Uttarakhand Government Compliance with Supreme Court Directives on Police Reform

UTTARAKHAND 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 new Uttarakhand legislation creates a State Police Board (SPB), however the Board is not empowered to make binding recommendations (Act s.35), despite the clear directive from the Court that the SPB's decisions must be binding to avoid undue influence on the police. The Act stipulates, instead, that the SPB's mandate is simply to provide "suggestions" and "advice" to the state government.

- The composition of the SPB 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** (Sorabjee Committee) is not met. It calls for 5 independent members (none of whom can be sitting government persons), and adds that they must be appointed only on the recommendation of a tri-partite Selection Panel (MPA ss.42, 43, 44). Conversely the Bill proposes only 2 independent members (Act s.30), who are selected by a panel that is composed in a manner that does not mirror the MPA (Act s.31).

    - The MPA stipulates that a High Court Judge (retd) nominated by the Chief Justice must be a member of the SPB, that 2 members must be women, and that minorities must be adequately represented (MPA s.42). The proposed term of service under the MPA is 3 years, for a maximum of 2 terms (MPA s.46); whereas the Act calls for a 2-year non-renewable term (Act s.33).

    - The DGP is the sole police officer who ought to serve on the SPB, and that this individual should function as member-secretary (MPA s.42(1)(f)). The Act, conversely, contemplates 2 police officers as members, with the Add'l DGP serving as secretary (Act s.30(g)).

    - Although the Act broadly mirrors the MPA provisions for the removal of independent members (Act s.34(1)), the legislation lacks the requirements contained in MPA s.47, which stipulate that removal from the SPB can only occur upon resolution passed by a two-thirds majority of the Board, and with reasons provided in writing.

        - The Uttarakhand statute also adds that independent members may be removed "on recommendation of the Selection Panel" (Act s.34(1)(f)). This ground is not contained in the MPA, and is subject to potential abuse, given the government domination of the proposed selection panel, set out at s.31 of the new Act.

    - The **Ribeiro Committee** model is not met—the Ribeiro model requires the 3 independent members to be chosen by a panel created by the Chair of the NHRC, and stipulates that

a High Court judge nominated by the Chief Justice, must be a member (Ribeiro Recomm. 1.2).

- The term of service for independent members (Act s. 52(1)) does not comply with the Ribeiro model, which calls for 3 year non-renewable term (Ribeiro, Recomm. 1.3)

- The Ribeiro model does not contemplate the Home Secretary serving on the SPB, and stipulates that the DGP must be the sole police officer on the Board, and serve as its secretary (Ribeiro, Recomm. 1.2).

- The **National Human Rights Commission** model is not met—the NHRC model calls for two sitting or retired High Court judges (nominated by the Chief Justice) to sit as members of the SPB (NHRC petition, p.87). In the alternative, one judge may serve, together with a member of the State Human Rights Commission or the Lok Ayukta of the State (NHRC petition, p.87).

- The NHRC model also does not contemplate the Home Secretary serving on the SPB, and stipulates that the DGP must be the sole police officer on the Board, and serve as its secretary (NHRC petition, p. 87).

- The function of the SPB does not comply with the SC directive. The Court expressly stated that the purpose of the SPB is to ensure that the State Government does not exercise unwarranted influence or pressure on the Police, and its functions must include giving directions for the performance of preventative tasks by the Police. Each of these specific functions/purposes is absent from the Act s.35 (See also Ribeiro Recomm. 1.5, and NHRC petition, p. 88).

- The function of the SPB also does not mirror the models recommended by the Supreme Court. For example, the MPA states that one of the functions of the SPB is to recommend the DGP candidates for appointment by the State Government (MPA s.48). This function is absent from s.35 of the Uttarakhand legislation.

- In addition, while the new statute calls for an annual report to be prepared by the SPB for the State Government, which is then obligated to place such report before the Legislature (Act s.37)—this does not fully comply with the Court's order. The directive stipulates that the report of the SPB must proceed directly to the State Legislature. (See also Ribeiro 1.5; NHRC Petition, p.88) This aspect of the decision ensures that the report proceeds on a timely and unadulterated basis to the Legislature itself. (Note: the MPA (at 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.

- Although the Uttarakhand legislation sets out a minimum tenure requirement of 2 years, it stipulates that this tenure may be reduced in the event of superannuation (Act s.20(3)). This directly violates the SC directive, wherein the Court stated that the tenure should run for 2 years independent of any retirement related issues that may arise [see also MPA s.6(3)]. To circumvent the Supreme Court's 2 year minimum requirement, the government could simply appoint candidates within 6 months of their date of retirement!

- The new legislation does not require that the state government select a DGP from a panel of candidates chosen by the UPSC, a non-state organization, as directed by the SC (Act s.20(2)). Instead, the Uttarakhand statute calls for an undefined "screening committee" to

prepare a panel of suitable DGP candidates. This screening committee will not function in an objective manner—it will be "constituted by the Government" and subject to state domination and control. [The selection process also contradicts MPA ss. 6(2), which outlines in detail the criteria upon which a DGP is to be chosen.]

- The new legislation fails to enumerate the specific criteria which must be used for selecting a DGP (Act s.20(2)), in accordance with the Court's directive (length of service, very good record, and range of experience). The failure to entrench selection criteria renders the process arbitrary and subject to greater state government manipulation.

- 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" [State Police Board]. However, the Uttarakhand Act permits the Government to act unilaterally in removing a DGP based on one of the enumerated grounds in s.20(4) of the legislation.

- The nature of the guaranteed tenure is quite tenuous, as the enumerated grounds for premature removal themselves do not comply with the SC judgment. Uttarakhand has added grounds not contemplated by the Court:

    - Namely on "promotion or transfer to a higher or similar post" (s.20(4)(iii)). This provision opens the DGP up to potential pressure and manipulation on the part of political masters, particularly since the individual's consent to the promotion is not required under the legislation. (See, conversely MPA s.6(3)(e), which calls for consent in similar circumstances.)
    - In addition, the Uttarakhand Act allows for premature removal of a DGP for "gross inefficiency and negligence" where "a prima facie case of a serious nature is established after a preliminary enquiry" (Act s.20(5)). 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 DGPs is subject to abuse and manipulation by the State. (Arguably s.20(5) is redundant given the ability to prematurely remove Officers due to disciplinary issues, contained in s.20(4)(i) of the new legislation.)

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 Uttarakhand legislation provides a minimum tenure to some senior officers, this tenure is actually quite fragile. The legislation contains an override proviso at s.28(1)(g) that states that a senior officer may be removed prematurely for any reason consistent with the "public interest". This broad and undefined power undermines the Supreme Court's objective of securing the tenure of senior officers to immunize them from Government interference.

- Although the new legislation (Act s.28(1)) provides a minimum tenure of 2 years for certain officers (the Superintendent of police, and DIG (Range), it does not extend the minimum tenure requirement as far as the SC directed—the IG (Zone) is not provided any guaranteed tenure whatsoever. In addition, the Station House Officer is granted only 1 year tenure, rather than the Court prescribed minimum of 2 years.

- As with DGPs, the Act adds additional grounds for the premature removal of senior officers not contained in the SC directive--namely for "gross inefficiency and negligence" where "a

prima facie case of a serious nature is established after a preliminary enquiry" (Act s.28(2)). The problems with this kind of permissive language are outlined under the discussion relating to Directive 2, above.

Directive 4
Separate the investigation and law and order functions of the police.

- The Uttarakhand legislation provides very little information on the separation of the investigation function, from the law and order function of the police. To the extent some separation of functions is contemplated, this separation is not immediate—the Act simply states that the "State Government may create" a separation of functions at some point in the future (Act s.50(1)). This provision is entirely speculative, and leaves the decision about compliance with the Court's directive entirely in the State Government's discretion.

- 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 Uttarakhand statute fails to fully comply with several provisions recommended to ensure the success of the separation of the 2 functions:

    - The statute speaks only to the creation of Crime Investigation Units (Act s.50(1)). It does not implement a State level Crime Investigation Department (MPA s.131ff), nor district level Special Investigation Cells (MPA s.129).

    - The legislation does not delineate the types of offences to be investigated by the new Unit. The MPA, s.125(1), specifies that certain significant offences require dedicated investigative staff, such as crimes of: murder, kidnapping, rape, dacoity, robbery, dowry-related offences, serous cases of cheating, and misappropriation.

    - Due to the brevity of the Act, there is no detail whatsoever regarding important items, including: training for officers assigned to the Crime Investigation Unit, tenure, funding, the provision of staff, adequate scientific facilities, crime scene technicians and legal/forensic advice (see MPA ss.126-27, 133-137)

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.

- Although the Uttarakhand Act creates a Police Establishment Committee (PEC), the efficacy of this committee is dubious. The legislation contains a broad and permissive override clause which permits the State Government to "alter or amend the decisions of the Committee" in any "such matters as it may deem fit" (Act s.38(3)). This wide and undefined power entirely subverts the Supreme Court's goal of countering the prevailing practice of subjective appointments, transfers and promotions through the creation of an Establishment Committee, which is meant to be immunized from inappropriate government interference.

- The PEC contemplated in Uttarakhand fails to meet the parameters articulated by the Court:

- First, the legislation does not grant the PEC virtually binding power over the transfer, promotion and posting of all officers at or below the rank of DSP, as the Supreme Court directed. The statute restricts the PEC's jurisdiction to only "transfers", at s.38(2)(c).

- Second, the Uttarakhand statute contemplates an advisory role for the PEC respecting posting and transfers of officers at the rank of Add'l SP or above (Act s. 38(2)(d)). Conversely, the SC indicated that in many instances the view of the PEC ought to bind the State Government. It stated that although the decisions of the PEC for officers at the DSP rank or above (which would include Add'l SP and above) are recommendatory, "the Government is expected to give due weight to these recommendations and shall normally accept" them. (See also MPA, s.53(3))

- Third, the SC directive explicitly provides the Establishment Committee a wide mandate to dispose of representations from officers concerning "promotion, transfer, disciplinary proceedings, or their being subjected to illegal or irregular orders" along with "generally reviewing the function of the police in the state." Conversely, the authority granted in the HP legislation is narrower in scope. It permits the PEC only to analyze the grievances of police personnel and "suggest remedial measures to the State Government" (Act s. 38(f)). [Note that s.26 of the new Act speaks to appeals by police against orders of punishment, but completely fails to acknowledge the role of the PEC in this regard!]

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 Uttarakhand 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 Uttarakhand Act creates a Police Complaints Authority, but fails to formally comply with the Court's directive (Act ss.64, 71). Most importantly, the SC directive that the recommendations of the PAC regarding disciplinary and criminal matters must be binding on the State Government, has not been followed (see also MPA s.171(b)).

- Only one PCA is created for the entire state, rather than creating both a state level and a district level authority, as instructed by the Court (see also MPA s.173).

- The composition of the PCA does not comply with the Court's directives.

    - The judgment clearly indicated that the Chair must be a retired Judge of the High Court, selected by the State Government from among a panel of names presented by the Chief Justice (see contra Act s.65).

    - The statute (s.65) ignores the Court's directive that members of the PCA (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).

- The Uttarakhand Act authorizes the PCA to inquire into serious misconduct, but defines this narrowly at s.71(2). The SC directive authorizes inquiries into extortion, land-grabbing and serious abuse of authority.

- Both the SC directive and the MPA (ss. 163, 165) call for "suitable remuneration" for members of the PCA. Although the new statute (Act s.67(3)) provides for compensating Commission members, it does not stipulate that compensation "shall not be varied to their disadvantage after appointment" (MPA s.163(3)). This important safeguard is needed to guard against reprisals and attempts to influence the PCA. In addition, the provision of remuneration for PCA staff is vague and indeterminate (Act s.69(4)).

- The Act permits the State government 6 months within which to establish its PCA (Act s.64). Whereas the SC's directive is intended to have immediate effect, and does not contemplate staged implementation.

<u>Additional Concerns regarding the MPA Model</u>

- The requirements under the MPA respecting the composition of the PCA are more stringent, and have not been followed. For example, MPA s.160 states that the PCA may include a retired DGP or retired officer with experience in public administration, but only if such persons hail from a different state. This requirement is absent from the Uttarakhand legislation (Act s.65), making the PCA more vulnerable to control and influence by vested interests within the State's police establishment.

- The legislation (Act s.67) fails to limit the number of eligible terms for PCA members to 2, as per the MPA s.163(2).

- The statute (Act s.71(4)) authorizes the PCA to monitor the status of internal departmental inquiries into more general police misconduct, but fails to define "misconduct" (see MPA s.167(3)).

- In cases directly inquired by the PCA, the Model Police Act indicates that the PCA may direct the State Government to, *inter alia*, register an FIR, and that such direction will have binding effect (MPA s.171(1)(b)). The Uttarakhand legislation provides only for advisory recommendations in this regard (Act s.72(3)).

- The statute is not entirely commensurate with the broad powers and jurisdiction awarded to the PCA under the MPA ss.168-170 (including the power to ensure the protection of witnesses and statements, visit station houses, summon witnesses, receive evidence, discover documents and requisition public records).

- The legislation addresses the rights of those who complain to the PCA (Act s.74), but fails to provide for: the right to attend hearings, interpretation assistance, or the ability to appeal an unsatisfactory outcome (MPA s.177(4),(5),(6).)

- The Uttarakhand statute calls for staff to be selected by the PCA "in accordance with the procedure, prescribed by the Government" (Act s.69(2))—this fails to comply with the MPA provision which requires that the selection of Commission staff through a "transparent process" (MPA s.165(3)).

Miscellaneous

- The statute contains a wide opt-out provision, which exempts the State from complying with the legislation within the first 3 years of its passage, if any "difficulty arises" and opting out is "necessary or expedient" (Act s.88(1)). This permissive override is perilous and vulnerable to manipulation, as the government may simply defer complying with its own legislation based on the assertion that "difficulties" have arisen in the implementation process. The existence of s.88(1) increases the likelihood of state influence, and entirely undermines the Supreme Court's directives.

- The Uttarakhand Police Act includes an omnibus exemption clause, at s.75, which protects from liability any action taken in "good faith" by the State Government, the State Police Board, the PCA, its members and staff. Omnibus exemption clauses are dangerous and subject to abuse. Such clauses are 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 enable" the police to function as an "accountable and people friendly and responsive agency". Exemptions of this kind allow the government 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's ruling is meant to help entrench.

- The legislation includes provisions related to the establishment of training policies and institutions (Act s.15), however the implementation of such initiatives is left entirely at the discretion of the State. The MPA stipulates that for any professional police force, training of new police recruits, annual in-service training and pre-promotion training must be obligatory (MPA ss.139, 141).

- Section 39 of the new Act lists the functions, duties and responsibilities of police officers, but omits the social responsibilities of police, including: behaving with courtesy to senior citizens, women, and children; guiding and assisting the poor and indigent; preventing the harassment of women, and; remaining impartial during conflict between communities, classes and castes (MPA s. 58)

    - The Bill 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 Bill 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))

- Village Guards: the statute (Act s.56ff) contemplates the use of Village Guards to facilitate policing in more remote areas, however it fails to specify what type of training such individuals will be required to undertake (see by contrast MPA s.72). In addition, the duties of such Village Guards are overly broad—they are directed to remain alert and sensitive to "any

information about any suspicious activity" or "movement of suspicious persons" (Act s.59(3)). This threshold is too low and subject to abuse. The scope of the Village Guards duties should be restricted to reporting on actual criminal activity, rather than speculative wrongdoing.

- Chapter VII of the Act, entitled "Public Order and Internal Security" should be omitted in its entirety. This Chapter has no place in the Uttarakhand Police Act—the concerns addressed in Chapter VII are more appropriately addressed in separate, 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 statute.

- Although the Act creates a Welfare Bureau for Police Personnel, to address police concerns regarding education, financial security, medical care and education, the statute does not contain any provisions regarding maximum working hours (unlike MPA ss. 188).

- The Statute is unique among recently drafted Police legislation, in its incorporation of a formalized witness protection program (including name changes and re-location) (Act s.54), along with measures to ensure the safety and protection of witnesses in the face of reprisals from accused parties (Act s.55)

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