. There are several instances where detention of persons has been declared to be unlawful and the detainees released; however this is indeed a short reprieve, for barely does he leave the jail, when he is re-apprehended on charges of another crime purported to be committed by him. Therefore the constitutional guarantees are not always helpful. Another remedy lies against illegal detention under Section 491 of the Code of Criminal Procedure, 1898. This section is rather broadly worded. The High Court Division may whenever it thinks fit direct:

a) a detenu/detainee to be brought before the High Court

b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty.

Nowadays preventive detention is mostly used to settle political grudges where false and frivolous cases are lodged against political rivals. Section 494 of the Code of Criminal Procedure is used by government politicians to victimize and harass their rivals in the opposition parties.

Thus it can be seen from the preceding commentary that preventive detention has been grossly abused by the authorities and gravely undermines the liberty of the individual and fundamental freedoms which pose a serious threat to the rule of law in Bangladesh. While the argument that preventive detention is justified in upholding and maintaining national security is tenable to some

[30] 31 DLR (AD) (1979) p. 149..
[31] Commonwealth Law Bulletin Vol. 27, No 1 2001, p.683.

extent, the widespread abuse of the enormous powers conferred by it poses a serious problem to the promotion and protection of human rights.

**6. Effectiveness of other remedies including the Constitutional Remedies**

The Constitution of the People's Republic of Bangladesh is the supreme law of the country. It gives legitimacy to a just and proper criminal justice system and places emphasis on the due process of law being followed in the adjudication of criminal cases. The right to defend oneself, to be treated in accordance with the law are the fundamental rights guaranteed by the Constitution. The preamble to the Constitution proclaims the national and fundamental aim of realizing a society based on the rule of law, human rights, equality and justice. Article 11 makes it a fundamental principle of state policy to establish a democracy based on fundamental values and respect for human 'dignity and worth'. But these inviolable values have unfortunately being disregarded at times.

The following Articles of the Bangladesh Constitution are given below:

Article 26: Laws inconsistent with fundamental rights to be void.

Article 27: All citizens are equal before the law and are entitled to equal protection of the law.

Article 28: State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex or place of birth

Article 31: Right to the protection of the law. Everybody will enjoy the protection of the law and shall be treated in accordance with law

Article 32 Protection of right to life and personal liberty

Article 33 No person who is arrested shall be detained in custody without being informed, as soon as possible, of the grounds of such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

Article 35: Provides protection in respect of trial and punishment

1) No person shall be convicted of any offence except for violation of law in force at the time of the commission of an offence

2) No person shall be prosecuted and punished for the same offence more than once.

3) Every person accused of a criminal offence shall have the right to a speedy and public trial by an impartial court or tribunal established by law.

4) No person shall be subjected to torture or cruel, inhuman or degrading punishment or treatment.

It is indeed puzzling and one wonders how a country with such constitutional safeguards to protect civil liberties has such a record of police torture, custodial death, illegal detention and disappearances. Those who have taken oath to uphold the Constitution have not kept to the letter and spirit of the Constitution. No doubt, some judges of the High Court Division have expressed deep concern over violation of fundamental human rights of citizen and have taken appropriate steps by orders or judgments. There is a Bengali proverb which says "contents of a judgment cries silently" – which means that judgments and orders are not being strictly followed. Unlawful arrest, prolonged detention, police torture, custodial death, police abuse and atrocities are common types of human rights violations in Bangladesh.

The police frequently resort to torture to extract confessions from suspects in police remand. The courts are well aware of these illegal practices but at times choose to overlook allegations of torture. In the High Court Division case of *Yousuf Ali v. State,*[32] the State strongly condemned the practice of police torture and censured the police against exercising their power of arrest in a capricious or unreasonable manner. The police were directed to act with circumspection and caution.

In the case of *ASK and BLAST v. Bangladesh*[33] the Court by reference to Article 35 (4) sternly admonished the police to refrain from inflicting torture on suspects who are in police custody. In the case of *BLAST v. Bangladesh*[34] certain recommendations had been made with regard to search, arrest, police remand and confessional statements, but unfortunately these recommendations have not been followed on the ground that an appeal is pending in the Appellate Division against the said judgment although 'the matter in issue' in appeal is altogether different. In the case of *Ain-O-Salish Kendra (ASK) v. Bangladesh*[35] the High Court directed that the accused, Shaibal Sha alias Partho shall not be further held in remand custody. A similar order was given in *Nurul Islam Bablu's* case[36]

In the case of Mohammed *Ali v. Bangladesh*[37] the police searched the house of a well known journalist at midnight without a search warrant. The High Court Division found the police guilty and liable for abuse of power in carrying out the search and thereby the loss, injury, humiliation and harassment suffered by the petitioner. The court awarded a token compensation of Tk. 5000 against each police officer personally.

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[32] 22 BLD (HD) 231.
[33] 56 DLR (HD) 620.
[34] 55 DLR H.D.) 363.
[35] *Supra* note 3.
[36] 24 BLD (HD) 205.
[37] 23 BLD (HD) p 389.

In a case of mistaken identity the police ordered the arrest of the wrong person. The Court found that the police had acted in a negligent manner and ordered the release of the innocent person who was imprisoned and awarded a compensation of 20,000 tk against the police officers.[38]

One Makar Kanti has been languishing in jail for four years being wrongly confined instead of the actual convict in a place called Haradhan. The writ petition No 6332 of 2008 challenging the unlawful detention of the petitioner, Makar Kanti is still pending.

**7. Effectiveness of Criminal Laws**

Here I would like to quote some sections from one of my articles published earlier in the *Daily Independence.*[39] In recent years custodial deaths and extra-judicial killings have increased at an alarming rate. Some of the ready explanations given after a killing takes place are death as a result of:

- Crossfire
- bushfire
- Suicide
- Cardiac arrest

A prominent journalist and column writer A.B.M Musa said very recently that causing persons to disappear is a new form of killing by the present government. He expressed it in one sentence by adding that it was like "Old wine in new bottles" [40] The law enforcement agencies are never held accountable for the killing of an arrested suspect/victim. The investigating or arresting officer never stands trial for the killing/disappearance of an arrested suspect. The Ministry of Home Affairs made a statement to The Press on 16th May 2009 to the effect that members of the law enforcement agencies have a right to defend themselves, which simply put means that they can kill the suspect/accused if necessary. A similar comment was made on September 6th, 2009 referring to the shooting to death of two polytechnic students by the RAB.

National newspapers reports of 29th May 2009, reported the Ministry of Foreign Affairs as saying that; "It will take time to stop extra-judicial killings." This was also broadcast on the television news channels of May 29th 2009.

**8. Lack of clear laws**

There is no clear law in Bangladesh to bring to book any police officer or member of the law enforcement agencies, if he/she (police officer) illegally kills any person held in custody. A few existing laws, the Penal Code of 1860 for instance is not effectively drafted and cannot deal efficiently and effectively with the perpetrators. The reality is that nothing can be done against the perpetrators. For example, if an allegation is lodged against such an officer who has been suspected of killing a suspect/accused, the case will be investigated by a police officer (Sections

[38] 18 BLD – 337.
[39] 13.09.2009.
[40] Prothom ALO 22.07.2010.

156 and 157 of the Code of Criminal Procedure 1898). In most cases, it is rarely that one police officer reports against another officer. Moreover, people are so intimidated that normally they would not lodge a complaint against members of the law enforcement agencies. Should anyone go as far as registering a complaint against state officers, it is likely that the complainant or any member of his family maybe falsely implicated in the case which will be more serious in nature.

There are certain Sections in the Penal Code of 1890, in Chapter IX, from Sections 161 – 171 regarding offences by or relating to public servants such as; public servants receiving gratifications other than legal remuneration in respect of an official act (see Section 161); public servants disobeying the law with the intent to cause injury (see Section 166) or public servants filing a corrupt report in a judicial proceeding contrary to the law (see Section 219) or commitment for trial or confinement by a person in authority who knows that the action is contrary to the law (Section 220) as incorporated in Chapter XI of the Penal Code regarding false evidence and offences against public justice. These are punishable offences. But such cases filed against police officers/public servants are rarely found. People are very reluctant to file a case against a police officer or the armed forces as they are afraid of being wrongly implicated for crimes.

Secondly these cases are generally investigated by police officers. Information has to be handed over to the police station as provided in Chapter XIV, Part V of the Code of Criminal Procedure. Every cognizable offence is investigated by police officers. If the case is directly filed before a Magistrate, the same information is sent to the police for investigation. In such circumstances, it is difficult to bring the wrongdoers to justice. These are crimes committed by police officers/armed forces in the discharge of their official duties.

**9. Mechanisms of trial and punishment**

Decisions given by the armed forces tribunals and decisions relating to disciplinary action of armed forces are immune from being challenge by writ jurisdiction, except in the narrower sense for want of jurisdiction.[41] The Police Battalion Ordinance of 1979 has given rise to i) the Armed Police Battalions and ii) Rapid Action Battalions (RAB). Under Section 6A of the Ordinance, the RAB is empowered to investigate any offence on the direction of the Government under the provisions of the Code of Criminal Procedure of 1898 or any other law.

The investigation officer shall exercise all such powers and perform all such functions and duties as maybe exercised or performed by a police officer under the Code of Criminal Procedure of 1898; but if they do anything wrong or illegal they will be tried by their own Tribunal, not by an ordinary court. There are a few persons who praise the work done by the RAB. They condone and justify extra-judicial killings on the pretext that the increasing deterioration of the law and order situation in the country. They justify that such types of killings are necessary. However, this argument is untenable as according to the principles of natural justice, everyone is entitled to a fair trial.

[41] Dhaka Law Reports (DLR) 34 Appellate Division, p. 125.

## 10. Legal Checks and Balances

There are certain legal checks and balances to minimize these acts of cruel and illegal acts committed by inhumane officials. The Code of Criminal Procedure of 1898 has conferred extensive powers to police officers effecting arrest or investigating a case. But the law requires that they should act in good faith. Sections 46 – 67 lay down procedural safeguards relating to arrests, escape and retaking of suspects:

Section 46

> Arrest – How made : (1) "In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person arrested, unless there be a submission to the custody by word or action."
>
> Resisting endeavour to arrest (2) "If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.
>
> (3) Nothing in this section gives a right to cause the death of a person not accused of an offence punishable with death or transportation for life

Hence, it is crystal clear from Subsection (1) of Section 46 that police officers in arresting a person will not touch the suspect unless by word or action the police officer informs him that he is arrested or placed under custody. It follows from this provision that there is no scope for applying force in arresting a person unless the person required to be arrested applies force or resists in evading arrest.

But in Subsection (2) of Section 46, the police officer may use all means necessary if the person resists or attempt to evade arrest. The police officer may shoot towards the evading person and kill him if he is accused of an offence punishable with death or transportation for life. In this instance it has become easier for the police/RAB to cause the death of a person while arresting him by fabricating a story of his resistance in evading arrest. To minimize extra judicial killings, this Subsection (2) of Section 46 needs to be amended. Judges of the South Asian Subcontinent have on many occasions been critical of excessive force used by the police/law enforcement authorities, which ideally should be guardians and protectors of innocent persons. A heavy responsibility devolves on them in ensuring that innocent persons are not charged with irresponsible or false allegations. In a High Court case [42] Justice Hamidul Haue and Justice Salma Masud Chowdhury laid down certain recommendation regarding arrest, confessions and police remand. But these recommendations are confined to the paper on which they are written.

What role should the judiciary ideally play before adjudicating on the innocence or the guilt of the accused condemned to death? In a civilized society, much is expected from judges as guardians of

[42] 55 DLR (High Court p. 363).

civil liberties and the rights of the accused. Under law, the Bangladesh investigative officers have overriding powers similar to what was in existence during the British colonial period. It can incriminate an innocent person to stand trial, while setting free a hardened criminal. The violence and brutality of police investigations is a serious threat to the criminal justice system of Bangladesh

Under Sections 54, 156, 157, 164 and other related Sections of the Code of Criminal Procedure of 1898, the police have unfettered powers to do as they wish in criminal investigations. There is an urgent need to amend and reform the offending laws and enact laws in keeping with norms of justice. If such reforms are carried out, law enforcement agencies will be held accountable. They must be made to realize that they are not above the law and cannot act with impunity.

In Bangladesh, addressing grave human rights violations by bringing in stringent laws to rein in the police/army is a political minefield considering the patronage and good will of law enforcement agencies that is necessary to keep together shaky government coalitions and weak governments. Parties in the opposition do to some extent attempt to address these violations. However, the moment these parties assume power, the pledges given to protect violations are forgotten and they assume the role of shielding the perpetrators from being prosecuted for these grave crimes. To ensure the independence and effectiveness of the judiciary, the law enforcements agencies should be held accountable. Perpetrators of crime in the law enforcement agencies must be prosecuted and held answerable by the enactment of new laws.

All grave human rights violations committed by the armed forces, the police and RAB should be investigated and inquired into as suggested by the Chairman of the Human Rights Commission of Bangladesh, Dr Mizanur Rahman.[43] The Chair thus gave his opinion on the limitations and shortcomings in the current laws and stressed the importance of raising awareness among the law enforcement agencies about human rights norms and practices. His call to urged civil society organizations, non-governmental organisations (NGOs) and community based organizations (CBOs)to take a firm stand against human rights violations and the breakdown of the rule of law certainly found resonance in Bangladesh.

[43] Remarks made in an interview with the Prothan Alo correspondent on 1st August 2008.

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