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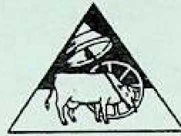

THE WRIT OF *HABEAS CORPUS* (PART II) – REFLECTING ON THE STATE OF THE LEGAL REMEDY IN INDIA AND COMPARATIVE PERSPECTIVES FROM MYANMAR

LAW & SOCIETY TRUST

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Editor's Note ....

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"It is not easy to analyse a complete farce, particularly when the players of the farce act it out with a seeming air of unawareness. We found absurdity, capriciousness, culpable negligence, callous disregard and more. We found a court completely oblivious to its place and importance in the constitutional scheme of things; a court unwilling to acknowledge its linkages to the society in which it was situated. Yet, the Court functions: judges come and go in their siren equipped cars, shielded both by curtains on the car windows, and by the phalanx of security personnel who guard them. Perhaps [they are] guarded by the same personnel (or, at least, their brothers in arms) who "disappear" the people on whose behalf the judges [hear] habeas corpus petitions?"

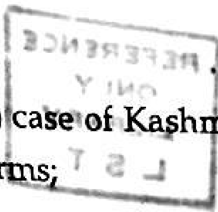
Ashok Agrwaal, "In Search of Vanished Blood" The Writ of *Habeas Corpus* in Jammu and Kashmir, 1990-2004, South Asia Forum for Human Rights (2008).

This Issue of the *Review* examining the writ remedy of *habeas corpus* in India and including for comparative value, an opinion on the relevance of the *habeas corpus* remedy in Myanmar, is a companion volume to the preceding Double Issue (*Volume 21 Issue 275 & 276 September & October 2010)* which reflected on similar questions in Sri Lanka, Nepal, Pakistan and Bangladesh.

In this Volume, **Ashwita Ambast** and **Debasis Poddar,** writing for the *LST Review,* discusses the peculiar contradictions that emerge when looking at how this most fundamental of legal remedies functions in respect of persons who have been 'disappeared' in India's troubled regions, most particularly Jammu and Kashmir.

The first paper dissects the general principles that have informed Indian jurisprudence in the context of personal liberties and emphasizes the considerable expansion that has taken place in this regard. As an aside, it may be editorially noted that many of these jurisprudential principles have been cited and used for good effect by Sri Lankan judges in adjudicating both in respect of their fundamental rights jurisdiction (of the Supreme Court) and writ jurisdiction (of the Court of Appeal).

That said, the author then illustrates as to the manner in which these general principles of rights protections are often inapplicable in the 'special' (as is referred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to) case of Kashmir. She cites reasons as to why this has become the case in succinct terms;

"One primary reason why the writ of habeas corpus has been unable to secure the Fundamental Right to Life under Article 21 of the Constitution of India in Kashmir is because its legal and procedural requirements are not followed properly in individual cases. This is amply illustrated in first, the non-disclosure of the grounds of arrest and the general inadequacy of the same in addition to not providing the detenu with adequate time to make a representation.

Not only is this illustrated vis-à-vis failures in disclosing the grounds of individual arrests, but also through failures of providing detenus with adequate time to make representations. The failure of the writ of habeas corpus also lies in the manner in which inquiries directed by the court are carried out. This point is further illustrated in what have been termed 'sanction cases', whereby the government arbitrarily fails to sanction prosecution as stipulated under the detention legislation."

Analysing a recent case study by the *South Asia Forum for Human Rights* (2008) she highlights concrete instances of non-disclosure of grounds of detention and lack of information which appears to have become a matter of routine in arrests in this region. Allied to this is the inefficacy of judicial inquiries in *habeas corpus* applications filed by friends and relatives of a person when he or she is arrested by a state officer and then disappears. Inquiries are not ordered by court even where they are warranted, even when held, such inquiries are delayed, are poorly conducted and inefficaciously executed.

One overriding problem meanwhile was the manner in which the power of sanction is used to block judicial inquiries into the conduct of a member of the armed forces. As stipulated by law, the "prosecution, suit or any other legal proceeding' against 'any person' in respect of *of anything done or purported to be done in exercise of the powers conferred by this Act* (Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990) must be with the previous sanction of the Central Government. Activists allege that this sanction power is withheld or delayed or implemented arbitrarily.

The reluctance of affected persons to resort to the legal remedy of *habeas corpus* is marked. This reluctance is compounded by fear of intimidation and worse

consequences if legal remedies are resorted to. These considerations are of paramount importance in Sri Lanka and other countries in South Asia. The commonalities attaching to the ineffectiveness of this remedy in countries in this region are many indeed.

Our second contributor takes this discussion further by deliberating on the specific jurisprudence of the Indian courts as relevant to the liberty discourse. He too makes the point that, the difficulties that have emerged in the implementation of the law and of the Constitution in troubled areas of the country such as Jammu and Kashmir as well as the Punjab militates against the general recognition of the primary place occupied by the right to liberty in national jurisprudence.

In practice, legal remedies such as *habeas corpus* have been rendered to a nullity in the Kashmir valley, as he opines. He warns that state agencies should take note of the fact that nullifying the law leads only to increased discontent of citizens and further, even legitimises the actions of violent non-state actors. In that regard, he cautions appropriately as follows;

> *"Indeed, in conflict zones, sporadic instances of human rights violations may occur. However, there must be an effective line of command responsibility to ascertain that, the same may at its best constitute an exception rather than a rule. A workable way is strengthening of judicial supervision in respect of such aberrations. Allowing the effective operation of the Judiciary through issuing writs in the nature of habeas corpus may prevent enforced disappearances emerging as a sign of impunity and injustice. A systemic subversion of the justice delivery system through the politicizing of judicial institutions is however, the worst that can happen.*
>
> *Abuse of judicial institutions for the vested interest of the state results in the erosion of the credibility of these institutions in popular perception. A non-state actor thereby derives legitimacy and gains popular support as enforced disappearances hurts the heart and soul of liberal democratic governance."*

The third contribution in this Volume is a re-publication of a short extract from the paper authored by **Ashok Agrwaal**, *"In Search of Vanished Blood"* The Writ of *Habeas Corpus* in Jammu and Kashmir, 1990-2004, South Asia Forum for Human Rights (2008). This extract captures the flavour of the lack of judicial control over these proceedings in most graphic terms. The opening quote in this Editor's Note is from

this extract and we commence with this forceful and moving comment due to its extreme relevance in other parts of Asia as well.

Lastly the Issue includes for the benefit of its readers, some interesting perspectives on the dilemmas facing the *habeas corpus* remedy in Myanmar by Nick Cheesman taken from an earlier publication (2010) by the Institute of Southeast Asian Studies, Singapore. The author identifies common problems frustrating this remedy not only in Myanmar but also in countries such as Sri Lanka which includes unacceptable and deliberate delays, re-arresting and 'disappearing' persons ordered to be released by court order and the intimidation of judges.

Kishali Pinto-Jayawardena

DISAPPEARANCES IN KASHMIR: THE FAILURE OF THE WRIT OF *HABEAS CORPUS*

Ashwita Ambast •

1. Introduction

In July 2002, erstwhile Home Minister of Kashmir, Khalid Najeeb Soharwardy stated before the Legislative Assembly that 3184 people have been missing since the commencement of militancy in the Kashmir Valley.[1]

This figure was revised to 3931 people *per* a comment made by the Minister of State and Parliamentary Affairs in the Legislative Assembly in June 2003.[2] The Association of the Parents of Disappeared Persons in Jammu and Kashmir (APDP) estimates around 10,000 disappearances.[3] Although very little information exists regarding such cases of enforced disappearances, most instances can be attributed to acts of security forces positioned in Kashmir.[4] Most often, security personnel arrest individuals arbitrarily in raids, routine patrolling, and search operations, and subsequently fail to secure their release.[5]

Article 21 of the Constitution of India stipulates that

> *"No person shall be deprived of his personal life or liberty except according to procedure established by law."*[6]

While the Apex Court has on early occasions adopted a restricted understanding of the import of this article,[7] today the guarantee provided by Article 21 is more substantial. In *Maneka Gandhi v. Union of India*,[8] the Supreme Court clarified that any deprivation of life and liberty whose protection is envisaged by Article 21 can only be carried out by a procedure that is not only prescribed by valid state law, but that is also just, fair and proper. The mechanism of enforcing such rights that are protected by the Constitution lies in the writ jurisdiction of the Supreme

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The *LST Review* records its appreciation to Dr. Angana Chatterji, Professor, Department of Social and Cultural Anthropology, California Institute of Integral Studies who was kind enough to offer feedback on the analysis in this paper and also acknowledges the assistance rendered therein by Erin Brownstein McElroy, M.A. Candidate in Social and Cultural Anthropology, California Institute of Integral Studies.

[1] http://www.afad-online.org/healingwounds/bk_kash_enforced.htm.

[2] http://www.afad-online.org/healingwounds/bk_kash_enforced.htm.

[3] http://www.paktribune.com/news/index.shtml?169044.

[4] http://news.bbc.co.uk/2/hi/south_asia/694459.stm.

[5] http://www.afad-online.org/healingwounds/bk_kash_enforced.htm; http://www.hrw.org/legacy/english/docs/2007/02/15/india15336.htm; http://www.reuters.com/article/2007/02/10/idUSB754906

[6] Article 21, The Constitution of India, 1950.

[7] *A K Gopalan v. State of Madras*, AIR 1950 SC 27: The court rejected the contention that the term 'law' in Article 21 embodied the requirements of Natural Justice and Due Process and limited its meaning to state made law.

[8] AIR 1978 SC 597.

Court and the High Court, vested in Article 32[9] and Article 226[10] respectively. Writs may thus be characterised as a procedural mechanism for the judicial enforcement of rights and duties specifically created by law.[11] The writ of *habeas corpus* finds express mention both in Article 32 and in Article 226. The writ of *Habeas Corpus* is generally employed in order to "*secure release of a person who has been detained wrongfully or without legal justification.*"[12] It was first used to challenge arbitrary imprisonment without charge,[13] and has therefore been rightly characterised as "*an immediate determination of the right to freedom.*"[14]

The disappearances of individuals in Kashmir by means of arbitrary arrest and abuse of police powers not only provide an opportunity for custodial torture, but often culminate in death, thus exemplifying the atrocities that Article 21 is intended to prevent. Consequently, a writ of h*abeas corpus* must necessarily come to the aid of affected individuals. This paper will contextualise the

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[9] Article 32, The Constitution of India, 1950: "Remedies for enforcement of rights conferred by this Part: (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto and certiorari,* whichever may be appropriate, for the enforcement of any of the rights conferred by this Part (3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2) (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

[10] Article 226, The Constitution of India: "Power of High Courts to issue certain writs: (1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibitions, *quo warranto* and *certiorari,* or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose (2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories (3) Where any party against whom an interim order, whether by way of injunction or stay order or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without (a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and (b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated (4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32."

[11] King and Hoffman, "*Habeas Corpus for the 21st Century*", Working Paper No. 9-27, Vanderbilt University Law School Public Law and Legal Theory, (forthcoming – 2011).

[12] M.P. Jain, *Outlines of Legal and Constitutional History* (LexisNexis/Wadhwa: Nagpur, 2010)

[13] Semeraro, "*A Critical Perspective on Habeas Corpus History*" Thomas Jefferson School of Law Legal Studies Research Paper No. 599141, p.8 (2004).

[14] *Supra* note 12.

frequent and relentless disappearances of individuals in Kashmir in light of the writ of *habeas corpus*. It will be argued that although it is well established in law and logic that a writ of *habeas corpus* must lie in order to remedy violations of Article 21, the writ has been rendered meaningless in the context of Kashmir. This is because:

(i) State agencies are unable or unwilling to follow the requisite mandatory, legal procedures associated with this remedy, and
(ii) The writ is rendered inefficacious in light of extra-legal considerations.

In understanding the incidents in Kashmir, reliance is placed on reports from newspapers and other independent organisations, including Amnesty International. In elucidating the writ of *habeas corpus*, reference is made to authoritative treatises, articles, and decisions delivered by courts of law in India. Further, reference is made to The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, and to The Public Security Act, 1978, both of which legislatively find application in Kashmir.

2. The Writ of *Habeas Corpus*: Overlooking Legal Prescriptions

One primary reason why the writ of *habeas corpus* has been unable to secure the Fundamental Right to Life under Article 21 of the Constitution of India in Kashmir is because its legal and procedural requirements are not followed properly in individual cases. This is amply illustrated in first, the non-disclosure of the grounds of arrest and the general inadequacy of the same in addition to not providing the detenu with adequate time to make a representation. Not only is this illustrated *vis-à-vis* failures in disclosing the grounds of individual arrests, but also through failures of providing detenus with adequate time to make representations. The failure of the writ of *habeas corpus* also lies in the manner in which inquiries directed by the court are carried out. This point is further illustrated in what have been termed 'sanction cases', whereby the government arbitrarily fails to sanction prosecution as stipulated under the detention legislation.

2.1 Neglecting Procedural Requirements: Grounds of Arrest

It is well established that in cases that involve the deprivation and compromise of life and personal liberty, procedural requirements protecting individuals must be strictly complied with. It has been held by the Apex Court that the most essential elements to be complied with by authorities when an order of detention has been passed are found in Article 22(5) of the Constitution of India. The text of this provision reads as follows:

> "*When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be,* ***communicate to such person the grounds on which the order has been made*** *and shall afford him the earliest opportunity of making a representation against the order*" (emphasis added).[15]

[15] Article 22(5), The Constitution of India, 1950.

It is therefore abundantly clear that providing the grounds of detention to a detenu is a crucial procedural prerequisite for a valid detention. This is buttressed by the fact that Section 13(1) of the Jammu and Kashmir Public Safety Act, 1978, specifically stipulates that:

> "*When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than ten days from the date of detention* ***communicate to him the grounds on which the order has been made,*** *and shall afford him the earliest opportunity of making a representation, against the order to the Government*" (emphasis added).[16]

Several Supreme Court decisions emphasise this very point. For example, *Chandoo Ram*'s case[17] states specifically that:

> "***The first ingredient is that the grounds of detention should be communicated as soon as may be meaning thereby as early as possible*** *and secondly that it should afford the person so detained the earliest; opportunity of making a re-presentation against the order. There is one thing also implied which is the third ingredient, that the earliest opportunity should be such as to allow the person not only to be able to make a representation but he should be able to make as effective a representation*" (emphasis added).

Over and above the requirement that the grounds of arrest be disclosed, the Supreme Court stated in *Icchu Devi Choraria v. Union of India*[18] that:

> "*It is unquestionable that copies of such documents, statements and other materials must be supplied to the detenu without any unreasonable delay, because otherwise the detenu would not be able to make an effective representation and the* ***fundamental right conferred on him to be afforded the earliest opportunity of making a representation against his detention would be denied to him.*** *The right to be supplied copies of the documents, statements and other materials relied upon in the grounds of detention without any undue delay flows directly as a necessary corollary from the right conferred on the detenu to be afforded the earliest opportunity of making a representation against the detention, because unless the former right is available, the later cannot be meaningfully exercised*" (emphasis added).

Therefore, the ability to make a representation is closely associated with the right to be informed of the grounds of one's arrest. The close association between these two rights is also outlined by

[16] Section 13(1), Public Security Act, 1978.

[17] *Chandoo Ram v. District Magistrate*, 1974 CriLJ 1505 (Jammu and Kashmir High Court).

[18] AIR 1980 SC 1983.

the Supreme Court in *Deora v. District Magistrate, Kanpur,*[19] in which the Court held that the constitutional requirement of Article 22(5) will not be satisfied unless the detenu is given the earliest opportunity to make a representation against the detention. Furthermore, unless the detenu is furnished with adequate particulars of the grounds of detention, an opportunity to make representations is ineffective.

It is evident that these procedural norms, despite being mandatory, are routinely flouted in Kashmir. In fact, the problem relating to non-disclosure of grounds of detention and lack of information regarding the detenu is apparent in almost all cases of disappearances. ***Waheed Ahmed Ahangar*'s** case,[20] involving the arbitrary arrest of a 14-year-old boy, was witnessed by the entire locality. Waheed's parents, being influential, made numerous unsuccessful attempts to file a First Information Report (FIR), and even met with the Cabinet Minister in charge of affairs in Kashmir, Mr. Sachin Pilot. Subsequently, a *habeas corpus* petition was filed. Despite these efforts, to date, Waheed's parents remain unaware of the reasons and grounds for his arrest. Further, no information has been provided to his parents regarding his whereabouts.

Similarly, the family members of **Dr. Ghulam Hasan Sofi** filed a *habeas corpus* petition once Dr. Sofi had disappeared for over three days. However, the State Government and the Officer Commanding Team 9, (which was allegedly responsible for Dr. Sofi's detention), responded to the family saying that Dr. Sofi had never been arrested. The family later filed another *habeas corpus* petition in the High Court stating that Dr. Sofi had been seen in the custody of the army. Not only were the grounds of arrest in this case mysterious, but all the information that reached the family came through non-government agencies.[21]

A third example of this trend is seen in the detention of **Nazir Ahmed Sofi**. Nazir and his friends were arrested by the Border Security Force in 1993. While his friends were subsequently released, Nazir's whereabouts remained unknown. Although Nazir's family filed a *habeas corpus* petition before the High Court, the state, in addition to providing no information regarding the arrest of Nazir as mandated by Article 22 of the Constitution, failed to file a response to the petition. The only information that Nazir's family received regarding their son's whereabouts was from eyewitnesses that they had sought out. State agencies did not come to their aid any way.[22]

2.2 Inquiries in *Habeas Corpus* Cases

A second important aspect of *habeas corpus* petitions is the institution of an inquiry into the case, normally directed by the court. The importance of this inquiry has been elucidated by the courts of law in India at various points.

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[19] AIR 1974 SC 183.

[20] Ashok Agrwaal, "*In Search of Vanished Blood*" The Writ of *Habeas Corpus* in Jammu and Kashmir, 1990-2004, South Asia Forum for Human Rights Paper Series 17, 2008, at 23.

[21] *Supra* note 20, p.27.

[22] *Supra* note 20, p.30.

The broad objectives of the inquiry in *habeas corpus* cases are elucidated by the Gujarat High Court as:

> *"The inquiry in habeas corpus is whether a person is illegally detained by any other person or authority. The idea is to ensure freedom and restore the liberty of the person detained and not to put an adult and a capable person in someone's custody against his or her desire. The writ ensures freedom of movement and personal liberty."*[23]

Hence, the foremost concern in conducting the inquiry must be to ensure the freedom of the person detained. Debates existed in the Judiciary regarding exactly when the inquiry that was to be conducted, would commence. It was established over time that the inquiry must commence from the date of return, not from the date of instituting proceedings.[24]

The scope and extent of this inquiry has also received some judicial attention. In *Mohd. Ikram Hussain v. State of U.P. & Others*,[25] the Apex Court stated:

> *"In our opinion the writ nisi in this case for the production of Kaniz Fatima should have been preceded by some more enquiry.* ***It is wrong to think that in habeas corpus proceedings the court is prohibited from ordering an inquiry into a fact. All procedure is always open to a court which is not expressly prohibited and no rule of the court has laid down that evidence shall not be received, if the court requires it*** *"* (emphasis added).

This decision is buttressed by the findings of the Kerala High Court in *T.V. Eachara Varier v. Secretary to the Ministry of Home Affairs and Others.*[26] Yet, despite these specific pronouncements there are multiple problems with the manner in which inquiries are conducted in the course of *habeas corpus* petitions.

The first problem arises at the inception of the inquiry itself. It is found that in numerous circumstances, inquiries are not ordered where they are warranted. This problem is well outlined by Agrwaal who states that inquiries are not ordered in almost 27% of the cases that come before the High Court.[27] For example, after **Hamidullah Mir** was released after being illegally detained for over two years, his father filed a petition in court claiming compensation. The petition, although erroneously stated that Hamidullah was held in custody after the period of his detention. The petition was eventually disposed of without the court ordering an inquiry into the case.[28] Similarly, the families of **Manzoor Ahmad Dar** and **Bilal Ahmed Sheikh** filed *habeas corpus* petitions when Manzoor and Bilal went absconding following arrests by grenadiers.

[23] *Kalpeshkumar Bhikhalal Vohara v. Dalpatbhai Manilal Shah* on 6/8/1999.

[24] *Kanu Sanyal v. District Magistrate Darjeeling*, 1974 Cri LJ 465 (Supreme Court).

[25] AIR 1965 SC 1625.

[26] 1978 CriLJ SC 86.

[27] *Supra* note 20, p.79.

[28] *Supra* note 20, p.82.

Neither the State Government nor the army replied to this petition, and finally the petition was dismissed for non-prosecution since the counsel for the petitioner missed one court date. When the case was later restored, the court did not order an inquiry and dismissed the petition again on grounds that it was a case of a missing person, saying that the correct remedy in such circumstances was to file a FIR at the police station.

Second, inquiries are almost always delayed. There is often a wide temporal gulf between when the inquiry is ordered and when it is commenced, and indeed, when it is completed. To illustrate, in the case of ***Syed Amjad Ali Byhaqi,***[29] an arrest was made in November 1992. However, both the State Government and the army contested his ever being arrested. On filing of the *habeas corpus* petition, the High Court directed an inquiry to be made into his disappearance. This matter remained before the court for over nine years. In the in meantime, Byhaqi had already been released after spending only a few months in custody. Similarly, **Mohammad Ayub Bhat**[30] was arrested in June 1992, along with four others, who were released in three days. Ayub's family filed a petition on behalf of Ayub, but this did not receive any response from the army or from the State Government. The court's inquiry order remained pending for over a decade, until October 2003. By this time, Bhat's family had availed of state benefits for families of disappeared individuals and had notified the Judge that they did not want to resume litigation. As a result, the inquiry proceedings were terminated by the court.

It is also important to note that in cases where inquiries are conducted when ordered, they are often not conducted well. This is the third difficulty associated with inquiries – that they are poorly executed. This difficulty is exemplified in the case of ***Mohammad Ayub Dar.***[31] The government was directed by the court to file a reply to Dar's petition within two weeks. The government did not file an appropriate reply. The only response from the government was received eight months later in the form of an oral statement, declaring that Dar was no longer in the custody of the respondents and that his whereabouts were unknown. The court later ordered an inquiry into Dar's disappearance. In the course of this investigation, the Government resiled on its previous statement saying that Dar was at Tihar jail at the time. Unfortunately Dar's family had withdrawn the petition by that time since they had been notified of Dar's whereabouts from other sources.

2.3 Cases requiring governmental sanction

Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (AFSPA) reads:

> "*No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect*

[29] *Supra* note 20, p.71.
[30] *Supra* note 20, p.71.
[31] *Supra* note 20, p.70.

of anything done or purported to be done in exercise of the powers conferred by this Act."[32]

Hence, prior to the prosecution of any member of the armed force, sanction of the central government is mandatory. However, the power of sanction is implemented arbitrarily

This is displayed in the case of ***Nazir Ahmad Gojar*** who disappeared after being arrested. A writ petition was filed by Gojar's family and an inquiry was ordered in which it was clearly stated that there was no doubt that Gojar had been arrested by the 5 Dogra Regiment and was probably killed in custody. A charge sheet was prepared, however arrest of the officers could not be effected by the police as the central government had not sanctioned such a move. Finally, the High Court was compelled to dispose of the case as the requisite sanction could not be obtained. When the case was re-opened by Gojar's family, the State Government requested the central government for prosecutorial sanction. However, this was rejected by the central government and the case was closed. Therefore, such power in the hands of the central government often hinders the process of justice.

3. The Inefficacy of *Habeas Corpus*: Myriad Extra-Legal Considerations

The previous chapter outlined problematic legal and procedural aspects of the writ of *habeas corpus* in the context of enforced disappearances in Kashmir. In this chapter, I will outline the extra-legal issues associated with the writ of *habeas corpus* in Kashmir that significantly hinder the judicial process. These extra-legal issues include the powerlessness of the Judiciary to enforce meaningful orders, judicial delays, and ways in which filing *habeas corpus* petitions is becoming an increasingly unattractive option for families of the disappeared.

It cannot be disputed that delay is endemic to the Indian judicial process. This is primarily due to a shortfall in deciding, as many cases as are filed in each year, limitations in judge-strength, inefficient investigative methods employed by agencies, repeated adjournments, *inter alia*.[33] Amnesty International estimates that between 200 and 400 *habeas corpus* petitions are currently pending before the Jammu and Kashmir High Court. Moreover, *habeas corpus* petitions are heard only once or twice a week by the High Court. Advocates of the Jammu and Kashmir High Court reveal that judges do not directly admit petitions of *habeas corpus*. Petitions are admitted only if there is urgency involved in finding the person who has disappeared, or alternatively, if that the person who has disappeared is in grave danger of losing their life or property.[34] These provisional specifications around petitions *compound* the delay in hearing matters relating to enforced disappearances in Kashmir.

[32] Section 7, Armed Forces (Jammu and Kashmir) Special Powers Act, 1990.

[33] Centre on Public Law and Jurisprudence, "Justice without Delay: Recommendations for Legal and Institutional Reform", *Jindal Global Law Review*. pp.11-12.

[34] "Disappearances" in Jammu and Kashmir, ASA 20/02/99 (1999), p.29.

Bhagwati J., in *Hussainara Khatoon v. Home Secretary, Bihar Government*[35] in adjudicating a petition for the writ of *habeas corpus*, expressed outrage at these very circumstances in stating:

> "*We are talking passionately and eloquently about the maintenance and preservation of basic freedoms. But, are we not denying human rights to these nameless persons who are languishing in jails for years for offences which perhaps they might ultimately be found not to have committed? Are we not withholding basic freedoms from these neglected and helpless human beings who have been condemned to a life of imprisonment and degradation for years on end? Are expeditious trial and freedom from detention not part of human rights and basic freedoms?*"

Similarly, in *Babu v. Raghunathji*,[36] the Supreme Court observed that,

> "*...social justice would include 'legal justice' which means that the system of administration of justice must provide a cheap, expeditious and effective instrument for realisation of justice by all sections of the people irrespective of their social or economic position or their financial resources.*"

It is important to note that the Indian Supreme Court has also gone a step further and has, at various instances, stated that delay in dispensation of justice amounts to a complete denial of justice.[37] To illustrate, the Apex Court in *All India Judges Association and Others. v. Union of India and Others*[38] declared that:

> "*An independent and efficient judicial system is one of the basic structures of our Constitution. If sufficient number of Judges is not appointed, justice would not be available to the people, thereby undermining the basic structure.* ***It is well known that justice delayed is justice denied.*** *Time and again the inadequacy in the number of Judges has adversely been commented upon. Not only have the Law Commission and the standing committee of Parliament made observations in this regard, but even the head of the Judiciary, namely, the Chief Justice of India has had more occasions than once to make observations in regard thereto. Under the circumstances, we feel it is our constitutional obligation to ensure that the backlog of the cases is decreased and efforts are made to increase the disposal of cases*" (emphasis added).[39]

Therefore, in law, the delays associated with the *habeas corpus* petitions in Kashmir amount to a blatant denial of justice.

[35] AIR 1979 SC 1360.

[36] AIR 1976 SC 1734.

[37] *P. Ramachandra Rao v. State of Karnataka*, (2002) 4 SCC 578.

[38] AIR 2002 SC 1752.

[39] AIR 2002 SC 1752, 24.

Judicial delays also have more far reaching consequences. An important and pernicious consequence of these delays is an instilled reluctance on the part of the affected families to file petitions at all. The manner in which this attitude has taken over Kashmir is well illustrated in the study conducted by Ashok Agrwaal. The report documents various instances where families have chosen not to file petitions or withdraw petitions, being disincentivised by what Agrwaal terms the "*panoptic regime of injustice*" reigning in Kashmir.[40] A case in point is that of 18-year-old ***Ejaz Ahmad Sheikh***, and 19-year-old ***Firdous Ahmed Sheikh***. The former was arrested on three previous occasions and was constantly under pressure to become an informant to the militants. The circumstances of both of their disappearances remain a mystery. It is suspected that they voluntarily left their homes in order to join the militant forces. This fact cannot be established with certainty. The families of the two boys approached the police and the press regarding their disappearances. In this process, Ejaz's father was detained by the authorities, tortured and harassed. Although he complained to the State Human Rights Commission, he was provided with no remedy, and his case was merely postponed to inconvenient dates. As a consequence, Ejaz's father was compelled not to pursue the litigation further as he was constrained by his job and other familial responsibilities. In addition, he was unable to bear the harassment.[41]

It is of course important to note that the reluctance of families to pursue action under the writ of *habeas corpus* also stems from other considerations. This is illustrated in the case of ***Mohammad Akbar Sheikh***, a daily wage labourer who disappeared while at work. His family was informed that Shiekh was in custody only eight to nine months later by some neighbours; a fact which was later confirmed when Sheikh's picture was published in the newspaper. The family later received a letter from Sheikh informing them of his whereabouts and of his detention. The family subsequently went to Palampur, where Sheikh was being held, and conducted numerous inquiries in addition to filing an FIR and a case in court. However, after filing the case, Sheikh's family was compelled to withdraw their grievances, as their house was raided arbitrarily by the security forces around 60 to 70 times, and as they were fearful that further antagonising the forces would result in their being harmed.[42]

This entire paper has rested on the presumption that if the Judiciary is able to pronounce fair and reasonable decisions based on established law, then justice to the families of the disappeared would automatically ensue, since the dicta directing the executive to perform the necessary action would carry authoritative value. The predicament in Kashmir indicates otherwise. It has been stated that: "*Like truth, the judiciary became also the casualty of the armed conflict,*" as the orders passed by the judiciary have been seldom complied with by the executive.[43]

One of the judges of the Jammu and Kashmir High Court observed in 1994 that:

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[40] *Supra* note 20, p.104.

[41] *Supra* note 20, pp.105-106.

[42] *Supra* note 20, pp.108-109.

[43] http://www.afad-online.org/healingwounds/bk_kash_enforced.htm.

"There is a total breakdown of the law and order machinery. I shall not feel shy to say that this court has been made helpless by the so-called law enforcing agencies. Nobody bothers to obey the order of the Court. Thousands of directions have been given to top administrative and law enforcing agencies which have not been responded to."[44]

It is therefore disturbing, yet true, that even in cases with delays, disincentives and legal difficulties, when the Judiciary discovers faults in the actions of the security forces, its pronouncements are rendered entirely meaningless by the disobedience of the Executive. This trend may be taken as a broader indication of an impending and complete breakdown of justice systems, a condition which is extremely dangerous in any place whose legal and social fabric is as fragile as that of Kashmir.

The last question which may be raised in respect to the efficacy of the writ of *habeas corpus* in the present cases, is whether this writ, in all situations, satisfies those who approach the court for a remedy. It is a well established position of law in India that compensation may be provided by the court in *habeas corpus* cases. This is the position of law on account of a series of decisions of the Supreme Court, evidenced in *Nilabati Behra v. State of Orissa.*[45] The Court held:

"...we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders to release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation."[46]

This case upheld the decision of the Apex Court (in similar circumstances) in *Rudul Shah v. State of West Bengal,*[47] and was followed in cases such as *Malkiat Singh v. State of Uttar Pradesh.*[48]

In the aforementioned case of ***Waheed Ahmed Ahangar***[49] after Waheed's father met with the concerned ministers and filed the *habeas corpus* petition, an inquiry was ordered and

[44] Petition No. 850/94: October 1994.
[45] AIR 1993 SC 1960.
[46] *Supra* note 45 .
[47] AIR 1983 SC 1086.
[48] 1998(9) SCC 351.
[49] *Supra* note 20.

investigations began. The search has been continuing for over thirteen years. In accordance with the decisions cited above, Waheed's father has, on a number of occasions, been offered compensation. However, he remains uninterested.

4. Conclusion

Having analysed the condition in Kashmir, it is appropriate perhaps to close with the following quote from the 1976 Turner Memorial Lecture, delivered by Lord Denning:

> "....coming *into the law, our great task is two-fold, to keep order and to do justice. What is justice you may ask. Many men far wiser than you or I have asked that for 2,000 years or more. Plato asked it and could not find a satisfactory answer. Justice is not a temporal thing. It is eternal. It is a thing of the spirit. The nearest approach to a definition that I could give is: Justice is what the right thinking members of the community believe to be fair. Simply that. All of us represent-whether we be the lawyers, or jurymen or others - we represent the right thinking members of the community doing, as best we can, what is fair,* ***not only between man and man in these days, but between man and the state***" (emphasis added).[50]

The central point that has been urged throughout this paper is that the writ of *habeas corpus* has proved to be ineffective in securing the fundamental rights of 'disappeared' individuals in Kashmir. This has been demonstrated by first showing that the procedural requisites imperative for the proper enforcement of fundamental rights through the writ of *habeas corpus* have not been complied with. Further, it has been discussed that there are numerous extra-legal reasons which render the writ inefficacious. As a result, it is important for law reforms to be instituted to not only hasten the judicial process, but to also ensure that petitions are investigated properly once they have been filed. These reforms may perhaps make Article 21, in addition to the means of its enforcement, more meaningful for people faced with the atrocities carried out everyday in Kashmir.

[50]Denning, "*Law and life in our Time*" University of Tasmania Law Review (1967). p.359. Available at http://www. austlii.edu.au/au/journals/UTasLawRw/1967/1.pdf.

WRIT OF *HABEAS CORPUS* AND ITS APPLICATION: A CRITICAL APPRECIATION OF LIBERTY DISCOURSE IN POSTCOLONIAL INDIA

*Debasis Poddar**

1. Introduction

As part of its common law legacy, India inherited writ jurisprudence including that of *habeas corpus* applicable through its Supreme Court (the Apex Court of the land) and High Courts (Apex Courts of respective provinces, but subject to precedents set by the Supreme Court) under Articles 32 and 226 of its Constitution respectively. Often than not, however, *habeas corpus* remains a legal grandeur with no *de facto* relief to its people whose liberty the writ is meant for. The greatest retrogression was evidenced through the majority judgment of the Supreme Court in *Additional District Magistrate, Jabalpur v. Shukla*[1] while a dissenting opinion in the same case which this paper will discuss, was inclined more in favour of a rights viewpoint. This controversial majority judgment was delivered during a declared emergency and was in defiance to the writ jurisprudence of *habeas corpus*. A far more progressive judgment in *Inder Singh v. State of Punjab and Others*[2] later condemned state sponsored enforced disappearances. But regrettably Indian judges have, at times preferred to follow the *Shukla* precedent rather than the *Inder Singh* principles. In the largest democracy of the modern world, Indian courts are yet to consistently follow good precedent in terms of the liberal democratic paradigm that the country claims to its credit.

While judicial action for cases of enforced disappearances in Punjab sets a precedent in defence of the liberty discourse, judicial omissions in respect of cases in Jammu and Kashmir (J & K) pose a serious concern regarding the objectivity of the judicial process in India. J & K has had a special status in the constitutional scheme. It must be noted however that temporary provisions under Article 370 of the Constitution- which was meant to provide for transition of power- constitute no excuse for repression of its people in practice.

I explore the liberty discourse prevalent in India with special reference to the judgment of its constitutional courts and judicial processes involved therein and thereby contend that, like other countries in the South Asian subcontinent, India has miles to go before it may rest content in terms of the uniform application of liberty principles across the land. No institution of the state in India, whether it is the Legislature, Executive or Judiciary may be spared in terms of Machiavellian governmentality to this end.

Indeed in terms of its subcontinental perspective, India may *prima facie* look bright in terms of its liberty discourse. An almost uninterrupted democratic system of governance, which includes part of the liberty discourse as well, helps constitute an illicit generalisation of a hypothesis that the right to liberty is guaranteed all over the territory in India.

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[1] (1976) 2 SCC 521.

[2] (1995) 3 SCC 702.

In such an apparently neat weaving of the liberty discourse, however, there lies sizeable loopholes and at times, the liberty discourse seems to be completely negated as a result of these loopholes, at least in pockets of India's territory (states, e.g. Punjab, Jammu & Kashmir etc.,) which constitute part of a special reference. Even if all instances of aberrations during the third or last national emergency are ignored as constituting exceptional circumstances, a systematic count of systemic subversion throughout the last six decades leads us to the imperative conclusion that violation of civil liberties in those parts of India seems a *de facto* state policy. Undoubtedly such state policies do not constitute part of Part IV of the Constitution and are in conflict with Part III of the Constitution.

By and large an amalgam of the then major Constitutions of the world, the Constitution of India is an offshoot of its American counterpart and thereby places great emphasis on the liberty discourse. This constitutes a core fundamental right under Article 21 of its Constitution. Liberty rights are also secured through constitutional remedies for enforcement of fundamental rights including Article 32 of the Constitution of India. The Constituent Assembly of India adhered to the British legacy to introduce writs including that of *habeas corpus* to uphold the rule of law and to prohibit arbitrary deprivation of personal liberty. As per the constitutional framework, all constitutional courts - the Supreme Court along with High Courts - have had writ jurisdiction conferred upon them to uphold individual personal liberty against high-handedness of the executive to the detriment of the existing system of liberal democratic governance. However, in practice, at least in the valley of Kashmir, what seems in vogue may be termed as a state of undeclared emergency which is contrary to the essential spirit of the law of the land in India. This is also contrary to the International Covenant on Civil and Political Rights, 1966- an international regime to which India is a party. Thus, in practice, *habeas corpus* is reduced to a virtual nullity in these areas.

The effective operation of the writ of *habeas corpus* to address enforced disappearances is yet to be seen in India. The country has signed but not ratified the International Convention for the Protection of all Persons from Enforced Disappearance, 2006. Even though it is consequently excluded from the obligations of this treaty in the strict sense of the term, it must be recalled that in terms of Article 18 of the 1969 Vienna Convention on the Law of Treaties, a state that has signed a treaty is under an obligation not to defeat the object and purpose of the treaty prior to its entry into force. Further, we cannot condone enforced disappearances as the same is in clear conflict with India's commitment to the International Covenant on Civil and Political Rights (ICCPR). The International Criminal Court and its complementary jurisdiction is no longer a juridical grandeur but constitutes a real threat to rogue statesmen as is witnessed by the fate that has befallen *Omar al-Bashir*, the Sudanese President as a result of his alleged participation in international crimes like genocide and war crimes in Darfur. Pleading that one is not a party to the Rome Convention of 1998 may therefore be no respite for rogue states. This is a message that India ought to take note from the intervention of the International Criminal Court (ICC) in the Darfur matter.

While India is seemingly proud of its basic human rights in its affairs of state generally, enforced disappearance with impunity in several parts of its territory constitutes a loss of face in the international community. Further, this trend makes similar human rights actions perpetrated by belligerent non-state actors against the state, seem more legitimate.

2. Writ Remedy of *Habeas Corpus*: Indian Jurisprudence

As stated earlier, under Article 21, read with Article 32, of the Constitution of India, the fundamental right to liberty is associated with the right to life and guaranteed by enforcement of the same through a constitutional remedy- a writ in the nature of *habeas corpus* as an appropriate writ.[3-4] Certain points are clear and unambiguous from the express provisions of the law. First, unlike its American counterpart, the Indian Constitution deals with personal liberty only. Second, even personal liberty is not an absolute right as the same is subject to procedure established by law. Thus the legality of arrest and detention of a person in certain cases becomes implicit under Article 21, read with Article 22, of the Constitution.[5]

In particular, under Article 22, the right to personal liberty seems to be at stake where there is deprivation of the same under any law of preventive detention. Whether the rest of the provisions, e.g. (4) to (7), of Article 22 were drafted to offer fundamental rights to its people or its police may be a moot point as these provisions constitute a travesty of justice and disregard for the rule of law apparent on the face of the record.[6] The legitimacy, if not legality, of such draconian provisions as part

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[3] No person shall be deprived of his life or personal liberty except according to procedure established by law. Article 21, the Constitution of India, 1950.

[4] (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part (III)

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution, Article 32, the Constitution of India, 1950.

[5] (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall be denied the right to consult, and to be detained by, a legal practitioner of his choice

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate

(3) Nothing in clauses (1) and (2) shall apply-

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention. Article 22, the Constitution of India, 1950.

[6] (4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-

(a) An Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-section shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provision of any law made by Parliament under sub-clauses (a) and (b) of clause (7)

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such persons the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe-

of Part III is irrelevant here and thereby remains outside the purview of this effort. As per the then position of the majority judgment in the *Shukla Case*[7] constitutional remedies for enforcement of the right to personal liberty through *habeas corpus* are also subject to Article 359 of its Constitution through Section 39 of the Constitution. Later, the Constitution (Forty-fourth Amendment) Act, 1978 excluded the right to personal liberty from the clutch of suspension under Article 359 during emergencies.[8] But there are umpteen instances of functional failure on the part of constitutional courts to uphold the right to personal liberty through the writ of *habeas corpus* despite the existence of the law of the land to this end. This is apparent in cases of state sponsored enforced disappearances in disturbed provinces in the country.

The repression of the liberty discourse was so often than not perpetrated as part of a political end game to settle scores against any opposition in terms of petty (party) politics and may thereby be unconnected or even against the so called public interest in the true sense of the term. In such perspective, the majority judgment in *Shukla*[9] was seemingly in unholy consensus (read collusion) with the then executive. The dissenting opinion of *Khanna, J.* in this case is appreciated as upholding judicial integrity, thereby asserting the principle of the separation of Judiciary from the Executive as a matter of state policy under Article 50 of the Constitution of India even during a state of declared emergency in India.[10]

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provision of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).Article 22, the Constitution of India, 1950.

[7] *Supra* note 1, *Additional District Magistrate, Jabalpur v. Shukla* (AIR 1976 SC 1207).

[8] (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except Articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.Article 359, the Constitution of India, 1950.

[9] *Supra*, note 1.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate

(3) Nothing in clauses (1) and (2) shall apply-

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention. Article 22, the Constitution of India, 1950.

[10] "The principle that no one shall be deprived of his life or liberty without the authority of law is rooted in the consideration that life and liberty are priceless possessions which cannot be made the plaything of individual whim and caprice and that any act which has the effect of tampering with life and liberty must receive sustenance from and sanction of the laws of the land. Article 21 incorporates an essential aspect of that principle and makes it part of the fundamental rights guaranteed in Part III of the Constitution. It does not, however, follow from the above that if Article 21 had not been drafted and inserted in Part III, in that event it would have been permissible for the State to deprive a person of his life or liberty without the authority of law. No case has been cited before us to show that before the coming into force of the Constitution or in countries under the rule of law where there is no provision corresponding to Article 21, a claim was ever suspended by the courts that the State can deprive a person of his life or liberty without the authority of law".

As a matter of fact, however, the above majority judgment of the Apex Court put all efforts of its High Courts in the dock with the result that arbitrary deprivation of liberty on the part of the executive prevailed over and above judicial review. This continues with impunity.[11] As an apparatus of terrorism, state-sponsored enforced disappearances thereby derive its legacy from the age of emergency. It is no wonder that the same is used by Leviathan-like state agencies to tackle political dissidence through extra-judicial modalities.

At one point of time, enforced disappearance was systematically used as an instrument of state terror in the state of Punjab; and nowadays a similar experiment seems apparent in the Kashmir valley. While the Apex Court was proactive in its approach to address the same in the Punjab, the same forum fell short of initiative in terms of the Kashmir valley. The following segment of this paper addresses the dilemmas that are faced in the Punjab and in Kashmir.

3. Enforced Disappearance: An Aberration of Life and Liberty

At present, there is a reference to "armed rebellion" as a ground for making a Proclamation of Emergency under Article 352 of the Constitution. Section 37 of the Constitution (Forty-fourth Amendment) Act, 1978 substituted the term "armed rebellion" for the term "internal disturbance". Before entering into a discussion of (state sponsored) enforced disappearances, the understanding of this amendment is important. "Internal disturbance" was a term coined during the last emergency. It was a politically charged term as it inferred potential subjectivity in terms of determining an emergency. It is therefore not without reason that the same is no longer a criterion for determining a state of emergency. However, even after the same has come to naught in constitutional terms, other statutes continue this same terminology, e.g. the Chandigarh Disturbed Areas Act, 1983 uses the term well after the word "disturbance" was removed from the Constitution. This statute was instrumental for the perpetration of a series of enforced disappearances in that region.

There are other statutes as well, e.g. the Disturbed Areas (Special Courts) Amendment Act, 1983 which is again a post-emergency extension of the internal disturbance syndrome well after the same was deleted from Article 352 of the Constitution. Also there is another contentious statute- the Armed Forces (Assam and Manipur) Special Powers Act, 1958- the constitutionality of which was upheld by the Apex Court in *Naga Peoples' Movement of Human Rights v. Union of India*.[12] Despite repeated reference to the word 'disturbance', in *Naga Peoples* judgment, the Apex Court has overlooked the subjectivity underlying Section 3 of the impugned statute and thereby ignored the apparent conflict between the legislation and the Constitution. Under Article 13(2) of the Constitution, in such cases, the former and not the latter shall be void. However, this judgment is vulnerable to an allegation of

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H. R. Khanna, J., excerpt from his dissenting opinion in *Additional District Magistrate, Jabalpur v. Shukla* (AIR 1976 SC 1207), *supra* note 1.

[11] By majority- In view of the Presidential order dated 27 June 1975 no person has any *locus standi* to move any writ petition under Article 226 before a High Court for *habeas corpus* or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by *mala fides* factual or legal or is based on extraneous consideration. Order issued through concluding paragraph in Additional District Magistrate, *Jabalpur v. Shukla* (AIR 1976 SC 1207), *supra*, note 1.

[12] (1998) 2 SCC 109.

being decided *per incuriam* as the Act is in clear conflict with Article 21 read with the Preamble to the Constitution.

Without enforcing martial law under Article 34 of the Constitution, no "disturbance" on the part of state or government- whatever the case may be- may constitute any ground for the violation of personal liberty conferred by Article 21, read with Article 32 of the Constitution of India. But the concept of "internal disturbance" with its widespread subjective elbow space, is operative even after the same ceased to exist in Article 352 of the Constitution. Thus, one may draw an inference and conclude that in practice, a protracted martial law is in vogue in parts of India. Whether enforced disappearances are valid or how far it is valid even under martial law is a separate issue and will be dealt with later.

The definition of enforced disappearance, as recognised in international law, seems directly applicable to what happens in Kashmir.[13] Under Article 9(1), read with 4(1), of the International Covenant on Civil and Political Rights, 1966- to which India is a party- a limited violation of liberty and security of person may be allowed during a declared state of emergency. However, in India, the same happens sans a declared emergency. This is a development which refers to the virtual adherence of martial law and in practice, is a grey area of law which lacks articulation even under Article 34 of the Constitution. It is therefore not in tandem with the rule of law being part of the basic structure of the Constitution. Also the same is inconsistent with other obligations, e.g. right to life, right against torture etcetera, derogation from which is proscribed under Article 4.2, ICCPR. The right against enforced disappearances is an implicit right well within the ICCPR regime..

Since the last two decades, disappearances have become a matter of serious concern for the Kashmir valley.[14] What adds fuel to the fire is the prevalence of political injustice combined with impunity with the operation of the writ of *habeas corpus* in practice, being reduced to a nullity. Indeed in *Naga Peoples,*[15]the Apex Court upheld the impugned Act to the detriment of the liberty discourse, but the

[13] For the purposes of this Convention (International Convention for the Protection of All Persons from Enforced Disappearance, 2006), "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the States or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.
Article 2, International Convention for the Protection of All Persons from Enforced Disappearance, 2006. Available at: http://www2.ohchr.org/english/law/disappearance-convention.htm accessed on February 16, 2011.

[14] The testimonies of the families and the documentation of cases of disappeared persons in Kashmir indicate that the practice of enforced disappearance is widespread and systematic. Due to lack of proper survey and documentation there are no authentic figures available. However, about 8000 to 10,000 people are thought to have disappeared. A large number of disappearance cases remain undocumented for various reasons, including fear of reprisal by the security forces. At times the families have to move court to even register a First Information Report (FIR) at the police station. Families go through coercion and intimidation to withdraw complaints. There is no reparation or recourse for disappearances. *Ex gratia* relief of Rs. 1,00,000/- is awarded only after the families obtain a death certificate from district authorities indicating that the victim was not involved in militancy. Families are pressured to withdraw complaints in order to receive *ex gratia* relief.
Association of Parents of Disappeared Persons (APDP) A Movement against Enforced Disappearances. Available at: http://www.disappearancesinkashmir.com/ accessed on February 19, 2011.

[15] *Supra* note 11.

Court also issued a series of functional guidelines.[16] Of late, in *Masooda Parveen v. Union of India and Others,*[17] the Apex Court minimised existing liberty rights that had been evidenced in the judicial thinking in the *Inder Singh* case[18] and reverted to its *Shukla* position.[19] In *Inder Singh,*[20] the Court progressively upheld a right against enforced disappearances and thereby established a set of rights including the right to compensation for such aberrations. Yet this judicial progression has not been consistently followed in the years thereafter.

4. Enforced Disappearance with Impunity: The Indian Experience

In spite of being well advanced in its rights jurisprudence in the Punjab, the Judiciary could not apply the same principles to enforced disappearances in Kashmir. Instead, the Judiciary followed a so called one step forward two steps back approach and thereby offered undue importance to the special status of Jammu and Kashmir to the detriment of its disappeared people. The fact that Article 370 of the Constitution is meant to provide for transition of power and that the same is not meant for restraint of the judicial process was overlooked.

Under Article 10 of the Constitution of Jammu and Kashmir, 1956, read with its Preamble, the Permanent Residents of the State have all the rights guaranteed under the Constitution of India which

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[16] The Court arrived at *inter alia,* the following conclusions:

(1) Parliament was competent to enact the Central Act in exercise of the legislative power conferred on it under Entry 2 of List I and Article 248 read with Entry 97 of List I. After the insertion of Entry 2-A in List I by the Forty-second Amendment to the Constitution, the legislative power of Parliament to enact the Central Act flows from Entry 2-A of List I. It is not a law in respect of maintenance of public order falling under Entry I of List II.

(2) The expression "in aid of the civil power" in Entry 2-A of List I and in Entry 1 of List II implies that deployment of the armed forces of the Union shall be for the purpose of enabling the civil power in the State to deal with the situation affecting maintenance of public order which has necessitated the deployment of the armed forces in the State.

(3) The word "aid" postulates the continued existence of the authority to be aided. This would mean that even after deployment of the armed forces the civil power will continue to function.

(4) The power to make a law providing for deployment of the armed forces of the Union in aid of the civil power of a State does not include within its ambit the power to enact a law which would enable the armed forces of the Union to supplant or act as a substitute for the civil power in the State. The armed forces of the Union would operate in the State concerned in cooperation with the civil administration so that the situation which has necessitated the deployment of armed forces is effectively dealt with and normalcy is restored.....

[17] (2007) 4 SCC 548.

[18] The Punjab Police would appear to have forgotten that it was a police force and that the primary duty of those in uniform is to uphold law and order and protect the citizen. If members of a police force resort to illegal abduction and assassination, if other members of that police force do not record and investigate complaints in this behalf for long periods of time, if those who had been abducted are found to have been unlawfully detained in police stations in the State concerned prior to their probable assassination, the case is not one of errant behaviour by a few members of that police force. ... On the contrary it betrays scant respect for the life and liberty of innocent citizens and exposes the willingness of others in uniform to lend a helping hand to one who wreaks private vengeance on mere suspicion... This Court has in recent times come across far too many instances where the police have acted not to uphold the law and protect the citizen but in aid of a private cause and to oppress the citizen. It is a trend that bodes ill for the country and it must be promptly checked. We would expect the DGP, Punjab, to take a serious view in such a case if he is minded to protect the image of the police force which he is heading. He can ill-afford to shut his eyes to the nose-dive that it is taking with such ghastly incidents surfacing at regular intervals. Nor can the Home Department of the Central Government afford to appear to be a helpless, silent spectator. *Inder Singh v. State of Punjab and Others* (1995) 3 SCC 702, paragraphs 9-14, *supra* note 2.

[19] *Supra* note 1.

[20] *Supra* note 2.

includes liberty in general and personal liberty in particular. At the same time, however, martial law is part of Part III of the Constitution to restrain fundamental rights with impunity while the same is in force. However harsh the same may be, therefore, "the state" has reasons of its own to ignore disappearances.

What seems imperative is to maintain a balance between rights and obligations of the state and its people. While the state has an obligation - be the same international or national- to secure human rights for its people, the people too have an obligation not to abuse the same to the detriment of national security unless and until they prefer to exercise their right to self-determination. This is a contentious right not recognised by the government. Similar, if not exactly the same wisdom was reflected in a pioneer work on the liberty discourse through which the author of the dissenting opinion in *Shivakant Shukla* himself explored the political economy of the volatile liberty discourse and thereby preferred a balanced midway between authoritarianism and liberalism.[21]

By and large, governmental allegations *vis-à-vis* foreign intervention in Kashmir valley appears to be credible. This has helped the state to counter the claim of self-determination and assert a counterclaim over Kashmir as being an integral part of its territory. This is a premise that is pregnant with juridical contradiction though politically prudent under the circumstances.

From a rights advocacy point of view, enforced disappearances is anathema to the Rule of Law. Resorting to such practices ordinarily only worsens a situation where the people are unsettled. Recent incidents of the stone-pelting of Indian soldiers engaged in by Kashmiri housewives and children demonstrate the boomerang effect of a repressive governance syndrome operative in the valley. From an international humanitarian perspective, enforced disappearance as a means and method of armed conflict is in clear contravention of the Geneva Conventions, 1949. As a non-international armed conflict, though not so declared for understandable reasons, the struggle in Kashmir is no exception to this end. Earlier experiences in Sri Lanka demonstrate the futility of such actions and also illustrates as to why the legal remedy of *habeas corpus* must be strengthened and made legally effective. In its long-term interest, states ought not to be engaged in such a practice as this earns perpetual discredit for the concerned state party and affords sympathy for non-state actors waging a war against the state.[22]

5. Travesty of (Remedial) Justice: A Systemic Subversion

[21] "Liberty cannot rest upon anarchy; it is conditioned upon an ordered society. Some groups might bawl of liberty, but really they mean no more than the tyranny of their own domination over the mob and the freedom to use the mob for their partisan ends. Liberty postulates that all political parties should act with a sense of responsibility. There is a close nexus between liberty and the proper functioning of democratic institutions. Democracy embodies the principle of resistance to government within the principle of government itself. When differences of opinion within a State reach a point where individuals or groups refuse to behave peaceably and brush aside constitutional barriers, there arises real danger of the breakdown of constitutional system and collapse of civil liberties. Such individuals and groups would no doubt describe civil liberty to mean the removal of all restraints from the crowds and all local attempts to maintain order as impairment of the liberty of the citizen." H. R. Khanna, *Constitution and Civil Liberties*, Dr. B. R. Ambedkar Memorial Lectures, Institute of Constitutional and Parliamentary Studies, New Delhi, 1978, p. 70.

[22] For details, *vide* Kishali Pinto-Jayawardene & Jayantha Almeida Guneratne, *Liberty Rights at Stake: The Virtual Eclipse of the Habeas Corpus Remedy in Sri Lanka* (forthcoming).

Indeed, in conflict zones, sporadic instances of human rights violations may occur. However, there must be an effective line of command responsibility to ascertain that, the same may at its best constitute an exception rather than a rule. A workable way is strengthening of judicial supervision in respect of such aberrations. Allowing the effective operation of the Judiciary through issuing writs in the nature of *habeas corpus* may prevent enforced disappearances emerging as a sign of impunity and injustice.[23] A systemic subversion of the justice delivery system through the politicising of judicial institutions is however, the worst that can happen. The abuse of judicial institutions for the vested interest of the State results in erosion in terms of the credibility of the same in popular perception. A non-state actor thereby derives legitimacy and gains popular support as enforced disappearances hurt the heart and soul of liberal democratic governance.

Section 10 of the Constitution of Jammu and Kashmir demonstrates that permanent residents of the state are entitled to all rights offered by the Constitution of India including the right to complete justice which includes procedural justice, remedial justice etc. Thus the right against enforced disappearance and the constitutional remedy against the same constitute an integral part of good governance due to these residents. As per Article 32, constitutional courts are under obligation to offer a constitutional remedy through issuing writs in the nature of *habeas corpus* etc. However, there is a vast gap between theory and practice so much so that permanent residents of the valley have become victims of a virtual emergency- a *de facto* emergency not officially proclaimed which is in clear contravention of both international law and the constitutional law of the land in India as explained previously.[24-25] The intervention of the National Human Rights Commission has been instrumental in addressing this question to some extent.[26] Indeed instances of offering *ex-gratia* relief seem due to

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[23] For details, *vide* Benjamin N. Cardozo, The Nature of Judicial Process, the Storrs Lecture delivered at Yale University. Available at: http://xroads.virginia.edu/~hyper/CARDOZO/CarNat.html accessed on February 16, 2011.

[24] *Vide* Article 4.1, ICCPR, 1966.

[25] *Vide* Part XVIII, the Constitution of India, 1950.

[26] The matter of enforced or involuntary disappearances had already been taken up by the Commission. On 14 May 2003, the Commission directed the Government of J&K to furnish the following information:

i) whether the State Government has established a system to record allegations of enforced or involuntary disappearances and, if so, the nature of that system;

ii) the number of such allegations recorded by it, the details of the system established thus far to investigate such allegations and the results, thus far, of such investigations;

iii) the measures that are being taken to prevent the occurrence of enforced or involuntary disappearances; and

iv) the measures that are being taken to bring to book those who may have been involved in such disappearances and to provide justice to those who have suffered.

On 28th July, the Government of J&K sent a reply which, it was observed by the Commission, was singularly silent about the establishment of a system to record allegations of enforced or involuntary disappearances or the nature of that system. It has also not informed the Commission about the number of allegations and the details of the system established to investigate the allegations and the results of those investigations.

The Commission noted that the Home Department, Government of Jammu & Kashmir seems to have mistaken the query regarding recording of allegations with references made by NHRC/SHRC/Ministry of Home Affairs, Government of India and the Home Department, J&K. The Commission observed that the assertion in the reply of the Government of J&K that reports were called for and communicated to the concerned quarters was also vague. It has, therefore, asked the Home Department, Government of J&K to specifically answer all issues raised by the Commission. The Commission also asked it to furnish details of its directions regarding the measures to prevent occurrences of enforced or involuntary disappearances.

While noting that necessary instructions have been issued by the Government of J&K to the field staff to avoid such happenings, the Commission observed that there was no indication of any action having been taken to bring to book those who were involved in enforced or involuntary disappearances. The Commission directed the Government of J&K to send a detailed reply to the Commission within six weeks.

timely intervention on the part of the Commission rather than operation of the regular administration of justice as such. Even so, instances of relief are sometimes tainted by illegal persuasion on the part of state agencies in compelling the withdrawal of complaints of enforced disappearances. Rather than such abhorrent practices, what we need is social engineering on the part of institutions of governance to reinforce the rule of law, thereby rebuilding confidence of the public to influence the policies and politics of those who govern.

Unless and until these bridges are rebuilt between the state and its people, no system of governance sans justice will sustain the test of time. Remedial justice ought to focus on affirmative action on the part of the administration to offer a rehabilitation package to all affected families of the valley. The state must attain its transcendental state policy *vis-à-vis* separation (read independence) of the Judiciary from the Executive in terms of public services.[27] In brief, besides claiming the valley as an integral part of its territory, the state should treat its people accordingly and not like an alien enemy.

In practice, however, the state acts otherwise, so much so that permanent residents of the valley are yet to consider themselves as equivalent to their counterparts in the rest of the territory of India even after six decades of constitutional making. Instances of aberration of rights, like the right against enforced disappearances, contribute to their feeling of alienation from mainstream India as there is no jurisprudential defence available for the same.[28] As apparent on the face of the record, state agencies indulge in grave breaches of international humanitarian law against its own people and the fact that there is no recourse to prosecution only aggravates this environment of impunity.

6. Conclusion

To sum up the arguments abovementioned, India appears to be engaged in a self-defeating exercise in compelling an internal conflict to internationalise and thereby strengthening the self-determination movement.[29]

Available at: http://www.nhrc.nic.in/disparchive.asp?fno=588 accessed on February 27, 2011.

[27] *Vide* Article 50, the Constitution of India, 1950.

[28] In wartime, forced disappearances constitute a violation of international humanitarian law and at all times they are a violation of international human rights law. They negate the very existence of the human being and deny the person in question the basic legal protection to which every man or women is entitled, no matter whether they are guilty or innocent. It is also a violation of the rights of the missing person's next of kin.
The ban on enforced disappearances, like all the rules of humanitarian law, admits of no exceptions. No war, state of emergency or pressing national security concern warrants such disappearances.
Jacob Kellenberger, President of the ICRC, Geneva, commented in Paris, on February 6, 2007. Available at: http://www.icrc.org/eng/resources/documents/statement/enforced-disappearance-statement-090207.htm accessed on February 28, 2011.

[29] "We sought liberty- freedom from oppression, freedom from want, freedom to be ourselves. This then we sought; this we now believe that we are by way of winning. What do we mean when we say that first of all we seek liberty? I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognise no check upon their freedom soon becomes a society where freedom is the possession of only a savage few- as we have learned to our sorrow."

Further, under given circumstances, the practice of (state sponsored) enforced disappearances have provoked strong reactions from the people, particularly in the Kashmir valley. The sooner the state reads the writing on the wall, the better as it will enable the addressing of grievances at the grassroots level in its own interest. A snowball effect of the Kashmir syndrome may push South Asia toward the balkanisation of the subcontinent which will not be an encouraging development. Last but not least, permanent residents themselves are likely to be the worst victims as Kashmir would become the epicentre of political end games to settle diplomatic scores of giant power-players against each other with the geo-political position of the valley being of supreme strategic significance to all of them, i.e. India, China and Pakistan. The state of post-Taliban affairs in Afghanistan corroborates such apprehension beyond reasonable doubt.

While sustainable development is an insignia of and a *sine qua non* for good governance, India cannot compel the docility of its subjects in the valley by means of the maintenance of law and order through repression. In a modern liberal democracy, least governance seems best governance. The valley has had a *sui generis* status in the constitutional scheme of India. Thus prudence lies in offering people constructive governance along with practical guarantees of justice, equality, liberty and fraternity so pledged to secure for all its citizens, including permanent residents of the Kashmir valley, under the overarching protection of the Constitution of India.

Learned Hand, J., *The "Spirit of Liberty" Speech on "I am an American Day"*, 1944. Available at: http://www.providenceforum.org/spiritoflibertyspeech accessed on March 1, 2011.

EXTRACTS FROM PART 1, SECTION 1, TITLED THE IMPOSSIBILITY OF JUSTICE FROM *IN SEARCH OF VANISHED BLOOD* - THE WRIT OF *HABEAS CORPUS* IN JAMMU AND KASHMIR, 1990-2004*

Ashok Agrwaal

The single most striking feature of *habeas corpus* proceedings is the powerlessness of the High Court. Everything else can be derived from this fact. From the point of time when the Court issues *notice* of the petition upon the respondents, it looses all control over the proceedings. The pace, the manner in which the case would proceed, and the outcome of the case is controlled entirely by the respondents: the central and the State Governments. Nor does the Court display a significantly better control over its own establishment. The staff of the High Court has no fear of consequences for culpably slack and careless work. The subordinate judiciary, the District Judges (DJ) and the Chief Judicial Magistrates (CJM), who are appointed inquiry officers in most cases, are only marginally more responsive to the imperatives of their office.

It goes without saying that a helpless court is unlikely to be able to pass clear and decisive final orders, even in cases where the allegations, stand proved. In over 57% of the cases in which there was a clear finding against an identified security force/ unit, the Court found itself unable to do anything other than order registration of an FIR,[1] which ought to have been done in the first place, without the Court's intervention.[2] To fully appreciate the absurdity of this we must also factor in the number of years that it took the Court to pass such an order. In ten cases, the order to register an FIR took between five to twelve years.

What words does one use to describe a justice system in which the best order that the family of a disappeared person can expect – several years after the event – is a direction to the police to register an FIR? There can be no more damning indictment of the system than this. But the reality is even worse. We have records, and recorded testimony, to show that the registration of the FIR was seen by all concerned, the families, the police and, the judges as a mere formality, the completion of which would enable the *system* to wash its hands of the matter. The only expression of contrition that the system showed for its *mistakes* was in its willingness to consider the grant of *ex-gratia* compensation to the families of the disappeared.[3]

The Court was not completely oblivious of the fact that it was playing out a farce. For example, it is repeatedly seen that the Court did not pay attention to its earlier orders, acting – almost – as if on each date of hearing the entire matter was being dealt with afresh, ignoring all that was said and done in the past; as if the years of proceedings before that date never happened. It seems to me that such forgetfulness is essential for retaining a modicum of sanity in the schizophrenic environs of the J&K justice system. Unscrupulous respondents and their lawyers take advantage of this amnesiac

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[1] Or, completion of investigation in the FIR already registered.

[2] In the remaining 43% cases the Court did not even order the registration of an FIR.

[3] This gesture is steeped in irony since the object of the scheme is to provide compensation to 'Victims of Militant Violence'.

functioning, getting away with everything: from years of delay in filing replies to inveigling the Court to disposing of petitions (that had been pending for several years) in the absence of representation on behalf of the petitioners.

The Court's lack of control over its establishment, or the courts and officers subordinate to it, resulted in the staff of the Court frequently not carrying out the directions issued to it by the judges, with no fear of consequences. For example, notices/ summons were frequently not issued, despite directions. The result was years of delay in serving notices upon agencies who had a 'standing counsel' in the High Court. The performance of the subordinate judiciary, the DJs and the CJMs, who were appointed inquiry officers in most cases, was mixed. Despite working under harshly adverse conditions they sometimes conducted exemplary inquiries. However, in several cases the conclusions drawn in the inquiry reports were patently absurd, or careless. In none of the cases did the High Court catch the absurdity, or correct the carelessness.

The conduct of the other players in the farce is also reflective of their awareness of the true nature of the proceedings. In *Manzoor Zargar's* case (90/6), the BSF took over five years to file their response to the petition. In as many as 17 cases the respondents took more than two years to file their replies.[4] In 30 cases they took between one year and two years to file their replies.[5] Coupled with the fact that the accused unit of the armed forces did not file any reply at all in as many as 38 cases, the inference is clear.

The nature of their responses is equally revealing. In over 70% of the petitions in which the accused unit filed a response (41 cases out of 58), it was a bald denial of arrest. Of the remaining responses, in 10 cases they admitted the arrest but claimed that the person concerned had been, subsequently, released. In three cases (pertaining to four persons) they claimed that the arrested persons had *escaped* from their custody. In four cases it was stated that the arrested persons were held in legally recorded and, acknowledged, custody after their arrest.[6]

The conduct of the security forces was even more scornful once the case had been sent to the Inquiry Judge. In a very large number of the 62 cases in which inquiries were ordered by the High Court, the accused unit did not participate in the inquiry proceedings.[7] In several cases the Inquiry Judge recorded adverse remarks about the conduct of the accused unit, specifically attributing the delay in completing the inquiry to their tactics. In none of the inquiries did the security forces produce the records pertaining to the deployment of their troops, or those pertaining to the crackdowns that are a daily routine of life in Kashmir, or the records pertaining to the arrest/ detention of people. Nor did they ever bring before the court any of the soldiers/ officers responsible for the impugned actions. In *Basharat Shah's* (91/12) case, the Central Reserve Police Force (CRPF) *made* the Commandant and

[4] This includes the State Government, which was a party in all the petitions.

[5] The accused units responded in 58 of the 85 petitions examined. This includes replies at any stage of the proceedings, whether orally or in writing, so long as the same were reduced to writing by the judge.

[6] It is an established pattern for most arrests to be *unacknowledged* to begin with. Subsequently, for reasons that are not wholly clear (random chance?), the arrestees get classified into two categories: those who disappear; and those whose arrests are converted into *acknowledged* arrests.

[7] We are unable to be more precise because of the manner in which the security forces conducted themselves. In many cases the accused unit appeared before the inquiry on a few occasions and, thereafter, absented themselves from the proceedings. In some cases, they limited their participation in the inquiry proceedings to filing a very basic reply or, some rudimentary (and incomplete) documentation. In some cases the participation went to the extent of cross-examining some of the witnesses produced by the petitioner.

the Deputy Commandant of the 53 Bn to retire *rather* than produce them before the Inquiry Officer appointed by the High Court.[8]

That they did not file a reply before the High Court, or that they did not participate in the inquiry proceedings, did not mean that the security forces were not following the proceedings. In several cases the accused unit of the armed forces did not file a reply before the High Court or cooperate in the judicial inquiry ordered but chose to file objections to the inquiry report; which had held against them. Thus, the picture is one of watchful disregard for the court and its processes. Wherever the security forces felt that they needed to intervene, they did so.

This position becomes even clearer when the context is widened to include the response of the central government in cases where the State Government requested it for grant of sanction to prosecute officers/ members of the central security forces (including the army), who had been charged with penal offences.[9]

In four petitions the police are on record as having completed their investigation and finalised a charge sheet against the officers/ soldiers responsible for the arrest/ disappearance.[10] In two of these cases we have no information except for the fact that the police had stated before the Court that their investigation was complete and the charge sheet ready for being filed before the competent court. In two other cases, the High Court involved itself in monitoring and, to some extent, supervising the State Government in the process of *obtaining* sanction from the central government. In both these cases the central government rejected the request for grant of sanction to prosecute the officers concerned.

These two cases are not the only ones in which the central government has refused the request for sanction. It is our information that the central government has granted sanction to prosecute in only two of the hundreds of cases in which such sanction was sought.[11] In other words, it is reasonable to infer that the central government was/ is not inclined to permit the courts to exercise jurisdiction and control over forces under its command. The conduct of the central security forces in the *habeas corpus* petitions examined in this report mirrors this attitude, and once this is factored in the conduct of these forces becomes explicable.

The palpable indifference of the process also led to consequences that would have been comical, but for the tragic setting. In as many as 17 of the 85 petitions the proceedings continued for several years after the arrestee had been released by the security forces. In one case, the arrestee was booked under the Public Safety Act 1978 (PSA), served out his period of detention, was released, and killed by the army in a fake encounter before the High Court and its minions reached his home. The abjectly poor father of Mohammad Yusuf Wahloo (91/8) told the Inquiry Judge that since his son was dead, he did

[8] This fact was mentioned by the inquiry officer in his report to the High Court.

[9] Section 197 of the Indian CrPC 1973 is the generic provision with respect to the requirement to obtain *sanction* from the *appropriate* government in cases where public servants are sought to be prosecuted/ tried for offences under the IPC. Section 7 of the Jammu and Kashmir Armed Forces Special Powers Act (AFSPA) contains a similar provision.

[10] An FIR or a complaint was stated to have been filed in 60 of the 85 cases where petitions were filed.

[11] These are the cases of *Parveena Ahangar*, whose son, Javed, was disappeared in 1990. Sanction to prosecute was recently granted by the central government in this case, after a 14 year struggle for justice. The other case pertains to the murder of prominent lawyer and human rights activist, Jalil Andrabi. In both cases, we are informed, the court seized of the matter has been unable to enforce the attendance of the accused officers.

not want to participate in the proceedings. However, when apprised of the facts the High Court chose to dispose of the case *for want of instructions from the petitioner*. The insensitivity of the Court to the plight of the people whom it is supposed to serve, in justice, seems to be encapsulated in this remark.

One can speculate that the surrender of its prerogatives by the Court was, at least, in part a result of the realisation of its complete helplessness. It also seems to us that it took time for the full extent of its irrelevance to hit the Court. With the passage of years the proceedings became increasingly formal, with the Court displaying less and less enthusiasm for playing out, or prolonging the farce. On the other hand, the security forces displayed an increasing mastery of the processes of justice. The result is clearly visible from the cases discussed. From 1999 onwards, the Court ordered an inquiry in very few cases, being content to simply ask the police to register an FIR/ complete investigation in the FIR already lodged.[12]

The facts we have examined and analysed inexorably reinforce the conclusion about the irrelevance of the *habeas corpus* proceedings to the meaning of the sanctity of life and liberty under the Constitution of India. The Court went through the motions, without any faith in the effectiveness, or sanctity of its processes. The result was not just that the Court's intervention did not save any lives; these processes had no impact whatsoever on the prevailing situation. It was as if the courts did not exist.

It is not easy to analyse a complete farce, particularly when the players of the farce act it out with a seeming air of unawareness.[13] We found absurdity, capriciousness, culpable negligence, callous disregard and more. We found a court completely oblivious to its place and importance in the constitutional scheme of things; a court unwilling to acknowledge its linkages to the society in which it was situated. Yet, the Court functions: judges come and go in their siren equipped cars, shielded both by curtains on the car windows, and by the phalanx of security personnel who guard them. Perhaps [they are] guarded by the same personnel (or, at least, their brothers in arms) who "disappear" the people on whose behalf the judges [hear] *habeas corpus* petitions?

In this and the following two chapters, I shall analyse how the High Court of Jammu and Kashmir dispensed justice. The first two of these chapters are both called *The Impossibility of Justice*, while the third one is called *Brooding Omnipresence: Notional Powers and Actual Impotence*. The first stage of the analysis must necessarily be to establish the broad patterns of the court proceedings. The first two sections below, titled *Absurdity At Large* and *The Empty Cases* illustrate the general case. The third section examines the cases in which the inquiry report returned a clear finding against the security forces. This section is divided into two parts: cases that have been *disposed of* or *dismissed* by the High Court and, cases that are *still pending disposal* by the Court.

In the next chapter (The Impossibility of Justice –II) we will first examine several smaller categories. The section titled *Where Guilt Was Not Established* enumerates the cases in which the inquiry returned a finding of *not guilty*; cases in which inquiries were *ordered but not held*; cases resulting in the High Court ordering *inquiries which were still pending*; and, the cases in which the *inquiries were closed*. The second section in this chapter covers cases where the *inquiry was not ordered*. As the High Court did not order an inquiry in over 27% of the cases this is a very important section, though

[12] In a way, this trend must be welcomed since this was the most likely order that the Court would have passed even after the inquiry.

[13] In fact, given space constraints, and the limitations inherent in a structured presentation, it is impossible to do complete justice to our findings.

(necessarily) deficient in material from court records.[14] Since the collapse of the justice system cannot be attributed solely to the faults and failures of the courts, the third section of this chapter seeks to trace the impossibility of justice in the indefatigability of the Union of India's resolve to shield its security forces from judicial scrutiny and prosecution by *denying sanction*. The fourth and last section looks at the *cases that did not lead to the filing of petitions*. In every real and palpable sense the outcome in these cases is identical to those that went before the court. To reiterate, the filing of a writ of *habeas corpus* makes no difference to any instance of enforced disappearance and its outcome in Kashmir.

[14] The deficit has been made up by referring to information from the families.

THE RISE AND FALL OF *HABEAS CORPUS* IN BURMA*

Nick Cheesman

At independence in 1948, there were two ways to apply for *habeas corpus* in Burma. One was via the writ jurisdiction of the Supreme Court, established under the new Constitution, which guaranteed all persons the right to approach the court directly for relief. The other way was via the appellate criminal jurisdiction of the High Court, under Section 491 of the Criminal Procedure Code, which permitted applications "in the nature of *habeas corpus.*"[1]

In the two years immediately after independence, when government authorities used emergency powers to combat myriad insurgencies and related violence, *habeas corpus* was according to Maung Maung— later Chief Justice and architect of the so-called people's justice system — "the most popularly invoked remedy."[2] 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."[3] 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."*[4]

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 sympathiser or a notorious criminal. On the other hand, they did not order to release detainees in cases where procedure had been followed and the person's confinement justified, even when the law under which they had been detained had been written so as to reduce judicial oversight of custodial powers, as in the *U Ba Yi* case.[5]

After the 1958 constitutional coup, things began to change. Applicants continued to file for *habeas corpus* in cases of alleged wrongful arrest and custody.[6] However, the courts were given fewer opportunities to exercise their authority than under civilian government. The military and police promptly rounded up hundreds of political opponents and other perceived threats and sent them,

* Taken from "The Incongruous Return of *Habeas Corpus* to Myanmar" by Nick Cheesman which first appeared in Ruling Myanmar: From Cyclone Nargis to National Elections edited by Nick Cheesman, Monique Skidmore and Trevor (2010), pp. 90-111. Reproduced here with the kind permission of the publishers, Institute of Southeast Asian Studies, Singapore. <http://bookshop.iseas.edu.sg> with method of citation revised to be in line with the requirements of the *LST Review*.

[1] The Section remains on the code to the present day but has not been used since the mid-1960s and is a narrower provision than that provided under the former constitution; hence, in this paper I refer to the formal "return" of *habeas corpus* through the new constitution.

[2] Maung Maung. *Burma's Constitution*. 2nd ed., The Hague: Martinus Nijhoff, 1961. p. 99.

[3] *G.N. Banerji v. Superintendent, Insein Jail Annexe, Insein.* BLR (1948) SC 203–04.

[4] *Tinsa Maw Naing v. Commissioner of Police, Rangoon & Another* BLR (1950) SC 37.

[5] *U Ba Yi & Eight Others v. The Officer-in-Charge of Jail, Yamèthin.* BLR (1950) SC 130.

[6] Director of Information 1960. p.60.
For a reported case from the same year, see *Lim Lyam Hwat v. Secretary, Home Ministry* BLR (1960) SC 128.

without warning, to a prison camp on a remote island. They were held in barbaric conditions and without any means for effective judicial inquiries.[7]

With the military takeover of 1962, although writs were not formally abolished and the statutory allowance for *habeas corpus* as a form of criminal appeal remained, there was no longer an independent superior court to receive petitions. None of the hundreds or perhaps thousands of persons detained without charge or placed under protective custody successfully challenged the orders against them.[8] A new parallel system of army-controlled special courts heard cases that would have been most likely to give rise to complaints of unlawful confinement. Illegal arrest and imprisonment ceased to be an issue with which the judicial system was practically concerned. The last reported petition for *habeas corpus* that the apex court entertained was that of U Aung Nyunt in 1965, and it was not a complaint against custody at all but one against an order prohibiting movement into a special frontier area.

There was no reference to writs in the 1974 Constitution, and since then the only explicit writ-equivalent petition entertained has been for review of lower courts' proceedings on the ground of errors in law.[9] The 1975 Law Safeguarding Citizens' Rights was supposed to offer an alternative avenue for complaints of unlawful custody and other abuses, but as it was unaccompanied by any procedural guarantees, complaints were either delayed or ignored.[10] In 1976 the *Working People's Daily* carried a front-page article on a request for release from the central jail of a father and son whom military intelligence had arrested without charge in 1964. The apex court finally ordered that they be freed some seventeen months after it received the request, and then after the public prosecutor had repeatedly caused the case to be postponed, only to report that he had nothing special to say. In another case of this sort, an army battalion held an alleged insurgent without charge for around three years before a new commander discovered him and sent him up for trial. The judge found him guilty and sentenced him to imprisonment. Although his illegal confinement was acknowledged in court, the judge did not deduct it from the sentence, as it was not officially time served.[11] And during the 1988 protests when families of detained students applied to the Chief Justice for their release, he in turn just handed the documents over to the Attorney General's office, where they were put on file.[12]

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[7] For a detailed recount of a former detainee, see Ko Ko Lay. *Balehe-Kokokyun* [What is Coco Island]. Rangoon, Khin Maung Yi and Sons Press, 1960 (who records that some detainees were taken to the island in error, among them juveniles, small traders and at least one unfortunate who had the same name as a notorious criminal. Meaningful legal and political challenges to the camp were not launched until late 1959; the authorities closed it the following year. The island was again used to hold prisoners from 1968–70).

[8] Myint Zan. "Judicial Independence in Burma: No March Backwards Towards the Past". *Asian-Pacific Law & Policy Journal* 1, no. 1 (2000): pp1–38.
For a short account of a meeting with a detained former minister, see Balwant Singh, *Burma's Democratic Decade, 1952–1962: Prelude to Dictatorship.* Tempe, Az: Arizona State University, 2001, pp. 140–41.

[9] U Min Lwin Oo. "Shedawthwin-sachundawmya-agyaung-thigaungsayar" [What to Know about *Habeas Corpus* Writs]. *Constitutional Affairs Journal* 19 (2004): pp48–60 at p. 58.

[10] Under the law, a citizen whose rights had been infringed could report to the "concerned authorities" or their superiors, who were then duty-bound to investigate promptly and take further action where the grievance was found to be genuine or take other steps as necessary to redress the grievance and inform the complainant of the outcome. I have not been able to find any cases deliberated under this law in the law reports.

[11] Information provided by a professional intimate with the case, March 2009. In other cases cited in this paper where no specific reference is given, the details have been drawn from relevant documents.

[12] *Supra* note 2, pp. 47, 61. According to Maung Maung, when Ne Win asked the Attorney General if arrested students had been brought before the courts within twenty-four hours as required by law, the latter "could

The sabotage of Burma's criminal justice system in the 1960s and 1970s is revisited daily in the denial of rudimentary rights to detainees in Myanmar today. At no time in recent years was the absence of judicial remedies for persons in custody more blatant than in the aftermath of the September 2007 protests, when state media acknowledged that thousands of people were being detained and released after questioning — often after signing promissory documents with no basis in law — entirely outside of the system. That the government did not declare either a state of emergency or martial law to allow for this wholesale departure from ordinary legal procedure was immaterial; the families and friends of detainees had no ways to approach the courts. Judges did nothing when lawyers for persons accused of being protest organisers brought to their notice that their clients had been illegally detained. The investigating officer in one case admitted on record that two accused had been held in the central prison for over three months without charge. He denied that the imprisonment was unlawful because, he said, remand had been obtained for the pair in other related cases, but when defense counsel asked him to provide details he was unable to do so. The court did not take up the matter.

Lacking judicial avenues to have their grievances heard, citizens instead make complaints direct to the agencies responsible for wrongdoing. Some people complain because conflicts with local authorities have forced them to go higher up, others for want of alternatives. The family of a man who disappeared from army custody in April 2007 lodged a formal complaint about his disappearance with senior commanders and government ministries. According to them, an army unit had come to the victim's fishery in Kyauk Kyi during early 2006 and demanded money. The disappeared person had not been able to give it at the time but apparently had persuaded the soldiers that he would do so after he sold his fish; however, the unit came again shortly thereafter and took him with them. The family searched various facilities and located him at the regional strategic command headquarters, where they were told that if they paid the money immediately then he would be released. But before they could collect the amount required, they learned that another unit had taken him to carry supplies in a remote area. Over a year later, they lodged their complaint with the help of a human-rights defender, who submitted a copy to the International Labour Office in Yangon. There is only one matching complaint for the period concerned in the office's anonymous public register of cases. It is recorded as closed, with comments that, "Government denied portering and alleged victim to be an insurgent who was captured but subsequently escaped."[13]

Could the return of *habeas corpus* make any difference for this family or other persons in similar situations? The remainder of this chapter is taken up with that question. What are some of the obstacles that applicants are likely to face? How do they compare with those in other places where writs have been sought before authoritarian governments? And what do these indicate about the incongruities of Myanmar's new Constitution?

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only mumble that he couldn't say." p. 48.

[13] Special Sitting to Examine Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), International Labour Organisation, 2009. p. 29. The ILO appears to have waited around two years for this reply; in a March 2009 report the case was still recorded as "open", with "further government information awaited."

1. The Return of *Habeas Corpus* to Myanmar?

Who could now apply for *habeas corpus* and why would they bother? The cartoon constitution barring the entrance to the new developed nation suggests the existence of at least two general categories of plausible applicants: those on the outside of the gateway, aiming to demonstrate that its return is a fraud; and those on the inside, hoping that it is not.

The first category includes those detained for political reasons, or other reasons of special concern to the state or senior state officials, over whose cases the courts have no real authority. Applicants from this category and their legal counsel might apply for *habeas corpus* to demonstrate that it is a sham rather than in hope of obtaining relief. They could include the chairman and general secretary of the Shan Nationalities League for Democracy, Hkun Htun Oo and Sai Nyunt Lwin, jailed since 2005 and convicted of — among other things — high treason and sedition, but whose trial and imprisonment the UN Working Group on Arbitrary Detention in 2008 opined is arbitrary. They could also include the family members of 35 political detainees who in October 2008 lodged a complaint with the Chief Justice over the authorities' refusal to grant them access to the trials of their relatives going on inside the central prison. Given that the order to conduct the trials in this manner itself came from the Supreme Court, the complaint was evidently framed to make a point rather than in a belief that he would reverse the order.[14] And they could include persons detained because of conflict with senior officials or persons close to senior officials, such as businesspeople and other government personnel embroiled in financial or personal disputes.

One advantage of lodging petitions for these applicants would be that their complaints could at least be formally recorded, or they could say that they tried and failed to set down the details of alleged abuses. A writ petition is a formal accusal that obliges an official response. An applicant's affidavit carries weight that other paperwork does not. The evidence needed to lodge a request also makes for a more detailed and accurate narrative than might otherwise be the case. In this way the Judiciary can be used as a record-keeper: if not a bulwark against the denial of human rights then at least one against the denial of historical fact. In Chile under the Pinochet regime, the vigorous filing of requests for writs had the effect of ensuring that something of the personal details of each illegally abducted and detained person is known to this day, even though in the period of dictatorship the Supreme Court only accepted 30 out of almost 9,000 petitions filed.[15] The body of cases also served to make the forced disappearance of some persons more difficult.[16]

But in Myanmar the value of *habeas corpus* for public advocacy is reduced by the lack of scope for publicity around court cases. Local news journals and civic groups do their best to create some space for coverage, but it remains painfully small in comparison even to most other countries across the

[14] In court daily diaries for these cases where defence attorneys applied to have the hearings held in the open, the trial judges invoked Supreme Court orders No. 16/2008 as the basis for holding the trials inside the central prison.

[15] Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile*. Cambridge Studies in Law and Society, eds. Chris Arup *et al*, Cambridge and New York, Cambridge University Press, 2007. p.115.

[16] Hugo Fruhling, "Stages of Repression and Legal Strategy for the Defence of Human Rights in Chile: 1973–1980". *Human Rights Quarterly* 5, no. 4 (1983), pp510–33. p 524.

region. The work of the courts goes virtually unreported in state media: during the 2009 trial of democracy-party leader Aung San Suu Kyi, which was a notable exception to this pattern, writers for the state newspaper demonstrated unfamiliarity with legal terms, using them awkwardly and inconsistently. There are no domestic or international rights groups operating in the country with the capacity or mandate to document and report on most of the types of cases that could be taken up in requests for *habeas corpus* in this first category. There are as yet no independent professional bodies to train members and lobby on issues of special concern. In the absence of these, the efficacy of the writ for advocacy is greatly diminished. This is already a problem for lawyers and others who are fighting cases behind closed doors and without means to communicate directly with large parts of the populace, other than via short-wave radio broadcasts from abroad. Whereas ultimately the writ is about bringing into the open that which is ordinarily shut away, without the means to communicate about the rights of detainees and abuses of these rights, *habeas corpus* is ineffectual. It remains to be seen whether or not after 2010 anticipated changes in government allow for more space to communicate than exists at present — as some analysts predict — but for the time being the domestic media for the most part must persist with writing between the lines rather than on them.

The second category of persons who might apply for *habeas corpus* includes a wide variety of subtypes, among them applicants who feel they have nothing to lose and applicants who for one reason or another cannot or do not choose to negotiate through the usual channels. The former subtype includes the family of the Kyauk Kyi fisherman, who having exhausted all prior available avenues may be prepared to try any new ones, knowing that his life is probably already lost. The latter subtype includes a group of residents in New Dagon who, during March 2007, made a complaint against ward officials and police and fire brigade personnel for allegedly illegally arresting and detaining nine persons whom the officers claimed were residing in the area without having been registered, although the complainants maintained that the detainees had already been put onto the household lists after some earlier delays caused by tardy ward officials. In this case, like others of its type involving complaints to higher levels, a dispute between the residents and the local authorities that led to the arrests also forced the unsatisfied inhabitants to seek the involvement of people further up the administrative hierarchy.

One common experience in countries where citizens have sought *habeas corpus* during times of repressive government is that authorities accused of having — or having had — people in their custody simply deny it. A few admit that they had the person, but that they let him go afterwards and do not know what happened to him next. In areas affected by civil war or occupied by various armed groups, the alleged perpetrators may acknowledge that they had the person but say — as in the *Kyauk Kyi* disappearance case — that he was an insurgent or sympathiser; that he escaped or was killed in an encounter. Outright disavowal of responsibility is easy, and often difficult to prove false. Because of the requirement that the applicant show grounds for the court to consider issuing a writ, if no evidence can be produced then the court will usually reject the request outright.[17] The courts in Burma during earlier decades sided with government officials where the matter rested on the mere say-so of the

[17] In *Kodippilage Seetha v. Saravanathan* (1986) 2 Sri LR 228, the Court of Appeal, Sri Lanka, went so far as to say that not only did the burden to prove an enforced disappearance lie with the petitioner for a writ of *habeas corpus*, but that the standard required was proof beyond reasonable doubt. p. 234. The jurisprudence on the standard of proof in Sri Lanka has been inconsistent. At other times the courts have issued writs on *prima facie* evidence.

applicant against that of the respondent.[18] And in present-day Myanmar where lawyers accuse police in court of keeping detainees in illegal custody, the officers also simply deny knowledge of wrongdoing.[19]

In times of authoritarianism, requests for *habeas corpus* may have the perverse effect of encouraging judges and prosecutors to collude with police and soldiers. The methods used to frustrate applicants can be subtle or crude. Courts and their personnel can erect all sorts of barriers to cause delays without appearing to deviate from normal practice. In Sri Lanka, where people lodged at least 2,755 separate writ petitions for victims of forced disappearances in three provinces from 1989 to 1997, it took around seven years for the courts to hand down their orders.[20] This was in part because the system was overburdened and delays were the norm, but also because officers would fail to appear in court on appointed dates and judges would accommodatingly set new dates for them to fail to turn up again. Nor did lawyers feel obliged to serve their clients properly or keep them informed of proceedings. Not only did people disappear, but so too did files on them. Families never learned of the outcomes of their cases. Staff at the Attorney General's office appeared for police and soldiers responding to *habeas corpus* petitions — as they did in Burma when the writ was in effect during earlier decades, and as they will in cases arising under the new Constitution. Some coached the respondents on how to contribute to delays and submit false or misleading evidence. In this way they developed conspiratorial relationships with police officers and later on when they needed favours of the police the latter would help them in return.[21] When judges finally handed down their orders, many rejected petitioners' requests on spurious grounds of questionable legality.

Where advocacy and record-keeping through *habeas corpus* is aimed at incremental change but does not lead to any tangible benefits for the victims and families of detained or disappeared persons, it can even have a corrosive effect. In Sri Lanka, the presidential commissions of inquiry into disappearances paid special heed to the filing of the thousands of petitions for *habeas corpus* writs and the reasons for their failure in protecting the rights of citizens; however, they did not result in criminal cases against alleged perpetrators, and the families of disappeared persons at best received no more than paltry compensation. Most accused continued serving in official posts, many in higher posts, despite attempts to bring them to justice. The cumulative effect of all the work on these cases, while putting down the basic facts for posterity, has been to demoralise and exhaust people whom it was supposed to benefit.[22] People become frustrated and lose hope after years of trying to obtain justice, further diminishing the standing of the Judiciary as a whole. *Habeas corpus* in Myanmar ultimately could have the same sort of detrimental rather than beneficial effects on a society that is already profoundly demoralised.

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[18] See, for example, *Mrs. G. Latt v. The Commissioner of Police & One* BLR (1949) SC 102.

[19] In cases where persons have allegedly been illegally detained and these facts have come to the notice of the courts in which they have been tried, police have replied that as they have been assigned only to investigate they know nothing about arrangements for keeping the accused in custody.

[20] Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces, Presidential Commission on Disappearances (Western, Southern and Sabaragamuwa Provinces), Sri Lanka, Sessional Papers No. 11 and V, 1997.

[21] Thanks to Basil Fernando for these observations and for his comments on an early draft of this chapter.

[22] See the stories in *An Exceptional Collapse of the Rule of Law: Told through Stories by the Families of the Disappeared in Sri Lanka*. Hong Kong: Asian Legal Resource Centre, 2004.

Even if judges and government lawyers try to perform their tasks conscientiously, the perpetrators of abuses in authoritarian settings have many opportunities to thwart the system, with or without inside help. They can botch or manipulate inquiries to ensure that when instructed to locate and bring a person to a hearing, or explain what has happened to them, they conceal more facts than they reveal. In places where the work of the police is militarised and a variety of other groups have quasi-policing duties — as is the case in Myanmar — a number of agencies may be involved in holding a detainee. Sorting out whether they were last in the hands of the army, police or a vigilante group may be all but impossible. Police or other officers may re-arrest people whom the courts order to be released, as happened frequently in Nepal from about 1999 to 2004, where sometimes the same police who brought a person to court effected her re-arrest as soon as she emerged from the premises. In Sri Lanka, security forces resorted to abducting people from their houses at night rather than bothering to re-arrest them. Some lawyers, witnesses and family members who insisted on lodging requests for writs suffered the same fate. Judges too can be put in harm's way and, even where not in fear of their lives, they may risk their jobs or chances of being promoted and, at very least, their reputations if they are repeatedly humiliated when their orders for release of detainees are ignored or ridiculed through these sorts of practices.

Among the material and technical obstacles to the return of *habeas corpus* to Myanmar, some are common to other countries and others are not. Under the new Constitution, only the Supreme Court can issue writs, which means that applicants or their counsel must use time and money simply to lodge a petition, let alone to get it heard. In a country where most detained people do not have access to attorneys there is no prospect of more than a tiny percentage of the total number of plausible applicants approaching the court.[23] On top of this, there is no longer any practice of filing for writs. Lawyers do not know what *habeas corpus* is. There is no continuity with the habits of earlier periods as in parts of South Asia where legal traditions were kept alive even in the worst times, and where courts retained formal authority over other parts of the state, even if they could not exercise it. The technicalities of reintroducing the use of writs to Myanmar at present remain a mystery, and will have to be sorted out, through issuance of directives and administrative rearrangements, before applicants are able to approach the court at all.

Attempts to use the writ could backfire on individual applicants, their lawyers and supporters, as well as society as a whole. Persons who accuse state officers of wrongdoing in Myanmar — and people helping them — are targeted through counter-complaints, not only in high-profile cases but in ordinary ones too.[24] Lawyers assisting applicants are easy prey for vindictive officials, as their licences can be suspended or revoked on any number of spurious grounds.[25] And there is the risk that the Supreme Court could respond to *habeas corpus* requests with regressive orders that formally endorse the arrogating of policing powers by the army or otherwise authorise state officers to do as

[23] During visits to two prisons in 2008, a United Nations expert who spoke at random with detainees did not meet anyone who had been represented in court, and according to him many prisoners did not even know the meaning of the word "lawyer". Tomas Ojea Quintana, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, United Nations Human Rights Council, 2009, pp. 6–7.

[24] In the disappearance case from Kyauk Kyi, the ILO register further records: "Any connection between the facilitator['s] subsequent imprisonment and this case was denied." International Labour Organisation 2009. *supra* note 13, p. 29.

[25] In May 2009 two prominent rights lawyers had their licences revoked following four months' imprisonment for contempt of court because they had presented documents withdrawing their powers of attorney citing the reason given by their clients for no longer requiring counsel as that they "no longer trust the judiciary".

they please.[26] The Constitution has itself opened the way for rulings of this nature through its deliberate ambiguity on the statutory limit of twenty-four hours before a detainee is brought to court, which it reaffirms but qualifies, excluding "matters on precautionary measures taken for the security of the Union or prevalence of law and order [rule of law], peace and tranquility in accord with the law in the interest of the public".[27]

But if certain types of applicants might fail for these and other reasons, how might others succeed? The somewhat counterintuitive answer to that question goes to the incongruity of Myanmar's legal and political arrangements, an incongruity which has in turn been written into its new Constitution.

2. Why Some Cases might Succeed

To understand how some applicants for *habeas corpus* under the new Constitution might succeed in their plaints, we need to distinguish more clearly between the type of authoritarian legality in Myanmar as against that in recent periods in Sri Lanka or Nepal. To do this we must draw a line, with Otto Kirchheimer,[28] between a judiciary seeking its own adjustments and answers to the pressures of the times and one that has been integrated with the goals and objectives of the political authorities. During periods of dictatorship, judiciaries in South Asia have been coerced into making compromises with executive authorities, but have retained a degree of autonomy.

After the overthrow of Nepal's absolute monarchy, the Supreme Court brought forward hundreds of *habeas corpus* requests that it had kept pending indefinitely. It issued the wide-ranging and unprecedented Dhakal ruling[•] on a batch of eighty-three cases in which it roundly condemned the government for the incidence of enforced disappearances and the failure to investigate, and directed it to pass a law to criminalise the offence in accordance with international standards and establish a special inquiry body with a view to prosecuting perpetrators, as well as compensating families of victims. By contrast, the Supreme Court of Myanmar today is altogether subordinate to and integrated with other parts of the state. To imagine that it can adopt proceedings devoted to resolving a dispute between the individual and the state of the likes of *habeas corpus* is, to paraphrase Mirjan Damasˇka, to smuggle ideological assumptions into a hostile environment. "The state interest" in this type of setting, he writes, "is lexically superior, indeed supreme, rather than placed on the same plane with

[26] This happened in the *U Ye Naung* case, in which the court found that there was no reason why a confession to a military intelligence officer should not also be admissible as evidence, although the finding contradicts all prior law and precedent.

[27] Constitution, 2008, Section 376. The English version of the constitution uses "prevalence of law and order" where in the original text the expression is "rule of law". On the ambiguities of rule-of-law language in Myanmar, see Cheesman 2009. The statutory requirement of 24-hour detention in Section 61 of the Criminal Procedure Code is that, "No police officer shall detain in custody a person arrested without a warrant for a longer period than... twenty-four hours" excluding time taken for transporting the detainee to the police station and court, unless the police officer obtains an order from a judge under Section 167.

[28] Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends*. Princeton, NJ, Princeton University Press, 1961. pp. 18–19.

[•] Editor's Comment; See *Nepal Judicial Academy Law Journal* 2007, pp. 301-339.

individual interests wherein the two could be 'balanced.' "[29]

In this setting, where the courts have an administrative rather than a judicial function, certain types of cases could be successful because of the need to comply with policy dictates rather than enforce law. For instance, Myanmar has joined international instruments concerning children's and women's rights and has sought to demonstrate commitment to these categories of rights. There is a lot written on them in professional journals and texts, and some attorneys are specialising in cases where women and children are the victims of abuse. Official groups and international agencies are helping to make space for debate and reportage on abuses of women and children that does not exist for lots of other issues. And in many cases of illegal confinement involving women and children, especially teenage girls brought to the towns and cities for employment, the perpetrators are private citizens rather than state officers, or the latter acting in a private capacity. These types of cases, if coming within the ambit of *habeas corpus* as an extraordinary remedy could succeed for administrative rather than judicial reasons.

The success of a few *habeas corpus* petitions, resulting in the release of detainees, could mislead well-intended outside agencies and serve as propaganda to raise money for in-country projects, as is already being done on issues like human trafficking and child soldiers. The government of Myanmar could seize on cautiously optimistic reports from international bodies keen to identify any change as a sign of some progress so as to impress faraway experts that it is sincerely promoting the rule of law and upholding judicial independence, just as the government of Argentina did during the 1970s even as its military was abducting, torturing and killing tens of thousands.[30] For some years, officials from Myanmar's courts and its Attorney General's office have sought to convince counterparts at meetings in other parts of Asia and further abroad that their country too shares in the common-law heritage and its values.

Reintroducing the writ may be one useful way for them to boost these claims in attempts to enhance not only their own credibility but also that of the new Constitution, without much risk of actually achieving anything.

Finally, any *habeas corpus* petition without special policy interest to the state or senior officialdom could also succeed through the simple expedient of money given to judges, prosecutors and police. Anecdotally, the criminal-justice system in Myanmar is extremely corrupt. At present, virtually every stage in the criminal process, including arrest, filing of charges, granting of bail and hearing of an ordinary criminal case — both in the court of first instance and upon appeal — can be accompanied with payment of money to secure a desired result or at least mitigate the consequences of an undesirable one. Perhaps the prospect of further profit through brokerage and manipulating of the system, rather than any sense of justice or professional responsibility, will be the greatest motivator for lawyers interested to learn how to revive the ancient practice of writ petitions in Myanmar through the terms of the new Constitution, however incongruous they may be.

[29] Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*. New Haven & London: Yale University Press, 1986. p.86.

[30] Osiel, Mark J. "Dialogue with Dictators: Judicial Resistance in Argentina and Brazil". *Law and Social Inquiry* 20, no. 2 (1995): 481–560. p.485.

3. Conclusion

Where the role of the courts is to assist in a state programme, rather than check executive power, policy directives can be implemented through the Judiciary in the same way as through the administrative bureaucracy. By contrast, systems like those in Sri Lanka or Nepal may be defective and compromised but judges in them do still adjudicate more according to the terms of law than according to the dictates of executive officers. Ironically, a corrupted policy-implementing judicial system like that in Myanmar can be mistaken for an efficient system in contrast to its functionally separate counterparts, because its efficiency derives from the carrying out of orders and urgency to make money through the exercise of authority, not from integrity or professionalism of the sort that courts in other countries struggle to achieve, however imperfectly and half-heartedly.

This is the real incongruity of *habeas corpus* as an element in the 2008 Constitution of Myanmar. *Habeas corpus* is premised on the idea that courts have the power to compel soldiers, police and other officials to follow their orders. In Myanmar, where the Judiciary is a proxy for the Executive, judges have this power only where they have the approval and backing of higher executive authorities. Whereas in certain authoritarian settings the courts have retained nominal legal power over other parts of government but have been unable or unwilling to exercise it at certain times because of extenuating circumstances, in Myanmar the problem is much more basic. Myanmar's courts do not have effective authority over other parts of government at all. Their capacity to review the activities of state agencies and agents is limited to what the executive permits them. Under these circumstances, not only is the reintroducing of *habeas corpus* a figment but so too is any constitutional commitment to protect the individual, because all such legal commitments are delimited by higher administrative imperatives. Only where legal and administrative objectives coincide can the former prevail.

The incongruity of *habeas corpus* in the new Constitution percolates throughout the charter's contents, and through the extant state institutions that will be responsible for establishing new institutions in accordance with its terms following general elections. Where the armed forces rather than the Judiciary have responsibility to safeguard the Constitution and uphold the rule of law, statements of citizens' rights are perverse. Where the state has subordinated legality to policy and detached policy from any coherent ideology, no amount of technical or procedural rearranging can effect significant change. Because the new Constitution is a vague expression that is not binding on its guardian, ultimately it contains no guarantees, whether for a political detainee, an ordinary under-trial accused or anyone else.

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