

## Assam Government Compliance with Supreme Court Directives on Police Reform

### ASSAM POLICE ACT, 2007

#### Directive 1

Constitute a binding State Security Commission to (i) ensure that the state government does not exercise unwarranted influence or pressure on the police, (ii) lay down broad policy guidelines, and (iii) evaluate the performance of the state police. In the composition of this Commission, governments have the option to choose from any of the models recommended by the National Human Rights Commission, the Ribeiro Committee or the Sorabjee Committee.

- The Assam legislation creates a State Police Commission (SSC), however the SSC does not have the power to make binding recommendations (Act s.40) despite the clear directive from the Supreme Court that the Commission's decisions must be binding to avoid undue influence on the police.
- The SC directive calls for immediate implementation of a SSC, however, the Assam statute purports to phase-in the establishment of the SSC within 6 months of the statute coming into force (Act s. 34).
- The composition of the SSC does not conform with any of the models recommended by the Supreme Court, and lacks significant protections against government control and manipulation of the new Commission:
  - The **MPA model** (Soli Sorabjee Committee) is not met. The legislation requires only 3 independent members to be appointed by the State (Act s.35(f))—however, the MPA calls for 5 independent members, and adds that they must be appointed only on the recommendation of a tri-partite Selection Panel, which follows a transparent process (MPA ss.42, 43, 44).
  - The MPA also stipulates that the SSC must include the Leader of the Opposition, and a High Court Judge (retd) nominated by the Chief Justice, that 2 members must be women, and that minorities must be adequately represented (MPA s.42(2)).
  - The **Ribeiro Committee** model is not met—the Ribeiro model requires that all independent members must be chosen by a panel created by the Chair of the NHRC, and stipulates that the Leader of the Opposition and a High Court judge nominated by the Chief Justice, must be part of the SSC (Ribeiro Recomm. 1.2).
  - The **National Human Rights Commission** model is not met—the NHRC model calls for the Leader of the Opposition and two sitting or retired High Court judges (nominated by the Chief Justice) to sit as members of the SSC (NHRC petition, p.87). In the alternative, one judge may sit, together with a member of the State Human Rights Commission or the Lok Ayukta of the State (NHRC petition, p.87).
  - The function of the SSC does not reflect the Court's directive. Section 40 of the Act does not address 2 of the objectives set out in the SC decision: the roles of the State Security Commission is to ensure that the State Government does not exercise unwanted influence on the Police, and to provide directions to the Police for the performance of preventative tasks.
  - The Assam Act misconstrues the SC directives. The Act states that the SSC will “identify performance indicators to evaluate the functioning of the Police Service” (Act s.40(c)). In fact, the Court was explicit that the role of the SSC is not simply to identify performance indicators, but to conduct the evaluation of the police itself, and prepare a report on police performance to be

placed before the State Legislature. (See also NHRC Petition p.88, and Ribeiro Committee Recomm. 1.5). This aspect of the Court's directive has been violated. [Note: MPA s.50(2) adds that the Annual Report must be made available to the public.]

#### **Directive 2**

Ensure that the Director General of Police is appointed through a merit based, transparent process and enjoys a minimum tenure of two years.

- The Assam legislation provides security of tenure to the DGP, however, this tenure is only for one year and subject to superannuation. This is in direct violation of the SC directive which calls for a minimum tenure of 2 years, independent of the date of superannuation [see also MPA s.6(3)].
- The nature of the DGP's tenure is actually quite tenuous. An override proviso at the conclusion of s.6 in the Act states that in the "public interest" the State Government may transfer the DGP "as may be deemed appropriate to meet any contingency". This broad power undermines the Supreme Court's entire purpose of securing the tenure of DGPs to immunize them from State Government interference. The fact that the terms "public interest" and "contingency" are undefined, makes this provision subject to tremendous manipulation.
- The statute stipulates that the DGP will be selected by the State Government from among the group of 5 candidates empanelled by the State Security Commission (Act s.6(1),(2)). This violates the SC directive, which calls for empanelling of 3 candidates by the UPSC. It is important that a non-state organization nominate candidates for the position of DGP to preserve objectivity, and immunize the process from influence within the state.
- The SC directive only contemplates premature removal of the DGP on enumerated grounds when the State Government acts "in consultation with the State Security Commission". However, the Assam Act permits the Government to act unilaterally in removing a DGP based on one of the enumerated grounds in s.6(3) of the legislation.
- The grounds upon which a DGP may be removed prematurely are overly broad. The Assam legislation stipulates that a DGP may be removed early due to suspension from service, punishment or dismissal (Act s.6(3)(b),(c)), however, the statute does not stipulate that such discipline must occur "under the provisions of the All India Services (Discipline and Appeal) Rules 19", as set out in the SC directives, and MPA s.6(3)(b),(c). This omission is significant, because it fails to provide DGPs with adequate protection from the threat of arbitrary removal by the State Government.
- The Assam Act adds additional grounds for the premature removal of a DGP not contained in the SC directive--namely "inefficiency or negligence or misdemeanour prima facie established after a preliminary enquiry" (Act s.6(3)(f)). The nature of such a preliminary enquiry is not outlined, and the Act does not provide any procedural protections to DGPs who may be subject to such an enquiry (see, as a counter example, the procedural protections provided to officers who are subjected to enquiries under MPA s.13(2)). As such, s.6(3)(f) of the new Act is subject to manipulation and abuse on the part of the State Government. (Arguably s.6(3)(f) is redundant given the ability to prematurely remove a DGP due to disciplinary issues, contained in s.6(3)(b) and (c) of the new Act.)

#### Additional Concerns regarding the MPA Model

- The new legislation provides grounds for premature removal of a DGP, but does not stipulate that the reasons for removal must be reduced to writing (see MPA s.6(3)).

**Directive 3**

Ensure that other police officers on operational duties (Superintendents of Police in-charge of a district, Station House Officers in-charge of a police station, IGP (zone) and DIG (range)) also have a minimum tenure of two years.

- While the new Assam statute secures the tenure of SHOs and District Superintendents, this tenure is for only 1 year (Act s.12(3)—whereas the SC explicitly directed that certain officers must be provided with a minimum tenure of 2 years.
- The legislation (Act s.12(3)) also does not extend the minimum tenure requirement as far as the SC directed—the DIG and IG are not provided similar safeguards.
- As with DGPs, the nature of the Officers' tenure is tenuous. An override proviso at the conclusion of s.12 in the Act states that in the “public interest” the State Government may transfer the Officers “as may be deemed appropriate to meet any contingency”. This broad power undermines the Supreme Court's entire purpose of securing the tenure of senior officers to immunize them from State Government interference. The fact that the terms “public interest” and “contingency” are undefined, makes this provision subject to tremendous manipulation.
- The grounds upon which the officers may be removed prematurely are overly broad. The SC directive permits premature removal in to fill vacancies caused by “promotion” or “retirement”, but the Assam statute (s.12(3)(ii)(f)) adds that premature removal is also possible to address a vacancy caused by “transfer”. This violates the Court's Order—this ground was specifically omitted by the SC because of the State Governments' historic exploitation of the transfer power.
- As with DGPs, the Assam Act adds additional grounds for the premature removal of a senior officer, namely “inefficiency or negligence or misdemeanour prima facie established after a preliminary enquiry” (Act s.12(3)(ii)(h)). The nature of such a preliminary enquiry is not outlined, and the Act does not provide any procedural protections to Officers who may be subject to such an enquiry (see, as a counter example, the procedural protections provided to officers who are subjected to enquiries under MPA s.13(2)). As such, this new ground for the removal of Officers is subject to manipulation and abuse on the part of the State Government. (Arguably s.12(3)(ii)(h) is redundant given the ability to prematurely remove Officers due to disciplinary issues, contained in s12(3)(ii)(c),(d) of the new Act.)

Additional Concerns regarding the MPA Model

- As with DGPs, the Assam legislation (Act s12(3)(ii)(c),(d)) stipulates that the officers may be removed early due to suspension from service, punishment or dismissal (Act s.6(3)(b),(c)), however, the statute does not stipulate that such discipline must occur “under the provisions of the All India Services (Discipline and Appeal) Rules 19”, as set out in MPA s.13(1)(c),(d).

**Directive 4**

Separate the investigation and law and order functions of the police.

- The Assam legislation enacts a separation of the law and order, from the investigative functions of the police (Act ss.18ff,55ff). Although the SC directive is general in terms of the structure of such a separation of functions, the MPA provides a useful template. When compared with the MPA, the Assam Act fails to fully comply with several provisions recommended to ensure the success of the separation of the 2 functions:

- The legislation creates a state-level Criminal Investigation Department (Act s.61), district-level Special Investigation Cells (s.60), and station-level Crime Investigation Units (s.55). However, minimum tenure of 3-5 years is not provided for officers posted to any of these new entities (Act ss.56, 63). (See conversely the MPA ss.124,134).
- The training for officers within both the Crime Investigation Unit and the Criminal Investigation Department is to be upgraded “from time to time” (Act ss.56, 63), rather than on a regular basis.
- The statute indicates that the new Crime Investigation Unit will be headed by a DSP (Act s.59), however it does not stipulate that the supervisory officer may be assisted by an appropriate number of senior officers “posted for the specific purpose of ensuring quality investigation” (MPA s.128).
- The statute does not provide sufficient detail regarding the mandate of the Crime Investigation Unit. The Act (s.55) stipulates that the Unit shall investigate “organized, economic and heinous” crimes. The MPA, by contrast, enumerates the various crimes that must be investigated by the new unit, including: murder, kidnapping, rape, dacoity, robbery, dowry-related offences, serious cases of cheating, and misappropriation (MPA s.125(1)).
- The Assam legislation does not address the need to provide the new Criminal Investigation Department with adequate funding, scientific facilities and crime analysts (MPA ss.135-137).

#### **Directive 5**

Set up a Police Establishment Board, which will decide all transfers, postings, promotions and other service related matters of police officers of and below the rank of Deputy Superintendent of Police and make recommendations on postings and transfers of officers above the rank of Deputy Superintendent of Police. This Board will comprise the Director General of Police and four other senior officers of the police department, and will be empowered to dispose of complaints from SPs and above regarding discipline and other matters.

- The Assam Act creates a Police Establishment Board, but fails to do so in conformity with the SC directive. The new legislation provides an override, whereby the DGP may effect a transfer of any officer up to the rank of Inspector “as deemed appropriate to meet any contingency” (Act s.45(d)). Further, the Act permits the District SP to unilaterally transfer and post non-gazetted officers (Deputy SP and below) within a district, without any recourse to the PEB whatsoever (Act s.46). These kinds of broad powers eviscerate the PEB and undermine both the letter and spirit of the SC decision. According to the Court, the decisions of the PEB respecting transfer, promotion and posting of all officers at or below the rank of DSP are meant to be virtually binding (the Court allowed that the Government could interfere with the decision of the PEB in “exceptional” cases only after recording its reasons for doing so). The decisions of the PEB for all other officers are recommendatory, however, the Court expressly stated “the Government is expected to give due weight to these recommendations and shall normally accept” them. (See also MPA, s.53(3)).
- The composition of the PEB violates the Court’s directive. The SC stated the PEB must be comprised of the DGP and 4 other senior officers—whereas the Assam Act contemplates only 2 other officers serving together with the DGP (Act s.44).
- The function of the PEB violates the SC directives. The Assam statute indicates only that the PEB shall “accept and examine complaints from police officers about being subjected to illegal orders” (Act s.45(a)). Whereas the SC directive is more broad and empowers the PEB to both hear and conclusively resolve such complaints. The Court stipulated that the PEB is to serve as a forum of appeal for disposing of representations from officers at or above the SP level,

regarding: (i) their promotion or transfer; (ii) disciplinary proceedings against them, or; (iii) their being subject to illegal or irregular orders.

- The Court stated that the PEB must generally review the functioning of the police in the state. This function is not addressed in the Assam legislation (Act s.45).

#### Additional Concerns regarding the MPA Model

- The MPA provides that all police personnel subject to a promotion or transfer will be provided with a minimum tenure of 2 years (MPA s.53(7)). This protection is absent from the Assam Act.

#### **Directive 6**

Set up independent Police Complaints Authorities at the state and district levels to look into public complaints against police officers in cases of serious misconduct, including custodial death, grievous hurt, rape in police custody, extortion, land grabbing and serious abuse. The Complaints Authorities are binding on criminal and disciplinary matters.

The state level authority is to be chaired by a retired judge of the High Court or Supreme Court to be chosen by the state government out of a panel of names proposed by the Chief Justice. It must also have three to five other members (depending on the volume of complaints) selected by the state government out of a panel of names prepared by the State Human Rights Commission, the Lok Ayukta and the State Public Service Commission. Members of the authority may include members of civil society, retired civil servants or police officers or officers from any other department.

The district level authority is to be chaired by a retired district judge to be chosen by the state government out of a panel of names proposed by the Chief Justice of the High Court or a High Court Judge nominated by him or her. It must also have three to five members selected according to the same process as the members of the state level Police Complaints Authority.

- The new Assam Act creates a Police Accountability Commission at both the State and District level, but fails to fully comply with the Court's directive. Importantly, the statute defies the Court's order by failing to stipulate that the recommendations of the District-level PAC regarding disciplinary and criminal matters, are binding on the State Government (Act s.86)
- With regard to the composition of the State-level Police Accountability Commission, the statute properly stipulates that the Chair must be a retired Judge of the High Court (Act s.71(a)), but fails to adhere to the Court's directive that the Chair must be selected by the State Government from among a panel of names presented by the Chief Justice. [The SC directive regarding the manner of selecting the Chair for the District Level PAC is violated on the same basis (Act s.84(2))]
- The Act (ss.71-72) ignores the Court's directive that all members of the State-level PAC (other than the Chair), must be selected by the Government out of a panel of names prepared by the Lok Ayukta, the State Human Rights Commission and the State Public Service Commission. (MPA s.161 creates a similar requirement, calling for a transparent selection process). [The SC directive regarding the manner of selecting the remaining members of the District Level PAC is violated on the same basis (Act s.84) (see also MPA s.173(5))]
- The Assam Act authorizes the District-level PAC to inquire into misconduct, but defines this narrowly in defiance of the Court's ruling (Act s.85(a),(b)). The SC directive authorizes inquiries into serious abuses of authority and land-grabbing—2 provisions that are missing from the Assam statute.

- Both the SC directive and the MPA (ss.163, 165) call for the provision of staff assistance to District-level PAC members—this aspect is missing from the Assam legislation (Act s.84(4)).

#### Additional Concerns regarding the MPA Model

- The requirements under the MPA respecting the composition of the PAC are more stringent, and have not been followed. For example, MPA s.160 states that the PAC may include a retired DGP or retired officer with experience in public administration, but only if such persons hail from a different state. The MPA states that the PAC should include a minimum of 5 persons, including someone with experience in the law as a prosecutor or professor (MPA s.160).
- The Act (s.40) excludes certain persons from serving on the PAC, but fails to exclude persons above 70 years of age (MPA s.162(b)).
- The legislation provides grounds for the removal of members from the State-level PAC (Act s.75), but fails to indicate that vacancies in the PAC shall be filled as soon as possible (MPA s.161(4). [A similar problem exists regarding the District-level PAC, Act s.84 (compare to MPA s.173(4))]
- The powers of the PAC to compel evidence, etc. are fairly broad in the new legislation at s.79, however, the full scope of powers and jurisdiction awarded to the PAC under MPA s.168 are absent (e.g. the power to ensure the protection of witnesses, visit station houses, and operate as a civil court).
- The function of the State-level PAC is to inquire into allegations of “serious misconduct”-however this term does not extend to include inquiring into situations of arrest or detention without due process of law (MPA s.167(1)(d)).

<b>Miscellaneous</b>
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- The Assam Police Act includes an omnibus exemption clause, at s.89, which protects from civil liability any action taken in “good faith” by the State Government, the SPC, and the PAC. This type of omnibus exemption clause is dangerous and subject to significant abuse, as the government may seek to cloak any mishandling of police affairs under the guise of the undefined notion of “good faith”, and thereby immunize the police and the state from the very type of accountability the Court has required!
- The statute contains a clause which immunizes police officers from prosecution for an offence, absent the sanction of the State Government (s.102). This provision is an anachronism, and must be removed. It is entirely contradictory to both the letter and spirit of the SC ruling and the guiding philosophy of the legislation—which, as the Act’s preamble states, is “to make the police personnel...accountable to law”. If the State may intervene to prevent prosecutions against unlawful officers from proceeding, the potential for collusion and the immunization of human rights abuses is extremely significant.
- The statute requires Police stations to prominently display all relevant information that must be made public, but fails to specify, in accordance with the MPA (s.12(7)) that this requirement includes “the Supreme Court guidelines and directions” together with “departmental orders on arrests, and the details regarding the persons arrested and held in lock-ups”.
- The legislation includes provisions related to mandatory post-induction training of new police recruits, as well as mandatory pre-promotion training (Act s.19). However, it fails to require annual re-training of existing officers (MPA s.141).

- The legislation empowers the state to appoint Special Police Officers (s.23). Broad powers to create Special Police Officers are unwarranted, given the state's ample powers to appoint regular police officers. The creation of Special Police Officers is arbitrary and may be subject to abuse by the State Government—while Special Police Officers would possess the same powers as ordinary police officers, due to the emergency nature of their appointment they will not have adequate time to receive the same level of comprehensive training (in the use of firearms, the principles of law relating to the use of force, and the legal rights of the public) that all officers must be required to undergo. It is also unclear in the Assam legislation whether such Special Police Officers will be answerable to the new Police Accountability Commission (Act s.69ff).
- Chapter V of the Act, entitled “Policing in the Context of Public Order and Internal Security Challenges” should be omitted in its entirety. This Chapter has no place in the Assam Police Act—the concerns addressed in Chapter V are more appropriately addressed in separate, specific security related legislation. Emergencies of public order and problems of insurgency require a unique and carefully tailored response, which goes beyond the scope of the routine police requirements and regulations contained in the Assam statute.
- Although the Act lists duties and responsibilities of police (Act ss.47-48) which conform with the MPA (MPA ss.57-58), certain additional guarantees are not provided:
  - The statute lacks any provisions outlining the duty of police officers upon arrest or detention of any individual (to employ only reasonable force, provide access to a lawyer and doctor, etc.). (See as a counter example, Himachal Pradesh Police Act s.65)
  - The statute does not prevent a police officer from serving in his Home police station or district. (See as a counter example, Himachal Pradesh Police Act s.86(2))

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