article 2
of the International Covenant on Civil and Political Rights
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feature

torture prevention & policing law in India

any person whose rights or freedoms are violated shall have an effective remedy, determined by competent judicial, administrative or legislative authorities

The meaning of article 2: Implementation of human rights

All over the world extensive programmes are now taking place to educate people on human rights. As a result today there exists a vast number of persons and organisations firmly committed to human rights; more than at any other time in the history of humankind. Yet human rights continue to be monstrously violated.

It is time for the global human rights movement to examine why it may not yet be achieving real improvement in the global human rights situation. One factor hindering honest examination is the belief that improvement of knowledge about human rights will by itself end human rights violations. This is a myth based on the corresponding belief that education is itself capable of improving things.

In reality human rights can only be implemented through a system of justice. If this system is fundamentally flawed, no amount of knowledge—no amount of repetition of human rights concepts—will by itself correct its defects. Rather, these need to be studied and corrected by practical actions. Hence research and intimate knowledge of local issues must become an integral part of human rights education and related work.

article 2 aims to do this by drawing attention to article 2 of the International Covenant on Civil and Political Rights, and make it a key concern of all partners in the global human rights community. This integral article deals with provision of adequate remedies for human rights violations by legislative, administrative and judicial means. It reads in part:

> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Sadly, article 2 is much neglected. One reason for this is that in the 'developed world' the existence of basically functioning judicial systems is taken for granted. Persons from those countries may be unable to grasp what it means to live in a society where 'institutions of justice' are in fact instruments to deny justice. And as these persons guide the global human rights movement, vital problems do not receive necessary attention. For people in many countries, international human rights discourse then loses relevance.

Other difficulties also arise with article 2. One is the fear to meddle in the 'internal affairs' of sovereign countries. Governments are creating more and more many obstacles for those trying to go deep down to learn about the roots of problems. Thus, inadequate knowledge of actual situations may follow. A further and quite recent disturbance is the portrayal of national human rights institutions and their equivalents as surrogate agencies for dealing with article 2 related issues. Some state parties may agree to new national human rights institutions taking on this role because they know that by doing so they may avoid criticisms of a more fundamental nature.

Thus after many years of work, the Asian Legal Resource Centre began publishing *article 2* to draw attention to this vital provision in international law, and to raise awareness of the need to implement human rights standards and provide effective remedies at the local level in Asia.

Relevant submissions by interested persons and organizations are welcome.

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India's Prevention of Torture Bill requires a thorough review

Asian Human Rights Commission, Hong Kong

Over the past two years, India has been attempting to address problems adversely affecting its law-enforcement agencies. These efforts, all of them initiated by the government, unfortunately are not capable of tackling the central issue concerning law enforcement—the question of torture.

Use of torture is endemic in India. The police consider torture as an effective and thus essential tool for crime investigation and to maintain control over the people. The appreciation for torture among the rank and file of law enforcement officers emanates from an ill-conceived notion concerning the concept of law enforcement. A recent statement made by a high-ranking police officer of the Kerala state police department proves the point. The officer while participating in a discussion concerning police uniforms opined that if the colour of the uniform were changed from traditional khaki to blue, as was the suggestion, people would lose their fear of the force.

This perception of the officer, that the average citizen must fear the police, provides insight into the intellectual framework that draws denominators of engagement for law enforcement agencies in the country. This, however, is not the fault of individual police officers, but rather the result of the utter failure of the government, and its lack of initiatives to improve the state of policing to fit a democracy.

India has one of the largest police forces in the world, though its police-people ratio is one of the lowest in comparison to other democracies. The country does not have a permanent National Police Commission yet. A commission appointed on 15 November 1977 ceased to exist in May 1981, having held office for a mere 29 months after holding its first meeting on 22 December, 1978. The commission had to function without having a formally constituted secretariat or a secretary. In other words, the state of policing in India today is an indicator of the reasons for the country's failing democratic experiment.

Over the past six decades, modernisation of police in the country has been mostly superfluous, and limited to changes like increases in the length of trousers, differences in the insignia and the change in the letters 'IP' (Imperial Police) to 'IPS' (Indian Police Service) on officers' epaulettes. Even if one were to argue that there are indeed some changes, though not adequate, those who are exposed to these changes are officers of the IPS cadre and not the lower ranking officers, with a cadre strength estimated to be at least sixty times more than the IPS officers.

"The government has failed to inculcate democratic values into policing"

The natural result of this neglect is that policing as a state-run institution has failed to appreciate the change in the nature of responsibility, and in its mandate—from that of a uniformed and armed colonial servant for an occupying and exploiting master to that of a public servant paid by the public to serve. The day-to-day functioning of the police reflects the truth that the government, despite the passing of 62 years, has failed to inculcate democratic values into policing. The foundation of the country's policing model has hardly changed from its original construct of 1860. This is one of the reasons why the country's police lack professionalism and respect for equality, and engage in acts that negate democratic philosophy, in particular, acts of torture.

Torture has nothing in common with democracy. And although India claims to be the world's largest democracy, it still lacks a legal framework in which torture is criminalised.

The lower house of the Indian Parliament, the Lok Sabha, passed a Bill entitled the Prevention of Torture Bill, 2010 on 6 May 2010 after a short debate. However, a simple reading of the debate shows how ill-informed the country's law makers are concerning the question of torture, a crime against humanity. The debate about this important bill in the lower house of the world's largest democracy hardly lasted two hours, of which considerable time was spent by members who mostly repeated opinions already made by others. The triviality with which most members approached one of the most important pieces of legislation in independent India was crystallised in a member's speech in which he claimed that he is a victim of torture and a lawyer by training, but wasted time lamenting about Guantanamo Bay detainees and American imperialism.

Almost all of the members who participated in the debate were ill-prepared and apparently oblivious to the developments in jurisprudence on the subject globally during the last two decades. The Indian legislators competed to demonstrate their illiteracy about the subject and the serious adverse impact that the use of torture has upon democracy, democratic institutions and the space democracy provides for dialogue. Most of them viewed the legislative exercise as an unwelcome and superimposed precondition for ratifying the UN Convention against Torture and Other Inhuman and Degrading Treatment or Punishment (CAT).

A press release issued by the government on 8 April 2010 claims that

> (r)atification of the Convention [against Torture] requires enabling legislation having provisions that would be necessary to give effect to the Articles of the Convention. Although some provisions exist in the Indian Penal Code, they neither define "torture" as clearly as in Article 1 of the Convention nor make it criminal as called for by Article 4.
>
> For ratification of the Convention, therefore, the domestic laws of our country would require to be brought in tune with the provisions of the Convention. This would necessitate either amendment of the existing laws such as Indian Penal Code or bringing in a new piece of legislation. The matter was examined at length in consultation with the Law Commission of India and the then Learned Attorney General of India.
>
> After a lot of deliberation on the issue, it was decided to bring a piece of 'stand alone' legislation so that the Convention could be ratified. Accordingly, a draft Bill, namely the 'Prevention of Torture Bill, 2009', was drafted.

"Beating, oral abuse, threats and other forms of intimidation do not amount to torture in the proposed Indian law"

The proposed Indian law however does not meet the standard of an enabling legislation. For instance 'torture' is defined in Article 1 of the Convention as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." The Indian law limits the operation of the definition to "causing grievous hurt" or "danger to life, limb or health (mental or physical)".

The term 'grievous hurt' is defined in section 320 of the Indian Penal Code, 1861. As discussed further below, it is limited to emasculation; or acts that cause permanent privation of the sight of either eye; permanent privation of the hearing of either ear; privation of any member or joint; destruction or permanent impairing of the powers of any member or joint; permanent disfiguration of the head or face; fracture or dislocation of a bone or tooth; or any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits. In other words beating, oral abuse, threats and other forms of intimidation do not amount to torture in the proposed Indian law. The definitional clause in the bill 'danger to life, limb or health' is a loosely worded construct that will be subject to wild interpretations depending upon the judicial officer called upon to decide a claim. At the moment, the term 'danger' does not have a definition in the Penal Code, the basic law from which the proposed law derives explanations.

Section 6 of the proposed law requires prior government sanction to initiate prosecution under the law. This is a redundant provision since a crime, irrespective of the manner in which it is committed, must not save the accused from punishment. The rider brought in by section 6 has to be viewed as a limiting clause to delay or even deny prosecutions. Basic criminal jurisprudence warrants that it is for the court to decide whether a crime has been committed and a punishment is to be awarded. This jurisdiction of the court must not be taken away from the court and placed with the discretionary authority of a bureaucrat who acts on behalf of the government. In addition, government sanctions often take more than a decade in India to materialise as they are cost- and time-intensive. There is nothing to indicate that there has been any improvement in the manner in which the bureaucracy works today compared to how it functioned a decade before.

"The proposed law will not enable Indians to initiate any action against torture"

The bill also enforces a period of limitation of six months for prosecution of offenses under the law vide section 5. Such riders will seriously hamper even the limited scope of the law since often victims of torture require more time to be willing to speak about it. Why should there be a limitation clause fastened to a crime that the world considers a crime against humanity? The proposed law also lacks any provisions for important elements required for the effective implementation of the law, like witness protection and independent investigation.

Contrary to the claim in the government's press release, the proposed law against torture will not enable Indians to initiate any action against torture. Yet, it is lauded in the country as an exceptional piece of legislation by the government and the media have followed suit. While the government is happy with this relatively successful image that it has cleverly achieved though the attempt is to enact a farcical law, the national media has largely ignored it, since most journalists are also oblivious to the importance of criminalising and preventing torture. In fact many of the country's 'established' scribes share views with the bureaucrats that a country like India cannot be administered with meticulous adherence to human rights.

Notwithstanding, on 31 August 2010, the upper house of the Indian parliament, the Rajya Sabha, constituted a Parliamentary Select Committee to review the Prevention of Torture Bill, 2010. The committee, chaired by Mr. Ashwini Kumar has Dr. E. M. Sudarsana Natchiappan, Mr. Shantaram Laxman Naik, Ms. Brinda Karat, Mr. Naresh Gujral, Dr. Janardhan Waghmare, Mr. Ahmad Sayeed Malihabadi, Dr. Vijaylaxmi Sadho, Dr. Ashok S. Ganguly, Ms. Maya Singh, Mr. S. S. Ahluwalia, Mr. Kalraj Mishra and Mr. Satish Chandra Misra as its members.

The notification issued by the committee invited suggestions and opinions about the bill to be submitted to the committee on or before 22 September 2010. The following is the review and

suggestions of the Asian Human Rights Commission (AHRC) concerning the bill, which it has submitted to the committee for its consideration.

"At the moment, there is no functioning legal framework in the country that can adequately address the question of torture"

Introduction

The practice of torture is endemic in India. It is believed that torture, in its cognate and express forms, is practiced in every police station in the country. In addition to the state police, other law-enforcing and security agencies like the Border Security Force, Central Reserve Police Force, Forest Guards, and Customs and Central Excise officers also resort to torture in India. We have come across cases where the state agencies have tortured persons for various purposes unrelated to law enforcement or crime investigation, including but not limited to extraction of bribes and the silencing of opposition.

Over the past seven years, the AHRC, along with its local partner organisations, has documented cases of torture from India. On each occasion we have brought the case to the attention of the relevant authorities in the country and have requested the government to undertake an impartial and prompt investigation. From our experience of intervening in these cases, we have understood that the practice of torture has introduced a high degree of fear of state agencies into the psyche of the ordinary population. The AHRC is of the opinion, and is certain that the committee will agree, that this fear of law-enforcement agencies among ordinary citizens has in fact isolated these agencies from the people they are paid to serve and protect.

The AHRC is certain that the committee is aware that in a democratic framework fear must not be the denominator with which law and order is maintained. On the contrary, fear generates mistrust, thereby impeding the establishment of the rule of law in a country. For this very reason the question of torture has remained the key area of the AHRC's work in Asia.

We are certain that the committee is conscious of the seriousness with which torture is condemned in mature democracies. Torture being a crime committed by state agencies, it has remained and will remain a subject of intense discussion and condemnation internationally. It is a crime considered with such seriousness that today torture is considered as a crime against humanity.

At the moment, there is no functioning legal framework in the country that can adequately address the question of torture. Tackling the question of torture involves creating a respectable and independent mechanism where a complaint of torture can be lodged without fear of repercussions to the complainant; whereupon the complaint will be investigated promptly with the assistance of all modern crime investigation tools and the investigation lead to an impartial prosecution that can render a reasonable sentence as punishment to the perpetrator. There must be also a procedure by which a victim of torture can access

and receive redress and adequate rehabilitation to regain the balance in life, which every victim of torture is certain to loose, irrespective of gender, social status, race and nationality.

For this framework to be established in India, what is required is a law that forms the basic legislative outline to deal with torture. As mentioned earlier, such a framework does not exist in India at the moment.

The AHRC is afraid that the current bill under the consideration of the committee is far too inadequate to lay the foundation for such a legislative and/or procedural framework. It is this aspect that the AHRC wishes to highlight to the committee in the following paragraphs and suggest possible ways with which it could be addressed before the bill is enacted.

"Some of the most common forms of torture practiced in India at the moment are beating, slapping, punching, sleep deprivation and forcing a person to sit, stand or lie down in uncomfortable positions"

The purpose of the bill and the definition of 'torture'

The preamble of the bill states that the purpose of the bill is "… to provide punishment for torture inflicted by public servants or any persons inflicting torture with the consent or acquiescence of any public servant, and for matters connected therewith or incidental thereto…" and "… whereas it is considered necessary to ratify the said Convention and to provide for more effective implementation…" of the United Nations Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment (CAT). For this to be realised, the primary requisite is to define what amounts to torture.

Section 3 of the bill defines the 'act' of torture. The section, however, qualifies torture to those acts which cause (i) grievous hurt or (ii) danger to life, limb or health (whether mental or physical) of any person. The bill in section 2 draws meanings to words and expressions used in the bill from the Indian Penal Code, 1860.

'Grievous hurt' is defined in Section 320 of the Penal Code as:

> [f]irst - Emasculation; Secondly - Permanent privation of the sight of either eye; Thirdly - Permanent privation of the hearing of either ear; Fourthly - Privation of any member or joint; Fifthly - Destruction or permanent impairing of the powers of any member or joint; Sixthly - Permanent disfiguration of the head or face; Seventhly - Fracture or dislocation of a bone or tooth; Eighthly - Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

Reading section 3 of the bill with section 320 of the Penal Code excludes several forms of torture that are routinely practiced in India. For instance, some of the most common forms of torture practiced in India at the moment are beating, slapping, punching, sleep deprivation and forcing a person to sit, stand or lie down in uncomfortable positions, often generating pain for prolonged periods. All these methods of torture need not always qualify as 'grievous hurt' as envisaged in section 320 of the Penal Code. Yet all of them would be considered as torture according to the CAT.

> "It must not be for India to pose a hindrance to the development of customary international law"

Additionally, the test of what amounts to torture has to be subjective as well as objective. This has been a settled position in international human rights law since 1978. The AHRC is certain that the committee will agree that Indians deserve equal treatment in law in comparison to anyone else elsewhere in the world.

The bill excludes metal torture. The AHRC is certain that the committee is aware that a person can be tortured mentally, without the perpetrator having to be in physical contact with the victim. Such practices are widely used, particularly against vulnerable communities like religious or racial minorities, children and women. For instance, threatening a woman or girl with rape or forcing a person of any particular religious belief to eat prohibited food—like a Muslim to eat pork or a Brahmin to eat beef—can amount to severe mental torture, which the Bill at the moment omits.

The definition of torture in its simplest form is provided in the CAT. The AHRC urges the committee to suggest revision of sections 2, 3 and 4 to incorporate the letter and spirit of article 1 of the CAT in the bill, without which the purpose of the bill will be defeated.

In this context the AHRC wishes to submit and place on record before the committee a UN General Assembly Resolution sponsored by India in 1977. The Resolution requested the then-UN member states to make unilateral declarations of intent to implement and comply with the Principles of the Declaration on Torture.

The AHRC urges the committee to bring this resolution to the attention of the Honourable Members of the Rajya Sabha, and request them to assist the country in fulfilling the promise India made to the global community as early as 1977 in realising the effective prohibition of torture globally, and further, promoting universal respect of human dignity and the right of every human being to be free from torture. A proper law against torture will demonstrate the country's commitment in letter and spirit to the promise it made in 1977.

On statutory limitation

Section 5 of the bill places a statutory limitation of six months for taking cognisance of an offense punishable under the bill. India acceded to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity on 12 January 1971. It is well settled that torture is a crime against humanity. Being party to the above convention, India is bound by the principle of *pacta sunt servanda* not to legislate anything that vitiates its treaty obligations.

It is true that 'torture' is not explicitly mentioned in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. But it must not be for India to pose a hindrance to the development of customary international law. In fact it cannot.

Law is not static. By virtue of the developments in international human rights jurisprudence post-1947, culminating in the drafting of the Rome Statute that established the International Criminal Court, torture can now be safely considered as a crime against humanity. Indeed, India has neither ratified nor acceded to the Rome Statute. However, India's refusal to accede to the Rome Statute and to submit to the jurisdiction of the International Criminal Court was not because—at least not on record—torture is considered a crime against humanity.

The principal objections by India against ratifying the Rome Statute are mentioned in an explanatory statement on the vote on the adoption of the Statute of the International Criminal Court issued by India's then-Additional Secretary to the UN, Mr. Dilip Lahiri, on 17 July 1998. While enumerating India's position against the Rome Statute, Lahiri did not argue against the inclusion of crimes like torture as a crime against humanity, triable by the ICC.

"The settled position of law in India is that the right not to be tortured has attained the status of a fundamental right by virtue of the interpretation of article 21 by the Supreme Court of India"

To substantiate further, the settled position of law in India is that the right not to be tortured has attained the status of a fundamental right by virtue of the interpretation of article 21 by the Supreme Court of India. However, the constitutional provision to have a 'procedure prescribed by law', which the current bill is, should not be a procedure to proscribe the scope of a victim to pursue remedies against torture.

The purpose of the legislation must be to criminalise torture, encourage complaints of torture, prescribe a reasonable procedure for investigation and prosecution and provide punishment for the crime. All this must be conceived as aiming towards ending the practice of torture.

At the moment, India is not a country where a victim of torture has congenial circumstances to lodge a complaint. Most victims of torture are from the poorest of the poor and from marginalised communities. This stratum of the Indian population itself makes up an estimated 60 per cent of the total population, amounting to hundreds of millions.

The expectation that everyone who is otherwise marginalised or having limited or even no resources at all can lodge complaints and pursue them within a short window of time defeats the very purpose of this law. This defeat implies that a victim's right to prosecute a torture perpetrator must be circumscribed by the operation of limitations built into an enabling law.

Requirement of prior sanction

No Indian statute condones the commission of a crime in the course of employment. Neither is torture an act that could be committed 'in the course of employment', since it is expressly barred by existing departmental orders and by virtue of judicial decrees.

> **“ Requiring prior sanction from the government to take cognizance of a crime of torture implies that in cases where the government denies the sanction, torture is condoned ”**

Requiring prior sanction from the government to take cognizance of a crime of torture implies that in cases where the government denies the sanction, torture is condoned. It could also mean that if the bill is enacted, the right against torture and that of a victim to seek redress will be at the mercy of an executive decision. This is a proposition that will defeat the purpose of the law and further, go against the CAT.

Moreover, section 6 will be used as an excuse not to initiate investigations upon complaint. This will end in the destruction or erosion of evidence, which will adversely affect the rights of the victim.

Torture can be part of a state's clandestine policies, particularly those to silence political opposition. Should section 6 be enacted, it implies the outright denial of prosecution of perpetrators in states where torture is widely used as state policy. No Indian state is an exception to this practice at the moment.

Additionally, the right not to be tortured being interpreted as a fundamental right, requiring a prior sanction to initiate prosecution of the case, would imply that section 6 of the bill is worded to restrict the realisation of a right. Further, section 6 will only contribute to the existing delays in the prosecution of cases, increasing the number of cases before the High Courts and the Supreme Court. At a minimum, taking a cue from Bikari Paswan's case in West Bengal and many thousands more, section 6 of the bill is destined to defeat the victim and protect the perpetrators.

The settled position of law in India at the moment is that public servants can face prosecution without prior sanction of the appropriate authorities, as all their acts in the purported discharge of official duties cannot be brought under the protective umbrella of section 197 of the Criminal Procedure Code, 1973 (CrPC).

The Supreme Court of India in January 2009 settled the law concerning the requirement of prior sanction while deciding once again in a case involving a police officer from West Bengal, Deputy Superintendent of Police Mr. Sahabul Hussain, who had been protected from prosecution by the state government. The court said:

> … all acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of Section 197 CrPC. On the other hand, there can be cases of misuse and/or abuse of powers vested in a public servant which can never be said to be a part of the official duties required to be performed by him.

Justice Kabir, a judge in the Sahabul Hussain's case, perusing an earlier ruling of the apex court said:

> … the underlying object of Section 197 CrPC is to enable the authorities to scrutinise the allegations made against a public servant to shield him/her against frivolous, vexatious or false prosecution initiated with the main object of causing embarrassment and harassment to the concerned official.

> However, if the authority vested in a public servant is misused for doing things which are not otherwise permitted under the law, such acts cannot claim the protection of Section 197 CrPC and have to be considered de hors the duties which a public servant is required to discharge or perform. Hence, in respect of prosecution for such excesses or misuse of authority, no protection can be demanded by the public servant concerned.

At the minimum, section 6 of the bill under review by the committee is a reintroduction of the 'ruled out' protection of section 197 of the CrPC, which must not be permitted.

Aspects missing in the bill relevant to torture and the CAT

The bill falls short of specifying a mechanism to investigate torture, and lacks any witness protection arrangements. Given the nature of the crime, it is imperative that torture must be investigated by an investigating agency independent of the police and having no officers on deputation from any other law enforcement agencies.

One of the reasons for the failure of successful prosecution of complaints against police is that the investigation is conducted either by police officers directly or indirectly involved in the crime or by their superiors. There is no need to enumerate why a victim or witness having a complaint against a government servant like a police officer in India requires protection. In countries where the practice of torture has been reasonably contained, both these requirements are met. In jurisdictions where these basic requirements are not followed, like in Sri Lanka, the corresponding law has become useless.

"One of the reasons for the failure of successful prosecution of complaints against police is that the investigation is conducted either by police officers directly or indirectly involved in the crime or by their superiors"

What can the committee do?

Contrary to common belief that the committee can only file a report to the parliament concerning the bill under review, the committee is empowered to engage in the following acts.

By virtue of articles 300 and 301 of the Constitution, the committee can call for, or other members of the parliament can propose to the committee, amendments to the bill under review by the committee. The proposals however need to be presented in the committee through a member of the committee. Needless to say, any member of the committee can also propose such amendments on his or her own for the consideration of the committee. There are no restrictions whatsoever in law that limits the scope of such proposals for amendments.

Article 302 of the Constitution empowers the committee to hear expert opinions about the bill. The committee is urged therefore to facilitate such a process, involving the members of the civil society, the National Human Rights Commission as well as jurists.

Article 303 (3) empowers the committee to furnish to the parliament, along with its report a recommendation to the member in charge of the bill, that his next motion should be a motion for circulation, or where the bill has already been circulated, for recirculation.

Last but not least, all or any member of the committee can record a minute of dissent on any matter connected with the bill.

"When torture is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, torture can also be treated as a crime against humanity under the Rome Statute"

Conclusion

Torture is practiced by law enforcement agencies in India as a crude shortcut for crime investigation. Investigating agencies justify the use of torture arguing that they often lack advanced training and equipment for crime investigation. The concept of modern policing is still a mirage in India, where the police are expected to function as a tool for social control rather than to serve citizens.

It can be argued that a large number of law-enforcement officers in the country believe that the deterrence quotient against a crime is the possibility of being tortured, rather than the crime being detected, prosecuted and punished in the legal process. Extensive delays in court proceedings and the repeatedly demonstrated professional and intellectual paucity of the country's prosecutors appear to offer a layperson's excuse for the widespread belief among law enforcement officers that the only punishment a criminal might get in India is the torture at the hands of the investigator.

This has led into a situation where torture is widely practiced, particularly in the police stations, throughout the country. Police officers and other law enforcement officers generally consider torture as an essential investigative tool for investigation. Policy makers and bureaucrats believe that there is nothing wrong in punishing a criminal in custody, not realising the fact that a person under investigation is only an accused, not a convict and further, that even a convict must not be tortured. This is due to the lack of awareness about the crime, its nature and seriousness.

As early as in 1981 the Supreme Court of India said, "…[n]othing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts deeper wound on our constitutional culture than a state official running berserk regardless of human rights" (*Kishore Singh* v. *State of Rajasthan*, AIR 1981 SC 625). Internationally, torture is considered as one among the most heinous crimes like slavery, genocide and maritime piracy, against which there is an absolute prohibition and the principle of *ius cogens* applies.

When torture is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, torture can also be treated as a crime against humanity under the Rome Statute.

The National Human Rights Commission of India has repeatedly recommended that the government criminalise torture. The commission once said "[d]aily the Commission receives petitions alleging the use of torture, and even of deaths in custody as a result of the acts of those who are sworn to uphold the laws and the Constitution and to ensure the security of its citizens. Such a situation must end, through the united efforts of the Government..."

"Torture undermines democracy and the rule of law"

The UN Human Rights Committee as early as 1997 has expressed its concern about the widespread use of torture by the law enforcement agencies in India. (CCPR/C/79/Add.81). The Committee on Elimination of Racial Discrimination has expressed similar concerns (CERD/C/IND/CO/19) in 2007 and the Committee on Economic Social and Cultural Rights (E/C.12/IND/CO/5) in 2008.

In a democratic framework, torture undermines democracy and the rule of law. Its open or clandestine use undermines the fundamentals of democratic governance. A law enforcement agency, particularly the police, practicing torture reduces itself into an instrument of fear.

This image and torture often reduce criminal investigation into the business of laying a charge based on confession. Fair trial, an important part of the rule of law framework, has no place in such an environment.

The practice of torture is not limited to policing. Paramilitary and military units also resort to torture, often brutal. Whether torture is practised by a military detachment or by the local police, the possibility for a victim of torture to complain is very limited in India.

The absence of witness protection laws, proper investigation mechanisms, including medico-legal facilities, and prosecution mechanisms, render complaint making suicidal for a victim. This allows torture to also be used for blackmailing, as a form of revenge and for monetary gain.

A domestic law against torture is thus required to deal with the central deficit in India's policing.

Indeed the committee need not redraft a new law in lieu of the bill the committee is requested to review. The committee could instead recommend in its report that the bill need to be re-examined, taking into account the concerns raised by the AHRC, and similar concerns expressed by other civil society groups and jurists in the country.

In this context, to guide the committee and to suggest to the committee as to what should be incorporated in a model bill to criminalise torture, we wish to present before the committee a Model Bill on the Torture and Custodial Death (Prohibition) Act, 2010 (see p. 17 in this edition).

Prevention of Torture Bill, 2010

AS INTRODUCED IN LOK SABHA

Bill No. 58 of 2010

THE PREVENTION OF TORTURE BILL, 2010

A *BILL to provide punishment for torture inflicted by public servants or any person inflicting torture with the consent or acquiescence of any public servant, and for matters connected therewith or incidental thereto.*

WHEREAS India is a signatory to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

AND WHEREAS it is considered necessary to ratify the said Convention and to provide for more effective implementation.

BE it enacted by Parliament in the Sixty-first Year of the Republic of India as follows:— 1. (1) This Act may be called the Prevention of Torture Act, 2010.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. In this Act, unless the context otherwise requires,—

(a) words and expressions used in this Act shall have the same meanings respectively assigned to them in the Indian Penal Code; and

(b) any reference in this Act to any enactment or any provision thereof shall in any area in which such enactment or provision is not in force be construed as a reference to the corresponding law or the relevant provision of the corresponding law, if any, in force in that area.

3. Whoever, being a public servant or being abetted by a public servant or with the consent or acquiescence of a public servant, intentionally does any act for the purposes to obtain from him or a third person such information or a confession which causes,—

(i) grievous hurt to any person; or

(ii) danger to life, limb or health (whether mental or physical) of any person, is said to inflict torture: Provided that nothing contained in this section shall apply to any pain, hurt or danger as aforementioned caused by any act, which is inflicted in accordance with any procedure established by law or justified by law.

Explanation.—For the purposes of this section, 'public servant' shall, without prejudice to section 21 of the Indian Penal Code, also include any person acting in his official capacity under the Central Government or the State Government.

4. Where the public servant referred to in section 3 or any person abetted by or with the consent or acquiescence of such public servant, tortures any person—

(a) for the purpose of extorting from him or from any other person interested in him, any confession or any information which may lead to the detection of an offence or misconduct; and

(b) on the ground of his religion, race, place of birth, residence, language, caste or community or any other ground whatsoever,

shall be punishable with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

5. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no court shall take cognizance of an offence under this Act unless the complaint is made within six months from the date on which the offence is alleged to have been committed.

6. No court shall take cognizance of an offence punishable under this Act, alleged to have been committed by a public servant during the course of his employment, except with the previous sanction,—

(a) in the case of a person, who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person, who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

STATEMENT OF OBJECTS AND REASONS

1. The Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment was adopted by the United Nations General Assembly on 9th December, 1975 [Resolution 3452(XXX)]. India signed the Convention on 14th October, 1997. Ratification of the Convention requires enabling legislation to reflect the definition and punishment for "torture". Although some provisions relating to the matter exist in the Indian Penal Code yet they neither define "torture" as clearly as in Article 1 of the said Convention nor make it a criminal offence as called for by Article 4 of the said Convention. In the circumstances, it is necessary for the ratification of the Convention that domestic laws of our country are brought in conformity with the Convention. This would necessitate either amendment of the existing laws such as Indian Penal Code or bringing in a new legislation.

2. The matter was examined at length in consultation with the Law Commission of India and the then Learned Attorney General of India. After considerable deliberations on the issue, it was decided to bring in a stand alone legislation so that the aforesaid Convention can be ratified. The proposed legislation, inter alia, defines the expression "torture", provides for punishment to those involved in the incidents of torture and specifies the time limit for taking cognizance of the offence of torture.

3. The Bill seeks to achieve the above objects.

NEW DELHI; The 19th April, 2010.

P.CHIDAMBARAM.

(Shri P. Chidambaram, Minister of Home Affairs)

Model Bill on the Torture and Custodial Death (Prohibition) Act, 2010

Asian Human Rights Commission, Hong Kong

A draft law to criminalise torture proposed by the Asian Human Rights Commission for the consideration of the Government of India and the country's civil society

1. Title:

This Act may be cited as the Torture and Custodial Death (Prohibition) Act, 2010.

2. Definitions:

In this law, unless the context otherwise requires -

(i) "Convention" means the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;

(ii) "Public officer" means:

(a) any person in the service or pay of the State or Central Government or remunerated by the Government by fees or commission for the performance of any public duty;

(b) any person in the service or pay of a local authority;

(c) any person in the service or pay of a corporation established by or under a Central , provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government Company as defined in Section 617 of the Companies Act, 1956 (1 of 1956);

(d) any judge, including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;

(e) any person authorised by a court of law to perform any duty, in connection with the administration of justice, including a liquidator, receiver or commissioner appointed by such court;

(f) any arbitrator or other person to whom, any cause or matter has been referred for decision or report by a court of justice or by a competent public authority;

(g) any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;

(h) any person who holds an office by virtue of which he is authorised or required to perform any public duty;

(i) any person who is the president, secretary or other office bearer of a registered co-operative society or any corporation established by or under a Central, provincial or State Act, or any authority or body owned or controlled or aided by the Government or a Government Company as defined in Section 617 of the Companies Act, 1956 (1 of 1956);

(j) any person who is a chairman, member or employee of any Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board;

(k) any person who is a Vice-Chancellor or member of any governing body, professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any University or any government school and any person whose services have been availed of by a University or any other public authority in connection with holding or conducting examinations;

(l) any person who is an office bearer or an employee of an educational, scientific, social , cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government or local or other public authority.

Explanation 1- persons falling under any of the above sub-clauses or public servants whether appointed by the Government or not.

Explanation 2 - Wherever the words "Public officer" occur, they shall be understood of every person who is in actual possession of the office of a public servant, whatever legal defect there may be in the person's right to hold that position.

(iii) "Law enforcement agencies" means uniformed and disciplined forces of the government like the Police, Customs, Immigration, Intelligence Agencies, Central Bureau of Investigation, all Pan-military units and any other state or central government agencies engaged in the enforcing and implementing of the law in the country;

(iv) "Armed forces" include the members of the Army, Navy, Air Force or any other state unit that might be formed entasked with the defence of India;

(v) "Torture" with its grammatical variations and cognate expressions means any act or omission which causes pain, whether physical or mental, to any person, -

(a) For such purposes as-

(i) Obtaining from that person or some other person information or a confession; or

(ii)Punishing that person for any act or omission for which that person or some other person is responsible or is suspected of hems responsible; or

(iii) Intimidating or coercing that person or some other person; or

(b) For any reason based on discrimination of any kind;

And being in every case, an act that is done by or at the instigation of; or with the consent or acquiescence of; a public officer or other person acting in an official capacity.

(vi) "Custodial death" means the death of a person in the custody of a public officer or any person acting on behalf of a public officer.

(a) The term 'custody' includes all occasions where a person is detained by a public officer or any person acting on behalf of a public officer, irrespective of the legality, nature and the place of detention;

(b) It includes judicial custody and all other forms of temporary and permanent restraint upon the movement of a person by law, or by force or by other means enforced by a public officer or any person acting on behalf of a public officer;

(c) It includes deaths occurring whilst a person is being arrested or taken into detention or being questioned;

(d) In all cases where the death of a person is within 72 hours after his release from 'custody', or at any other subsequent occasion AND where the cause of death can be attributed to acts committed upon the deceased by a public officer or anyone acting on his behalf while the deceased was in custody;

(e) 'Custodial death' may have taken place on police, private or medical premises, in a public place or in a police or other vehicle.

(vii) "Victim" or "Aggrieved person" means any person who alleges that an offense under this law has been committed upon him or upon a person he is concerned about.

3. Punishment:

(i) No person shall engage in torture or cause the custodial death of any other person;

(ii) Any person who tortures any other person shall be guilty of an offence under this law;

(iii) Any person who –

(a) attempts to commit;

(b) aids and abets in committing;

(c) conspires to commit;

an offence under Subsection (ii) shall be punished under this law.

(iv) Any person who commits an offense under Sub-section (ii) above shall be punished with rigorous imprisonment for a term of seven years AND a fine not less than Rs. 500,000. The fine upon realisation shall be paid to the victim;

(v) Any person who causes the custodial death of any other person, provided the cause of death is proved to be the result of an offense punishable under Section 3 (ii) or (iii) (b) above, the person causing the death shall be punishable with a sentence to life imprisonment AND fine of an amount not less than Rs. 1,000,000. The fine upon realisation shall be paid to the legal heir of the deceased;

(vi) Any person who commits an offense under Sub-section 3 (iii) (a) and (c) above shall be punished with a sentence of imprisonment for a period of one year and fine of Rs. 100,000. The fine upon realisation shall be paid to the victim;

(vii) The subjection of any person on the order of a competent court to any form of punishment recognised by law shall be deemed not to constitute an offence under this law;

(viii) A person convicted for any offense under this law must deposit at the trial court within 7 days from the date of conviction, the fine, as required above in Subsection (iv) or (v) or (vi) above. An appeal against a conviction for an offense under this law shall not be admitted until such deposit is made;

(ix) The court may allow the victim or his legal heir to withdraw the amount after 90 days from the date of deposit of fine, unless an appeal court stays such withdrawal;

(x) An offence under this law shall be a cognizable, non-compoundable and a non-bailable offence, within the meaning, and for the purposes, of the Code of Criminal Procedure 1973.

4. War or other contingencies no excuse:

(i) For the avoidance of doubts it is hereby declared that the fact that any act constituting an offence under this law was committed -

(a) at a time when there was a state of war, threat of war, internal political instability or any public emergency

(b) on an order of a superior officer or a public authority;

shall not be a defence to such offence.

5. Jurisdiction of courts:

(i) No court inferior to that of a Session's Court shall have the jurisdiction to try an offence under this law committed in any place inside or outside the territory of India by any person;

(ii) The jurisdiction of the Session's Court in respect of an offence under this law committed:

(a) by a person who is not a citizen of India;

(b) or outside the territory of India;

shall be exercised by the Session's Court that has been assigned the jurisdiction by the Chief justice, by a direction in writing under his hand.

6. Non-citizens:

Where a person who is not a citizen of India is arrested for an offence under this law, the person so arrested shall be entitled to communicate immediately with the nearest appropriate representative of the State of which he is a national or if he is a stateless person, the nearest appropriate representative of the State where he usually resides.

7. Extradition:

(i) Where a person is arrested for an offence under this law, the Ministry in charge of the subject of External Affairs shall inform the relevant authorities in any other State having jurisdiction over that offence, of the measures which the Government of India has taken, or proposes to take, for the prosecution or extradition of that person, for that offence;

(ii) Where a request is made to the Government of India, by or on behalf of the Government of any State for the extradition of any person accused or convicted of the offence of torture, the Ministry in charge of the subject of External Affairs shall, on behalf of the Government of India, forthwith inform the Government of the requesting State, of the measures which the Government of India has taken, or proposes to take, for the prosecution or extradition of that person, for that offence;

(iii) Where there is an extradition arrangement in force between the Government of India and the Government of any other State, such arrangement shall be deemed, for the purposes of the Extradition Act, 1962, to include provision for extradition in respect of the offence of torture as defined in the Convention, and of attempting to commit, aiding and abetting the commission of, or conspiring to commit, the offence of torture as defined in the Convention;

(iv) Where there is no extradition arrangement made by the Government of India with any State, in force on the date of the commencement of this law, the Government may, by Order published in the Gazette, treat the Convention, for the purposes of the Extradition Act, 1962, as an extradition arrangement made by the Government of India with the Government of that State, providing for extradition in respect of the offence of torture as defined in the Convention and of attempting to commit, aiding and abetting the commission of; or conspiring to commit, the offence of torture as defined in the Convention;

(v) The Government shall afford such assistance (including the supply of any relevant evidence at its disposal) to the relevant authorities of any State as may be necessary in connection with criminal proceeding instituted in that State against any person, in respect of the offence of torture.

8. Complaints of an offense under this law in court:

(i) In addition to the existing provisions in the Code of Criminal Procedure, 1973 if a person brought before a judicial officer complains that he has been subjected to torture, the officer shall:

(a) Record the statement of the person immediately;

(b) Direct the person/body of the person, to be examined by a registered medical practitioner immediately,

provided that where the person is a female, the examination shall be made only by or under the supervision of a female registered medical practitioner

(ii) The registered medical practitioner examining the person shall prepare the record of the examination, mentioning therein any injuries or marks of violence upon the person, and the approximate time when such injuries or marks might have been infected;

(iii) Where an examination is made under Subsection (ii), a copy of the report of the examination shall be furnished by the medical practitioner to the person examined or to the person nominated by the person examined and also to the court within 24 hours;

(iv) If the medical practitioner is of the opinion that the person examined requires medical treatment, the judicial officer shall direct the person to be admitted in a hospital.

9. Court may direct registration of cases:

(i) After recording of the statement as mentioned in Section 8 (i) (a), the judicial officer shall immediately forward a copy of the statement, to the District Investigation Officer under his jurisdiction with a direction to register a case and Investigate it;

(ii) It shall be the duty of the District Investigation Officer who receives such an order to immediately investigate the matter, and file a report to the Session's Court within sixty days;

(iii) The officer while filing the report must serve advance written notice with a copy of the report to the person whose statement was recorded by the judicial officer under Section 8 (i) (a) informing the person, the date and court in which the report is filed;

(iv) A person receiving a notice under Subsection (iii) above may file objections, personally or through a lawyer, to the report to the court within 30 days from the date of receipt of notice.

10. Investigation:

(i) The Central Government shall, for the purposes of investigating crimes committed under this law constitute a National Crime Control Agency and all crimes under this law shall be investigated by this Agency;

(ii) The National Crime Control Agency shall have officers under its command stationed in every district in the country to investigate crimes committed under this law;

(iii) The Central Government shall provide all necessary infrastructures required for the independent and smooth functioning of the National Crime Control Agency;

(iv) No person working for the National Crime Control Agency shall be appointed on deputation or transfer from any state or central service;

(v) The officers of the National Crime Control Agency shall, for the purposes of the investigation of crimes committed under this law have the authority to arrest and detain suspects and question witnesses irrespective of the official position of the suspect or witness;

(vi) Each District Office of the National Crime Control Agency shall have at least ten investigators under the command of a District Investigation Officer;

(vii) District Investigation Officers shall be officers recruited by the Government through a National Examination and trained in aspects of crime control and law similar to that of the selection and training of officers for the Civil Service;

(viii) The Central Government shall decide the manner of selection of officers subordinate to the District Investigation Officer;

(ix) The officers posted in any given state shall be able to read, write and speak the official language of that state;

(x) The investigators under the command of a District Investigation Officer shall be a team comprising of medical, legal and forensic experts;

(xi) The officers of the National Crime Control Agency shall have all powers under the Criminal Procedure Code, 1973 to investigate crimes committed under this law;

(xii) The Central Government shall formulate the necessary rules required for the operation of the National Crime Control Agency;

(xiii) The Central Government shall decide through appropriate legislation the service conditions of the officers appointed under the National Crime Control Agency;

(xiv) All complaints of crimes committed under this law shall either be made to a Sessions Court having jurisdiction upon the place of residence of the complainant or where the crime has been allegedly committed or to a District Office of the National Crime Control Agency;

(xv) For the purposes of providing trauma counselling, the Central Government shall enlist and appoint at least six trauma counsellors of three men and three women in every district. The counsellors so appointed shall either be a qualified psychiatrists or clinical psychologists registered by the Medical Council of India;

(xvi) The service contracts and the remuneration of the counsellors shall be decided by the Central Government;

(xvii) Every officer serving, as an officer under the National Crime Control Agency shall have the minimum tenure of three years at the station of appointment;

(xviii) Every investigating officer or any superior officer thereof working for the National Crime Control Agency shall have the right to carry firearms and shall be provided with appropriate training and weapons;

(xix) A case once initiated registered by the National Crime Control Agency or pending trial in any court shall not be withdrawn from prosecution by the Government;

(xx) To register a crime under this law against a public officer of any category and for its investigation no prior sanction is required from any authority;

(xxi) However, if the accused is a judge appointed by the High Court or a judge of the High Court or that of the Supreme Court, the National Crime Control Agency prior to the prosecution shall obtain a sanction for prosecution from the High Court or the Supreme Court, as the case may be;

(xxii) For the prosecution of a minister in any State Government, if the minister is in office at the time of prosecution, the National Crime Control Agency shall obtain a sanction from the High Court entertaining jurisdiction upon the state where the minister serves;

(xxiii) For the prosecution of a minister in the Central Government, or that of the Governor of a State if the minister or Governor is in office at the time of prosecution, the National Crime Control Agency shall obtain a sanction from the Supreme Court;

(xxiv) All applications for sanction for prosecution under Subsections (21), (22) and (23) shall be decided by the respective court within 30 days from the date of filing of the application. An appeal or revision, if preferred upon the decision of the court, the same shall be decided within 30 days from the filing of such appeal or revision.

11. Special Prosecutor:

(i) The offenses punishable under this law shall be prosecuted by a Special Prosecutor. A Special Prosecutor shall be a person enrolled as a lawyer in India with a minimum active legal practice of 14 years;

(ii) If the victim/aggrieved person so requires, upon an application to the Session's Court, may appoint a lawyer of his own choice to conduct the prosecution of the case;

(iii) On the appointment of such a lawyer as provided in Subsection (ii) above, it shall be the duty of the Special Prosecutor to provide all necessary assistance for the lawyer so appointed in order to conduct the prosecution, including the furnishing of the copies of all documents, statements, reports, and other information related to the case, and any other information concerning the case which the lawyer may require to conduct the prosecution;

(iv) A lawyer appointed as provided in Subsection (ii) above shall upon appointment have all powers of a Special Prosecutor for the purposes of the conduct of the prosecution of the case the lawyer is appointed as the Special Prosecutor;

(v) The Central Government shall provide adequate facilities in every District for the functioning of the Special Prosecutor, including a modern and furnished office, vehicles and the required staff.

12. Protection:

(i) Any person who alleges that he requires protection from a person accused of having committed an offense under this law, shall, file a petition to the Session's Court;

(ii) The state and the person against whom such a protection is sought for shall be made parties to such petition;

(iii) The court receiving the petition, after giving seven days notice to the opposite parties shall hear the matter and pass an order on the petition within three days;

(iv) The court while disposing off such a petition as mentioned in Subsection (iii) above, shall make such orders as deemed necessary, including but not limited to, the detention of the accused for periods not beyond 14 days, which may be extended as required from time to time;

(v) The Court may also direct the officer investigating the offense punishable

under this law to take such measures as directed by the court to ensure the compliance of the court's order;

(vi) If the Court allows the petition for protection, it shall handover the charge for protection of the person to the National Crime Control Agency. Protection shall include all steps necessary according to the court to safeguard the security of the petitioner or his family members. The Court shall make such decision after consultation with the Special Prosecutor in charge of the prosecution of the case.

13. Accusations by third parties:

(i) Whenever an allegation of torture is made by a person brought before a judicial officer, the officer shall, in addition to the procedures laid down in Section 8 above, record the officer's observations about the person making the allegation and shall take appropriate measures to ensure the safety of the person making such allegation;

(ii) When the allegation so made is concerning the torture of a third person, it shall be the duty of the judicial officer to direct the officer from the National Crime Control Agency to visit such place of detention, record his observations and take all measures necessary to ensure the safety of the person so detained within 24 hours.

14. On receipt of complaints:

(i) In addition to the procedures mentioned here above, any person who wishes to file a complaint of torture, either concerning him or a third person may do so either to the Session's Court or to an officer of the National Crime Control Agency;

(ii) Upon receipt of such a complaint as mentioned in Subsection (i) above, the concerned officer shall immediately register a case, record the statement of the complainant, serve a copy of the complaint to the complainant specifying the case number and inform in writing what action is taken upon the complaint;

(iii) The National Investigation Officer upon receiving and taking action upon a complaint as provided above in Sub-section (ii), shall within 24 hours furnish a report mentioning the facts of the complaint and the actions taken, to the Session's Court entertaining jurisdiction;

(iv) The National Investigation Officer shall complete the investigation of every case within a reasonable time, and such time shall not exceed six months from the date of filing of the complaint;

(v) For the purposes of investigation of a complaint, all police officers and other public servants in a District, shall be subordinate to the investigative authority of a District Investigation Officer. Provided, if the accused in the crime under investigation is a judicial officer of the rank of a Sessions Judge, the National Investigation Officer should obtain permission from the High Court entertaining jurisdiction upon the area only for arresting or detaining the suspect. For all other matters concerning the case no such permission is required;

(vi) The District Investigation Officer or his subordinate officers shall have free and unquestioned access to all police stations, police records, public and other government offices and the records maintained therein, including military and para-military establishments concerning the crime he is investigating.

15. Appeals:

(i) Any appeal against a conviction for an offense under this law shall be made to the High Court;

(ii) The victim or his legal representative shall also have the right to file appeals or revisions against the finding in a case tried under this law;

(iii) An appeal shall not be admitted until Section 3 (viii) is complied with.

16. Termination or suspension from public office:

(i) A public servant under investigation for an offense punishable under this law shall be immediately placed on suspension;

(ii) If the person under investigation for an offense punishable under this law is a member of any of the law enforcement agencies in India, including the armed forces, the accused officer shall be immediately relived from all active duties;

(iii) A person convicted for an offense under this law shall be terminated from public service, from the date of conviction. However, if the sentence is reversed in Appeal, the appeal court shall make necessary orders to reinstate the person into service.

17. In case of conflict with existing laws:

Irrespective of the provisions in any other law in force in India if any provision of this law is in conflict with any other law in India, the provisions in this law shall prevail.

18. Time limit for investigation, trial & appeal:

(i) The investigation of an offense must be completed within six months from the date of recording of the first complaint;

(ii) Should there be an extension of time required for the completion of the investigation of an offense punishable under this law, the investigating officer, shall in person, submit an application to the Session's Court entertaining jurisdiction to try the case, specifically mentioning the grounds for the extension of time;

(iii) Such extension shall not be allowed without heating the victim/aggrieved person;

(iv) The court shall give the victim /aggrieved person a minimum period of 7 days to file counter applications for any applications seeking extension of time;

(v) If the court hearing such applications is of the opinion that an extension is not warranted, it shall deny the same;

(vi) A decision concerning the application seeking extension shall be made within ten days from the date of filing the application;

(vii) The time taken to decide such an application shall not be excluded from the six-month period fixed for the completion of investigation;

(viii) The trial of an offense punishable under this law shall be completed within six-months from the date of the filing of the charge against the accused;

(ix) An appeal or revision from any order against a proceeding initiated under the provisions of this law shall be concluded within 12 months from the date of filing of the appeal.

19. Presumption and burden of proof:

If it is proved that a person has suffered injuries or died in custody, it shall be then the burden of the person accused of an offense punishable under this law to prove that the injuries were not suffered or the death occurred in an act amounting to a crime punishable under the law.

A critique with recommendations on the Kerala Police Bill, 2010

Nervazhi, Thrissur & Asian Legal Resource Centre, Hong Kong

On 11 May 2010, a Select Committee appointed by the Kerala Legislative Assembly prepared and published a questionnaire seeking opinions and advice from the general public, jurists and human rights organisations concerning the Kerala Police Bill, 2010. The purpose of the exercise is to receive comments and recommendations concerning the bill so that the aspirations of the people of Kerala are reflected in the law governing the state police, when the Kerala Legislative Assembly finally enacts the law.

To prepare comments and suggest recommendations on the Bill, Nervazhi and the Asian Legal Resource Centre (ALRC) have consulted experts in the field, including senior police officers serving and retired in India, jurists, academics, journalists, and above all, the people of Kerala.

The comments and recommendations below reflect a combination of expertise emerging from this knowledge base.

We have no claims whatsoever that the following pages contain a comprehensive analysis of the bill, but we are certain that the bill, as it stands now has the potential to turn Kerala into a police state. The comments and recommendations are thus made with an intention to prevent this. We have analysed the bill bearing in mind various human rights cases that we have come across

This article consists of the edited text of a report released by Nervazhi, a registered human rights organisation in Thrissur, Kerala state, India; and, the Asian Legal Resource Centre, a regional human rights organisation based in Hong Kong with the General Consultative Status at the Economic and Social Council of the United Nations, outlining a critique with recommendations for public discussion, and debates in the Kerala Legislative Assembly on the Kerala Police Bill, 2010 (Bill No. 331 of the 12th Kerala Legislative Assembly). The bill is reproduced in full in this edition of *article 2* as an annexe to this critique. For inquiries and comments in Kerala please contact: Mr. T. K. Naveenachandran, Secretary, Nervazhi, ACF Centre, Ayyanthole Post, Thrissur district, Kerala State, India, 680 003. Telephone + 91-487-3261235, Email: nervazhithrissur@yahoo.in.

from Kerala in particular and India in general. We have studied the jurisprudence developed internationally concerning law enforcement agencies and their operational standards and the case law developed by the courts in India, the Supreme Court of India in particular, concerning the rights of the citizens while in custody and the duty of the state as well as that of the law enforcement agencies in dealing with the citizens while engaged in law enforcement duties.

> **"It is not enough that the government strive 'subject to resources' to provide manpower and infrastructure for the police to function"**

We have held consultations with the general public about the bill. The use of simple language in this document, understandable to the common person, is the result of the effort taken to write down the opinions the ordinary Indian living in Kerala provided us concerning the bill. It reflects the collective wisdom of the ordinary people, rooted in their experience of dealing with the police as a state institution.

The recommendations also reflect this collective voice of the people of Kerala and their hope that their police can be corrected, provided the law governing the police is also right. Almost everyone whom we have consulted has informed us in various forms that the state of affairs of the Kerala police is deplorable at the moment. They want the new law to be a tool to bring change to this unacceptable status quo.

The ALRC is, along with the comments and recommendations, also submitting a model law for the consideration of the legislature to criminalise torture and extrajudicial executions.

We hope that the recommendations and comments will be duly considered and appropriate changes incorporated in the bill. We are certain that by incorporating the recommendations in the bill, the Kerala State Police will be provided with a statutory framework to discharge their duties, thereby contributing to develop India, a country of great people, into a mature democracy.

T. K. Naveenachandran, Secretary, Nervazhi

Bijo Francis, South Asia Desk, ALRC

21 June 2010

Section 6

Comment: It is the constitutional duty of the government to provide all resources, without failure and in a prompt manner, to guarantee the disciplined and effective functioning of the police. To realise the mandates set forth in the preamble to the bill and to discharge the duties mentioned in section 3, it is not enough that the government 'may' strive 'subject to resources' to provide manpower and infrastructure for the police to function.

Recommendation: The current wording in section 6 (1) in the bill does not imply the mandatory nature of state responsibility to provide without failure all resources, financial and logistical for the police to function. Viewed from the reality that lack of resources has been an important impediment for the proper

functioning of the police, and the police being a vital state institution for guaranteeing democracy and fundamental rights to the people, the wording in section 6 (1) must be changed to:

> **The government shall ensure that every police station has appropriate manpower and infrastructure facilities to provide police services to all who need the same.**

"The establishment of a 'Special Police Station' must be a matter of public knowledge; such police stations are often misused by the police to run illegal torture cells"

Section 7

Comment: It is the right of every citizen to receive efficient police service at all times. It must not be left to the police or to the government to decide the efficiency and quality of service rendered by the police depending upon the conditions prevailing at the time when the service is required.

Recommendation: Section 7 must be changed to:

> **All citizens are entitled to efficient police services from every police station and police officers at all times.**

Section 8

Comment: In view of the comments and the recommendations made above concerning section 7 it is the right of every citizen to have a peaceful entry to every police station for lawful purposes. Words like 'reasonability' and 'practicability' must not be left to the interpretation of each police officer that will be bound by this law, since it can vary from person to person.

Recommendation: Accordingly, Sub-section (1) of shall be amended as:

> **All persons shall have the right to peaceful entry to any police station for obtaining lawful services and the right to be received at all times.**

Comment: When it is the right of every citizen to lawfully enter any police station for lawful purposes and meet any police officers, it must not be left to the police officer to decide or to impose restrictions upon the citizen whom he shall meet. A police officer, irrespective of rank, is a government servant appointed to serve the public.

Recommendation: In view of the comment above, sub-section (2) shall be amended as:

> **Any member of the public shall have the right to meet the officer in charge of a police station.**

Section 11

Comment: The establishment of a 'Special Police Station' in any place at all times must be a matter of public knowledge. 'Out of the ordinary' police stations are often misused by the police to run illegal torture cells and interrogation houses in India, and Kerala cannot be an exception.

Recommendation: An additional sub-section (7) shall be added to section 11 to incorporate the following:

> **The State Police Chief shall by a public notification notify the public of the place and period of the establishment of Special Police Stations.**

Section 12

Comment: Section 12 requires a thorough editing since due to wrong use of punctuation it now appears that it is only required for the police station to maintain a general diary from time to time, as opposed to what is required which is: "Every police station shall keep a general diary, in such form as shall be prescribed from time to time by the government…" Also the changes must be made to read the section as "… charges preferred, the names of the complainants and the names of the persons…"

"In India, the police have no legal right to 'punish': punishment in any form or a threat to punish can be illegal and subject to criminal prosecution"

Section 17

Comment: Similar to the State Police Chief, a person to be appointed as the District Police Chief must not also have any charge pending against him/her at the time of appointment.

Recommendation: An addition to sub-section 17 (2) should be incorporated in section 17 to read:

> **The District Police Chief shall not be an officer lower in rank than of a Superintendent of Police and shall not have a charge pending against the person appointed in any Court or Tribunal or Departmental agency on a charge filed on behalf of the state.**

Section 24

Comment: It is the obligation of the state government to constitute a State Security Commission. The commission must be set up according to the directions issued by the Supreme Court in the *Prakash Singh & Ors.* v. *Union of India and Ors*, in Civil Writ Petition 310/1996 vide judgment dated 22/09/2006. The judgment, against which the state governments, including the Government of Kerala, filed a revision, which was summarily dismissed, is binding upon all state governments in India and the Government of Kerala is no exception. Accordingly, "the recommendations of the Commission shall be binding on the State Government" (page 8 of the judgment).

Sub-sections 4 and 5 of the bill contravene this obligation of the state government and can be read having powers conferred upon the state government to nullify the recommendations of the commission and therefore its very purpose.

Recommendation: Sub-sections 4 and 5 must be deleted.

Section 29

Comment: According to the laws in India, the police have no legal right to 'punish'. On the contrary, 'punishment' in any form or a threat to punish can be illegal and subject to criminal prosecution. In a mature legal setup, punishments by law-enforcing agencies can amount to torture, a crime having universal jurisdiction and considered to be as evil as slavery and genocide. There is no reason why the Kerala Police can be an exception.

Recommendation: Sub-section (2) must be amended as follows:

They shall not, unless it is necessary to achieve any lawful purpose, use force or threaten use of force or any legal action.

> **"Government must ensure that the working conditions of police officers meet standards that would allow the officers to be in good mental and physical state"**

Further comment: Maintaining good manners and good health must not be the singular responsibility of the state police officer. It is a requirement to maintain discipline among the officers and a primary necessity to keep a vital public service in good shape. This implies in addition to the officers maintaining good manners and a good physical state at all times, that the government must ensure that the working conditions of the officers meet standards that would allow the officers to be in good mental and physical state.

The government must also guarantee that there are adequate arrangements made to provide periodic training, physical, scientific and psychological, to the officers. For this the very notion of viewing police as just 'the arm of the state to enforce law by force and to maintain discipline' must change. Police in many parts of the world that face manmade and natural calamities and threats much more than in Kerala have changed from being a stick or weapon-wielding uniformed arm of the state to that of a people-friendly service provider and an agency the common citizen trusts and does not fear to approach. This has been possible by gradually educating and encouraging the police to deal with citizens with respect, to undertake investigations scientifically, ensuring timely prosecution of the crimes the police investigate, and by providing employee-friendly service packages, including conditions of service and other benefits.

Today, for various reasons, the Kerala Police is an internally demoralised force. This is not unique to the Kerala Police, as it is a common character of the police in all other states in India and even in the neighbouring countries. This must change. Expecting the police to function to the best of their ability without adequate service packages, including working conditions is like expecting to row a boat on dry sand. Poor working conditions, like in any job, demoralise the employee. The service conditions, including training facilities, have to be made. To begin with, the willingness of the government to provide good working conditions to the police must be reflected in the law. Thus the following sub-section must be incorporated into section 29, reading:

(7) It shall be the duty of the State Government to provide the best working conditions for the police, in terms of salary, allowances, training and deployment. The State Security Commission shall make periodic directions to the Government with a view to improve the working conditions of the police, their training and deployment.

Section 30

Recommendation: In the light of the comment and recommendation above, sub-section (4) may be amended as follows:

The Government shall institute a system of incentives and infrastructure facilities to promote good mental and physical health of the Police Officers.

Section 31

Comment: By being in custody, a person's right to dignity and privacy is not surrendered to the police. Even a convict has an inalienable right to dignity and privacy. Parading a suspect in public is a cruel and inhuman practice currently followed by the police. It is a form of extrajudicial punishment.

"Parading a suspect in public is a cruel and inhuman practice currently followed by the police; it is a form of extrajudicial punishment"

Punitive jurisprudence has changed world over and it is only in places where the development of law and practice is still stuck in the medieval mindset that public parading and punishment of suspects is practiced today. Such punishment impairs the possibility of a person to change or reform. It traumatises a person, often beyond the point of recovery. Parading a suspect or convict in public is counterproductive for correction. This practice has to end in India and Kerala can be a model.

Recommendation: For the above reasons, sub-section (3) shall be amended to read:

> **Persons in custody shall not be paraded or photographed for the purpose of publication in press or visual media. The police shall take all measures to guarantee and respect the privacy and dignity of a person in custody, even if the person is a convict.**

Section 32

Comment: A police officer and the police department is a 'state agent/agency' and by virtue of this status, all acts of the police must be accountable. Record keeping is fundamental to accountability. No action of the police is at anytime non-recordable and any attempt to breach this vital duty is prone to misuse by the police and anyone in control of the police.

Police cannot commit illegal acts with impunity, and if the police commit no illegal acts they have no reason not be any hesitation to keep records of all actions. Additionally, the criminal law of India mandates law-enforcing agencies to maintain activity records, as these records forms vital part of the crime adjudication process.

Recommendation: For the above reasons sub-section (2) shall be amended as:

> **Under all circumstances in every case, a police officer, performing any act which is likely to endanger or adversely affect a person's fundamental liberties, property or reputation of a person, shall maintain records of all of the officer's actions as may be prescribed by any law governing the performance of such act or by the State Police Chief.**

Comment: The Indian Evidence Act, 1972 the Criminal Procedure Code, 1973 as well as the Criminal Rules of Practice, 1982 mandate all crime investigating agencies to provide all evidence against an accused in court in the trial, irrespective of the fact whether the production of such evidence may adversely affect the prosecution case or not. In addition under the provisions of the Right to Information Act, 2005 all actions of a public office

and servant must be provided to the information seeker under the act, unless the disclosure of such information is exempted under the Right to Information Act, 2005.

> "It shall be the duty of the police officer receiving the complaint to record and investigate it"

Refusal to divulge information by the police unless it is exempted by any of the above law is illegal and unwarranted. Such a provision can lead to misuse of authority, intrusion into privacy and the breach of fundamental rights of a citizen.

Recommendation: For the above reasons sub-section (3) shall be amended as follows:

> **The State Police Chief or any police officer shall not deny the furnishing of information to any person concerning any acts committed by the police, unless such information sought for is exempted by the Right to Information Act, 2005.**

Section 34

Comment: While a complaint can be made to a police officer by various means, including the complainant remaining anonymous, it shall be the duty of the police officer receiving the complaint to record and investigate it. It must be mandatory for the police officer to record the complaint, including the manner in which the officer received it. It shall also be the responsibility of the officer to record with reasons what actions have been initiated upon the complaint, and its result.

Upon receipt of a complaint through any means, including written or oral, it shall be the right of the complainant to receive an acknowledgment of the fact that a complaint has been lodged with the police. It shall be a duty of the police officer to give such written acknowledgment to the complainant.

If a police officer decides to take no action upon receiving a complaint, that also has to be recorded by the officer. If the complainant has provided the complaint either orally or by other means where the identity of the complainant is made available to the police officer, it shall be the duty of the police officer to inform the complainant in writing whether the officer has investigated the complaint and why no action has been taken and the complaint is dropped. Such information has to be provided to the complainant regarding the action taken upon the complaint, in addition to the written acknowledgement for the receipt of the complaint within 48 hours from the time of receipt of the complaint.

Recommendation: In view of the comments above section 34 shall be amended as follows:

> **Section 34 (1) A complaint to the police officer may be made orally, or in writing or by gestures or signals or by digital or electronic means. A police officer receiving the complaint shall investigate the complaint immediately.**
>
> **(2) The complainant has a right to receive a written acknowledgment for the filing of the complaint from the police officer receiving the complaint within 48 hours from the filing of the complaint. A person filing a complaint by personally presenting at the police station or through the**

complainant's authorised representative has a right to receive such acknowledgement immediately. For the purposes of issuing an acknowledgment, the police officer may require the complainant or the complainant's representative to provide the police officer the complainant's or the representative's identification details, which may either be a contact address, or the details in any identity document that is issued by the government in the name of the complainant. It shall be the right of the complainant however to refuse it and to remain anonymous.

(3) Upon receipt of a complaint, the police officer shall record all details of the complaint in the record maintained at the police station where the officer serves within 24 hours of the receipt of the complaint.

(4) The police officer shall investigate the complaint and take appropriate actions against the compliant, including the decision to drop the complaint.

(5) For all actions mentioned in sub-section (5) above, the officer shall provide written information to the complainant informing the complainant what actions the officer has taken upon the complaint and the reasons for the same. Such written information shall be provided to the complainant within 72 hours from the receipt of the complaint.

"One of the several reasons why persons fail to volunteer as witnesses in cases involving the police is the present practice where police officers summon witnesses to the police station"

Section 35

Comment: One of the several reasons why persons fail to volunteer as witnesses in cases involving the police is the present practice where the police officers summon witnesses to the police station. Often this procedure has been misused to the detriment of crime prevention and eventually criminal trial. Cases are common where police officers summon a person to the police station repeatedly on the pretext of gathering evidence or recording statement. This practice must end.

Recommendation: Changes must be incorporated into sub-section (2) of section 35 as follows:

All witnesses shall be approached by the police officer at their normal places of residence or work. No one shall be summoned to the police station for the purposes of recording a witness statement.

Comment: It shall not be the lawful duty of any police officer to curtail the freedom of movement or privacy of any person. Limitations on these two rights can only be enforced by a court and a police officer at no time must be given a quasi-judicial authority, particularly those that may result in the infringement of individual freedoms.

Recommendation: For the reasons stated above, sub-section (3) shall be deleted.

Section 36

Comment: While it is required for the police officer to demand the identity of a person as an essential tool for crime prevention and for the maintenance of law and order, such a tool must be used with caution since it has the potential to enable a police officer to interfere into a citizen's life and privacy for unlawful purposes, or at the least for causing nuisance. Hence two qualifiers are essential to define this authority so that it is used with caution. They are the rank of the police officer and the

officer's reason to demand the identity of a citizen, which is when the officer suspects that the person to whom a demand is made has committed a crime or is to commit a crime.

"The police while an important arm of the state to maintain law and order, must remain an executing arm of the state and must not in any circumstances be bestowed with any decision-making powers"

Recommendation: For the reasons stated above, to apply caution to the use of such authority, section 36 shall be amended as follows:

> **Section 36 (1) Every person shall disclose the person's identity when so required by a police officer not below the rank of an Inspector of Police. The police officer requiring a person to disclose the identity shall do so only if the police officer is of the opinion that the person is likely to commit a crime or is suspected to be in the process of committing a crime.**
>
> **(2) Such police officer may take reasonable steps necessary to get the identity of the person established and for this purpose, the police officer may make such or write down such records of personal identity as may be necessary in each case. However, the police officer so recording the personal details of a person shall give in writing to the person whose identity is being questioned the officer's reason for demanding such personal details.**
>
> **(3) No person shall be arrested or kept in custody in any manner under this section merely for the reason that the identity given by such person requires to be verified.**

Section 37

Comment: Privacy is the right of a citizen and it is the responsibility of the state to guarantee and protect it. Police being a state agency, it shall be the duty of every police officer to protect a citizen's right to privacy and property. Therefore the police have no reason to intrude into the privacy of a citizen, unless such intrusion is necessitated to prevent a crime, or to protect another person or property. The procedure for this is mentioned in the Criminal Procedure Code, 1974. The Kerala Police Act cannot override the provisions in the Criminal Procedure Code.

Recommendation: Section 37 for the reasons stated above shall be amended as follows:

> **No police officer shall have access to a private place unless following the procedures mentioned in the Code of Criminal Procedure 1974.**

Section 40

Comment: An educational institution is a place for students and teachers. The police have no role to play inside an educational institution, unless the head of the institution requires police help.

Recommendation: In light of the above comment, in sub-section (2) "including educational institutions" shall be deleted.

Section 45

Comment: The police while an important arm of the state to maintain law and order, must remain an executing arm of the state and must not in any circumstances be bestowed with any decision-making powers, particularly when an area is declared

'disturbed' by the government. As of now, the Criminal Procedure Code, 1974 empowers an Executive Magistrate with certain powers to limit individual freedom under section 144 to maintain peace and prevent large-scale violence. It must be left as is and the authority of the Executive Magistrate shall not be delegated to a Station House Officer in any circumstances.

Recommendation: For the reasons stated above, sub-section (2) shall be amended to read:

> **When an area is declared to be a disturbed area, the Station House Officer may, under written instructions and the supervision of the Executive Magistrate entertaining jurisdiction over the area, in the interest of maintenance of law and order,-**
>
> **(a) ... same as in the draft Bill (b) ... same as in the draft Bill (c) ... same as in the draft Bill (d) ... same as in the draft Bill**

Section 46

Comment: Studies conducted by the ALRC and Nervazhi suggests that mistreatment of persons by the police happens the most while they are detained in custody. This is not exceptional behaviour of the Kerala Police, and is a common characteristic across police units throughout India.

That torture is an act that the state commits against the citizen calls for special seriousness with which this crime must be treated. World over, much has been discussed, and the jurisprudence against torture has evolved and developed. Today a police officer engaged in the practice of torture is looked down on as an incapable officer not worthy of serving the citizen, a person who is systematically engaged in committing a crime and somebody who requires psychological assistance to recover.

The torture and inhuman or degrading treatment of suspects and persons in custody is a crime that is recognised world over as evil. Yet, in India torture is not a crime and there is still no credible mechanism in India by which a case of torture can be punished. The only advancement India has made in dealing with torture is in the initial stages, at the behest of the Supreme Court of India, which has made it mandatory for the police and all other law-enforcing agencies to follow a strict set of procedures, which if followed limit the chances for a state officer to engage in torture.

The bill as it stands now appears to dilute this procedure by convenient usage of terms and provisions as provided in sub-section (8) of section 46. The state government cannot in any form dilute the procedures set up by the Supreme Court when it decided the *D. K. Basu case*.

The procedure to be followed by the law enforcement agencies in India at the time of arrest and detention has been an issue of discussion and concern at various forums, including the Supreme Court of India and venues where India's state obligations are assessed and reviewed under the International Convention on Civil and Political Rights.

"The only advancement India has made in dealing with torture is in the initial stages, at the behest of the Supreme Court of India"

"The Supreme Court has on several occasions issued clear and specific directions for law enforcement agencies to follow at the time of arrest and detention of persons"

The Supreme Court of India has on several occasions issued clear and specific directions for law enforcement agencies to follow at the time of arrest and detention of persons. Based on these recommendations the Criminal Procedure Code, 1974 has been recently amended to incorporate the Supreme Court's directives. These directions are mandatory for all law enforcement agencies, and the Kerala Police cannot be an exception. Accordingly section 46 has to be completely changed.

Recommendations: In view of the comments above, section 46 shall read as follows:

Procedure for arrests: (1) A police officer arresting a person shall inform the person at the time of arrest, the reason for arrest and caution the arrestee that she/he has a right to remain silent and that whatever the person may say to the police officer could be used against the arrestee in future legal proceedings against the arrestee and that the arrestee has a right for legal counsel.

(2) The police officers carrying out the arrest and handling the interrogation of the arrestee must bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police officers who handle interrogation of arrestees must be recorded in a register.

(3) The police officer carrying out the arrest shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(4) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up shall be entitled to have one friend or relative or other person known to her/him or having interest in his welfare being informed, within six hours, that the person has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(5) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(6) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(7) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(8) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The 'Inspection Memo' must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(9) A trained doctor must medically examine the arrestee every 48 hours during his detention in custody. Such doctor shall be from the panel of approved doctors appointed by Director of Kerala Health Services. Director of Kerala Health Services shall prepare such a penal for all Tehsils and Districts and review the same every six months.

(10) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Judicial First Class Magistrate entertaining jurisdiction over the place where the arrest is made or the arrestee is detained for her/his record.

(11) The arrestee shall be permitted to meet his lawyer during interrogation.

Section 47

Comment: No police officer should be allowed at any point to use force upon a detainee at the time of arrest or after, unless the force is required to arrest the person. While the term 'minimum force' can be subject to interpretation depending upon the circumstances in each case, the term must not be left to wide interpretation that allows a police officer to defend his acts whatever be the nature of the case. For this very reason the language in section 47 must be precise.

"While the term 'minimum force' can be subject to interpretation depending upon the circumstances in each case, the term must not be left to wide interpretation that allows a police officer to defend his acts whatever be the nature of the case"

Recommendation: Sub-section (1) of section 47 must be amended to be specific. As of now, usage of terms like 'suitable gadgets' can cause serious challenges to interpretation as anything could be a gadget, including a weapon, which if used at the time of arrest can cause serious injuries to an arrestee. Thus sub-section (1) must be amended as follows:

A police officer shall not use force at the time of arrest unless the use of minimum force is required to arrest the person and to prevent the person from escaping from custody. While using force the officer must not use force than what is required to carry out his lawful duty. Use of force shall not be as punishment.

Section 50

Comment: While it is the right of the police to seek medical treatment of a person in custody from any hospital, and it is the responsibility of all medical facilities to provide treatment to persons in police custody, it shall also be the responsibility of the hospital to produce a copy of the medical report to the person examined or to his authorised representative and get acknowledgment for the same.

Recommendation: Sub-section (2) shall be thus amended as:

It shall be binding upon the hospital authorities to immediately furnish on demand to the police copies of all the medical records pertaining to the treatment of such persons. It shall also be binding for the hospital authorities to furnish a copy of the records handed over to the police to be submitted to the person examined or his authorised representative and obtain acknowledgement, irrespective of the fact that such a record has been demanded either by the person or his authorised representative.

Section 51

> "It shall be mandatory for a police officer to produce a person who is under the officer's care and custody before a medical practitioner for examination"

Comment: Injuries sustained at the time of arrest or in custody could not only challenge the entire police operation, but could also play a vital role in determining whether a person has been mishandled by the police. It is for the benefit of the injured or those accused of having caused the injury that a medical examination is conducted when an injury is suspected.

Additionally, all injuries need not be visible since there could be internal injuries. Not all persons at all times can be expected to be conscious or suffer pain immediately after sustaining an injury enabling the person to complain. Neither is a police officer a medical practitioner, who could assess the injury a person might have suffered. So it shall be mandatory for a police officer to produce a person who is under the officer's care and custody before a medical practitioner for medical examination.

At the time of medical examination, the officer accompanying the person shall not in any form interfere or witness the medical examination or listen to the communication between the person and the medical examiner. The medical report prepared by the medical examiner shall be despatched to the nearest Judicial First Class Magistrate entertaining jurisdiction in a sealed envelope by the medical examiner through the police officer producing the person. The officer shall also provide a copy of the same to the person examined or his authorised agent.

If the person produced requires continuous treatment or admission at the hospital or to be referred to another hospital for specialist treatment, the same shall be incorporated in the report and the police officer producing the person instructed to ensure that the person continues to receive treatment.

Recommendation: Section 51, for reasons mentioned above, shall be amended as follows:

> **Action in respect of injuries on those in police custody: When any person is taken into police custody in a physically injured condition or if application of force upon the person in custody by the police officer was required or if the person in custody complains of pain, the Station House Officer shall immediately cause the person to be examined by a medical practitioner.**
>
> **(i) The medical practitioner before whom a person is so produced shall medically examine the person, ensuring that no police officer witnesses the medical examination or over hears the consultation between the person and the medical officer.**
>
> **(ii) The medical officer shall prepare a medical report, that includes the version narrated by the person examined, regarding what caused the injury or pain with details concerning the event, including the date, place and time and the persons involved and the same shall be on the same day send to the nearest Judicial First Class Magistrate entertaining jurisdiction in a sealed envelope through the police officer who produced the person.**

(iii) A copy of the report shall be handed over to the person or to his authorised representative. If the person is unconscious, or does not want the copy to be furnished to him at the time of examination, the medical officer shall keep the medical record in his safe custody, until demanded by the person or a court. Under no circumstances the medical practitioner shall make the detailed contents of the medical record available to the police officer.

(iv) If the person produced requires admission at the hospital or has to be referred to another hospital with adequate facilities, it shall be the responsibility of the medical practitioner to inform the police officer producing the person about the requirement and to guarantee that the person receives treatment as chosen by the medical examiner.

Section 65

Comment: The concept of community policing is good in places where the state of affairs within the police is also good and the purpose of constituting community police is to provide meaningful and thoughtful advice to the police so as to help them to merge with the society. In India however the concept is premature and is often an ill-conceived licence to form vigilante groups, like the Salwa Judum in Chhattisgarh or the village defence forces formed in Manipur.

"The concept of community policing is good in places where the state of affairs within the police is also good and the purpose of constituting community police is to provide meaningful and thoughtful advice to the police so as to help them to merge with the society; in India however the concept is premature and often ill conceived"

The pretext for introducing the concept of community policing in India is that it will make the police people-friendly and it can be used as a mode by which the police can seek advice from the community to improve policing. Indeed the suggestions from communities, if they meet democratic and rule of law standards, must be incorporated in policing and there is definitely lot of scope for this today in India.

Yet, the reality in India is that the ordinary people are distanced from the police due to a combination of factors, of which the primary two are that ordinary Indians are afraid of the police due to the extensive use of torture, and the repeated and demonstrated failure of the police to do their job as mandated by law. Without addressing these two cardinal issues, introducing concepts like community policing into the police will only help to worsen the situation and at the very least to create avenues for the influential middle class to use this concept as a tool for settling partisan issues based on wealth, influence, political allegiances and above all religion and caste.

Security and safety of person and property is primarily the responsibility of the police and it is the right of everyone. Today, in Kerala this responsibility has been largely delegated to the ordinary public due to the utter failure of policing, which has resulted in situations where crimes like burglary have now been left to local communities to detect, investigate and prove, so that the role of the police has become that of an uninterested bystander who does no more than finally produce the suspect in court. This has resulted in large-scale violation of human rights.

> "Sixty-two years after independence, there is no reason why a state government should require special police officers"

Unfortunately, even human rights organisations, some of them based in New Delhi, have been advocating for the introducing of community policing throughout India, and the "Kerala Model" has been falsely projected as a success story. This is because of the lack of understanding about the day-to-day functioning of the police and the reasons for their failure as a state institution in India. The Bill must not be a statutory excuse for the police to neglect their duties and expect the community to do policing on their behalf.

Recommendation: Section 65 shall be deleted.

Section 99

Comment: The concept of Special Police Officers is a colonial concept that had justifications for a colonial master to run a colony. Sixty-two years after independence, there is no reason why a state government should require Special Police Officers. The concept, as evidenced in states like Chhattisgarh and Manipur, has the potential to be misused where neighbours can be asked to fight neighbours. It is a failed concept and was scrapped some three years ago in Jammu and Kashmir.

It is the responsibility of the state to account for the safety and security of the citizens and their property. The state has the constitutional duty to provide adequately for the proper functioning of the police and other law enforcement agencies required in the state. Expecting the 'outsourcing' of police and employing mercenaries is a concept not practiced in civilised jurisdictions. Kerala thus does not require Special Police Officers.

Recommendation: Section 99 must be deleted.

Section 113

Comment: It is an option of the complainant to choose the forum where the complainant would prefer to file a case against a police officer. It is redundant for a complainant to complain against a police officer to an adjudicating body where one or many of the adjudicators are police officers. In that sense, the constitution of the police complaints authority at the state and the district level must not have a police officer as one of its members. Accordingly the constitution of the State Police Complaints Authority and the District Police Complaints Authority must be changed in the following manner.

The State Police Complaints Authority shall be chaired by a retired high court judge and of the two additional members, one shall be a government servant of the rank equal to that of the chief secretary of the state government and the other a legal practitioner having legal practice for not less than 15 years with an advanced master's degree in law, preferably in human rights law. At least one of the members shall be a woman.

The District Police Complaints Authority shall be chaired by a retired district and sessions judge, and of the two other members, one shall be the district collector and the other a legal practitioner

with at least 12 years of legal practice and with a master's degree in law, preferably in human rights law. At least one of the members shall be a woman.

The jurisdiction of the police complaints authority shall not supersede the statutory authority or the State and National Human Rights Commissions.

Recommendation: Section 113 shall be amended as follows to include the following sub-sections:

> **(5) Nothing in this section shall prohibit the jurisdiction of the State and National Human Rights Commissions or of any court for entertaining, adjudicating and deciding cases against police officers.**
>
> **(6) Upon written complaint regarding a police officer to any of the authorities or bodies or Courts mentioned above, the police officer against whom a complaint has been filed shall be immediately placed on suspension and discharged from all duties. Provided such suspension from duty shall only be made based on the direction of any of the bodies mentioned above, after the body considers the question on a petition filed accompanying the main complaint. That the officer is investigating a serious crime shall not be an excuse from the operation of this sub-section.**

"To prosecute any police officer committing a crime under any law does not require the prior sanction of the government"

Section 116

Comment: To prosecute any police officer committing a crime under any law does not require the prior sanction of the government. The Police Act cannot supersede the provisions in the Criminal Procedure Code where government sanction is required only if the act subjected to prosecution was carried out legally in the course of discharge of official duty. Breach of violation of a law, if it amounts to a crime, must not be provided statutory impunity from prosecution, even for the slightest period of time. In addition, it must not be left for the exclusive discretion of the government to decide whether a state agent must be prosecuted for a crime the agent has committed. Such provision undermines the very notion of justice and equality and only allows statutory impunity and nurtures corruption.

It is also an anomaly to create an institution within the police having the exclusive and sole authority to investigate, prosecute and adjudicate crimes committed by police officers. It must not be at any time left to the exclusive decision of a superior officer to decide whether a subordinate officer has to be prosecuted.

What is required in Kerala in particular and India in general is to have separate authorities independent from the police having investigative and prosecution authorities to deal with the crimes committed by police officers. Such an attempt has not been so far made either in Kerala or anywhere else in India. Until there is such an authority, independent from the police to investigate and prosecute crimes committed by the police, the existing and alarming instances of crimes committed by police officers of all ranks cannot be successfully prevented.

> "The Bill has been reduced to give wide ranging arbitrary authority to the police of all ranks and further, has left complaints against police officers to the whims of superior officers"

In countries and jurisdictions where the police officers are considered to be people-friendly and honest and held by the citizenry as one of the coveted government agencies, such independent mechanisms do exist. It is apparent that this new bill is far short of addressing crimes committed by police officers and as it stands now fails to provide foolproof mechanisms where a citizen having a complaint against a police officer can approach with trust and expect actions taken upon his complaint. Instead, the bill has been reduced to give wide ranging arbitrary authority to the police of all ranks and further, left complaints against police officers to the whims of superior officers, which is like asking the thief to investigate the theft.

To complain and to have independent mechanisms to file, investigate and prosecute complaints is a right of the citizen. A loosely worded bill as it stands now must not take this right away.

Recommendation: Section 116 shall be amended as follows:

> **116. Protection to police officers: (1) No suit, prosecution or other legal proceedings shall lie against a police officer or a public servant duly appointed or authorised under this act for anything done or intended to be done in the lawful discharge of duties. However such protection shall not be available for any crime under any law committed by the police officers or a public servant duly appointed or authorised under this act.**
>
> **(2) No prior sanction from any authority is required to take cognizance of any offence alleged against a police officer or a public servant duly appointed or authorised under this act.**

Sub-section 3 and the subsequent proviso shall be deleted.

Section 117

Comment: There shall be no prescribed period of limitation for the prosecution of any crime committed by a police officer. Section 117 shall be thus deleted accordingly.

Section 120

Comment: Crimes committed by police officers are to be considered serious in nature, irrespective of the pecuniary or physical damage caused by the crime. The simple argument to this is the fact that a person who has the statutory duty to prevent it commits the crime. The punishment prescribed in the bill as of now is too low.

Recommendation: For this reason section 120 shall be amended to increase the imprisonment, its nature and fine as follows:

> **... shall, on conviction, be punished with rigorous imprisonment for a period of seven years and shall be liable to pay fine. The amount of fine shall be not less than Rs. 300,000 in all cases. Whereas if a person has suffered mental or physical injuries and trauma as the result of a crime committed by the police officer, the amount of fine shall not be less than Rs. 1,000,000.**

Section 129

Recommendation: In view of the comments made under Section 116, this section must be deleted.

Kerala Police Bill, 2010

Twelfth Kerala Legislative Assembly Bill No. 331
THE KERALA POLICE BILL, 2010

A BILL *to consolidate and amend the law relating to the establishment and regulation of Police force, in the State of Kerala and for matters connected therewith and incidental thereto.*

Preamble.—WHEREAS it is expedient to provide for a highly professional, trained, skilled, disciplined and dedicated police service capable of, protecting the integrity and security of State and upholding rule of law with due transparency and regard for human rights, the life, liberty and dignity of every person;

AND WHEREAS it is necessary to empower the police with sufficient institutionalized authority and enable them to efficiently exercise their powers and discharge their duties;

AND WHEREAS it has become imperative to ensure that the police do not abuse the authority vested in them and are accountable to their activities by being subject to such disciplinary control so that they are responsive to the needs of a modern democratic society and people friendly;

NOW, THEREFORE, it has become imperative to consolidate and amend the Law relating to the establishment and regulation of Police force in the State of Kerala;

BE it enacted in the Sixty-first year of Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. *Short title, extent and commencement*.—(1) This Act may be called the Kerala Police Act, 2010.

(2) It extends to the whole of the State of Kerala.

(3) It shall come into force at once.

2. *Definitions*.—(1) In this Act, unless the context otherwise requires.—

(a) “Commission” means the State Security Commission constituted under section 24;

(b) “District Magistrate” shall mean the officer charged with the executive administration of a district and vested with the powers of a Magistrate of the First Class, by whatever designation such officer is called;

(c) “Government” means the Government of Kerala;

(d) “Place” includes any building, tent, booth or other erection, whether permanent or temporary and any area, whether enclosed or open;

(e) “Place of public resort” shall include any place to which the public may enter for purpose of recreation, diversion, amusement, entertainment, refreshment or relaxation or for availing or enjoying any service;

(f) “police” means and includes all persons discharging the role and functions specified under sections 3 and 4 and who is authorised under section 89 to do so;

(g) “police force” means the police force referred to in section 14;

(h) “police district” means the territorial area declared under section 16 of this Act;

(i) “police officer” means any member of the police force and includes an officer of the Indian Police Service;

(j) “property” shall include money, valuable security and all property, whether movable, immovable or digital;

(k) “public place” means any place to which the public have access, whether as of right or not, and includes,—

(i) a public building and monument and precincts thereof; and

(ii) any place accessible to the public for drawing water, washing or bathing or for purposes of recreation;

(l) “service provider” means any person or agency which provides any service to the public or any section thereof with or without collecting any payment and includes phone companies, hotel keepers, internet service providers, hospitals, laboratories, sanitary services, rental services, financial institutions and any other such agency which offers any service to the public on demand;

(m) “street” includes any highway, bridge, way, causeway, viaduct or arch or any road, lane, footway, square, court, alley, channel or passage accessible to the public, whether or not it is a thorough fare;

(n) “traffic” means the movement of persons, animals, vehicles, vessels or goods along any public place and includes the disposition of vehicles and static objects, either temporary or permanent, situated in or near any such place in such a manner as to influence such movement in any manner;

(o) “vehicle” means any carriage, cart, van, truck, handcart, boat or any conveyance of any description and includes a bicycle, tricycle, a rickshaw, a motor vehicle, a vessel or an aeroplane

(2) Words and expressions used and not defined in this Act, but defined in the Indian Penal Code, 1860 or in the Code of Criminal Procedure, 1973 shall have the meanings respectively assigned to them in those Codes.

CHAPTER II

DUTIES AND FUNCTIONS OF POLICE

3. *The duties of the Police*.—The Police, as a service organised in the State and functioning among the people, shall, subject to the Constitution of India and the laws enacted thereunder, strive to ensure that all persons enjoy the freedoms and rights guaranteed to them under the law by maintaining law and order, upholding integrity of nation and safeguarding security of State.

4. *The functions of the Police*.—Every Police Officer shall, subject to the provision of this Act, perform the following functions, namely:—

(a) uphold and enforce the law impartially;

(b) to protect the life, liberty, property, human rights and dignity of all persons;

(c) to protect the internal security of the Nation and to guard against terrorist activities, sectarian violence, insurgency etc.;

(d) to promote and preserve public order and to maintain public peace;

(e) to protect the public from danger and nuisance;

(f) to protect all public properties including roads, railways, bridges, vital installations and establishments;

(g) to prevent and reduce commission of crime to the best of their ability;

(h) to investigate crimes and to take action to bring offenders subject to due process of law;

(i) to control and regulate traffic at all public places where there is movement of people or goods;

(j) to resolve conflicts which may result in the commission of crimes;

(k) to provide all reasonable help to persons affected by natural or man-made disaster, calamity or accident;

(1) to collect, collate and disseminate intelligence in support of all functions of the police and the security of the State;

(m) to take care of all persons in custody;

(n) to obey and execute all lawful commands of competent authorities and official superiors;

(o) to uphold and maintain standards of internal discipline;

(p) to instill a sense of security among people in general;

(q) to discharge such other functions as may be assigned to them by Government, from time to time.

CHAPTER III

THE POLICE STATION

5. *Establishment of Police Stations*.—(1) The Government may by notification and subject to the provisions in section 2 of the Code of Criminal Procedure, 1973 establish police stations for every local area for the purposes of this Act;

(2) The area of jurisdiction of every police station and the premises at which it shall function shall be, as specified in the notification issued under sub-section (1).

(3) Every police station shall function under the general supervision of an officer designated as the station house officer of such rank as may be determined by the Government and he shall be in charge of the police station.

6. *Government to provide sufficient facilities at Police Stations.*—(1) The Government may, subject to resources, strive to ensure that every police station has appropriate manpower and infrastructure facilities to provide basic police services to all who need the same.

(2) Such facilities shall include sufficient working area and sufficient infrastructure for all police personnel attached to the police station, reception area for public with adequate facilities, sufficient storage space for the safe custody of articles in custody and official arms and ammunition, sufficient space for civic amenities including washrooms and toilets for the staff, visitors and those in custody, sufficient custodial facilities, record room, suitable communication facilities, sufficient mobility, sufficient equipment including digital devices, arms and forensic devices to adequately discharge the statutory responsibilities cast on the personnel of the police station.

(3) The State Police Chief shall every year arrange to review the adequacy of facilities available in every police station in the State and take steps to upgrade the facilities to the desired level.

7. *Citizens have the right to efficient police service.*—All citizens are entitled to efficient police services reasonable under the circumstances from every police station.

8. *Rights of the public at a police station.*—(1) All persons shall have the right of peaceful entry into any police station for obtaining lawful services at any time and the right to be received, subject to reasonability and practicability.

(2) Any member of the public shall have the right to meet, subject to reasonable restrictions, the officer in charge of any police station.

(3) Any member of the public shall have the right to have the grievance presented by him appropriately acknowledged by the officer in charge of the police station.

(4) Any member of the public shall have the right to insist that the substance of any grievance that he has given at the police station, either orally or in writing, be entered simultaneously in a chronologically and contemporaneously maintained permanent register kept at the police station.

(5) Any citizen shall have the right to know whether any particular person is in custody at the police station.

(6) Any person shall have the right to know the stage of police action or investigation with regard to a complaint made by him at the police station.

9. *Provision for persons in custody.*—The State Government shall provide to every police station a sum proportionate to the period of custody at the daily rate of half the minimum daily wages for unskilled labour prevailing at the time for food, water and other primary requirements of every person who is in custody.

10. *Police stations to be always open.*—A police station shall always be open for those who need police services and shall always be alert for the performance of any police duty.

11. *Special police station.*—(1) In addition to the police stations notified for any area under section 5 above, Government may establish special police stations, for any particular period in any area or for any particular purpose in any area or for enforcement of any particular law or laws in any area.

(2) Such special police stations shall have the same status in law as police stations established under section 5 and shall be notified similarly specifying the premises and area and the scope of jurisdiction.

(3) Nothing in this section shall be deemed to prevent the Government from establishing a special police station in a mobile vehicle or in any temporary office.

(4) The fact that a special police station has been established shall not render any action taken by a regular police station null and void on the ground that it was a matter which could have been entrusted with the special police station.

(5) Special police stations shall be so named as to make the special purpose and special nature self-evident.

(6) The State Police Chief may, by special order, exempt the Station House Officer of a special police station from any responsibility normally associated with a police station and may also entrust him with additional or special responsibilities not normally assigned to a police station.

12. *Police Station Diary*.—Every police station shall keep a general diary in such form as shall be prescribed, from time to time, by the Government and record therein all complaints and charges preferred, the names complainants of the and the names of persons, if any, against whom complaints are made, the names of all persons arrested, the offences charged against them, the weapons or property that may have been taken from their possession or otherwise and the names of witnesses who may have been examined.

13. *Persons competent to verify station diary and custodial facility*.-—(1) All Chairpersons and members of the State Human Rights Commission or the State Women's Commission or the State or District Police Complaints Authorities or officers deputed by such Chairpersons or members may examine the entries in any police station diary maintained as per section 12 and further verify the condition of any person kept in custody.

(2) Any person visiting the police station as aforesaid shall make a contemporaneous record of his visit in the diary and also communicate to the District Police Chief the summary of his observations and further action as may be necessary, shall be taken on such observations by the District Police Chief.

CHAPTER IV

GENERAL ORGANIZATION OF THE POLICE FORCE

14. *Kerala Police*.—(1) There shall be one police force for the entire State of Kerala, known as Kerala Police and it may be divided into as many sub-units, Units, Branches or Wings on the basis of geographical convenience, functional efficiency or any special purpose as may be decided from time to time by the Government.

(2) The police force shall consist of various ranks as may be decided from time to time by the Government subject to the limit that there shall not be a rank higher than that of the State Police Chief and these ranks shall, in ascending order, be presently as follows:—

(a) Police Constable

(b) Police Head Constable

(c) Assistant Sub-Inspector of Police

(d) Sub-Inspector of Police

(e) Inspector of Police

(f) Deputy Superintendent of Police

(g) Superintendent of Police

(h) Deputy Inspector General of Police

(i) Inspector General of Police

(j) Additional Director General of Police

(k) Director General of Police

(1) Director General of Police & State Police Chief.

(3) The Government may, by general or special order, specify that any other phrases used to specify any rank under the service either of Kerala Police or of any other State or of the Centre shall be deemed to be equivalent to anyone of the above ranks.

(4) Nothing in sub-section (2) shall be deemed to preclude the authority of the Government to create a new rank or to give a new designation to a rank specified therein.

15. *Government to specify Police Organisation.*—Subject to the provisions of this Act, the police force shall consist of such numbers in each rank and have such organization, structure, offices, jurisdictional patterns chain of command and such administrative powers, functions and duties as the State Government may by general or special order determine.

16. *Police District.*—The State Government may by notification declare that as from such date as may be specified in the notification, any area in the State shall be a police district for the purposes of this Act: Provided that one police district may not fall within the jurisdiction of more than one revenue district.

17. *District Police Chief.*—(1) Subject to such orders as may be issued by the Government and subject to the supervision and command of the State Police Chief and of such other officers in respect of such matters as may be prescribed, the police and the police stations of a police district shall function under the supervision and control of a District Police Chief of such rank as may be prescribed by the Government and he shall be assisted by police officers of such rank as may prescribed by the Government.

(2) The District Police Chief shall not be an officer lower in rank than a Superintendent of Police.

18. *State Police Chief.*—(1) The administration, supervision, direction and control of the police throughout the State shall, subject to the control of the Government, be vested in an officer designated as the State Police Chief.

(2) The State Police Chief shall be appointed by the Government from among those officers of the State cadre of the Indian Police Service who have either already been promoted or are eligible to be promoted to the rank of Director General of Police, considering his overall record of service and experience for leading the police force of the State: Provided that the officer selected as the State Police Chief must not have a charge pending against him in any Court or Tribunal or Departmental agency on a charge filed on behalf of the State.

(3) All persons discharging any police functions in the State of Kerala invoking authority under this Act shall be subordinate to the State Police Chief.

(4) The State Police Chief shall be assisted by such number of officers of the rank of DGP/ADGP/IGP/DIGP/SPlDySP as may be decided from time to time by the Government.

(5) Other officers of the rank of Director General of Police may be posted in Kerala Police provided they are junior to the State Police Chief in interse seniority.

19. *Co-ordination by District Magistrate.*—The District Magistrate may, for the purpose of dealing effectively with extensive disturbance of public order, natural disasters, man-made disasters, elections, epidemics, external aggression, land reforms, land disputes, beggary, child labour, trafficking in human beings, juvenile justice, prosecution, transport of persons and goods etc., direct police activity in these matters and further co-ordinate the activities of the district police with the activities of other government departments, local self-governments and public or private institutions interacting with the police in any manner.

20. *Police Manual.*—(1) The State Police Chief may, from time to time, cause compilation subject to the authority of the Government to modify or annul the standing orders and guidelines, not inconsistent with this Act, for the efficient discharge of all police duties and specially those relating to the general supervision, administration and distribution of the police force, their places of residence, the particular duties of the members or of each rank or of each category thereof their inspection, their arms, equipments and other necessaries to be furnished to them the collecting and communicating intelligence and information, the manner of performance of duties, the prevention of abuse of authority or neglect of duties.

(2) The compilation of such orders and guidelines issued by the State Police Chief, supplemented, if any, by any government order or direction in relation to the same shall be known as the Police Manual.

(3) Any provision in the Manual, if circumstances so warrant, may be amended by the State Police Chief.

21. *Special Wings, Units, Branches, Squads.*—(1) In order to assist the State Police Chief or other Police functionaries or District Police Chiefs or to generally assist the police in their functions and duties Government may, by general or special order, create and maintain any Special Wing or Special Unit or Specialized Branch or Special Purpose Squad of such strength, sub-units, powers, duties, jurisdiction or internal or external supervisory structure as the Government may by order direct.

(2) Such units may be created or special arrangements may be made, inter alia, for the following:—

(a) collection of intelligence directly or indirectly affecting National security, State security, maintenance of law and order, maintenance of public safety or prevention of crime, security of vital installations and individuals facing grave threats from terrorist or extremist violence;

(b) investigation of especially complicated cases, heinous crimes or sensational cases and any case of special importance;

(c) traffic control;

(d) coastal, river and backwater policing and policing for the protection of tourists;

(e) policing on the Railways;

(f) collection, collation, indexing storing of data and intelligence relating to crime and criminals and analysis thereof and the establishment of a Bureau of Missing Persons;

(g) helping police offices and officers in selecting, using and utilizing computers and other digital services and developing software necessary for the purpose;

(h) maintaining the telecommunication and digital communication networks for police purposes;

(i) identification of individuals and property by means of fingerprints, photography or any digital or biometric technique;

(j) maintaining a well-trained reserve force with a proper chain of command to be deployed whenever and wherever the district police or the local police stations fall short of manpower in the proper discharge of any police function;

(k) training of recruits and refresher training of those in service and general training in policing related matters to any other individual or group as may be decided by the Government;

(l) specialised response units like control rooms equipped to respond to distress calls relating to crime, calamity or accident;

(m) enforcement of any local or special law or special enforcement in any particular area;

(n) digital and cyber policing;

(o) forensic support services to effectively complement the role and functions of the police;

(p) administrative support services for police functioning in terms of processing of establishment, financial and documentation matters;

(q) general support services to help in the functioning of police institutions and offices of various types and to discharge essential functions like cleaning, grooming, cooking, maintenance of equipments and areas etc.;

(r) research and development support for various policing related social and professional matters and for evolution of new policing, preventive and investigative techniques.

(3) The State Government shall equip these units and arrange to impart such specialized training to the personnel as may be necessary to enable such units to function at a high level of technical and professional competence.

(4) Such units created under sub-section (1) may consist of either police officers of designated ranks or non-police personnel or both as may be specified by the Government and the Government may prescribe their conditions of service, special allowances payable to them, special qualifications and skills necessary and special facilities to be made available to them individually or collectively.

22. *A Police Officer may himself perform the duties of his subordinate.*— A police officer may perform any duty assigned by law or by a lawful order to any officer subordinate to him and in case of any duty imposed on such subordinate, a superior police officer, where it shall appear to him necessary may aid, supplement, supersede or prevent any action of such subordinate by his own action or that of any person lawfully acting under his command or authority, whenever the same shall appear necessary or expedient for giving more complete or convenient effect to the law or for avoiding an infringement thereof.

23. *Separation of investigation from law and order.*—(1) The Government may, having regard to the population in an area or the circumstances prevailing in such area, by order, separate the investigating police from the law and order police in such area as may be specified in order to ensure speedy, effective and professional investigation.

(2) The District Police Chief shall ensure the full co-ordination between the two wings of the police separated under sub-section (1).

24. *The State Security Commission.*—(1) The Government may, by notification in the official Gazette, constitute a State Security Commission for the purpose of exercising such functions and discharging such duties as may be assigned to the Commission under this Act.

(2) the Commission shall consist of the following members, namely:—

(i) the Minister in-charge of Home Department who shall be the Chairman;

(ii) the Minister in-charge of Law;

(iii) the Leader of Opposition;

(iv) the Chief Secretary-ex-officio;

(v) the Secretary to Government, Home Department-ex-officio;

(vi) the State Police Chief-ex-officio;

(vii) three non-official members, who shall be persons of eminence in public life with wide knowledge and experience in law and order administration, human rights, law, social service, management of public administration nominated by the Governor.

(3) The State Police Chief shall be the Secretary of the Commission.

(4) Every member nominated under clause (vii) of sub-section (2), shall unless their seats become vacant earlier by resignation, death or otherwise, hold office for a period of three years and shall be eligible for re-nomination.

(5) If a non-official member of the Commission is absent without sufficient cause for more than three consecutive meetings thereof, the Chairman of the Commission may, remove such member from the membership of the Commission:

Provided that no member shall be removed under the provisions of this sub-section except after giving him a reasonable opportunity of showing cause against such removal.

(6) Any non-official member of the Commission, may resign his office by giving notice in writing, of his intention so to do, to the Chairman, and on such resignation being accepted, he shall be deemed to have vacated his office.

(7) The Commission shall regulate its own procedure and the conduct of the business to be transacted by it.

(8) The fees and allowances payable to the nominated members of the State Security Commission and their conditions of service shall be such as may be prescribed.

25. *Functions of the Commission.*—(1) The Commission shall have the following functions, namely:—

(a) to frame the broad policy guidelines for the functioning of the police in the State;

(b) to issue directions for the performance of the preventive tasks and service oriented functions of the Police;

(c) to evaluate, from time to time, the performance of the police in the

State in general;

(d) to prepare and submit an yearly report of its functions to the Government; and

(e) to discharge such other functions as may be assigned to it by the Government.

(2) The report submitted by the Commission under clause (d) of sub-section (l) shall, on receipt, be placed before the Legislative Assembly.

(3) No act or proceedings of the Commission shall be deemed to be invalid merely by reason of any vacancy at the time any such act or proceedings is done or passed.

(4) Notwithstanding any guidelines or directions issued by the Commission, the Government may issue such directions as it deems necessary on any matter, if the situation so warrants, to meet any emergency.

(5) The directions of the Commission shall be binding on the Police Department: Provided that the Government may, for reasons to be recorded in writing, fully or partially reject or modify any recommendation or direction of the Commission.

26. *Evaluation of Police performance*.—(1) The State Security Commission, may every year, appoint a panel of three experts, familiar with the functioning of the police or public administration or sociological or criminological studies, to evaluate the performance of the police in the previous financial year as well as to suggest performance standards for the succeeding financial year.

(2) Parameters for evaluating performance may be fixed by the State Security Commission, taking care to avoid considering statistics of reduction in crime registered by police as an indication of reduction in the incidence of crime and further taking care to ensure that the parameters cover the entire range of police activities as well as manpower utilisation and resource utilisation by police officers.

(3) Every year, the State Security Commission shall fix performance standards to be attained by various units and branches in the succeeding financial year and the facts thereof shall be communicated to the concerned before the first day of March in the current financial year.

CHAPTER V

DUTIES AND RESPONSIBILITIES OF POLICE

27. *Duty of a Police Officer*.—It shall be the duty of every police officer to undertake all reasonable and lawful actions so that such officer and the Police in general are enabled to discharge all responsibilities arising from the stipulated functions of the Police in an efficient and effective manner.

28. *Police response*.—Every police officer on duty shall remain in a state of mental and physical alertness and shall respond as quickly as practicably possible to any situation brought to his notice with respect to which police are lawfully expected to discharge any of its functions.

29. *Police behaviour*.—(1) All police officers on duty, in their dealings with the public, shall be courteous, considerate and polite.

(2) They shall not, unless it is necessary to achieve any lawful purpose, use force or threaten use of force or threaten anyone with any punishment or any adverse police or legal action.

(3) They shall be particularly considerate to the victims of crime and be responsive to the special needs of women, children, senior citizens and the differently abled.

(4) They shall eschew unnecessary show of aggression and avoid intemperate behaviour even under provocation.

(5) They shall not ill treat anyone in their care or custody.

(6) They shall take care to appear in public in a state of good physical grooming and shall not appear sloppy or unkempt or unclean or untidy, unless such a state is directly caused by the diligent performance of any duty.

30. *Police Officer to maintain good health.*—(1) All police officers shall strive to maintain good physical and mental health.

(2) Subject to any direction the Government may issue in this regard, the State Police Chief may prescribe standards of physical and mental efficiency to be maintained by a police officer, with due consideration for age, gender, nature of duties and standards prevalent among the general population.

(3) No police officer shall be discriminated against by reason of failure to meet a physical standard if such failure is due to any injury or circumstance suffered as a result of or in the course of duty or chronic ailment.

(4) Government may institute a system of incentives and infrastructure facilities to promote good mental and physical health among members of Kerala Police.

31. *Police to keep information confidential.*—(1) All information relating to the activities of any individual or institution which the police collect in the course of their duties shall be kept confidential except for the purpose of using such information for any official purpose.

(2) Such official purpose may include publication of such information for assistance in the detection or prevention of crimes.

(3) Persons in custody may not be paraded or photographed for the purpose of publication in the press or in any visual media.

32. Police to be accountable.—(1) Any person or his representative in interest shall have the right to seek and be informed of the reason for any police action as a result of which his person, property or reputation was adversely affected.

(2) As far as reasonably practicable under the circumstances of each case, a police officer, performing any act which is likely to endanger or adversely affect the person, property or reputation of any person, shall maintain such records of his actions as may be prescribed by any law governing the performance of such act or by the State Police Chief.

(3) Nothing in this section shall prevent the State Police Chief from denying the furnishing of information to any person on the ground that the same would be prejudicial to the interests of an ongoing investigation or trial or to the interests of security of the State.

33. *Police and Public may keep Audio or Video or Digital Records.*—(1) Police may make and keep audio or video or digital records of any activity performed by them in pursuance of any duty imposed on them individually or collectively and such records may be used in any proceedings in which the correctness of police action is called into question.

(2) No police officer shall prevent any member of the public from making any audio or video or digital record of any police activity or action carried out in a public place or in any private place under the control of the member of the public making the record.

34. *How to make Complaints to Police.*—A complaint to the police may be made orally or in writing or by gestures or signals or by digital or electronic means and a police officer is bound to take appropriate action thereon provided the officer has no reason to suspect that the complaint is pseudonymous, anonymous or manifestly false or frivolous or trifling.

35. *Police to treat witnesses with due consideration.*—(1) If any person is acquainted with the facts and circumstances of any matter which any police officer has any valid ground to ascertain, the police officer may take action to do so taking care to ensure that he does not unduly inconvenience such person.

(2) All such persons shall normally be approached while they are at their normal places of residence or place of work and no child, woman or senior citizen shall be summoned to the police station for this purpose.

(3) If any person, from whom the police officer wants any assistance in the ascertainment of any fact or circumstance in any connection, is planning to be away from his residence, it shall be lawful for the police officer to direct that he may inform the police of his whereabouts for the succeeding days, not exceeding fifteen days in any case and such person shall comply with such direction.

(4) If any person is so seriously inconvenienced as to lose his wages for any day due to the fact that he had to assist the police in ascertaining any fact or circumstances, he may be paid, out of the Criminal Justice Miscellaneous Expenses Fund, such amounts as may be prescribed in general by the State Police Chief.

36. *Persons to identify themselves if required.*—(1) Every person shall disclose his identity if so required by a police officer.

(2) Such police officer may take reasonable steps necessary to get the identity of the person established and for this purpose, the police officer, may make or take such records of personal identification as may be necessary in each case.

(3) No person shall be arrested or kept in custody in any manner under this section merely for the reason that the identity given by such person needs to be verified.

37. *Police access to private places.*—Every police officer shall have due access, with due regard for custom, decency, privacy and propriety, for good and sufficient reason for which such officer shall be personally accountable and responsible, to any private place, for the purpose of ensuring safety or for averting imminent danger: Provided that such officer shall, as far as possible, try to get the co-operation and consent of the person in charge of the premises before exercising this right.

38. *Police to interpose to prevent crime.*—(1) Any police officer present at the spot shall, to the best of his ability, interpose and stop any criminal activity going on or about to take place in his presence or proximity.

(2) For this purpose he may lawfully demand and accept the services of any able bodied adult male and no person shall disobey, without reasonable cause, a lawful and reasonable direction so given by a police officer present on the spot.

39. Police to give reasonable directions.—(1) All persons shall be bound to comply with the reasonable directions given by a police officer in the discharge of his duties under this Act.

(2) In order to ensure compliance with any direction of law or in lawful discharge of any duty cast upon any police officer by this Act or any rule, regulation or order made there under, a police officer may,—

(a) caution a person who is about to commit an offence punishable under any law or any rule or order made under any law;

(b) require any person to comply with any law which prescribes the manner in which such person should act either with regard to himself or another person or with respect to anything under his charge;

(c) subject to the provisions of sub-section (a) and (b), arrest where such arrest is considered necessary, any person who is committing an offence or who in the presence of the police officer has committed an offence;

(d) seize any object used or about to be used, in committing an offence;

(e) seize any object in relation to which an offence has been committed, if such seizure is necessary for the prevention or investigation of such offence.

40. *Removal by Police.*—(1) Where any person, at a place where the public are present resists, refuses or fails to comply with any reasonable direction given by a police officer, the police officer may, without prejudice to any other action he may take under any provision of this Act or any law, cause the removal of such person to a nearby place and release him, after ascertaining his name and address, within six hours or as soon as the need for the removal has ceased to exist, whichever is earlier.

(2) Such removal followed by release within six hours shall not be deemed to be an arrest.

(3) Police may use the minimum amount of force necessary to effect such removal if the persons concerned refuse to remove themselves if so ordered or if they physically resist the removal.

41. *Police action in offences requiring special authorisation.*—A police officer may keep, in the presence of appropriate local witnesses as is reasonably practicable, any person or object, at any appropriate place, as is reasonably possible under the circumstances of each case, for a maximum period of six hours, if the person or the object is manifestly involved in any cognizable offence, in respect of which such police officer is, by rank or jurisdiction, not authorised to effect the arrest or seizure, to enable another police officer or other authority legally competent to do so to take further action under the law.

42. *Maintenance of order and prevention of danger.*—(1) For preventing serious disorder or breach of peace or manifest and imminent danger to persons assembled at any place, any police officer having jurisdiction, present at such place or such assembly, may give such reasonable directions regarding the conduct of persons at such places as he thinks necessary and all persons shall be bound to conform to such directions.

(2) Every police officer shall have free access to every public place including educational institutions and private establishments where members of public may be found for giving effect to the provisions of sub-section (1).

43. *Police Uniforms to be distinctive, exclusive and easily identifiable.*—

(1) The State Police Chief may, with the prior approval of the Government, specify the uniforms of all ranks and categories of police officers keeping in view the need for such uniforms to be distinctive, exclusive and easily identifiable by the members of the public who seek the services of police.

(2) The State Police Chief may specify the times and manner of wearing the uniforms and further specify the duties on which uniforms are to be compulsorily worn, optionally worn or not worn.

(3) A police officer shall always maintain his uniforms in proper order and state of good repair and appearance.

(4) No person, other than a police officer acting officially, shall, save for artistic or scientific purpose, wear any dress which can be perceived as a police uniform and if a question arises whether a particular dress creates such an impression, it shall be decided by testing whether a person wearing the dress in question shall look like a uniformed police officer to a casual observer standing 25 metres away from him.

44. *Police duty vehicles to be distinctive, exclusive and identifiable.*—(1) The State Police Chief may, with the prior approval of the Government, specify the colours, equipments and accessories of every police duty vehicle keeping in view the need for their appearance to be distinctive, exclusive and easily identifiable by the members of the public who have to seek police services.

(2) Every police duty vehicle with such specified appearance, shall respond to any emergency call from any person, unless it is manifestly engaged in some other emergency or important duty.

(3) No person, other than a police officer in respect of an official vehicle, shall, save for artistic or scientific purpose, keep any vehicle in such a condition as to create the impression that the said vehicle is a police vehicle and if a question arises whether a particular vehicle creates such an impression, it shall be tested whether the vehicle in question shall look like a prescribed police duty vehicle to a casual observer standing 100 metres away from it.

45. *Special powers in disturbed areas.*—(1) When any area is beset by communal or political violence or terrorist or anti-national activities or large scale violence and vandalism or destruction of public property, the State Government may declare the area as a "disturbed area".

(2) When an area is declared to be a disturbed area, the Station House Officer may, in the interest of maintenance of law and order,—

(a) place reasonable limitations on the movement of persons and vehicles in the area;

(b) order any person who, in the opinion of the police, if left to continue his activities unbridled, shall carry on activities prejudicial to the maintenance of law and order, to keep the police informed of his whereabouts in the manner prescribed by the police;

(c) suspend all arms and explosive licenses and direct the licensees to deposit their weapons with the police;

(d) search any person or vehicle or container entering or leaving the area.

46. *Procedure for arrests.*—(1) The police officer making the arrest shall caution the person arrested that he is being placed under arrest and inform the grounds of arrest.

(2) The person arrested shall be informed of his right to have someone informed of his arrest as soon as he is put under arrest.

(3) The police officer carrying out the arrest shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness if available, who may be either a member of the family of the person arrested or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the person arrested and shall contain the time and date of arrest.

(4) The person arrested shall also be examined at the time of his arrest with due regard for decency and visible injuries, if any present on his person, must be recorded at that time in an "Inspection Memo" signed both by the person arrested and the police officer effecting the arrest and its copy provided to him.

(5) The police officers carrying out the arrest and handling the interrogation of the person arrested shall carry appropriate identification and the person arrested shall be at liberty to ask for such identification.

(6) An entry shall be made in the diary at the police station regarding the arrest of a person.

(7) A person who has been arrested and is being held in custody in a police station, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest was himself, such a friend or a relative of the person arrested: Provided that

detention at a place other than the police station shall require the prior permission of the District Police Chief and the name of such place shall be recorded in the station diary.

(8) If the person arrested so requests or if the police feel so to be necessary, the person arrested shall be subjected to a medical examination by a qualified doctor and if a magistrate orders custody beyond 24 hours, he may also order medical examination at such frequency as he may deem fit.

(9) The person arrested may be permitted to meet his lawyer during interrogation, but such lawyer may not remain present during the interrogation.

(10) The particulars of all police officers who handle interrogation of the person arrested shall be recorded in a register.

47. *Restraint on those arrested.*—(l) A police officer may use sufficient force with or without the aid of suitable gadgets to ensure that a person arrested by him does not escape from custody unlawfully.

(2) A police officer arresting a person may not use a handcuff to restrain the arrested person, unless, for reasons to be recorded in writing, he has reason to believe that the arrested person shall escape from custody unless handcuffed or that the arrested person shall hurt himself unless handcuffed.

(3) When any person is arrested and kept in the custody of the police, it shall be ensured that he is adequately and properly clothed and is allowed the use of apparel with which the arrested person is usually accustomed, provided that the police officer may take such action as is reasonable, proper and within the norms of decency, to ensure that the arrested person does not use the wearing apparel or anything concealed therein to hurt himself or others.

48. *Custody of persons who are psychopathic, intoxicated or sick.*—(1) The Police may take a person who appears to be insane, psychopathic, intoxicated or otherwise incapable of looking after himself into protective custody.

(2) Where it appears necessary for the police officer concerned that in the interest of the person taken into custody such action is required, the police officer may request a medical institution to keep such a person in such hospital under observation or treatment and the authorities of such institution shall be bound to comply with such request.

49. *Medical examination of accused.*—It shall be binding on any medical practitioner before whom an accused or suspect person is produced by a police officer for medical examination to subject him to an examination as requested by such officer as may be reasonably necessary under the circumstances.

50. *Medical treatment of accused.*—(1) Every hospital shall earmark sufficient space for the treatment of persons in police custody so that they may be properly guarded and kept under police observation.

(2) It shall be binding upon the hospital authorities to immediately furnish on demand to the police copies of all the medical records pertaining to the treatment of such persons.

(3) Any such person initially admitted in any emergency to a private hospital, shall subject to medical clearance, be shifted as early as possible to a government hospital.

51. *Action in respect of injuries on those in Police custody.*—When any person is taken into police custody in a physically injured condition or any person is physically injured by application of force by a police officer and the injured person complaints of the injury

or if the police officer himself notices the injury, such person shall be taken before the nearest medical practitioner who shall ascertain the injury and the manner of its causation; and

(i) if such person is medically fit to be taken before a magistrate, he shall be produced by the Station House Officer before the executive magistrate or the judicial magistrate having jurisdiction who shall ascertain the version of the injured with regard to the manner in which the injury was caused; or

(ii) if the injured is not in a condition to be moved, the details of the incident and circumstances shall be furnished forthwith to such magistrate by the Station House Officer and a copy of the said report shall be given to the medical officer and the injured under acknowledgement.

52. *Service providers to maintain records.*—All providers of any public service, belonging to such categories as may be notified for the purpose by the Government from time to time, shall maintain accurate records regarding the identity of persons to whom they have provided services along with the details of services provided and all such records shall be kept for reference for such periods as may be prescribed by Government.

53. *Service providers to provide information to Police.*—It shall be the duty of all providers of any public service like phone companies, hotel keepers, internet service providers, hospitals, laboratories, taxi services, rental services, financial institutions and any other agency which offers any service to the public on demand, to furnish, when so required by the police in due discharge of duties cast on the police in respect of any item or instance or groups of instances of service which have a bearing on any police enquiry or police investigation lawfully conducted, to the police all the details thereof and to give such documents, details or information as expeditiously as possible and in any case not later than the time limit set by the requisitioning police officer.

54. *Verification of antecedents of service providers.*—The Government may, by notification, direct that any class or category of service providers or any group of service providers in any area, shall, before they start providing any service to the public at large, must obtain police verification certificates from the District Police Chief or such other police authority as may be prescribed with regard to themselves and their employees and furnish such reasonable information to the police about their activities and antecedents as may be reasonably necessary in the circumstances of each service and further direct that such verification be repeated with such periodicity as may be specified: Provided that the information so obtained from a service provider by the police other than the information which is necessary to be used for any public purpose for the purpose of preventing or investigating a crime shall be kept confidential and shall not be divulged to any person or to the public.

55. *Service providers to report stolen, missing or wanted property.*—(1) Any police officer may deliver to any merchant, service provider, pawn- broker, dealer or repairer, a list of any property believed to have been stolen or reported to be missing or required to be located by reason of any crime and thereupon it shall be the duty of such person, upon any article answering the description of any of the property set forth in any such list being brought to his notice, to inquire the name and address of the person offering such article, to seize and detain the artic1e and forthwith to communicate the circumstances to nearest police station.

(2) Such merchant, service provider, pawn-broker, dealer or repairer as aforesaid may also detain any person offering such article as aforesaid pending the arrival of the police.

56. *Storage and disposal of articles seized by police.*—(1) In every police station adequate space shall be provided for the storage of seized articles and if the given space in the police station is insufficient, the State Government may notify an enclosed area other than the police station for keeping articles seized by the police during investigation or as unclaimed property etc.

(2) Dangerous articles such as explosives or harmful chemicals may be destroyed after a sample is collected for forensic analysis, in the presence of competent experts and under advance intimation to courts: Provided that such an analysis may be dispensed with if the danger of its exploding or causing harm is imminent.

(3) Perishable articles that are no longer required for any statutory purpose shall be disposed off by auction under the orders of the District Police Chief and the proceeds credited to the Criminal Justice Miscellaneous Expenses Fund under section 131.

(4) When any article seized by the police is ordered by any Court to be retained by the Police, such Court may also order the requisitioning of suitable space by the police officer entrusted with the custody of the article, if there is no suitable space available under the control of such officer to keep the said article in safe custody and that the expenses incurred in connection with such retention in custody shall be fully borne by the Government or by the Criminal Justice Miscellaneous Expenses Fund maintained by the District.

(5) Any article seized by the police may, with the general or special permission of the court, be placed in safe custody with such persons or agencies or institutions as may be appropriate in the circumstances of each case.

57. *Police action in relation to unclaimed Property.*—(1) It shall be the duty of every police officer to take temporary charge,—

(i) of all unclaimed movable property found by or made over to him or left with him; and

(ii) of all movable property found lying in any public street, if the owner or person in charge of such property, on being directed to remove the same by a notice pasted on or near the said property refuses or fails to do so, within a reasonable time.

(2) The police officer taking charge of the property under sub- section (1) shall furnish an inventory thereof to the District Police Chief and to the Executive Magistrate having jurisdiction giving an approximate assessed market value of the same by getting a signed assessment from any respectable dealer of the area who usually deals in such articles.

(3) If the property or any part thereof, is subject to speedy and natural decay or consists of livestock, it may forthwith be sold by auction, by the Station House Officer in the manner as may be prescribed.

(4) Where any property has been taken charge of under sub- section (1) the District Police Chief shall issue a proclamation specifying the details of the property and requiring that any person who may have a claim thereto may appear before an officer specified in the proclamation within thirty days from the date of such proclamation and establish his claim.

(5) The District Police Chief on being satisfied of the title of any claimant to the possession or administration or ownership of the property specified in the proclamation order the same to be delivered to him, after realisation of the expenses incurred in the seizure detention thereof.

(6) The District Police Chief may, at his discretion, before making any order under sub-section (5), take such security as he may think proper from the person to whom the said property is to be delivered and nothing herein before contained shall affect the right of any person to recover the whole or any part of the same from the person to whom it may have been delivered pursuant to such order.

(7) If no person establishes his claim to such property within the period specified in the proclamation, the property or such part thereof as has not already been sold under sub-section (3) shall be, used for any official purpose in lieu of a similar article which was required to be purchased in the normal course or such property may be sold in auction under the orders of the District Police Chief, as provided in sub-section (2) or (3) and the proceeds thereof shall be credited to the Criminal Justice Miscellaneous Expenses Fund.

(8) With due regard to the size and volume of the unclaimed property and the volume of space required to keep it safe and in good condition, the State Police Chief may prescribe from time to time the rates of daily charges to be levied for safe keeping and the unclaimed article or the seized article, not being required for production in a court of law, shall be sold in public auction on the day when the cost of safe keeping becomes half the assessed value of the unclaimed article: Provided that no such charges shall be levied from the original owner of the property for the first seven days for which the article was kept in custody and for any period after the date of auction of the property and its transfer to the bidder or the date of its being put to governmental use.

(9) When an unclaimed article had been sold in auction and it is later found that the actual owner is entitled to the full value of the said article by reason of the fact that he had been wrongfully dispossessed of the article by another person which dispossession he had lawfully reported to the authority well in time, then the entire sale proceeds of the article shall be remitted back to him.

(10) No police officer shall be expected to keep in custody any perishable article or livestock for more than one day and he shall not be liable for any loss caused to anyone by reason of expeditious auctioning of such perishable article.

(11) No police officer shall be expected to make good any loss sustained to anybody by reason of any loss that any person has actually or notionally suffered by reason of the auctioning of any unclaimed non-perishable article, if such police officer had taken action to conduct auction more than 30 days after the property came into the possession of the police.

58. *Police to attempt to locate missing persons.*—(1) Whenever any Station House Officer receives any information from which he can reasonably suspect that any person is missing either from his normal or temporary place of residence and there are reasonable circumstances to believe either,—

(a) that such person might be in some danger or out of the care of lawful guardianship; or

(b) that such person might be the victim of some serious crime; or

(c) that such person is concealing himself to prevent anyone from enforcing a legal right upheld by any court, Such officer may register the information in such manner as is prescribed for a cognizable offence and shall proceed to enquire into the matter of the disappearance expeditiously.

(2) During such enquiries such officer or anyone deputed by him may examine any witness and record their statements and may examine any place or may search any place.

(3) All persons shall answer any question put to him by a police officer enquiring into this matter truthfully and shall sign any statement recorded from him by a police officer conducting the enquiry, after getting a copy thereof from the police officer.

(4) All searches under this section shall be done in accordance with the provisions of the Criminal Procedure Code, 1973.

(5) If the enquiry succeeds in tracing the person, he shall forthwith be produced before the Executive or Judicial Magistrate having jurisdiction, as the case may be.

59. *Police may keep register of missing properties.*—(1) Whenever any Station House Officer receives any information from any person that any valuable property or security belonging to that person is lost, such officer may, if satisfied that the value and the nature of the missing article justifies such a course of action, register the information in a register maintained for the purpose and may cause such enquiries to be made as may be reasonably necessary to locate the article.

(2) The charges to be levied for such enquires shall be in the manner as may be prescribed.

(3) Nothing in this section shall be deemed to compel any police officer to make any enquiries in this regard when he reasonably feels either that the missing article is trifling in value or that there is no reasonable chance of it being identified and located or that making any enquiry is either too expensive or time consuming.

60. *Police may give certificates of non-involvement in crimes.*—Whenever any District Police Chief receives any request from any person that he may be issued with a certificate to the effect that he is not involved in any crime in his jurisdiction, the District Police Chief may make such enquiries as he deems fit, and then give such a certificate after realising such charges as may be fixed by the Government in this regard.

61. *Police may give security advice.*—Whenever any District Police Chief receives any information that there is any place within his jurisdiction where extraordinarily large sums of cash or very valuable movable properties are kept or that any place of public importance is facing a grave security threat, then he may, on his own, in consultation with the person or persons in charge of the place concerned, get a security audit conducted by persons selected by the District Police Chief and on the basis of such security audit, the persons in charge of the premises may be advised to take certain steps or take certain precautions to safeguard life and property situated in the premises: Provided that nothing in this section shall be deemed to compel any person to do or not to do a thing which he was otherwise not compelled.

62. *Police to Regulate and Control Traffic.*—A police officer on duty may regulate and control traffic on the streets to ensure smooth flow of traffic and to give reasonable directions to all concerned for ensuring that disorder, traffic blockade and danger are avoided.

63. *Security to individuals and private institutions.*—(1) The District Police Chief or the State Police Chief or the Station House Officer, may on his own or from information received from any source, may, in any emergency, decide to deploy, free of cost, additional police strength in any place, public or private, to prevent any imminent crime or to prevent or avert any imminent danger to the public or any part thereof or any individual or group or institution.

(2) No individual or institution shall have any right to be provided with, over and above the normal police arrangements generally arranged for the general public as part of general policing, any special police deployment free of cost or even on payment exclusively for the protection of any private person or private property except under circumstances where the State Police Chief or the District Police Chief or the Station House Officer is satisfied that there is imminent danger of a serious crime occurring otherwise.

(3) The Government or the State Police Chief may prescribe the criteria and the procedure by which an individual or institution or group of persons may be provided with additional police deployment meant exclusively for the safety of such individual or institution or groups or for the safety of their properties.

(4) The Government or the State Police Chief may further prescribe the conditions under which such additional deployment can be given free of cost or at partial cost or at full cost as may be applicable or desirable in each case.

(5) No special and exclusive police deployment shall be provided to any private institution or individual free of cost to prevent the occurrence of any apprehended threat to person or property in such a manner as to adversely affect, in the judgement of the District Police Chief, the availability of police services and police personnel to the general public and for normal police duties in any area.

64. *Police action in disputes which may lead to cognizable crime.*—If any dispute between any individuals or groups is brought to the notice of any Police Station tmder circamstances in which it is reasonably likely that unless the issue is speedily resolved, a cognizable crime may result, the Station House Officer may cause action to be taken,—

(a) to ascertain the facts and circumstances of the matter by talking to the parties concerned or to others acquainted with such facts; or

(b) to caution either or both parties to the dispute, by a written record, against taking recourse to any illegal act, in pursuance of the dispute; or

(c) to encourage either or both parties to resolve the matter through discussion among themselves or through mediation; or

(d) to advise either or both parties to seek resolution of the dispute through a competent court having jurisdiction; or

(e) to take action to report the facts to the magistrate having jurisdiction for the purpose of binding either or both the parties under the provisions of the Criminal Procedure Code, 1973.

65. *Community policing.*—(1) The District Police Chief shall constitute Community Liaison Groups for each Police Station, comprising respectable local residents of the area, as representatives of the community, to generally assist the police in their functioning.

(2) The Community Liaison Group shall have a fair representation of all segments, professions and genders of the society in the area of the police station.

(3) No person shall be nominated as a member of the Community Liaison Group who has a record of conviction by a criminal court in the preceding five years or been dismissed, removed, discharged or compulsorily retired from any employment on grounds of corruption, moral turpitude or misconduct.

(4) The Community Liaison Group shall identify the existing and emerging policing needs of the area for due consideration of the police and also develop action plans for ensuring the security of area or any part thereof.

(5) The Community Liaison Group shall meet as frequently as necessary.

(6) The meetings of the Group shall be open to public.

(7) Every citizen should be encouraged to bring to the notice of the police information about the occurrence of offences and the possibility of occurrence of offences.

(8) The Community Liaison Group may form sub-committees for specific areas or for specific functions to attend to a particular need.

(9) The Community Liaison Group may take action to promote safety awareness, security awareness and proactive action to prevent crime and promote legal literacy.

(10) Community Liaison Group shall not perform any police function which, by law, can be performed only by police officers and shall not by themselves take up any investigative or punitive function.

66. *Service of beats.*—(1) The area of every police station shall be divided into beats and sufficient beat patrols shall be assigned to each beat area to service the beat area on a regular basis.

(2) The duties and responsibilities of the beat patrols shall, inter alia, be,—

(a) to maintain liaison with active members of the community and members of the Community Liaison Group residing in that area;

(b) to review, during every visit, the crime prevention measures in the area;

(c) to collect information relating to crimes and criminals and activities of subversive, militant and anti-social elements, if any, in the area and to communicate the same to the officer-in-charge of the police station;

(d) to maintain watch over history-sheeted criminals, if any, or others with criminal record or bad characters;

(e) to acquaint himself with local disputes having potential for violence and inform the officer-in-charge of the police station with all available details;

(f) to carry out any other policing task in respect of the area assigned by supervisory officers;

(g) to record any public grievances and complaints in relation to policing; and

(h) to maintain a record of aforesaid duties and responsibilities carried out by him during his visit and submit the same to the officer-in-charge of the police station.

67. *Rewards to public.*—The District Police Chief may, subject to the rules prescribed in this behalf by the Government, promise and award rewards to the public for especially outstanding services rendered or information given in the prevention of crime, investigation of any case or in the maintenance of order, security or traffic safety.

68. *Taking possession of premises to prevent rioting.*—(1) In order to prevent or suppress any imminent riot or imminent grave disturbance of peace, the senior-most police officer present at the spot may temporarily close or take possession of any building or other place for a period not exceeding 48 hours and may exclude all or any persons there from or may allow access thereto for such persons only and on such terms as he shall deem expedient and all persons concerned shall be bound to conduct themselves in accordance with such orders:

Provided that the continued possession of the building or the enforcement of any direction up to a further period of sixty days may be ordered by the District Magistrate.

(2) The District Magistrate may either on his own or on the application of any person aggrieved by an order made under sub- section (1) either rescind, modify or alter any such order.

69. Dealing with accidents or calamities.—If, in the event of a serious accident or a calamity at any place, it appears to the senior-most police officer present at the site that any dispute or conflict of interest or contention or confusion exists, which is likely to lead to an imminent and grave disturbance of the peace or public disorder or serious public inconvenience or danger, he may give such orders as to the conduct of all persons concerned towards each other and towards the public as may be deemed necessary and reasonable under the circumstances and all persons concerned shall obey such orders.

70. *Actions on the occasion of fire, calamity or accident.*—(1) On the occasion of a fire, calamity or accident in any locality, any police or any member of the fire services or any magistrate, and in the absence of any such person, any public servant, may,—

(a) remove or order the removal of any person who by their presence interfere with or impede the rescue and relief operations for saving life or property;

(b) close any street or passage, whether public or private, for the purpose of rescue and relief operations;

(c) break into or through, or pull down or use for the passage of hoses or other appliances, by himself or those acting under his orders, any premise, public or private, for the purpose of rescue and relief operations for saving life and property;

(d) generally take such measures as may appear necessary for the preservation of life and property.

(2) Any damage done in pursuance of directions given in sub-section (1) above shall be deemed to be damaged by fire, calamity or accident within the meaning of any policy of insurance against such fire, calamity or accident and in the absence of such insurance, reasonable compensation, as may be assessed by the District Magistrate, may be paid to the affected party by the Government.

(3) Nothing in this section shall exempt any police officer or any member of the fire services or any magistrate or public servant from liability to damages on account of any acts done by him without reasonable cause.

71. *Police equipment to be exempt from licensing.*—The Government may exempt any equipment or property held by the police officially for the purpose of discharging any of its functions from the requirement of obtaining a license for it under any law or paying any annual fee or license fee to any governmental agency or public authority.

72. *Police Officer may lay information, etc.*—Any police officer may lay any information before a Magistrate, and apply for a summons, warrant, search warrant, or such other legal process as may by law issue against any person committing an offence or for discovery of an object.

CHAPTER VI

POLICE REGULATIONS

73. *Regulation and management of traffic.*—(1) The District Police Chief with due regard for the laws and orders in force as may have been issued by any competent authority, may issue, subject to approval of the Traffic Management Regulatory Committee and subject to modification or annulment by the Government, orders either general or special, in order to prevent danger, obstruction and inconvenience to public, for,—

(a) regulating traffic of all kinds in public places and the use of public places and streets by persons riding, driving, cycling, walking, steering, navigating or leading or accompanying any animal;

(b) regulating the erection of arches, festoons, banners or hoardings, signs, representations or display-lighting on any property or construction activity which is likely to distract or road- users;

(c) regulating the parking of vehicles or vessels in public places and the use of streets as halting places for vehicles or any animal;

(d) regulating the times and manner in which vehicles of a particular type or engaged in a particular task or animals are driven along the streets;

(e) regulating the leading, driving, conducting or conveying of any elephant or wild or dangerous animal through or in any street;

(f) regulating the manner and mode of conveying timber, poles, ladders, iron girders, beams or bars, boilers or other unwieldy articles through the streets;

(g) regulating any activity including trading, welding, or activities resulting in gaseous or smoky emissions by the roadside, which may act as a distraction to road-users;

(h) regulating the carrying in public places of any explosive substance or hazardous chemicals which may cause danger to the road users;

(i) regulating the blasting of rock or making excavations or the burning of any matter or discharging a firearm or using fireworks or sending up a kite, balloon or rocket in or near streets or public place;

(j) closing certain streets or places temporarily, in cases of danger from ruinous buildings or other cause, with such exceptions as shall appear reasonable;

(k) regulating the means and manner of entry to and from public premises and streets to private premises situated on the roadside;

(l) prescribing the manner in which members of the public may voluntarily assist in traffic management without causing any financial liability in this regard for the State or the Police Department.

(2) The orders issued by the District Police Chief shall be deemed to be reasonable directions issued by the police under this Act.

(3) Any order issued by the District Police Chief shall remain valid only for a period of 7 days from the date of issue unless in the meantime it has been placed before the Traffic Management Regulatory Committee of the area.

(4) There shall be a Traffic Management Regulatory Committee for every Municipality/ Corporation/Panchayat consisting of the head of the Local Government as the Chairman and the nominees of the District Magistrate, the District Police Chief, the Regional Transport Officer and the Executive Engineer of the Public Works Department and all orders issued by the District Police Chief may be placed before such Committee within 30 days of issue thereof.

74. *Regulation of physical training*.—(1) Notwithstanding anything contained in any other law for the time being in force, no person shall,—

(a) by himself or by any person on his behalf impart training to any member or members of public in any physical activity involving methods of attack or self-defence unless he holds a permit in this behalf issued by an authority as may be prescribed; or

(b) Permit the use of any premises, owned or possessed by him, for such training or organize abet or participate in such training, as may be imparted by any person who does not hold a permit in that behalf: Provided that the provisions of this sub-section shall not apply to any training imparted by,—

(i) an educational institution owned or controlled by the Government or affiliated to any University in the State as part of the curriculum or course of study; or

(ii) a club or gymnasium recognised by the Kerala Sports Council.

(2) The permit under sub-section (1) shall be issued subject to such conditions and restrictions and on payment of such fees as may be prescribed by rules.

(3) Any Police Officer, not below the rank of a Sub-Inspector, shall have free access to any place of training to ensure that such training is conducted in accordance with this Act and rules made thereunder.

75. *Power to cancel permit.*—(1) The authority notified under sub-section (1) of section 71 may, by order, cancel or suspend a permit granted under the said sub-section,—

(a) if any fee payable by the holder of such permit is not duly paid; or

(b) in the event of any breach by the holder of such permit or by his servant or by anyone acting with his express or implied permission on his behalf, of any of the terms and conditions of such permit; or

(c) if the ho1der thereof is convicted by a court of law for any offence involving moral turpitude.

(2) An appeal against an order under sub-section (1) shall lie to the Inspector General of Police having jurisdiction over the area where the place of training is situated.

76. *Power of prohibit mass drill.*—(1) The District Magistrate may, whenever he considers it necessary so to do for the preservation of the public peace or public safety or for the maintenance of public order, by public notice or by order directed to individuals, prohibit in any area within his jurisdiction, the holding of or taking part in any mass drill or mass training with arms or the carrying of arms in any procession.

Explanation:—For the purposes of this section "arms" means any type of object which can be used as an offensive weapon and includes any type of lathi or stick.

(2) No prohibition under this section shall remain in force for more than three months; provided that if the Government consider it necessary so to do for the preservation of public peace or public safety or for the maintenance of public order, it may, by notification in the Gazette, direct that a public notice or order issued by a District Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which such notice or order would have, but for such order, expired, as they may specify in the said notification.

77. *Power to reserve any street or public place.*—The District Police Chief may, subject to the orders of the Government, by public notice, temporarily reserve for any public purpose any street or public place and prohibit persons from entering the area so reserved save under such conditions as may be prescribed by him.

78. *Regulating nuisance caused by noise.*—(1) If the District Police Chief is satisfied that it is necessary to do so in order to prevent nuisance, annoyance, disturbance, or injury or risk thereof to the public or to any person who dwells in the vicinity may issue such directions, particular or general in nature, as he may consider necessary to any person or the general public for preventing, prohibiting, controlling or regulating the incidence or continuance in any street, open space or any other premises of,—

(a) any vocal or instrumental music or speech;

(b) any sounds caused by the playing or use in any matter whatsoever of any instrument contrivance which is capable of producing or reproducing or amplifying sound; or

(c) the carrying on in any premises of any trade, avocation or operation resulting in or attended with production of sound or noise.

(2) The District Police Chief may either on his own motion or on the application of any person aggrieved by an order made under sub-section (1) either rescind, modify or alter any such order.

79. *Regulations to prevent violence.*—(1) The District Police Chief may, whenever and for such time as he shall consider necessary for the preservation of public peace or public safety, by notification publicly promulgated or addressed to individuals, prohibit or regulate in any manner at any place,—

(i) the carrying of arms of any type or any other article which can be used for causing physical violence; or

(ii) the carrying of any corrosive substance or explosives or fireworks; or

(iii) the carrying, collection or preparation of stones or other missiles or instruments capable of casting or impelling missiles; or

(iv) the exhibition of living persons or corpses; or

(v) the preparation, exhibition, representation, distribution or dissimilation of pictures, symbols, placards, printed matter, pamphlets, books, audio-video recordings, digital records, posters which may inflame communal or religious passions, or offend against normal standards of public morality or gravely undermine public peace or endanger the security of the State.

(2) Any article used or carried by any person in contravention of any prohibition under the sub-section (1) may be seized by a police officer on duty.

80. *Regulation of public assemblies.*—(1) The District Police Chief, by notification publicly promulgated, license, control, regulate or prohibit any assembly or procession of any nature whenever and for such time as he considers such licensing, controlling, regulating or prohibition to be necessary for the preservation of public order and peace or law and order in an area.

(2) No notification promulgated under sub-section (1) shall remain in force for more than fifteen days from the promulgation thereof.

(3) The State Government may either on its own motion or on the application of any person either rescind, modify or alter or extend the period of validity of any such order made under sub-section (1).

(4) For the purpose of ensuring that demonstrations do not seriously disturb normal life on busy thoroughfares, the State Government may, by a general or special order, specify that such demonstrations, rallies or assemblies would be carried out only in certain specified places or only along certain specified routes in any urban area.

81. *District Magistrate to make rules and regulations.*—(1) In any local area in which he thinks fit, the District Magistrate may in consultation with the local government and the District Police Chief, from time to time, make and notify rules for,—

(a) preventing the damaging, dirtying or destruction of public property and any activity which endangers public cleanliness or the environment;

(b) preventing the dumping of any material at any time on any road or public place at any time except at places specifically designated for that purpose or at such times that may be specified by a competent authority including a local government;

(c) specifying certain hours of the day during which ordure or offensive matter or objects shall not be taken from or into houses or buildings in certain streets or conveyed through such streets except in accordance with certain regulations.

(d) regulating, the exposure or movement in any street of persons or animals suffering from contagious or infectious diseases, the carcasses of animals or parts of such carcasses or corpses of persons deceased or waste from abattoirs or similar obnoxious biological or chemical products;

(e) regulating construction, repair and demolition of buildings, platforms and other structures from which danger may arise to those who use any street or public place;

(f) ensuring that all the concerned departments inform the police sufficiently in advance before undertaking any work or embarking upon any project that may have a bearing on traffic management including digging/repair of roads for electrical, water, sewerage, telecommunication or civil engineering purposes, erection of hoardings, poles, lightings, traffic signs, speed breakers, rumble strips etc. so that the police may make suitable alternative arrangements till such work goes on and for ensuring that all such items of work by different departments are co-ordinated to minimise inconvenience to the public;

(g) licensing and controlling persons offering themselves for employment at quays, wharves, landing places, bus stands, airports and railway stations for the carriage of passengers' baggage, and fixing and providing for the enforcement of a scale of charges for the labour of such persons so employed;

(h) maintaining, in cases of existing or apprehended epidemic or infectious disease of men or animals, cleanliness and disinfection of premises by occupiers and the segregation and management of the persons or animals diseased or supposed to be diseased, with a view to prevent the disease or to check the spreading thereof;

(i) regulating, in order to prevent the obstruction, inconvenience, annoyance, risk, danger or injury to passers-by or the residents in the vicinity, activities relating to,—

(i) places of public resort;

(ii) the illumination of streets and public places and the exteriors of buildings abutting thereon;

(iii) the blasting of rocks; (iv) any manufacturing or repairing or maintenance activity; (v) any commercial activity.

(2) Every such rule shall be published in the place wherein it is to operate and all persons concerned shall be bound to conform to the same.

82. *Maintenance of order at assemblies where disputes exist.*—(1) In case of any actual or intended religious ceremonial or corporate display or exhibition or organized assemblage in any street or public place, as to which or the conduct of or participation in which a dispute or contention exists which is likely to lead to disturbance of the peace, the District Magistrate may give such orders as to the conduct of the persons concerned towards each other and towards the public as he deems necessary and reasonable under the circumstances.

(2) While issuing such orders, the District Magistrate shall give due regard to the apparent legal rights and to any established practice of the parties and of the persons interested.

(3) Every such order shall be published in the place wherein it is to operate, and all persons concerned shall be bound to conform to the same.

(4) Any order under sub-section (1) shall be subject to any decree, injunction or order made by a court having jurisdiction, and shall be recalled or altered on its being made to appear to the District Magistrate that it is inconsistent with a judgment, decree, injunction or order of such court.

83. *Persons to render essential services*.—(1) The District Magistrate or the Government may, having regard to the local situation prevailing in any loca1 area classify the professional, mental or physical services of any person or groups of persons as essential for the maintenance of peace or for the avoidance of danger to the public or for the prevention of any danger to life and property arising from any type of accident or calamity and such persons shall be bound to render such services to the best of their ability.

(2) The persons who render such services shall be eligible for reasonable remuneration as well reimbursement of expenses incurred by them and the District Magistrate shall take appropriate action for such payments.

(3) No such order shall remain in force for more than seven days at a time.

84. *Special Security Zones*.—(l) The Government may, on the recommendation of the State Police Chief or otherwise, notify any area as a Special Security Zone, either temporarily or permanently, by reason of high security threats towards any distinguished or protected person present there or towards any important institution or premises situated therein.

(2) When any area is notified as a Special Security Zone as above, Government may prescribe reasonable restrictions with regard to the use of premises and vehicles and with regard to movement of persons, vehicles and objects in such area and direct that all persons shall comply with reasonable directions of police officers with regard to the enforcement of such restrictions.

CHAPTER VII

SERVICE CONDITIONS

85. *Government to prescribe conditions of service*.—The recruitment, training, pay, allowances, posting and other conditions of service police officers shall be such as may from time to time be determined by the Government by general or special order: Provided that conditions relating to officers belonging to the Indian Police Service shall be governed by the All India Services Act and the Rules made thereunder.

86. *Police officers to be subject to discipline*.—All police officers and persons undergoing police training after selection for appointment as a police officer shall be strictly bound by a code of discipline by which they are liable,—

(a) to accept reasonable restrictions, in the manner specified by the Government or the State Police Chief, on their constitutional rights with regard to freedoms of public expression, associations assembly, political activism and withdrawal from duty, and on the standards of public and private conduct expected from them;

(b) to discharge their lawful duties in a lawful manner, with due courage and due determination, to the best of their abilities;

(c) to always uphold the law and to prevent the commission of cognizable offences to the best of their ability;

(d) to lawfully carry out the lawful commands of competent superior, magisterial or judicial authorities and not to withdraw themselves from their duties without the permission, express or implied, of their superior authority;

(e) to wear uniforms of the prescribed type at prescribed times and on prescribed duties as may be prescribed by competent authority;

(f) to carry himself or behave in such manner at such times on such duties and occasions as may be prescribed by the State Police Chief by general or special order.

87. *Disqualifications for appointment as a police officer.*—(1) No person shall be appointed as a police officer who,—

(a) is not a citizen of India; or

(b) was convicted by a court of law in a criminal case involving moral turpitude; or

(c) is found mentally, physically, behaviourally or psychologically unfit for police duties; or

(d) is a member of a political party and is not prepared to terminate his active membership even after recruitment; or

(e) is an office bearer of any social, religious, cultural or scientific organization and is not prepared to terminate his association if so required by the District Police Chief or the State Police Chief or the Government; or

(f) is or has been a member of a banned organization; or

(g) is believed, with reasonable cause and on the basis of credible material, to be involved in unlawful activities and associations, which shall prevent him from properly discharging his duties as a police officer.

(2) A person against whom a criminal case is pending based on a charge filed on behalf of the State shall be entitled to appear for recruitment and to get selected but he shall be allowed to join training only after being acquitted.

(3) If at any time after appointment, a police officer is found, either at the time of appointment or subsequently, to belong to one of the categories specified in (a) to (g) in sub-section (1) above, such officer shall forthwith be placed under suspension by the appointing authority and shall, after being given opportunity for reasonable defence to prove the contrary, be liable to be dismissed or removed or compulsorily retired from office without following the detailed procedure specified in the relevant Discipline, Punishment and Appeal Rules.

88. *Oath to be taken by police officers.*—(1) Every member of the police force enrolled under this Act shall, on appointment as a police officer after training, make and subscribe before the appointing authority or some person appointed in that behalf by him, an oath or affirmation according to the form which may be prescribed.

(2) The appointment shall become automatically null and void if the person refuses to take such an oath.

89. *Police officers to be given certificate of authority.*—Every police officer shall, on appointment, be given Certificate of Authority as a police officer authorised to discharge the functions of a police officer under this Act: Provided that a person shall be appointed as a Police Officer only after undergoing and successfully completing a course of training as may be prescribed by the Government.

90. *Police officers to be always on duty.*—Every police officer, not on leave or specific exemption or under suspension shall, for all purposes of this Act, be considered to be always liable to be on duty and shall be liable at any time to be employed as police officer in any part of India as may be decided by the State Police Chief.

91. *Police officers to serve in any branch.*—All members of the police force shall be liable for posting, if so ordered by the State Police Chief, to any unit wing or branch of the force irrespective of the cadre or unit or wing to which he is appointed or selected.

92. Police officers not to withdraw from duty.—(1) No police officer shall resign his office or withdraw himself from the duties thereof, unless expressly allowed to do so in writing by the State Police Chief or by such other officer as may be authorized by him to grant such permission;

(2) A police officer who, being absent on leave, fails without reasonable cause to report himself for duty on the expiry of such leave shall be deemed within the meaning of this section, to withdraw himself from the duties of his office.

93. *Police officers not to engage in other employment.*—No police officer, other than a special police officer, shall engage in any employment or office whatever other than attending to his duties under this Act.

94. *Police officers under suspension not to exercise authority.*—(1) The powers, functions and privileges vested in a police officer shall remain suspended when a police officer is under suspension from office.

(2) Notwithstanding such suspension, such person shall not cease to be a police officer and shall continue to be subject to the same disciplinary rules and control of the same authorities to which he would have been subject, if he was not under suspension.

(3) Any officer who directly supervises the functioning of another officer lower in rank and subordinate to him may, at any time, restrain such officer from discharging all or part of his duties as may be specified even if he is not placed under suspension.

(4) Any officer acting under sub-section (3) shall forthwith communicate the reason for the action with facts to the appointing authority within 24 hours of such restraint being imposed and if the appointing authority does not confirm or modify such action within seven days of the imposition, the restraints imposed shall cease to have any effect.

95. *Police officers to be compensated for extra hours of work.*—(1) Police officers, though liable to perform duties for any length of time as may be required, shall normally be expected to work for eight hours a day.

(2) Duty hours for police officers on any day may exceed eight in case of any emergent or essential duty.

(3) For duties performed significantly beyond eight hours in any twenty four hours time span, a police officer may be duly compensated at a reasonable rate fixed by the State Government or compensated by grant of adequate hours of compensatory rest.

(4) However no police officer shall withhold himself from performing any duty assigned to him on the ground that he has worked for more than eight hours in any twenty four hour period nor shall a police officer withdraw himself from any duty unless he has obtained the consent, either express or implied, of his superior that he may proceed off from duty.

(5) Nothing in this section shall prevent the State Police Chief from prescribing that the number of hours spent on certain type of duties,—

(a) in which a police officer is permitted rest or sleep during temporary breaks from duty; or

(b) involving travel for which the police officer is compensated otherwise, shall be counted only at a prescribed fractional rate of the total period between posting on duty and relief from duty.

96. *Police officer not to show cowardice.*—(1) All police officers shall always be prepared to face physical danger, arising in the lawful discharge of their duties to such an extent as may be reasonable under the circumstances.

(2) No police officer on duty shall commit any act of omission or commission by reason of cowardice.

(3) If a police officer abdicates, withdraws from or absents himself unauthorisedly from his lawful duty either by an act of commission or omission on account of fear of any person or object, it shall be deemed that he is guilty of cowardice.

(4) Nothing in this section shall be deemed to compel a police officer to voluntarily court certain imminent death under circumstances which create reasonable apprehension of the same.

97. *Police officers not to shield corruption and torture.*—(1) Every police officer shall be duty bound to report to the District Police Chief or the State Police Chief directly any corrupt activity or any act of torture committed in his presence by another police officer.

(2) No such report, made in a bona fide manner, shall be deemed to be a breach of discipline merely by reason of the fact that the person who made the report was an officer lower in rank than the person against whom the report was given.

98. *Minimum tenure of police officers.*—(1) The Government may ensure a minimum tenure of two years from the date of assuming charge of the post to the Director General of Police and to all Inspector Generals of Police in charge of ranges, Superintendents of Police in charge of Districts and Station House Officers in charge of police stations: Provided that the normal tenure shall not be applicable in cases of superannuation, promotion, reversion, suspension and leave.

(2) The Government or the appointing authority may without prejudice to any other legal or departmental action, transfer any Police Officer before completing the normal tenure of two years, on being satisfied prima facie that it is necessary to do so on any of the following grounds, namely:—

(a) if he is found incompetent and inefficient in the discharge of duties so as to affect the functioning of the police force;

(b) if he is accused in a criminal case involving moral turpitude;

(c) if departmental proceedings are initiated against him;

(d) if he exhibits a palpable bias in the discharge of duties;

(e) if he misuses or abuses powers vested in him;

(f) if he shows incapacity in the discharge of official duties;

(g) if there has been initiation of an enquiry against him by competent authority on a grave allegation of corruption or indifference in the discharge of duty;

(h) if his conduct has been adversely commented upon by any judicial authority;

(i) if there is disorder or rampant crime in his area of jurisdiction;

(j) if there is public dissatisfaction with the effectiveness of policing in the jurisdiction;

(k) if he requests to be transferred from the post.

99. *Special Police Officers.*—(1) The District Police Chief, subject to any orders that the Government may issue in this regard, may, at any time, by a written order signed by himself, hire any able-bodied and willing person of good character, who has passed the Secondary School leaving Examination or equivalent, between the age of 18 and 60 years, whom he considers fit to be a special police officer, to assist the Police in the maintenance of order for a period of less than two months at a time.

(2) Every special police officer so hired shall, on hiring,—

(a) receive a certificate in a form approved by the State Government in this behalf;

(b) have the same powers, privileges and immunities and be liable to the same duties and responsibilities and be subject to the same authorities as a regular police officer;

(c) receive daily remuneration to be paid at the rates decided by the State Government through a general or special order.

(3) Hiring of a person as special police officer shall not be deemed to be temporary or permanent government employment and the person so selected shall have no future claim for regular employment in the police on this ground: Provided that a special police officer may be hired afresh again after the expiry of eighty- nine days after a break of at least one day and it shall be deemed to be a fresh hiring.

(4) Special police officers shall not be chosen from amongst those persons who have,—

(a) a record of conviction by a criminal court in the past five years or figures in a case as an accused involving moral turpitude; or

(b) been dismissed, removed, discharged or compulsorily retired from any employment on grounds of corruption, moral turpitude or misconduct; or

(c) continuous activity as a member of a political party during his employment as Special Police Officer; or

(d) been a member of a extremist, terrorist, militant or subversive organization:

Provided that a person whose hiring as a special police officer has been terminated following his involvement in a criminal case, shall be eligible to be hired again if he is honourably acquitted by the court.

(5) The services of a special police officer may be terminated at any time during his employment by the District Police Chief without any notice and without assigning any reason or offering any compensation.

(6) No special police officer shall be issued with any weapon nor shall be entrusted with the investigation of or enquiry into a complaint preferred by any citizen before the police.

100. *Dismissal, suspension or reduction of officers of subordinate ranks.*— Subject to the provisions of Article 311 of the Constitution and to such rules as the Government may, from time to time make under this Act, the Director-General, Additional Director-General, Inspector-General, Deputy Inspector General and Superintendents of Police may, at any time dismiss, remove, suspend or reduce to a lower post or time scale or to a lower stage in time scale, any officer of the rank of Inspector and below whom they shall think remiss or negligent in the discharge of his duty, or otherwise unfit for the same.

101. *Act of personal servitude prohibited.*—(1) No police officer shall be required to perform any act of personal servitude to any other person or officer nor shall any officer be treated in an undignified manner.

(2) Nothing in this section shall be used as an excuse by a police officer to desist from doing any physical activity or mental activity which is required to be done for the proper accomplishment of any duty imposed on him by reason of the role and functions of the police which such officer is to perform either by himself or as commanded by a superior officer: Provided that the State Police Chief, subject to review by Government, may decide whether any particular activity is personal servitude or an act of indignity.

102. *Dispute as to whether act is duty or not.*—(1) Whenever in connection with any suit or proceeding before any court or Statutory Authority a question arises as to whether,—

(a) an act by a police officer was done in the course of official duty or under the colour of office;

(b) the proceeding was initiated under circumstances arising from the lawful discharge of official duty or by reason of animosity induced in an affected party thereby;

(c) the injury suffered by the police officer was sustained by reason of official duty;

(d) the injury suffered by a police officer was the result of some animosity occasioned by the lawful discharge of official duty, such question may be enquired into or caused to be enquired into by the State Police Chief or by the District Police Chief on application made to him by the affected police officer and his decision thereon shall be binding on all concerned to the extent of procedural benefits relating of notice, sanction etc. and pecuniary assistance permissible under the rules in such cases without prejudice to the outcome of the suit or proceedings in which the question arose: Provided that the Government or the State Police Chief may, either on their own or on reference made to them by the concerned court or authority or by anyone aggrieved may further look into the decision made by the State Police Chief or the District Police Chief as applicable and the decision of the Government thereon shall be final.

(2) Nothing in this section shall be deemed to preclude, if there are prima facie reasons to justify such a course of action, any court or authority from conducting a further enquiry as it may deem fit for coming to an independent decision with regard to the same questions on the basis of evidence adduced before it during the course of the proceedings before such court or authority.

103. *Procedure for punishing Police Officers for official misconduct.*—(1) Whoever, being a police officer, commits any offence or misconduct under this Act or under any rule or order made there under, shall be dealt with departmentally under the Police Discipline Punishment and Appeal Rules in force as may be notified by the Government.

(2) The State Police Chief may order that in any particular case, because of the extreme gravity of the situation, criminal prosecution may be launched against the Police Officer in lieu of proceedings under the Police Discipline, Punishment and Appeal Rules.

(3) A police officer may be subjected to a disciplinary enquiry with regard to any official misconduct or any dereliction of duty or a violation of any order or rule or provision of this Act under the orders of such authority as may be prescribed by Government by general order and the manner of conduct of such enquiries may be as prescribed by the Police Discipline Punishment and Appeal Rules.

(4) A finding to the effect that a police officer is guilty arrived at in a departmental proceeding and the infliction of a penalty there under shall not be construed as sentencing or conviction under any law including this Act.

(5) After the due conclusion of such enquiry one, except as specified below, among the following penalties may be inflicted on the police officer, if he is found guilty of the charges,—

(a) fine;

(b) extra duty, including drill and physical training;

(c) recovery of loss to Government from pay;

(d) recovery of loss to affected party from pay;

(e) undergoing reformatory training;

(f) prohibition from performing specified duties or being assigned to specified posts;

(g) warning;

(h) censure;

(i) increment bar without cumulative effect;

(j) increment bar with cumulative effect;

(k) withholding of promotion;

(l) reduction in pay without cumulative effect;

(m) reduction in pay with cumulative effect;

(n) reduction in seniority;

(o) compulsory retirement;

(p) removal;

(q) dismissal.

(6) Punishments prescribed from (a) to (f) above may be imposed either by themselves or in addition to any punishment from (g) to (q) imposed on the police officer.

(7) No punishment from (a) to (o) shall be taken into account for any proceeding in which eligibility for promotion is to be decided by any Board or Committee constituted for the purpose under any Rule and no one shall be denied promotion on the ground that he has suffered such a punishment at any time.

(8) Nothing in this section shall prevent any directly affected party from taking up the matter in any court or authority subject to the conditions specified elsewhere under this Act or under any other law in force.

(9) In case any criminal court, after trial, either acquits a police officer, or after conviction, sentences a police officer on a matter in which he has been or is liable to be dealt with departmentally, he shall not be departmentally punished on the same matter for the same offence on the same facts: Provided that in case of conviction for an offence involving moral turpitude or serious personal or official misbehaviour as may be decided by the State Police Chief or the State Government, the officer may be either compulsorily retired or removed or dismissed from service as may be decided on the merits of each case.

(10) Punishments specified at (a) to (h) above may be imposed by the competent authority without following the detailed procedure specified in the Discipline Punishment and Appeal Rules but after the authority satisfies itself with regard to the facts and after giving an opportunity for the concerned police officer to be heard.

(11) Authorities competent to impose each penalty on each rank may be specified in the Police Discipline, Punishment and Appeal Rules.

104. *State Police Chief to prescribe a code of penalties.*—Subject to any directions which may be issued by Government, the State Police Chief may, standardise and codify punishments to be awarded by disciplinary authorities for common acts of misconduct, by specifying the maximum and minimum punishments which can be awarded to each type of misconduct under different specified circumstances and any deviation there from by disciplinary authorities shall be subject to the approval of the State Police Chief.

105. *Appeal and Revision.*—The Government may notify appeal and revision procedures in respect of departmental punishments awarded to police officers.

106. *Welfare Bureau.*—(1) There shall be a Police Welfare Bureau, (hereinafter referred to as 'Bureau') headed by an officer not below the rank of Additional Director General of Police, in the office of the State Police Chief to advise and assist him in the implementation of welfare measure of police personnel.

(2) The functions and duties of the Bureau shall, inter alia, include administration and monitoring of welfare measure of police personnel such as,—

(a) health care, particularly in respect of chronic and serious ailments, and including post-retirement health care schemes of police personnel and their dependents;

(b) full and liberal medical assistance to police personnel suffering injury or prosecution or civil suits in the course of duty or by reason of performance of duty;

(c) financial security for the next of kin of those dying in harness;

(d) post-retirement financial security;

(e) group housing and group credit facilities;

(f) educational facilities for dependents of police officers: and

(g) appropriate legal facilities for defence of police officers facing court proceedings in matters relating to bona fide discharge of duty or by reason of such duty or as a result of animosity created by reason of such duty.

(3) The Bureau shall have as many members as may be prescribed who may be nominated by the State Police Chief, and shall comprise representatives from all police ranks and may also include members in an advisory capacity.

(4) The Bureau shall lay down norms and policies relating to police welfare and monitor welfare activities undertaken by various police units in the State.

(5) A police welfare fund, under the administration and control of the Bureau, shall be created for the welfare activities and programmes for police personnel, which shall have the following components,—

(a) financial grant by the state;

(b) contributions made by the police personnel, towards the welfare fund;

(c) monetary value of any monetary punishment, including increment bar, imposed on any police officer of and below the rank of Sub-Inspector of Police except those relating to recovery of loss;

(d) any other contribution from any source as may be permitted by the Government from time to time.

107. *Police Establishment Board.*—(1) The State Government may constitute a Police Establishment Board which shall be a departmental body consisting of the Director General of Police as Chairman and four other senior police officers of the Department of the rank of Additional Director General of Police as members.

(2) The term of office of the members of the Board, the procedure for the functioning of the Board and guidelines to be followed by the Board in the exercise of its functions shall be in such manner as may be prescribed.

108. *Functions of the Board.*—(1) The Board shall discharge the following functions namely:—

(a) decide on appeals, complaints and general guidelines relating to all transfers, postings, promotions and other service related matters of police officers of and below the rank of Inspector of Police, subject to the provisions of the relevant service laws as may be applicable to each category of police officers;

(b) review the functioning of the police in the State either in general or with regard to specific instances; and

(c) discharge such other functions as may be assigned to the Board by the Government.

(2) The Government shall gjve due consideration to the recommendations of the Board.

(3) The Government may, either suo moto or on a representation filed by the affected person, for reasons to be recorded in writing, set aside or modify any decision or order of the Board.

109. *Redressal of grievances of subordinates*.—(1) The State Police Establishment Board shall nominate an officer of the rank of Deputy Superintendent of Police as police welfare officer of the District and he shall set apart one day every week to listen to or receive complaints from police officers of and below the rank of Sub Inspector of Police.

(2) The District police welfare officer shall study and examine the grievance and shall suggest appropriate remedial action to the District Police Chief and if the same is beyond the competence of the District Police Chief to the State Police Establishment Board.

110. *Insurance cover allowances and medical facilities*.—(l) The Government shall provide adequate insurance coverage for all police personnel against any injury, disability or death caused in the course of performance of their duty or out of attacks carried out on them by reason of animosity engendered by due performance of duty.

(2) Police Officers posted in special wings, such as Counter- Terrorism Operations Units, Bomb Disposal Squads, Commando Groups etc. shall be paid special risk allowance, in proportion to the risks involved in those duties.

(3) Police personnel may also be provided with a medical insurance cover that would enable them to keep up the required standards of health and physical fitness.

(4) If a police officer suffers injury or disfigurement as a result of violence inflicted upon him in the course of duty or as a result of a serious risk or dangerous situation to which he is exposed to in the course of his duty or out of attacks carried out on him by reason of animosity engendered by due performance of duty, he shall be duly and adequately compensated by the State for the same: Provided that such compensation shall be over and above the reimbursement of his medical expenses to which he is entitled to under the rules.

(5) If a policeman dies in the course of his duty as mentioned in sub-section (4), his legal heirs shall be duly and adequately compensated by the State, provided that such compensation shall be over and above the benefits to which the family are entitled to under the rules.

(6) When any police officer is injured while on duty, the injured police officer shall be entitled to sufficient and good quality treatment at public expense at any institution recommended by the Chief of the Medical Institution where such officer is admitted immediately afterwards.

111. *Police Associations*.—The Government may permit, by prescribing guidelines, the formation of Association or Associations of different ranks or categories of police officers subject to such restrictions as may be prescribed.

112. *Police Complaints Authority*.—(1) The Government shall establish a Police Complaints Authority at the State level to look into,—

(i) complaints of grave misconduct of all types against Police officers of and above the rank of Superintendent of Police;

(ii) serious complaints against officers of other ranks relating to molestation of women in custody or causation of death to any person or infliction of grievous hurt to any person or rape.

(2) The State Authority shall consist of the following members, namely:—

(i) a retired Judge of a High Court who shall be the Chairman of the Authority;

(ii) a serving officer not below the rank of Principal Secretary to Government; and

(iii) a serving officer not below the rank of Additional Director General of Police.

(3) The Government shall establish Police Complaints Authority at the district level to look into complaints against police officers of and up to the rank of Deputy Superintendent of Police.

(4) The District Authority shall consist of the following members, namely:—

(i) a retired District Judge, who shall be the Chairman;

(ii) the District Collector; and

(iii) the District Superintendent of Police:

Provided that the Chairman of one District Authority may be appointed as the Chairman of one or more District Authorities

(5) The conditions of service, remuneration and other allowances of the members of the State Authority and District Authorities and the procedure for functioning of the authority or authorities shall be in such manner as may be prescribed.

(6) The Government shall, in consultation with the authority or authorities, provide all necessary facilities for their proper functioning.

(7) The State Authority and the District Level Authorities shall, while conducting enquiry, have all the powers of a civil court, while trying a suit under the Code of Civil Procedure, 1908 (Central Act 5 of 1908) in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavit; and

(d) any other matter which may be prescribed.

(8) All agencies of the Government shall render all possible assistance to the authority or authorities in respect of production of documents, examination of records, analysis of evidence or provision of expert assistance in any matter in which such authority or authorities or an officer acting under the orders of such authority or authorities requires their assistance.

(9) The recommendations of the authority or authorities, for any action, departmental or criminal, against a delinquent police officer shall be binding insofar as initiation of departmental proceedings or registration of a criminal case is concerned. Such recommendations shall, however, not prejudice the application of mind by the enquiry officer or the investigating officer when he is conducting the departmental enquiry or criminal investigation, as the case may be.

113. *Avoidance of multiple enquiries*.—(1) All complaints against any police officer by members of the public shall normally be submitted before the State or District Police Complaints Authority constituted for the purpose.

(2) In case any other Statutory agency receives such complaints simultaneously or independently,—

(a) they may take cognizance of it but shall not pass any final order or conduct any enquiry if the matter is already under consideration by the State or District Police Complaints Authority and inform the Complaints Authority concerned accordingly.

(b) they may refer the matter to the Complaints Authority for necessary enquiry and report.

(3) In any matter referred to the Complaints Authority by a Statutory Authority, the findings and the recommendation of the Authority shall also be given by the Authority to the Statutory Authority concerned and thereafter such Statutory Authority may take such action as it deems fit either to further proceed with the matter or to drop further action.

(4) Nothing in this section shall be deemed to preclude an enquiry by the Government or by a superior police officer.

114. *Elected representatives may forward complaints*.—Complaints against the police may be forwarded by Presidents of Panchayats, Members of Legislative Assemblies and Members of Parliament to the concerned Police Complaints Authority and such Authority shall cause appropriate enquiries to be made in this regard and inform the MP/MLA/ Panchayat President of the result of the enquiry.

115. *Expeditious disposal by Complaints Authorities*.—(1) The District and State Police Complaints Authorities may take expeditious action to complete the enquiries relating to complaints under consideration by them.

(2) In any matter which is under consideration before any Complaints authority, such Authority may direct any public servant,—

(a) to question any witness and record his statement;

(b) to locate, examine or seize any relevant document;

(c) to conduct any test or examination which the said public servant is competent to do;

(d) to render any assistance as may be reasonable under the circumstances of each complaint.

(3) In any matter which is under consideration before any complaints Authority, such authority may call for a report from any police or governmental authority with regard to any fact in issue.

(4) In any enquiry, the affected police officer may be given opportunity to produce evidence on his behalf and to be heard before the authority finalises its opinion but the authority need not afford him an opportunity to cross examine any witness, if such a course of action is considered not practicable or not necessary under the circumstances of each case.

CHAPTER VIII

OFFENCES AND PUNISHMENTS

116. *Protection to Police Officers*.—(1) No suit, prosecution or other legal proceedings shall lie against the Government or any police officer or a public servant duly appointed or authorized under this Act for anything done or intended to be done in good faith as duty or under colour of office, in pursuance of this Act or in pursuance of any law for the time being in force.

(2) No court shall take cognizance of any offence under this Act alleged against any police officer except with the prior sanction of the Government.

(3) When a delinquency on the part of a police officer which is also an offence under this Act is brought before another officer to whom such officer is subordinate, he shall examine it and decide whether the delinquency warrants only departmental disciplinary action even if it constitutes an offence under this Act: Provided that such superior officer shall also be competent to decide whether the matter should be taken up for criminal prosecution without resorting to departmental disciplinary action.

(4) Nothing in sub section (2) and (3) shall preclude the right of an affected person from moving a court for prosecution or institution of a suit in respect of an offence under some other law allegedly committed by a police officer.

117. *Time limits for prosecution and for institution of suits.*—(1) Any offence allegedly committed by a police officer in the course of the discharge of his duty or under the colour of his office shall not be taken cognizance of by a court of law if the complaint has been made .more than three months after the date of the act complained of: Provided that this limitation shall not apply if the complainant was either not aware of the existence of the offence or he was otherwise incapable of making the complaint: Provided further that this limitation shall also not apply to matters about which complaints were made within three months of the date of offence before any superior officer or before the Police Complaints Authorities and to matters in which sanction for prosecution is given by the Government.

(2) Any claim for civil damages by reason an act of omission or commission by a police officer committed in the course of the discharge of his duty or under the colour of his office, shall not be taken cognizance of by a court of law if the plaint has been made more than three months after the date of the act complained of: Provided that this limitation shall not apply if the complainant was either not aware of the act or he was otherwise incapable of moving the court: Provided further that this limitation shall also not apply to matters about which complaints were made within three months of the date of offence before the Police Complaints Authorities and to matters in which sanction for prosecution is given by the Government.

118. *Dereliction of duty by a police officer.*—Whoever, being a police officer,—

(a) breaches or neglects to follow any legal provision, procedure, rules, regulations applicable to members of the police service under this Act; or

(b) malingers or feigns illness or injury or voluntarily causes hurt to himself with a view to evading duty; or

(c) acts in any other manner unbecoming of a police officer; or

(d) is guilty of cowardice,

shall, on conviction, be punished with imprisonment for a term which may extend to three months or with fine or with both.

119. *Bribe taking and extortion by police officer.*—Any police officer who, directly or indirectly, extorts, seeks or obtains any bribe, perquisite or unauthorized reward or consideration, by any threat or pretence, for doing or omitting or delaying any act which it may be his duty to do or cause to be done, or for withholding or delaying any information which he is bound to give or communicate or who attempts to commit any of the offences above said or who on any pretext or under any circumstance, directly or indirectly, collects or receives any fee, gratuity, diet- money, allowance other than what he may be duly authorised by the Government or the State Police Chief or the District Police Chief to collect or receive, shall on conviction be liable to fine not exceeding twelve months' pay and to imprisonment for a term which may extend to seven years, or with both.

120. *Vexatious arrest, search, seizure and violence.*—Whoever, being a police officer,—

(a) vexatiously and without lawful authority or reasonable cause enters in to searches or causes to be entered into or searched, any building, vessel, tent or place; or

(b) vexatiously and unlawfully, without reasonable cause, seizes the property of any person; or

(c) vexatiously and unlawfully and without reasonable cause detains, searches, or arrests a person; or

(d) deliberately subjects any person in custody or with whom he may come into contact in the course of duty, to torture or to any kind of inhuman or unlawful personal violence or gross misbehaviour; or

(e) deliberately and knowingly records a statement falsely with malicious intent to implicate an innocent person; or

(f) deliberately makes a false record to implicate any innocent person in a crime; or

(g) deliberately and knowingly makes a false allegation or attack on the police; or

(h) deliberately and directly aids or abets in the commission of an offence which, as a police officer, he was bound to prevent,

shall, on conviction, be punished with imprisonment for a term which may extend to three years and shall also be liable to fine: Provided that nothing in this section shall preclude the said police officer being additionally punished for the same matter according to the provisions of any other law for the time being in force.

121. *Penalty for interfering in police functions.*—Whoever,—

(a) induces or attempts to induce or does any act which he knows is likely to induce, any member of the police force to withhold his services or to commit a breach of discipline; or

(b) unlawfully assumes any function or power belonging to the police; or

(c) personates as a police officer, except innocently for purposes of entertainment; or

(d) deliberately makes a false statement to a police officer with intent to mislead the police in material particulars in an investigation or due performance of police duty; or

(e) threatens, obstructs or assaults or abuses a police officer with the manifest intention of preventing such officer from discharging any duty which he is about to carry out, shall on conviction be liable to fine not exceeding ten thousand rupees or to imprisonment for a period which may extend to three years or with both.

122. *Penalty for causing serious disorder or danger.*— Any person who,— (a) is found in a public place, in an intoxicated condition, riotous or incapable of looking after himself; or

(b) knowingly spreads rumours or causing a false alarm to mislead the police, fire brigade or any other essential service; or

(c) knowingly and wilfully causes damage to an essential service, in order to cause general panic among the public; or

(d) causes annoyance to any person by making indecent overtures, verbal comments, phone calls or calls of any type or by stalking or by passing comments or sending messages or mails by any means; or

(e) knowingly does any act which causes danger to the public or compromises public safety; or

(f) transports explosives or dangerous substances without being lawfully authorized to do so; or

(g) is found under suspicious circumstances, being a goonda or a rowdy, in a public place, in possession of equipment which is intended to be used for any activity in the vicinity to facilitate any anti-social activity as defined in the Kerala Anti-Social Activities Prevention Act, 2007,

shall, on conviction be liable to fine not exceeding ten thousand rupees, or to imprisonment for a period which may extend to three years or with both.

123. *Penalty for causing nuisance, disorder.*— Whoever,—

(a) slaughters any animal, cleans any carcass, article of furniture or vehicle, or grooms any animal in a public place causing annoyance or inconvenience to the public; or

(b) causes any vehicle or conveyance to remain in such a manner as to cause obstructive inconvenience or danger to the public; or

(c) defaces or covers a traffic sign or signboard reducing its visibility or readability; or

(d) defaces, walls, buildings or other structures without prior permission of the custodian of the property; or

(e) acts in contravention of a notice publicly displayed by the competent authority in any government building; or

(f) defiles water sources or water supplies or public sanitation or makes public places unclean or illegally causes serious damage to the environment; or

(g) trespasses into a government building or government premises; or

(h) drives, drags or pushes any non-motorised vehicle at any time between half an hour after sunset and one hour before sunrise without sufficient light; or

(i) drives, drags or pushes any non-motorised vehicle and does not keep (except in case of actual necessity or of some sufficient reason for deviation), on the left of such street when meeting any other vehicle on the right of such street when passing any other vehicle; or

(j) conveys through the streets any article which projects more than five feet in front or behind the vehicle or vehicles on which it is placed; or

(k) causes mischief by any negligence or ill-usage in the driving, management or care of any animal or vehicle; or

(l) eases himself in a public place causing annoyance to others; or

(m) does not take due care of pets under his care or control and negligently suffers them to cause inconvenience to neighbours or the public; or

(n) without the knowledge and consent of the owner buys any jewel, watch, fountain pen, bicycle, utensil or other article of value from any person apparently under the age of fourteen years or takes any article on pawn or pledge from such a person; or

(o) without adequate precautions and in disregard for public safety, lights any bonfire, discharges any firearm or air-gun, lets off or discharges any firework or sends up any fire-balloon or permits such act to be done in premises over which he has control; or

(p) makes a nuisance of himself to any person by making obscene or repeatedly unwanted or anonymous calls to any person or institution by any type of phone or writes such letters delivering them by messenger, post or e-mail; or

(q) breaks any queue, in any public place, formed for the purpose of orderly delivery or receipt or use of any service, whether public or private; or

(r) pastes or affixes any material anywhere which is of a defamatory or threatening nature concealing the identity of the author thereof,

shall, on conviction by a court, be liable to imprisonment which may extend to one year or with fine which may extend to five thousand rupees or with both.

124. *Punishment for offences for which there is no separate provision.*—

(1) Any person who contravenes any of the provisions of this Act or commits any act of commission or omission in violation of the provisions of this Act or any order made thereunder shall, on conviction, if no other punishment is prescribed for the same under this Act, shall, in addition to such other punishment that may be inflicted on him under any other law in force, be punished with fine which may extend to two thousand rupees or imprisonment for a term not exceeding six months or with both.

(2) When the offence is committed by more than one person, each one of them shall be punished individually.

125. *Offences by companies.*—(1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, and shall be liable to be proceeded against and punished accordingly.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of or that the commission of the offence is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation: For the purposes of this section,— (a) "company" means a body corporate and includes a firm or other association of individuals; and (b) "director", in relation to a firm, means a partner in the firm.

126. *Prosecution under other laws not affected.*—Nothing contained in this Act shall be construed to prevent any person from being prosecuted under any other Act for any offence made punishable by this Act or from being liable under any other Act to any other penalty or punishment other than what is provided for such offence by this Act.

127. *Procedural irregularity not material.*—No rule, order, direction, adjudication, inquiry or notification made or published and no act done under any provision of this Act or of any rule made, under this Act or in substantial conformity to the same, shall be deemed illegal, void, invalid or insufficient by reason only of any defect of form or any irregularity of procedure unless material prejudice had been caused by such defect or irregularity.

128. *Cognizable and bailable offences.*—(1) Offences under sections 120, 121 and 122 of this Act shall be cognizable and bailable and an offence under section 119 shall be cognizable and non-bailable.

(2) Notwithstanding the provisions of sub-section (1) a police officer may arrest a person if and only if such arrest is absolutely necessary for preventing the continuation of the offence or if it is manifestly evident that such person cannot be located subsequently or if such person is likely to hurt himself or another person or if there is some special and emergent circumstance, warranting the arrest.

(3) All other offences under this Act shall be non-cognizable and bailable; but a police officer may remove a person temporarily for the purpose of preventing the continuation of such offence.

129. *Cognizance of offences.*—No court shall take cognizance of an offence under this Act except on a report filed by the Station House Officer having jurisdiction or someone authorised by him in the particular case.

130. *Compounding of offences.*—(1) All non-cognizable offences under this Act shall be compoundable on the request of the accused by the Station House Officer.

(2) Offences under Sections 121 and 122 shall be compoundable by the District Police Chief, on any application made by the accused, if he deems that the matter is not serious enough to be prosecuted before a court of competent jurisdiction, provided that no such compounding shall be made in a matter in which the court having jurisdiction has already taken cognizance of the offence after charge sheeting by the police in which case it shall be compoundable before such court.

(3) The compounding fees to be levied in respect of each category of offences shall be as may be notified by the State Police Chief with the prior approval of the Government and such compounding fee shall be collected by the Station House Officer concerned.

(4) Compounding shall not be deemed to be a conviction; but may be used to prove previous conduct in any proceeding where such previous conduct is relevant.

131. *Criminal Justice Miscellaneous Expenses Fund.*—(1) There shall be a Fund maintained and administered centrally by the State Police Chief to meet the following expenses:

(a) expenses on those in custody, including medical expenses;

(b) expenses inclined in connection with investigation of criminal cases including allowances or reimbursement of expenses to witnesses, not being expenses incurred on police personnel or allowances paid to police personnel;

(c) expenses relating to maintenance and storage of articles kept in custody;

(d) expenses incurred in connection with procedures associated with dead bodies, removal of injured to hospitals and activities associated with rendering urgent assistance to victims of accidents and calamities.

(2) The administration of the Fund shall be according to rules prescribed by Government.

(3) All the compounding fee levied and collected by the Police for offence under this Act and all amounts realised by the sale of unclaimed properties and perishable properties shall be remitted to the Fund.

(4) Government may also provide for additional remittances to the Fund to ensure that the Funds are sufficient to meet the expenditure.

132. *Power of Government to give directions.*—Notwithstanding anything contained in the foregoing provisions of this Act, the Government may give directions to the State Police Chief for the purposes of this Act.

133. *Power to make rules.*—(1) The Government may, by notification in the gazette make rules, either prospectively or retrospectively, to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely.

(a) all matters expressly required or allowed by this Act to be prescribed; and

(b) any other matter which has to be or may be, prescribed.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before the Legislative Assembly while it is in session for a total period of fourteen days which may be comprised in one session or in two successive sessions and if before the expiry of the session in which it is so laid or the session immediately following, the Legislative Assembly makes any modification in the rule or decide that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of any thing previously done under that rule.

134. *Power to remove difficulties.*—(1) If any difficulty arises in giving effect to the provision of this Act, the Government may by order do anything not inconsistent with the provisions of this Act which appears for them necessary for the purpose of removing the difficulty: Provided that no such order shall be made after the expiration of two years from the date of commencement of this Act.

(2) Every order made under sub-section (1) shall be laid as soon as may be after it is issued before the Legislative Assembly.

135. Repeal and saving.—(1) The Kerala Police Act, 1960 is hereby repealed.

(2) Notwithstanding such repeal anything done or any action taken or any proceeding instituted under the Act so repealed shall be deemed to have been done or taken or instituted under the corresponding provisions of this Act.

STATEMENT OF OBJECTS AND REASONS

The Kerala Police Act, 1960 unified the police systems existing in the different parts of Kerala. The Act was substantially the same as the Indian Police Act of 1861. The structures prescribed under the Act were based on the conditions prevailing in India in the year 1858, when the British Crown took over the governance of India from the East India Company after the War of Independence in 1857. The Police structure of 1861 was meant for a society in which citizens did not enjoy freedom. The advent of democracy changed the matrix of policing. As always, Kerala was the first Indian State to discover and formulate a response to the contradiction implicit in trying to police democracy with a system perfected for ensuring colonial subjugation. In the years that followed, the calls for Police reform have become more strengthened. Several States and the Centre appointed myriad Commissions and Committees to look into the issues related to Police Reforms. As demanded by the Hon'ble Supreme Court of India, the National Human Rights Commission, Soli Sorabjee Committee and the Bureau of Police Research and Development were asked to file their views in this regard. In the light of the above, the Government of India has forwarded a draft Model Police Act, 2006 submitted by the Police Act Drafting Committee to replace the Police Act of 1960. As such, the Police Act Review Committee appointed by the Government of Kerala under the Chairmanship of Shri Jacob Punnoose IPS has submitted the draft Kerala Police Bill, 2010. This Bill is based on the above draft Bill.

The Bill is intended to achieve the above object.

FINANCIAL MEMORANDUM

As per clause 6 of the Bill, Government may subject to resources, strive to ensue that every Police Station has appropriate manpower and infrastructure facilities to provide basic police services to all who need the same. The approximate anticipated expenditure on account of the above purpose is Rupees Two crores [20 million] and twenty five lakhs [2.5 million] per year.

As per clause 9 of the Bill, the State Government shall provide to every police station a sum proportionate to the period of custody at the daily rate of half the minimum daily wages for unskilled labour prevailing at the time for food, water and other primary requirements of every person who is in custody. The approximate anticipated expenditure on account of the above purpose is Rupees One crore per year.

As per sub-clause 4 of clause 30 of the Bill, Government may institute a system of incentives and infrastructure facilities to promote good mental and physical health among members of Kerala Police. The approximate anticipated expenditure on account of the above purpose is Rupees One crore per year.

As per clause 110 of the Bill, the Government shall provide adequate insurance coverage for all police personnel against any injury, disability or death caused in the course of performance of their duty or out of attacks carried out on them by reason of animosity engendered by due performance of duty. The approximate anticipated expenditure on account of the insurance premium to be paid is Rupees One crore per year.

MEMORANDUM REGARDING DELEGATED LEGISLATION

Sub-clause (1) of clause 5 of the Bill seeks to empower the Government to establish police stations for every local area by notification, for the purposes of the Act.

Sub-clause (2) of the said clause seeks to empower the Government to specify the area of jurisdiction in the notification issued under sub-clause (1) of the clause.

2. Sub-clause (1) of clause 11 of the Bill seeks to empower the Government to establish special police stations for any particular period in any area or for any particular purpose in any area or for enforcement of any particular law or laws in any area.

Sub-clause (2) of the said clause empowers the Government to notify the special police station, specifying the premises, area and scope of jurisdiction.

Sub-clause (3) of the said clause seeks to empower the Government to establish special police station in a mobile vehicle or in any temporary office.

3. Clause 12 of the Bill seeks to empower the Government to prescribe the form for keeping a police station diary.

4. Clause 14 of the Bill seeks to empower the Government to decide the geographical convenience, functional efficiency or any special purpose based on which the 'Kerala Police' force be divided into sub-units, units, branches or wings. Sub-clause (2) thereof empowers Government to decide various ranks of police officers in the police force. Sub-clause (3) of the clause empowers Government to specify that a particular designation shall be equivalent to any of such ranks so decided. Sub-clause (4) of the said clause empowers Government to create a new rank or give a new designation to a rank specified therein.

5. Clause 15 of the Bill seeks to empower the Government, by a general or special order, to prescribe the numbers in each rank, the organization, structure, offices, jurisdictional patterns, chain of command and the administrative powers, functions, duties of the police force.

6. Clause 16 of the Bill seeks to empower the Government by notification to specify any area in the State to be a Police District for the purposes of the Act.

7. Sub-clause (1) of clause 17 of the Bill seeks to empower the Government to issue orders subject to which the Police and the Police Stations of Police District shall function under the supervision and control of a District Police Chief. The clause also empowers Government to prescribe the rank of the District Police Chief and that of the police officers to assist him.

8. Clause 18 of the Bill seeks to empower Government to appoint State Police Chief. Sub-clause (4) of the said clause seeks to empower the Government to decide the number of officers of the rank of DGP/ADGP/IGP/DIGP/SP/DySP to assist State Police Chief.

9. Sub-clause (1) of clause 21 of the Bill seeks to empower the Government, by order, to create and maintain Special Wing or Special Unit or Special Branch or Special Purpose Squad to assist the Police in the performance of their functions and duties. Sub-clause (4) of the said clause seeks to empower the Government to prescribe the conditions of service, special allowance payable to the personnel of the Special Wing, Special Unit, Specialised Branch and Special Purpose Squad created and to prescribe special qualification and skills necessary for them.

10. Sub-clause (1) of clause 23 of the Bill seeks to empower the Government, by order, to separate the investigation police from the law and order police in order to ensure speedy, effective and professional investigation.

11. Sub-clause (1) of clause 24 of the Bill seeks to empower the Government to constitute a State Security Commission by notification, for performing such functions and discharging such duties as may be assigned to the Commission under the Act. Sub-clause (8) of the said clause seeks to empower the Government to prescribe the conditions of service, fees and allowances payable to the nominated members of the State Security Commission.

12. Sub-clause (4) of clause 25 empowers Government to issue directions, in circumstances so warranting, to meet any emergency.

13. Sub-clause (4) of clause 30 seeks to empower the Government to institute a system of incentives and infrastructure facilities to promote good mental and physical health among the members of Kerala Police.

14. Clause 45 of the Bill seeks to empower the Government to declare any area be set by communal or political violence, or terrorist or anti-national activities or large scale violence and violation as disturbed area.

15. Clause 52 of the Bill seeks to empower the Government to notify the categories of public service in respect of which records are to be maintained by service providers and the period for which the records are so kept. Clause 54 of the Bill seeks to empower the Government by notification, direct the class or category of service providers or any group of service providers whom are to obtain police verification certificates. It also empowers Government to prescribe the authority in that behalf.

16. Sub-clause (1) of clause 56 of the Bill seeks to empower the Government to notify an enclosed area other than police station for keeping the articles seized by the police during the investigation or as unclaimed property.

17. Sub-clause (3) of clause 57 of the Bill seeks to empower the Government to prescribe the manner in which a property subject to natural decay or consisting of livestock, be sold in auction.

18. Sub-clause (2) of clause 59 of the Bill seeks to empower the Government to prescribe the charges to be levied for enquiries for locating articles reported to be missing.

19. Clause 60 of the Bill seeks to empower the Government to fix charges for issuing certificate to the effect that a particular person is not involved in any crime within his jurisdiction.

20. Sub-clause (3) of clause 63 of the Bill seeks to empower the Government to prescribe the conditions under which additional police deployment can be given free of cost or at partial cost or at full cost.

21. Clause 67 of the Bill seeks to empower the Government to prescribe rules to promise awards and rewards to the public for outstanding services rendered or information given in the prevention of crime, investigation of any case or in the maintenance of order, security or traffic safety.

22. Clause 71 of the Bill seeks to empower the Government to exempt any equipment or property held by police for discharging his function from the requirement of having a license.

23. Clause 73 of the Bill seeks to empower Government to modify or annul orders issued by District Police Chief in matters specified therein.

24. Clause 74 of the Bill seeks to empower the Government to prescribe the authority to issue permit for imparting training to a member or members of public in any physical activity involving methods of attack or self-defence.

25. Clause 76 of the Bill seeks to empower the Government to extend the period of a public notice or order issued by the District Magistrate for prohibiting any mass drill or mass training with arms or carrying of arms in any procession for a further period up to six months.

26. Clause 77 of the Bill seeks to empower the Government to issue orders subject to which the District Police Chief may issue public notice, temporarily reserving for any public purpose any street or public place and prohibit persons from entering into the area so reserved.

27. Clause 80 of the Bill seeks to empower the Government to extend the period for making necessary amendment to the notification issued by the Police Chief to prohibit any assembly so as to preserve public order, peace or law and order in an area.

28. Clause 83 of the Bill seeks to empower the Government or the District Magistrate to classify the professional, mental or physical services of any person or groups of persons as essential for the maintenance of peace or for avoidance of danger to the public.

29. Clause 84 of the Bill seeks to empower the Government to notify any area as a Special Security Zone and to prescribe reasonable restrictions with regard to the use of such Special Security Zones.

30. Clause 85 of the Bill seeks to empower the Government to prescribe the recruitment, training, pay and allowances and other conditions of service of Police Officers from time to time, by general or special order.

31. Clause 88 of the Bill seeks to empower the Government to prescribe the form of oath or affirmation to be taken by a police officer on his appointment after training.

32. The proviso to clause 89 of the Bill seeks to empower the Government to prescribe the course of training to be undergone and successfully completed for appointment as police officer.

33. Sub-clause (3) clause 95 of the Bill seeks to empower the Government to fix the rate for compensating duties performed significantly beyond eight hours.

34. Clause 99 of the Bill empowers Government to issue orders subject to which the District Police Chief may hire any willing person of good character, between the age of 18 and 60 years, as Special Police Officer, to assist the Police in the maintenance of order.

35. Clause 100 of the Bill seeks to empower Government to make rules applicable for the dismissal, removal, suspension or reduction to a lower post or time scale or to a lower stage, an officer of the rank of Inspector and below.

36. Sub-clause (1) of clause 101 of the Bill seeks to empower Government to review the decision of State Police Chief as to whether an activity is personal servitude or not.

37. Sub-clause (3) of clause 103 of the Bill seeks to empower the Government to prescribe the authority to conduct enquiries under the Kerala Police Departmental Inquiries, Punishment and Appeal Rules.

38. Clause 105 of the Bill seeks to empower the Government to notify the procedure for appeal and revision for awarding departmental punishments to the police officers.

39. Sub-clause (3) of clause 106 seeks to empower the Government to prescribe the number of members to be nominated to the Welfare Bureau.

40. Clause 107 of the Bill seeks to empower the Government to constitute a Police Establishment Board. Sub-clause (2) of the said clause seeks to empower the Government to prescribe the term of office of the members, the procedure for its functioning and the guidelines to be followed by the Board in the exercise of its functions. Sub-clause (3) of clause 108 of the Bill seeks to empower the Government to set aside or modify any decision of the Police Establishment Board suo moto or on application.

41. Clause 110 of the Bill seeks to empower the Government to provide adequate insurance coverage for all police personnel against any injury, disability or death caused in the course of performance of their duty or out of attacks on them while on duty.

42. Clause 111 of the Bill seeks to empower the Government to prescribe guidelines for the formation of the police association subject to certain restrictions.

43. Clause 112 of the Bill seeks to empower the Government to establish a Police Complaints Authority at State level.

Sub-clause (3) of the said clause seeks to empower the Government, to establish Police Complaints Authority at the district level. Sub-clause (5) of the said clause seeks to empower the Government to prescribe the conditions of service, remuneration and other allowances of members of the State Authority and District authorities and the procedure for the functioning of the authorities.

Item (d) of sub-clause (7) of the said clause seeks to empower the government to prescribe other matters with respect to which the State Authority and District Level Complaints Authority shall have the powers of a civil court.

44. Sub-clause (2) of clause 131 seeks to empower the government to make rule for the administration of Criminal Justice Miscellaneous Expenses Fund.

45. Clause 132 of the Bill seeks to empower the Government to give directions to the State Police Chief for the purposes of the Act.

46. Clause 133 of the Bill seeks to empower the Government to make rules, by notification, to carry out the purposes of this Act.

47. Clause 134 of the Bill seeks to empower the Government, by order, not inconsistent with the provisions of this Act, do anything which appears to them necessary for removing any difficulty in giving effect to the provisions of the Act.

The matters in respect of which notifications or orders may be issued or rules may be made are matters of procedure and are subject to the scrutiny of the Legislative Assembly. The delegation of legislative power is, therefore, of a normal character.

Bribery & corruption in Sri Lanka's public revenue system: An unholy nexus?

Kishali Pinto-Jayawardena, senior media columnist,
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> "Public sector corruption in Sri Lanka is a key factor driving poverty and the country is losing two percentage points of economic growth a year from resources lost to sleaze, a senior economist said." (President of the Sri Lanka Economics Association [SLEA] A D V de S Indraratne, speaking at the annual sessions of the SLEA, as reported in The Sleaze Factor, *Lanka Business Online*, 11 August 2007)

Prevalent debates in Sri Lanka on fiscal reforms focus on a simplified tax structure, revised financial sector regulations, abolition of tax holidays and the consolidation of existing taxes. In a post-war stage, a commission report on tax reforms is expected to recommend tough measures to this effect and expectations are heightened towards a better future, based on the fact that terrorism is no longer perceived to be a problem to economic growth. Greater fiscal devolution is one of the cries made at this stage. However, are these recommendations and measures, which are being vigorously debated in the public forum, sufficient to resolve the problem of fiscal indiscipline? Are these debates bypassing the key factor underpinning the essential success of taxation reforms in any country, namely effective controls of bribery and corruption in the public sector?

In a context where the primary tax collection body, namely the Inland Revenue Department itself has been plagued by monumental corruption scandals as discussed in this paper, are we not losing sight of the sleaze factor, which could be counted as among the most important obstacles to effective tax collection?

The observation made by one of Sri Lanka's senior economists in 2007 with which this paper commences draws attention to the 'elephant in the room', so to speak, by pointing out that "public

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This paper was written in September 2010 and reflects the state of discussion at that time. Kishali Pinto-Jayawardena is a human rights advocate, senior media columnist and published author. Navin Karunatilaka is an attorney-at-law and researcher.

officials and politicians fight shy of even mentioning it as a cause of our poverty, and even among us economists, only a very few have shown interest in the study of this nexus between corruption and inequity and poverty". Dr Indraratne remarked aptly that if state revenues had not been lost due to corruption, they would have gone to reduce the burgeoning budget deficit. Interestingly, he was of the view not only that there was rampant corruption in infrastructure projects both at central and provincial government levels, resulting in contractors engaging in sub-standard work pilfering inputs, not using specified materials, by giving commissions and by giving kickbacks to officials or elected representatives who are overlooking such projects but also but also that the poor had to give bribes local officials or the police to avail themselves of public services that should be due to them without charge. This rule applied even to supply of material inputs such as fertilizer, seed paddy and water. Those who could not afford to pay were denied access to these public services and were denied justice, thereby worsening their poverty.

"Sri Lanka, where bribery and corruption are major concerns, is ranked 92nd out of 180 countries and has been given a dismal grade of 3.2 on the corruption perception index by Transparency International"

Bribery is defined in West's Encyclopaedia of American Law online as "the offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of an official in the discharge of his or her public or legal duties". Corruption, a wider concept than bribery, is harder to define but has been referred to in the United Nations Declaration against Corruption and Bribery in International Commercial Transactions as "any offer, promise or giving of any advantage to another person as undue consideration for performing or refraining from the performance of that person's duty, or the soliciting or accepting of any advantage as undue consideration for performing or refraining from the performance of one's duty" or also as an extension of the concept of bribery, as when the 9th UN Congress held in Cairo in 1995 declared "corruption is bribery or any other act relating to persons vested with responsibility, aimed at influencing the performance of their official duties and at obtaining any improper advantage for themselves or for others".

Bribery and corruption are twin evil forces that impede economic progress and cause hardships to many whilst enriching a few. This is a worldwide phenomenon but most acute in developing countries or countries with transitional economies. Sri Lanka, where bribery and corruption are major concerns, is ranked 92nd out of 180 countries and has been given a dismal grade of 3.2 on the corruption perception index by Transparency International. Furthermore, it was recently estimated that corruption in the public sector in Sri Lanka amounts to approximately one hundred billion rupees per annum by the Parliamentary Committee on Public Accounts. According to a June 2007 report of USAID, this figure represented 9 per cent of the Annual Gross Domestic Product of Sri Lanka in 2006. The financial, social and economic impact of corruption in Sri Lanka is vast and tragic.

> "Sri Lanka currently has the benefit of one of the most comprehensive legislative frameworks to combat bribery and corruption whilst being signatory to numerous international conventions"

This paper will examine the nexus between some of these core issues, which are at the heart of any discussion on bribery and corruption in Sri Lanka. It will examine the current legal framework in place within Sri Lanka; including anti-bribery and corruption laws and institutions, examine the frauds and scandals that have taken place in the public sector with particular emphasis on the VAT (Value Added Tax) scam that exposed the corruption prevalent on the part of some officers of the Inland Revenue Department, evaluate whether existing laws and institutions satisfy the standards set by the international conventions and institutions which have been established for the prevention of bribery and corruption, study other Asian legal frameworks designed to prevent bribery and corruption, and finally propose feasible reforms that would help increase the efficiency and effectiveness of our national legal framework.

Domestic legal framework relating to bribery and corruption

Sri Lanka currently has the benefit of one of the most comprehensive legislative frameworks to combat bribery and corruption whilst being signatory to numerous international conventions. The legal mechanisms for the control of bribery have been in place since 1883, with the enactment of the Penal Code. However, its offences were limited to acts done by or relating to 'public servants', and thus excluded persons elected to public office. This lacuna in the law was filled in 1942 with the enactment of section 20 of the State Council (Powers and Privileges) Ordinance, which was followed by the Public Bodies (Prevention of Corruption) Ordinance, 1943. The amendments provided that it is "an offence to offer, accept or receive any fee or reward for the promotion or opposition or any bill or resolution before the (state) council" and any local authority. However, the provisions did not provide for criminal sanctions against the offenders and the punishment was limited to the expulsion from elected office.

The Bribery Act of 1954

The introduction of the Bribery Act (No. 11 of 1954; hereinafter the Bribery Act) significantly altered the law that existed and—together with subsequent amendments described below—to date forms the core legal framework available to combat bribery in Sri Lanka.

The Bribery Act was enacted with the idea of containing bribery within the public sector. It made members of parliament and judicial officers amenable to it. Inter alia, it stated that "the offering, soliciting or acceptance of a gratifications as an inducement or reward for doing or forbearing to do any act in his capacity as a member of parliament or in his judicial capacity" as offences. The term "gratification" was granted a wide and inclusive definition. The provisions were further strengthened by Act No 40 of 1958; it provided a much easier method for the establishment of an offence of bribery. Section 23A of the

amended act provided for bribery to be established through circumstantial evidence, even if there is no direct evidence to prove the acceptance of gratification. It provided for an inference of bribery if inconsistency was to arise between the sum total of a person's income or revenue that could be explained as lawfully attained and the sum total of that person's capital assets which have been acquired or owned by that said person.

Section 20 of the 1958 amendment also created the office of the Bribery Commissioner. This office functioned under the aegis of the attorney general and the Ministry of Justice and was provided with comprehensive investigative powers such as the power to:

> ...summon persons and question them; procure affidavits and documents; obtain asset declarations and full financial disclosure from the subject of an investigation; require Government departments to produce documents; search Government buildings; apply to public servants for assistance; and arrest or detain suspects (Sunil Ponnamperuma, *Permanent Commission to Investigate Allegations of Bribery and Corruption 1994-1999: A Study in Institutional Failure*, p. 278).

"The Bribery Commissioner functioned under the aegis of the attorney general and the Ministry of Justice and was provided with comprehensive investigative powers"

However, the law did not permit the commissioner to conduct an inquiry against a member of parliament without the prior approval of the speaker of parliament, or an inquiry against a judicial officer without the consent of the Judicial Service Commission.

Commission to Investigate Allegations of Bribery or Corruption and Amendments to the Bribery Act (No. 20 of 1994)

The commission to investigate allegations of bribery or corruption was established in 1994 amidst much promise at a time when it was widely perceived that bribery was rampant and immediate action necessitated curbing the menace. In fact, one of the main issues in the general election of 1994 was the menace of bribery and the urgent need to curb it.

On 5 October 1994 the bill to establish a permanent commission to investigate allegations of bribery and corruption was passed as Act No. 19 of 1994. The justice minister at that time addressing parliament compared the old law to the newly passed bill and stated that "the conditions that fostered opportunities for corruption had to be reduced by greater transparency and accountability in Government dealings" (Parliamentary Debates [Hansard], vol. 94, no. 7, 5 October 1994, col. 406). The commission was to consist of three members with two of them retired judges of the appellate courts and the other to be from a law-enforcement background. The period of office was five years and security of tenure was guaranteed.

Anton Fernando and R M B Senanayake (in *Synopsis of Anticorruption and Related Laws*, August 2007, pp. 1-2) described the main powers of the commission as

> 1. To procure and receive all evidence written or oral and to examine all such persons as the Commission may seem to be necessary.

2. To summon and examine persons relevant to the investigation.

3. To summon a person to produce any document.

4. To notice any Bank to produce any checks or any other documentary evidence relating to the investigation against any person in respect of an allegation.

5. To notice the Commissioner General of the Inland Revenue to furnish information required by the Commission in respect of the investigation of such a person.

6. To notice any Government department, local authority or any State Corporation, to produce documents relevant to such investigations.

7. To require the person against whom an allegation of bribery is made to furnish an affidavit disclosing his assets liabilities and that of others members of immediate family.

8. To notice any other person to make a sworn statement setting out the assets and liabilities of such person.

"The commission to investigate corruption had to rely on the IGP for its officers to conduct investigations and the Ministry of Public Administration for officers to do administrative work, as it did not have its own officials"

The act also considered "corruption" and "gratification" in a wide manner. Its section 7 as amended defined corruption as including all possible mala fide activities including nepotism, misconduct, misuse of information, induced omissions or commissions contrary to law etc. Its section 90 as amended defined gratification as including anything of monetary value or convertible to monetary value, any office or contract, or any other form of protection.

Despite these provisions and wide powers entrusted to the commission, in actual practice the legislation proved to be of little value. There are manifold reasons for this and an interview with a former bribery commissioner by Rohan Abeyawardena ('Bribery Commission Blows the Whistle', Ratathota.com, 16 May 2010) shed light on several of these reasons. The commission had to rely on the Inspector General of Police for its officers to conduct investigations and the Ministry of Public Administration for officers to do administrative work, as it did not have its own officials. The commission lacked police officers that were directly answerable and responsible to it. Instead, the commission had to rely on the regular police force to carry out its orders. As shall be elaborated later, this is in contrast to some commissions in other countries that have had better success in curbing corruption. Apart from this, the director general of the commission was appointed by the president and answerable to him and not to the commission itself. Anonymous or pseudonymous complaints could be made but in the generality of cases they were not inquired into. Thus many critics referred to the commission as a classic case of "plans that looked good on paper or in the abstract, but went awry in the implementation" (Ponnamperuma, p. 301). The functions of the last commission wound up in March 2010 and a new body is yet to be appointed.

The Declaration of Assets and Liabilities Law

The purpose of this law (consisting of Acts No. 1 of 1975, No. 29 of 1985 and amending Act No. 74 of 1988) was to monitor the acquisition of wealth by public servants, politicians and others through bribery and corruption. The categories of people required to make declarations of assets and liabilities as at March 31 each year are referred to in section 2 of the act. Declarations are to be made to the speaker by ministers of parliament, to the president by all appointees of the president and heads of departments by other persons under them. It is considered an offence if any one fails to submit the declaration to relevant authorities within three months of the due date, to submit a false statement or to wilfully omit any assets or liabilities owned by them.

> **"The functions of the last commission to investigate corruption wound up in March 2010 and a new body is yet to be appointed"**

Section 7 provides that a complaint can be lodged regarding the recent acquisition of wealth by any person to the attorney general, bribery commissioner, Commissioner General of Inland Revenue, Principal Collector of Customs, or the Head of Department of Exchange Control. Section 9A of the act provides that a complaint regarding any false statement or omission in a person's declaration could be made to a magistrate.

However, this law too has proven ineffective as it provides for no central authority with the power to receive and monitor the filing of declarations. Further, if a private citizen makes a complaint according to section 9(a), the individual must make a deposit for costs and damages which would effectively shut out such complaints.

Prevention of Money Laundering Act

This act (No. 5 of 2006) makes it an offence to engage in financial transactions to hide the identity or source of money generated from illegal activities as defined in section 38 of the act. The illegal activities include bribery. Sections 20 and 21 stipulate some of the offences under the act. They include destruction of information regarding money laundering activities. The act also paves the way for better intergovernmental agency interaction through the Financial Intelligence Unit (created by Act No. 6 of 2006) and enables cooperation of foreign nations in the investigation of money laundering activities (under section 3 of the Mutual Assistance in Criminal Matters Act, No. 25 of 2002).

Financial Transactions Reporting Act

This act (No. 6 of 2006) should be read together with the above Prevention of Money Laundering Act. This legislation provides that the institution accepting money or valuables should verify the identity of the customer. Sections 4 and 5 of the act place a duty upon institutions to maintain proper records regarding customers/clients and conduct due diligence on any business relationship on an ongoing basis. It is incumbent on a financial

institute to coordinate with the Finance Intelligence Unit established by the Central Bank to ensure that all relevant information is properly disclosed regarding financial transactions.

"Directions given by the ombudsman are completely ignored as his powers are limited to drawing the attention to a violation of a fundamental right or injustice and then recommending steps to grant relief"

The Office of the Parliamentary Commissioner for Administration (Ombudsman)

The office of the ombudsman was established under the Second Republican Constitution to offer the public with an opportunity to have their injustices and disputes resolved in an economical and expeditious manner. The ombudsman is appointed by the president and security of tenure is guaranteed. Act No. 26 of 1994 enhanced the purview of the ombudsman and now the public can directly canvass his office in respect of a perceived violation of a fundamental right or other injustice by a public official or tribunal. Should the ombudsman find that indeed such an injustice has happened, he can recommend his determination to the relevant minister or head of department and the public petitions committee. If no action is taken he can inform the president and parliament.

The office of the ombudsman can be a powerful tool to combat corruption where the public can directly address a senior constitutionally mandated official to have injustices arising from corruption corrected. However, the law is often seen to be made impotent where the directions given by the ombudsman are completely ignored as his powers are limited to drawing attention to a violation of a fundamental right or injustice and then recommending steps to grant relief.

The 17th Amendment to the Constitution

The 17th Amendment to the Constitution bought about an important change with regard to depoliticizing of many vital departments and institutions of the government. Under the amendment, a Constitutional Council was established which comprised 10 members: prime minister, speaker, leader of the opposition in parliament, one person appointed by the president, five others on appointment by the president on the recommendation of the prime minister and the leader of the opposition, and one person nominated by a majority of the parliament, representing one of the independent groups or parties not represented by the prime minister or leader of the opposition.

The Constitutional Council was mandated to provide recommendations to the president on members that shall be appointed to several commissions that carried out the appointment, transfer and disciplinary matters of public officials. Some of the commissions are the Elections Commission, the Public Service Commission, the National Police Commission, the Human Rights Commission of Sri Lanka, the Permanent Commission to Investigate Allegations of Bribery and Corruption, the Finance Commission and the Delimitation Commission. These changes sought to restrict the President's powers of appointment and de-politicize the public administration of the country.

However, the 17th Amendment was (in the main) properly implemented only from 2002 to early 2005. The lack of political will on the part of those entrusted to govern Sri Lanka resulted in the president's failure to appoint members to the Constitutional Council in its second term, thereby crippling the council. Most facets of the 17th Amendment have been altered with the recently passed 18th Amendment to the Constitution. According to this new amendment, most senior public officials—including superior court judges—are directly appointed by the president and the middle level public officials are controlled by a new set of commissions, the members to which are also appointed by the president, who is required merely to consult a toothless Parliamentary Council on the appointees. The initial aim of de-politicising a generally corrupt public service that underpinned the 17th Amendment seems to have been lost.

"The initial aim of de-politicising a generally corrupt public service that underpinned the 17th Amendment seems to have been lost"

International standards and conventions relating to bribery and corruption

Apart from the manifold domestic constitutional and statutory mechanisms available to counter bribery and corruption in Sri Lanka, the country is signatory to several of the major international conventions relating to bribery and corruption.

United Nations Convention against Corruption

The United Nations Convention against Corruption (UNCAC) was adopted by the UN General Assembly on 31 October 2003 and came into force on 14 December 2005. As of November 2007 it had been signed by 140 nations and as of September 2008 ratified by 125. Sri Lanka signed the convention on 15 March 2004 and ratified it on 31 March 2004.

In its eight chapters and 71 articles, the UNCAC compels states parties to implement a detailed and broad range of anti-corruption measures affecting not only their laws, but also their practices and institutions. The aim of these measures includes the prevention, detection and sanction of corruption. According to the Transparency International website, "UNCAC is unique as compared to other conventions, not only in its global coverage but also in the extensiveness and detail of its provisions." Led by the United Nations Office on Drugs and Crime (UNODC), UNCAC was negotiated for a period of over two years with representation from over one hundred countries and representatives from civil society organisations such as Transparency International. The main categories of obligations for state parties via the convention are:

1. Provisions on the ways, means and standards of preventive measures in both the public and private sectors.

2. Criminalisation of a vast range offences relating to both public sector corruption and private sector (private-to-private) corruption.

3. An international cooperation framework, which provides room for potential improvement in mutual law-enforcement assistance and in the processes of extradition and investigations.

4. A global asset recovery framework. The provisions on technical cooperation and information are seen as key to the overall balance and composition of the UNCAC, as it highlights the importance of providing financial and material assistance to developing countries, without which some countries like Sri Lanka would be unable to implement the UNCAC requirements.

5. An implementation mechanism, which includes both the periodical reviewing of implementation and the provision of recommendations to improve the convention and its implementation.

"The UNTOC recognises that corruption plays a key part in trans-national organised crime, and thus believes that it must be dealt with in the process of combating organised crime"

United Nations Convention against Transnational Organised Crime

The United Nations Convention against Transnational Organised Crime (UNTOC) was adopted by the UN General Assembly on 15 November 2000. As of October 2005 it had been signed by 147 nations, being open to all countries and regional economic organisations, it came into force from 23 September 2003. Sri Lanka became a signatory to the convention on the 13 December 2000 and ratified it by 22 September 2006.

The UNTOC recognises that corruption plays a key part in trans-national organised crime, and thus believes that it must be dealt with in the process of combating organised crime. The obligations imposed by the UNTOC upon state parties fall into four main categories:

1. Development of effective measures to promote the integrity of, and prevent corruption of, public officials and to provide public authorities with adequate independence, so that they are able to operate without having inappropriate influences.

2. Criminalisation of corruption, particularly of public officials as a part of the international framework for addressing transnational organised crime. Furthermore, it calls for effective measures to detect and punish the corruption of public officials.

3. Criminalisation of money laundering and the establishment of a domestic regulatory and supervisory regime to combat money laundering.

4. A broad framework for mutual legal assistance, extradition and law enforcement cooperation and technical assistance and training, in order to fulfil the convention's aim of addressing cross-border aspects of organised crime. These provisions are mainly mandatory and cover specific aspects of law such as gathering and transferring evidence and assisting investigations and prosecution. The UNTOC has broad judicial provisions which can be used to create a national legal framework for combating corruption.

Facts of bribery and corruption in Sri Lanka

Despite these manifold laws and regulations, Sri Lanka remains one of the most corrupt nations in the world. Although there is strong public condemnation of bribery and corruption,

which means that up to now they are not considered acceptable to most people, the following illustrations indicate the seriousness of the problem and the inability of Sri Lankan institutions to deal with them.

"In 2004, one of Asia's biggest tax scandals was exposed by the Auditor General's Department in Sri Lanka, popularly referred to as the VAT scam"

The VAT scam

In 2004, one of Asia's biggest tax scandals was exposed by the Auditor General's Department in Sri Lanka, popularly referred to as the VAT scam. VAT (Value Added Tax), a consumption tax that is levied at each stage of production based on the added value to goods or services, was introduced in Sri Lanka in 2002. However, the VAT payments of industrialists who add value to their goods and services (and thereby are amenable for the payment of VAT) for the purpose of exporting are reimbursed by the government of Sri Lanka as an inducement to encourage exports. By producing certain fraudulent invoices and fictitious documents of exports that never took place, fraudsters obtained VAT refunds. Subsequent to investigations into the matter, a report was released by the Auditor General's Department to parliament. The report concluded that either "willfully or negligently" the Inland Revenue Department has incurred a loss of 441 billion rupees of computed costs (further stating that the costs that could not be computed could not be fathomed) (*Sunday Times*, 27 January 2008).

Even though many arrests were made at the time, several of the accused have managed to escape to countries such as Australia, New Zealand, Singapore, Japan and Thailand. The alleged "king-pin" of the scam, Kamil Kathubudeen, has to this date not been found, although the case was directed to Interpol. Former Inland Revenue Deputy Commissioner G. Z. Jayathilake and Assistant Commissioner A. W. Ambeypitiya are still imprisoned; however, former Commissioner General A. A. Wiyepala, who is alleged to be indirectly involved, later served as chairman of the National Insurance Trust (*Sunday Times*, 7 February 2010).

Former Auditor General Sarath Chandra Mayadunne in his report revealing the VAT scam pointed out two main errors in the current tax collection system. First, the current system is based upon a series of guesstimates as opposed to precise forecasted figures based upon accurate economic data, leaving space for human error. Second, the department has a severe staff shortage. According to him the department is running "with less than forty percent of the staff it requires" and thus is highly inefficient and prone to error (Arajuna Ranawana, *Global Integrity Report 2007*). It has been more than six years since the VAT scam was uncovered and the country is yet to see investigations carried out and the perpetrators brought to justice.

According to the World Economic Forum *Global Competitiveness Report 2008-2009*, the tax system lacks transparency and thus is seen to encourage corruption. Even though at present the procedures have been simplified and the number of tariffs have been reduced, according to the World Bank & IFC, on average a

medium sized company has to make 62 payments to the tax authorities, have at least five visits from tax officials and spend approximately 256 hours per annum preparing, filing and paying taxes. Furthermore the Tax Department of Sri Lanka has wide discretionary powers, allowing it to act corruptly without fear of public scrutiny. Therefore, the occurrence of large scandals such as the VAT scam cannot come as a surprise.

"According to the World Economic Forum Global Competitiveness Report 2008-2009, the Sri Lankan tax system lacks transparency and thus is seen to encourage corruption"

Report of the auditor general

In Sri Lanka, the origins of the auditor general's office can be traced to 1799. The 1931 Donoughmore Constitution and the 1947 Soulbury Constitution of Ceylon considered giving the auditor general a larger degree of scope and provided for the accounts of government departments to be audited by the auditor general; however, there was no provision for audits to be conducted of local authorities and state corporations. This was amended with the Constitution of 1972, which gave the auditor general the powers to audit those institutions as well. The Auditor General's Department was established to increase public accountability of state institutions and authorities. According to the department's website, its key functions are to perform an "audit of the accounts of all Departments of the Government, Provincial Councils, Local Authorities and Public Corporations and of any Business or other Undertakings vested in the Government under any written law and to report to Parliament annually and as and when necessary on the discharge and performance of the duties and functions for the accomplishment of the above mission".

The annual report for the auditor general provides a summary of the expenditures, incomes and discrepancies of certain government departments and institutions. It is primarily a financial performance analysis of the said departments.

The Annual Report 2006 analyses the financial situation of six main government branches: the Inland Revenue Department, Department of Customs, Department of Motor Traffic, the ministries, health sector, and local authorities.

Inland Revenue Department

The Inland Revenue Department (IRD) was the subject of controversy in 2006 due to a four billion rupee loss incurred from the VAT scam. The report goes on to further point out the weaknesses within the internal system of the department. These weaknesses include accounting errors such as variations between opening and closing balances for the years 2003-2007, and failure to accurately record information received by the department. Furthermore there were disparities between the figures recorded for income tax and VAT between the IRD and the Central Bank Report. Thus the 2006 report strongly emphasized the need for improvement with regard to quality of management within the IRD; this included strengthening the internal control system and information system of the department (p. 46).

Confidential interviews conducted with several employees of the IRD to ascertain their perspectives in view of the VAT scam disclosed some interesting perspectives. An officer who wished to remain anonymous stated that the main reasons for the failures of the department are the lack of coordination with other departments (especially customs), corruption within the department itself, and political reasons. However, he also noted that there have been some improvements, including in the recruitment of new staff.

Department of Customs

The Department of Customs is the institution that collects the second highest amount of public revenue (after the IRD). This department experienced losses within the year under reportage due to weaknesses and lapses of the system and its failure to adhere with statutory requirements; however, unlike the IRD, the Department of Customs has faced losses due to setting unachievable and unrealistic figures for revenue collections where the revenue collection estimate was higher than what could be realistically gained (pp. 51-52).

Department of Motor Traffic

The Department of Motor Traffic experienced losses, according to the 2006 report. These losses were incurred as a result of cars being registered falsely as trucks and thus having paid a lower customs duty. Therefore the actual revenue collected from duty was so low that it caused heavy losses to the department. The auditor general's report pointed out the flaws in the file maintenance system of the department where in certain instances the files were either incomplete or untraceable, making it difficult to conduct investigations properly (pp. 53-55).

Ministries and departments

The auditor general's report revealed many flaws within ministries and departments that it audited. There were no long term, medium term or short term corporate plans which set out the role, mission, requirements and goals for the ministries and departments. The 2006 report identified a failure to establish action plans with monthly, quarterly and yearly targets for the said ministries and departments. Furthermore, the action plans that have been drafted have failed to be in accordance with budgetary allocations of the ministries and departments. The report also highlighted the lack of communicative channels with the stakeholders, the deficiencies of information systems within the ministries and departments, as they fail to monitor and analyse performance efficiently, and the lack of appropriate training facilities. Furthermore, many clerical errors were detected, such as classification errors, material omissions, delays in presenting back reconciliations and lack of board surveys and annual verifications. The report strongly recommended the correction of these deficiencies in order to prevent wastage of resources by ministries and departments (pp. 61–62).

"The Auditor General's Report revealed many flaws within ministries and departments that it audited; there were no long term, medium term or short term corporate plans which set out the role, mission, requirements and goals for the ministries and departments"

Local authorities

Local authorities incurred a total loss of 1,545.52 million rupees in 2006, according to the report. They owed the banks a total of 5,435 million rupees in loans and overdrafts. The report again emphasized that such losses were incurred as a result of the breakdown in internal control and internal audit systems (pp. 75-77). The report pointed out that the there was room for corruption as a result of the lack of accountability and transparency within various branches of government (p. 65).

"There have been reports of intimidation of Auditor General's departmental personnel by other government employees, and questions have also been raised about the forthrightness of the most recent reports, due to political influence and fear of reprisals"

According to investigations carried out by researchers collaborating in the writing of this paper, employees of the Auditor General's Department expressed several concerns. The gravest problems are corruption, political involvement and general negligence in carrying out duties by the employees of the department. Moreover, they mentioned concern for their safety and political victimisation. Also, the need to have resources independent of other government institutions was stressed, as it was felt that certain government institutions failed to provide sufficient assistance in carrying out investigations.

The Auditor General's Department although established under the Second Republican Constitution is not completely independent (especially so with the enactment of the 18th Amendment) and lacks the ability to recruit and train suitable persons. There have been reports of intimidation of departmental personnel by other government employees, and questions have also been raised about the forthrightness of the most recent reports, due to political influence and fear of reprisals. Incidentally, a draft "Audit Act" was approved by the Cabinet of Ministers in 2005; however, it was not presented to parliament.

Reports of the Committee on Public Enterprises and the Public Accounts Committee

The Committee on Public Enterprises (COPE) and the Public Accounts Committee (PAC) are the main parliamentary watchdog committees.

Committee on Public Enterprises

According to the parliament, "The Committee on Public Enterprises has been established on 21.06.1979 [under Standing Order 126] to ensure the observance of financial discipline in Public Corporations and other Semi Governmental bodies in which the Government has a financial stake" (2006 Parliamentary Publications No. 12).

COPE conducted investigations and observed 26 key government entities in 2007. Its report was widely spoken of at the time, as it revealed many irregularities, corrupt conduct and deficiencies of the entities investigated. Seven of the most controversial were: the Central Bank of Sri Lanka, the Ceylon Electricity Board, the Bank of Ceylon, the Ceylon Petroleum

Corporation, the Board of Investment, the Airport and Aviation Services, the Sri Lanka Ports Authority, and the Samurdhi Authority of Sri Lanka.

Central Bank

According to the 2007 report, the Central Bank of Sri Lanka, the main financial regulatory authority and reserve bank, had failed to take serious action against several bogus financial institutions, which were functioning illegally without prior approval from the Monetary Board. Such institutions have adverse effects upon the economic stability of the country. Furthermore, the committee pointed out that the Central Bank has been unwilling to recover the staggering seven billion rupees it had granted to financial institutions that had become insolvent. However COPE went on further to commend the governor of the Central Bank for his willingness to take initiatives in appointing a committee to inquire into a pyramid scheme's functions which had affected the exchange rate.

Ceylon Electricity Board

Due to its inefficiencies and mismanagement, the government-run Ceylon Electricity Board (CEB) had according to the 2007 report suffered a debt of 15 billion rupees. Furthermore, the report revealed that the CEB's internal audit division was deceitful and not up to standard, as it had not disclosed many fraudulent activities of the board. COPE pointed out that the appointment of the deputy general manager to the Kerawalapitiya power plant was done whilst he was under allegations from the internal audit division and he continued in office even when suggestions were made to remove him from his post. Thus COPE ordered that the retired deputy general manager was to not be given any benefits until his disciplinary inquiry was over, and requested that inquires against other officials be speeded up.

Bank of Ceylon

According to the report, the Bank of Ceylon (BOC), which is the largest state-owned commercial bank, had spent up to 127 million rupees within a four-year period on a foreign financial controller who failed to provide adequate services. The committee went on further to point out that efforts should be made to recover non-performing loans amounting to 12 billion rupees and adopt proper procedure when granting loans. Furthermore the committee pointed out that the cost revenue of the bank was 74 per cent whilst other private banks managed to keep the rates lower than 56 per cent. The committee also noted that BOC had granted loans and overdrafts amounting up to 340 million rupees and 300 million rupees to an international firm and these sums remained unpaid. Thus COPE expressed its strong discontentment towards the treasury for not performing its mandate to control and minimize the losses suffered by the BOC.

"Due to its inefficiencies and mismanagement, the government-run Ceylon Electricity Board had according to the 2007 report suffered a debt of 15 billion rupees; furthermore, the report revealed that the CEB's internal audit division was deceitful and not up to standard, as it had not disclosed many fraudulent activities of the board"

Board of Investment

"The Board of Investment was occupying several floors of the World Trade Centre building when it had in its possession a building which had been vacant since 1999"

COPE concluded that the Board of Investment (BOI), the investment authority established to encourage foreign investment, had been running without suitable corporate or action plans for a long period of time. The committee also expressed its unhappiness in the BOI attempting to mislead parliament by presenting false documents of nonexistent corporate plans for the board. COPE went on further to point out the wastage in resources of the BOI occupying several floors of the World Trade Centre building (amounting to nine million rupees in rent per month) when it had in its possession a building which had been vacant since 1999. It was also revealed by COPE that BOI has failed to monitor the financial control and performances of itself and thus had adversely affected the economy. As a result COPE concluded that the government was to take responsibility of monitoring the import and export procedure of BOI via a body such as the customs department.

Aviations Services Limited

COPE has recommended that legal action be initiated concerning a seven-million rupee transaction of Aviations Services Limited, a government-owned company. The transaction had occurred without prior approval of the board. Furthermore, COPE recommended that revised corporate and action plans be submitted by the company.

Sri Lanka Ports Authority

The Sri Lanka Ports Authority had no Director of Finance during the time period in which the observations were made and thus there were reports of serious irregularities such as the deterioration of accounting standards, loss of control over accounts and inaccuracy and lack of transparency in most of the accounts.

Samurdhi Authority

COPE revealed that the Samurdhi Authority has been functioning without a corporate plan. Further, it was learnt that the authority had failed to recover a sum of five and half million from its debtors.

Overall, when analysing the COPE report, a pattern of institutional failure becomes evident. Most units of government have incurred large losses due to not having made corporate plans or action plans. Most institutions had been functioning without the existence of targets and monitoring systems. Furthermore, administration was often not up to standard.

Committee on Public Accounts

The Committee on Public Accounts (PAC) was established under Parliamentary Standing Orders 125 to investigate the government, its ministries, departments, provincial councils and local authorities. PAC submits a report to Parliament with findings and recommendations. The PAC report for 2002-04 revealed fraud and corruption within government institutions; the report was

divided into three sections: the executive summary, income arrears and differences in accounts in calculations of income tax.

Executive summary of the PAC report

The PAC report revealed details regarding the 3.6 billion rupee VAT scam that occurred between November 2002 and August 2004. The report went on to point out that as a result of the inefficiency and irresponsibility of the IRD and its senior officials, the value of the VAT repayments of the scam is was higher than revealed. PAC also learnt that the auditing officers in charge had been lenient in providing evidence on the scam. Furthermore it was exposed that the IRD had not only failed to conduct an investigation on issues raised by the auditor general, but it also falsely stated that the reason for this failure to conduct an inquiry was due to the advice of the attorney general. The PAC also concluded that the VAT scam was a result of the department functioning whilst neglecting constitutional needs and financial regulations (pp. 1-3).

> **"The Committee on Public Accounts report for 2002-04 revealed fraud and corruption within government institutions"**

The PAC provided a series of recommendations to the IRD. Most importantly was that the IRD conduct an investigation under the supervision of the PAC, so that they would reveal other repayment frauds besides the "VAT scam". Furthermore, the committee stressed upon the importance of establishing a new data system with an internal control system and a management and accounting information system. The PAC also recommended the amendment of the tax procedure in order increase efficiency. And the PAC suggested that the IRD follow its code of ethics more effectively in order to regain public trust and confidence that was lost as a result of the VAT scam.

Income arrears

There were three main areas of concern for the PAC regarding income arrears. Firstly, the PAC was concerned as to why the IRD failed to present financial reports at the necessary time periods, delayed the annual balances by up to eight months and as to why even the commissioner general neglected his duty to present the mid-term report on taxes, which is considered essential. As a result, the PAC found that the processing done by the department and the collection of arrears had been delayed. More importantly, the PAC pointed out those delays created an environment heavy in corrupt and fraudulent behaviour. Secondly, the PAC noted that there have been significant increases in tax arrears: 22.7 billion rupee increase in tax arrears and 33.5 billion rupees in VAT arrears, due to an increase in arrears in VAT, income tax, and economic service tax, the lack of supervision and expertise and also having no proper system for receiving data and information. Thirdly, PAC pointed out that the tax collection process has become more lenient due to the Tax Amnesty Act, No. 10 of 2003 and due to the Goods and Services Tax procedure being halted. Both these changes encouraged a delay in the collection of taxes, encouraged tax payers to refrain

from paying taxes, and more importantly, affected the drafting of financial policies and the formulating of annual budget allocations (pp. 13-14).

"PAC pointed out that the tax collection process has become more lenient, encouraging tax payers to refrain from paying taxes"

The PAC stressed that the presenting of relevant reports should become a main priority of officials, and failure to do so should result in stern action being taken against them. The PAC also suggested that the IRD ought to use a modified computer system which would enable it to carry out functions of the department more efficiently. Furthermore, the importance of establishing a data bank and modified systems within the department was pointed out by the PAC with reference to the increase of tax arrears. The PAC also proposed to remove the discretionary powers of the commissioner general over the withholding of taxes and the releasing from fines of tax evaders, and the giving of those powers to a separate team of officials, so that this discretion would be used justifiably and in a transparent manner. Finally the PAC suggested that stern action be taken against officials who neglected their duties with regard to collecting taxes appropriately (pp. 22-23).

Differences in calculations of income tax

The PAC revealed two main areas in which there are differences in income tax calculations. Firstly, there were contradictions between the state accounts and the accounts of the IRD; where the accounts under four headings of the IRD did not match the state accounts under the same headings, costing 14.3 billion rupees and 0.6 billion rupees for the years 2004 and 2005. The PAC stated that the contradiction in these accounts were obvious, however it was shocking that the commissioner general of the IRD has failed to identify the importance of them and conduct an investigation as why these contradictions had occurred. The PAC however concluded that these differences were caused as a result of the necessary working lists not being provided to the relevant officials each year (pp. 87-89).

Secondly, the PAC noted differences in data between the Customs Department and the IRD. The computerized data of the Customs Department did not match the data of the IRD. Upon investigation is was found that computer data of the Customs Department and the BOI were directly received by the IRD; however, it was also found that the IRD data only matched the data of the BOI but not with customs. Furthermore the PAC was thoroughly dissatisfied and frustrated with the IRD officials for providing contradictory views regarding this matter (pp. 90-92).

In its concluding thoughts the PAC revealed that the main loopholes that were highlighted by the auditor general have not been addressed by the relevant officials of the IRD. Furthermore it was recommended that the state accounts and the IRD accounts be compared on a monthly basis. Finally the PAC concluded that the financial/annual reports were not up to par as a result of the chief auditing officers not performing their tasks adequately (pp. 98-99).

Corruption, delays and case mismanagement in courts

Legal measures that have been taken in order to eliminate bribery and corruption in Sri Lanka are severely flawed and need review. In practice the law is applied in a prejudiced manner and, in the words of former Inspector General of Police, Frank de Silva, "conviction itself is discriminatory; the small fry are netted in, the big fish escape" (*Sri Lanka Guardian*, 24 July 2010). Even though several studies on the relevant law and legal machinery have been conducted, these have had little practical impact on the actual performance of the country's institutions that are in place for the purpose of controlling bribery and corruption. In Sri Lanka, the public administration including the administration of justice has failed to be accountable when it comes to bribery and corruption.

"Legal measures that have been taken in order to eliminate bribery and corruption in Sri Lanka are severely flawed; in the words of former IGP Frank de Silva, 'conviction itself is discriminatory; the small fry are netted in, the big fish escape'"

The problem lies within the government strategy, as even though there has been considerable effort and expenditure put in by the government, the strategy has proven to be inefficient. The key to solving the inefficiencies within the legal framework lies in a strategy that permits law enforcement and administrative measures to operate simultaneously in a successful manner.

Law enforcement

The term 'law enforcement' invites one, again in de Silva's words, to discuss not only the "different notions of law enforcement but also the law and its adequacy" and "the limited idea of investigation".

Contrary to popular literary opinion law enforcement is not limited to police investigation. Law enforcement is a linked chain of four components: the law, investigation, prosecution and adjudication. Many legal writings fail to express law enforcement as a continuous course of action involving all these components and view it as merely the investigatory process done by the police; this analysis is flawed. Therefore it is vital that an efficient court administration system and judicial system exist along with an efficient police system.

Investigation is an important part of the process, yet despite the amount of critique about it, it is still severely flawed. One concern comes from the fact that in order for an investigation to commence a formal complaint needs to be lodged. In the case of small bribery and corruption offences this method works fine, however to "fry bigger fish" this method has proven ineffective. As stated by de Silva,

> Collapsing bridges and buildings, doctored ledgers, outdated drugs and a range of evident circumstantial evidence of corruption, known to the public at large, are not brought before the Bribery Commission for investigation, simply because there is not an aggrieved complainant to invoke the law.

This is seen as a loophole within the legal process for control of corruption.

Hence it can be stated that the scope and conception of the legal process is limited. As de Silva stated, "The legal machinery and legal process for control of bribery and corruption are plainly inadequate and ineffective in the face of the problem confronted."

"The Bribery Commission website gives information in relation to one of five convictions handed down by the courts during 2010; upon placing a request to find the case names and details of the convictions we were informed that a member of public is not permitted to gain access to such information"

A sad example of the utter failure in law enforcement is the Bribery Commission itself. The CIABOC website gives information in relation to one of five convictions handed down by the courts during 2010. However, the website is misleading as it gives the impression that the commission is still in operation and states the names of the previous commissioners who stepped down from office in March. Upon placing a request to find the case names and details of the convictions cited on the website we were informed that a member of public is not permitted to gain access to such information.

Corruption and wastage within parliamentary premises

It is interesting to note that incidents of corruption have been recorded even within the parliamentary premises and in institutions where parliament has direct supervision.

The MPs' Madiwela housing scheme scandal was a recent revelation that again indicated the extent to which bribery and corruption is rampant in the country.

Responding to a request made by MPs, the speaker of the house sought the assistance of the army to renovate approximately thirty houses which were part of the Madiwela housing scheme. The 2006 Auditor General's Report addressed a range of irregularities and shortcomings pointed out by sources. Such allegations made by sources include that certain houses had been fitted with pantry cupboards twice in a year, and others pointing to the waste and corruption concerning maintenance of the scheme. Despite the report being highly detailed and highlighting several of the main financial irregularities, parliament is yet to take it up. The problem here lies within the lack of power of the auditor general, as he is merely permitted to make recommendations and as Shaminda Fernando has written, has "no authority to prod Parliament in the right direction" (*The Island*, 20 July 2010).

The parliament modernisation project funded by the United Nations Development Programme is another example of a mismanaged project. It failed to fulfil many of the expectations placed upon it. The AG's inquiry into the matter, Fernando notes, "revealed a spate of violations with regard to financial laws and regulations governing Parliament". However no corrective action has been taken by the government or parliament.

Institutions to combat bribery and corruption in other Asian countries

As illustrated above, in Sri Lanka despite the various legal mechanisms available to combat corruption, it remains a very real problem. In such a scenario it is important to compare and

contrast the regulatory framework that exists in neighbouring countries and discuss the relative success in curbing corruption in those jurisdictions.

Hong Kong – Independent Commission Against Corruption

The Independent Commission Against Corruption (ICAC) of Hong Kong was established on 15 February 1974 when Hong Kong was under British rule. Its main aim was to get rid of endemic corruption in the various departments of the Hong Kong government. This was done through law enforcement, prevention and community education. Since the transfer of sovereignty in 1997 the ICAC has been headed by a commissioner, who is appointed by the State Council of the People's Republic of China on the recommendations of the Chief Executive of Hong Kong. The Basic Law of Hong Kong stipulates that the ICAC shall function independently and be accountable to the Chief Executive. At present, the ICAC has about 1200 staff, most of them serving on contracts.

The ICAC has adopted an exclusive strategy to combating corruption on three fronts, known as the three-pronged approach, embodied in the Commission's three departments, it has been essential in developing a new public consciousness. According to the ICAC website, "It was recognized that prevention was as important as the deterrent of prosecution, and the battle against corruption could only be won by changing people's attitude towards graft. The strategy has proved effective and remains the ICAC's guiding strategy today." Many believe that this was the key in transforming Hong Kong from one of the most corrupt to one of the least corrupt countries in the world.

Singapore – Corrupt Practises Investigation Bureau

Established by the British colonial government in 1952, the Corrupt Practices Investigation Bureau (CPIB) is a government agency in Singapore which investigates and prosecutes corruption in the public and private sectors. It is authorized to investigate other criminal cases in which corruption may be involved, despite the fact that its primary function is to investigate corruption. It is independent from the Singapore Police Force and other government agencies so as to prevent any undue interference in its investigations, as it is incorporated within the Prime Minister's Office. The bureau is headed by a director who reports directly to the prime minister.

The Prevention of Corruption Act has provided the CPIB with three main powers: the power to investigate not just the suspect, but also the suspect's family or agents and to examine their financial and other records; the power to require the attendance of witnesses for interview; and the power to investigate any other sizable offence which is disclosed in the course of a corruption investigation. The CPIB has two main divisions. The Operations Division executes the main function of the bureau in investigating offences under the Prevention of Corruption Act. It compromises of four investigation units and an intelligence unit.

"The Corrupt Practices Investigation Bureau is a government agency in Singapore which investigates and prosecutes corruption in the public and private sectors"

Secondly there is the Administration and Specialist Support Division which again compromises of four main units. From the CPIB website,

> the Administration Unit which is responsible for corporate and investigation support services, including registry, finance, procurement and personnel matters; Prevention & Review Unit which carries out reviews of the work procedures of corruption-prone Government departments to identify the administrative weaknesses, which could facilitate corruption and malpractices, and thereafter recommends appropriate preventive measures; Computer Information System Unit which undertakes computerisation projects and develops application systems to manage the records and enhance the effectiveness of the Operations Division; and the Plans & Project Unit which undertakes various staff work relating to planning projects, operations support and policies.

Singapore has managed to reduce corruption significantly as a result of the CPIB. In recent years, it has been ranked by the Transparency International Corruption Perception Index as amongst the top five least corrupt countries in the world.

"The public trust doctrine is a Roman law principle that has been developed to mean that the state should be a steward of a nation's natural resources and it is the responsibility of the government to protect the public's right with regard to those resources"

Possible reforms to tackle bribery and corruption in Sri Lanka

As illustrated above, Sri Lanka has a wide range of laws and regulations to combat bribery and corruption. However, the problem has reached epidemic proportions with no signs of improvement. As mentioned, Sri Lanka can learn and adopt much from regional nations that have successfully combated corruption. Moreover, there are also several suggestions put forth by eminent jurists and commentators in Sri Lanka that may be beneficial in combating the menace.

The public trust doctrine

The public trust doctrine is a Roman law principle that has been developed to mean that the state should be a steward of a nation's natural resources and it is the responsibility of the government to protect the public's right with regard to those resources. The "public's rights" generally include access and proper and equitable usage by the state so as not to trample the citizens usage rights of those resources. However, Justice Mark Fernando advocates extending this doctrine beyond natural resources to all state departments and enterprises, thereby conferring the public as the rightful holder of state resources.

Justice Fernando writes of the several means under which Sri Lankans may actualise the public trust doctrine. He states that the doctrine can be realised through the "sovereignty principle" as enunciated under articles 3 and 4 of the Constitution, the several articles of the fundamental rights provision in Chapter III of the Constitution, the Directive Principles of State Policy and Fundamental Duties under the Constitution, and the expansion of the rules of *locus standi* for public interest litigation.

Justice Fernando points out that article 3 of the Constitution stipulates that "in the Republic of Sri Lanka Sovereignty is in the People and is inalienable. Sovereignty includes the powers of Government, fundamental rights and franchise." People, he notes, thus are entrusted with the power to delegate powers "to the Legislature, the Executive and the Judiciary, to be exercised in good faith for the benefit of the people for the purposes for which they have been delegated – and not corruptly, to the prejudice of the People for the benefits of their delegates" ("In tribute to a judicial colossus", *LST Review*, 2009, p. 53) Accordingly, "public trust" is an intrinsic part of the sovereignty of the people and cannot be infringed upon by government for any reason whatsoever.

"Public trust' is an intrinsic part of the sovereignty of the people and cannot be infringed upon by government for any reason whatsoever"

It is important to note that despite it being a sovereign right for people to be free of corruption, this right is not in Chapter III (under fundamental rights whereby a special remedy for enforcement is provided for) or article 3 of the Constitution, which speaks of the sovereignty of the people. However it does not mean that if a right is not acknowledged in Chapter III it fails to be seen as a right. A good example would be the right to life, which although not mentioned under Chapter III of the Constitution, is a right nonetheless (*Kottabadu Durage Sriyani Silva* v. *Chanaka Iddamalgoda*, 2000). Therefore, although a right may not be stated as fundamental right it would not be prudent to reject the availability of an un-stated right (*Griswold* v. *Connecticut*, 1965).

Moreover, article 12(1), the provision relating to rule of law, stipulates that all people are equal before the law and are entitled to the equal protection from the law. This has been interpreted to mean that the constitution is founded on the rule of law; that the high concept of the rule of law underlies it (*Perera* v. *Jayawickrama*, 1985). The rule of law is inferred to have several meanings, out of which one represents that government is to be conducted under a framework of principles and rules which limits the discretionary powers of public bodies and officials. As a result of this, the law grants power to public bodies and officials and should it be conferred that the powers have been placed upon them as a matter of public interest and to be used to benefit the public. Thus where the rule of law exists there is no room for power to be exercised in an unlawful manner that is arbitrary and unreasonable. As Justice Fernando writes, "Interpreted in the context of its foundations, article 12(1) establishes, expressly or by necessary implication, norms governing the exercise of (and the refusal to exercise) governmental powers – namely, the powers vested and delegated by article 3 and 4." Therefore it can be seen that the public trust doctrine can be justified on the basis of the rule of law as well as article 12(1), independent of the sovereignty provisions.

Therefore, according to Justice Fernando the public trust doctrine is actualised in Sri Lanka through its Second Republican Constitution and the manifold provisions of the document enable Sri Lankans to play an active role in fighting bribery and corruption.

"According to Justice Mark Fernando the public trust doctrine is actualised in Sri Lanka through its Second Republican Constitution and the manifold provisions of the document enable Sri Lankans to play an active role in fighting bribery and corruption"

Freedom of information law and empowering citizens

Another provision that would strengthen a citizen's participation in the fight against corruption is the existence of a freedom of information act. It has been the experience of several countries that a freedom of information act can be a useful tool in the hands of ordinary citizens as it empowers individuals and civic-conscious groups to compel governments and government-related bodies to furnish information. This is based on the recognition that citizens of countries have a right to know about the activities of their governments. In Sri Lanka too efforts were made to enact a freedom of information act. There have been several attempts to enact such an act; however, all efforts have been in vain due to several reasons described below.

The first such attempt was in 1995 by the Committee to Advise on the Reform of Laws effecting Media Freedom and Media Expression, chaired by R.K.W. Goonesekera. This committee recommended that the right to information be included in the draft constitution that was being considered at that time. It recommended the enactment of the act to buttress the intended constitutional provisions under consideration. The proposals contained a wide definition of information and attempted to provide access to most of state matters and documents. These proposals were also supported by media industry bodies, as included in them was a comprehensive programme of media law reform. However, they were not implemented, and the media environment worsened and instead steps were taken to enforce further secrecy measures. For instance, in 2000 the cabinet announced that it would implement section 3 of Chapter XXXI, Volume 1 and section 6, Chapter XLVII, Volume 2 of the Establishment Code, which prohibits public officials from disclosing any information to the media. The threat led to jittery public servants refusing to release information of any kind to the media, and even refusing to confirm or deny information that was already in the hands of journalists or giving statistical information without the sanction of the secretary of the ministry concerned.

A draft Access to Information Bill was submitted to the Ministry of Justice by the Law Commission in 1996. This draft contained more modest proposals than the earlier version. However, it was not pursued. In 2003, a drafting committee headed by the then-attorney general, the late Mr K.C. Kamalasabeyson, and comprising the then-justice secretary, the Additional Legal Draftsman, editors, media lawyers and academics drafted a fresh set of wide ranging proposals in a draft Right to Information Act which also included limited whistleblower protection. The draft envisaged the right to obtain information relating to projects by

government authorities above a particular monetary value. Clause 8 of the draft placed an obligation on the relevant minister/ government body to divulge documents in relation to foreign funded projects (where the value exceeds one million United States dollars) and locally funded projects (where the value exceeds five million rupees). The information would be released according to guidelines prescribed by the Right to Information Commission, to be established in terms of the law. The draft was approved by the cabinet in 2003 but shelved thereafter with the change of government.

Later, the Law Commission of Sri Lanka approved a second law which was more liberal than its first attempt in 1996 but still retained the grounds of parliamentary privilege and contempt of court as bars to access to information. In March 2010, the outgoing justice minister proposed a further revised draft taking into account, the experiences of the past but failed to win a seat at the parliamentary elections held soon thereafter. Currently, the main opposition party has unsuccessfully attempted to table a private member's bill relating to the enactment of a right to information law. The government has promised the enactment of such a law but has shown no actual commitment in this regard. Critics claim that the bill will not be passed, as many government officials enjoy working behind a closed curtain, and the bill if enacted would reveal many scams within departments.

"The enactment of a right to information law would increase transparency within departments and institutions; this would avoid the recurrence of instances such as in the 2003 VAT Scam where it became very difficult for members of the public to gain information regarding the operations of the IRD"

Undoubtedly, the enactment of such a law would increase transparency within departments and institutions. Such a bill would give the public the right to access official information in the custody of public authorities. This will avoid the recurrence of instances such as in relation to the 2003 VAT scam where it became very difficult for members of the public to gain information regarding the operations of the Inland Revenue Department.

Another law that needs strengthening is the Assets and Liabilities Law. At present, as mentioned above, ordinary citizens are precluded from petitioning relevant institutions under this law as section 9(a) provides that a sum of money must be deposited before doing so. In order to strengthen the process, instead of the deposit, a sworn testimony (affidavit) could be introduced. It is submitted that this would enable anyone with credible information to initiate action under this law, thereby empowering the ordinary citizen.

Lack of autonomy and resources for institutions

In Singapore, as illustrated above, the head of the institution to combat bribery reports directly to the prime minister and the department is assured the required resources and the proper legal framework to act independently. In contrast, in Sri Lanka, the local Bribery Commission is understaffed and devoid of the necessary resources. The 2007 Annual Report of the Commission to Investigate Allegations of Bribery and Corruption in Sri Lanka listed 79 vacancies out of a total of 183 positions approved for the Investigation Division (p. 86). Moreover, there are a further 20

vacancies in the legal and administrative division (p. 85). Under such a situation it is unlikely that the commission can function properly.

"The best mode of combating corruption rests in the hands of the ordinary citizen"

The lack of resources and especially the lack of autonomy is an all-pervasive problem for most government departments and divisions in Sri Lanka. As mentioned above, the repeal of many of the provisions of the 17th Amendment by the 18th Amendment to the Constitution further institutionalises political interference in the day-to-day administration of government, thus making it even more difficult to arrest the ever-growing cases of bribery in the country.

Conclusions

> "Every public institution in Sri Lanka is corrupt. They include judges, politicians and bureaucrats. Every time someone comes into power, either politically or officially, they take it as a license to rob this country." (Prominent anti-corruption journalist, cited in Arjuna Ranawana, *Global Integrity Report 2007*)

Assuredly, all humans are susceptible to corruption if the price is right and the circumstances so compel. Consequently all the laws in the world will not result in the scourge of bribery and corruption being minimised in Sri Lanka if the popular will balks at demanding fiscal accountability from the public sector and from our politicians. The best mode of combating corruption rests in the hands of the ordinary citizen, through the utilisation of the public trust doctrine or the other manifold laws and regulations. Individuals and civic groups need to continue to impress upon our legislators to introduce legislation such as a freedom of information act that would provide the framework for citizens to take action.

More than ever, however, we need to take the current debates on taxation and tax controls out of the realm of a purely taxation-focussed environment and acknowledge that the effective control of bribery and corruption is a key to a successful strategy in this regard.

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The last debate on the Sri Lankan constitution

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Sri Lanka has turned out to be a land of many quarrels but no debates. Often quarrels turn into violence, sometimes ending in murder or worse. And the violence itself leads to new quarrels and the circle goes on. Sadly, hardly anything ever turns into a genuine debate. Debate has become a lost art and no one even seems to remember what it is.

Take for example the talk about the constitution. Among the discussions of any nation, those on the constitution should receive the highest place. Not so in Sri Lanka. No one any longer even debates the merits or otherwise of the constitution.

The last debate on the constitution was on the 17th Amendment. There were many who argued for it and they did so long a long time. Interestingly, no one argued against it, which raises questions about what sort of debate it really was.

The government's argument on the 17th Amendment was that it was good piece of legislation but that there were some defects in it. To cure the defects, the government killed the amendment itself; very much like cutting off the arm to save a finger. In fact, the real problem of the 17th Amendment from the government's viewpoint was that it tried to impose limitations on the power of executive president. The limitations were on powers to appoint people to important positions in the civil service. The government did not agree with having any such limitations and did not wish to debate them. It made the decision to kill off the amendment unilaterally and created some pretexts for doing so.

The government in this instance showed the basic mindset that underpins all political life in Sri Lanka today. It decided that it was not possible for it to debate on the need to have checks and balances. But it was not possible for it to say openly that checks and balances were wrong in principle, even if its own position was that having no limits to its power was a better principle for governance and that it is impossible to govern Sri Lanka while trying to abide by the checks and balances principle.

Thus, although the government believed that this principle was wrong and had to be abandoned, it had to pretend otherwise. Therefore, there was no meaningful debate over the 17th Amendment, since for the government the only way out was to bluff. As the government had abandoned the principles on which constitutionalism is based, but could not say this directly, then there was by this time nothing to debate about.

> "Instead of debate, what exists in Sri Lanka today is a smokescreen of quarrels"

Instead of debate, what exists in Sri Lanka today is a smokescreen of quarrels. The style of the media has in recent years changed to reflect this new condition, in order to trivialize everything. Trivialization is an essential component of quarrels, as opposed to debate, and quarrels are in turn used to trivialize various issues. Trivialization in its most advanced forms also necessitates the abandonment of principles of the sort that the current government has become expert in.

Soon there will be some major changes in the constitution of Sri Lanka. However, such changes will not be preceded by any debates. As the proposed 18th Amendment is for the displacement of limits relating to the president's power, debate would only create problems for the achievement of this plan which cannot be justified on the basis of principles of constitutional law.

The 18th Amendment will fundamentally transform Sri Lanka's political system, stripping away the façade of democracy. It will end presidential term limits, eliminate the Constitutional Council, increase the executive's control over appointments, and give the president the power to regularly attend and address Parliament. Its effect will be to remove vital checks on Executive power and further undermine Sri Lanka's imperfect democracy.

Presidential term limits are critical to democratization. The concept of term limits has been a part of discussions of democracy since its inception in ancient Rome and Athens. Without term limits, an individual and party may accumulate tremendous power. Incumbency advantages allow them to increase and preserve that power perpetually. The incumbent may rely on popular support, regime tactics, and opposition fragmentation to stay in office and set the country's agenda ad infinitum.

The consequences extend beyond the immediate issue of individual accumulation of power over a lifetime. As power becomes concentrated with a single individual and party, the range of views within the party decreases and opposition parties weaken and fragment, diminishing the representation of diverse views in democracy. The weakening of opposition parties undermines electoral choice, as voters have fewer alternatives to the party in power. Government and politics stagnate.

Political party alternation is crucial to the development of a democracy. It is more likely when the opposition faces a successor rather than incumbent, both because the successor does not enjoy incumbency advantages and because the opposition is more likely to unify when facing a new candidate.

Political party alternation is not just a symbol of democracy – it is essential to advancing democratization. Each successful turnover of power is a demonstration of democracy that increases legitimacy among domestic stakeholders and internationally. Awareness of the potential for turnover also makes officials and political parties more responsive to citizens and more likely to collaborate and reach consensus with other political parties.

In the absence of a presidential term limit, corruption will increase within and outside of government. As an Executive and ruling party accumulate power, they become more likely to abuse that power. Parties are less vigilant in rooting out vice and officials are more prone to corruption when they perceive little threat of removal or electoral repercussion. Conversely, without the potential for political turnover, businesses and other non-governmental actors have a greater incentive to invest in bribing and corrupting government officials, whose positions are more likely to be long-term and secure.

"As the proposed 18th Amendment is for the displacement of limits relating to the president's power, debate would only create problems for the achievement of this plan which cannot be justified on the basis of principles of constitutional law"

The end of term limits will preclude institution-building, policy reforms, and training integral to the development of stable democracy in Sri Lanka. Incumbents will have decreased electoral imperatives and become less likely to generate new platforms and policies or improve existing institutions and infrastructure. With a single party remains in power and little turnover among government employees and appointees, relatively few Sri Lankans will acquire the knowledge and experience necessary to become part of democratic government.

The 18th Amendment will also expand the power of the Executive to make appointments, eroding the independence and power of other government actors and branches. The President will only have to seek the opinion of a five-member council comprised of the Prime Minister, the Speaker, the Leader of the Opposition, a Member of Parliament nominated by the Prime Minister, and a Member of Parliament nominated by the Leader of the Opposition when appointing officials to the Election Commission, the Public Service Commission, the National Police Commission, the Human Rights Commission of Sri Lanka, the Permanent Commission to Investigate Allegations of Bribery and Corruption, the Finance Commission, and the Delimitation Commission. These far-reaching changes in the appointment process will affect agencies and actors responsible for essential human rights infrastructure and the provision of basic services and have the potential to destabilize or interrupt services.

Changes to the appointment process within the 18th Amendment present a special threat to the independence of the Judiciary. The President's expanded appointment powers will extend to the selection of the Chief Justice and the Judges of the Supreme Court, the President and the Judges of the Court of Appeal, the Members of the Judicial Service Commission, other than the Chairman, the Attorney-General, the Auditor-General, the Parliamentary Commissioner for Administration, and the Secretary-General of Parliament.

Additionally, the 18th Amendment's expansion of the president's privileges with regard to parliament will compromise the autonomy of parliament. The prerogative to address parliament and acquisition of full parliamentary privileges will significantly increase the president's influence on the legislative branch, reducing the separation of powers.

"The 18th Amendment is introduced as a triviality in the midst of triviality, though its implications for the country are momentous"

The principle that underpins the limitation on terms of office is that any person who is vested with extraordinary powers should be subjected to limitations more generally, and the principle behind this one is in turn that no human being is worthy of absolute trust. No one can be trusted with power absolutely. Entrusting power must be accompanied with the placing of limitations to that power. Behind this is the notion of binding power. Power should be bound otherwise it can destroy the very things it is supposed to protect.

A nation can be destroyed by the political power of one person. When the head of a state has the possibility of remaining in power indefinitely he will interfere with other parts of the state apparatus: the Attorney General's Department, the courts, the police, the public service and all other components of power. All those components that deliver services to the public suffer when one person has unlimited power through unlimited time in office. The ruling individual becomes the nation, and the nation is made subordinate to this ruling individual rather than this ruling individual serving the nation.

Thus the 18th Amendment challenges one of the most sacred notions that has been developed by civilisation: that power must be bound, power must be limited and that this is the only way to preserve the sovereignty of the people, the independence of the nation and that the power of the individual will not become a destructive force. If this sacred notion is taken away, Sri Lanka will be pushed together with those nations where all principles for the defence of constitutional rule have been abandoned. No nation that abandons limits on power can remain civilised and constitutional.

A major weakness of the 1978 Constitution of Sri Lanka is that it created room for the easy manipulation of the constitution by the use of a two-thirds majority in parliament and by referendum. As the constitution's father, J. R. Jayewardene was moved by authoritarian ambitions it was not to his benefit to incorporate democratic ideas that would restrict his powers. Thus, the 1978 Constitution left room for the destruction of democracy by manipulation of ostensibly democratic practices.

The 18th Amendment is a consequence of these historical circumstances. But whereas such an amendment needs to be vigorously debated and fought against, this amendment will be achieved in the midst of some quarrels instead: an amendment introduced as a triviality in the midst of triviality, though its implications for the country are momentous.

NEW CAMPAIGN PAGES @ www.humanrights.asia

Chiranuch Premchaiporn: Computer crimes = thought crimes

The director of independent news service Prachatai has been charged under Thailand's draconian Computer Crimes Act and for lese-majesty because of comments posted to the message board of her website. She faces a possible 80 years in prison. Her trial will begin in 2011.

http://www.humanrights.asia/campaigns/chiranuch-prachatai

Phyo Wai Aung: Conviction by press conference

A young engineer accused of involvement in a bomb attack at a carnival in Rangoon during April 2010, Phyo Wai Aung was unlawfully detained and severely tortured by Burma police for nine days to extract a confession. He is being tried in a closed court inside the central prison. The director general of the police force has already declared him guilty in a press conference.

http://www.humanrights.asia/campaigns/phyo-wai-aung

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- Model Bill on the Torture and Custodial Death (Prohibition) Act, 2010

Nervazhi, Thrissur & Asian Legal Resource Centre, Hong Kong

- A critique with recommendations on the Kerala Police Bill, 2010

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