This is the first time that a comprehensive study has been undertaken regarding the working and effectiveness of the habeas corpus remedy in Sri Lanka. The analysis is undertaken with the broad objective of not only illustrating judicial attitudes to the freedoms of life and liberty but also highlighting paucities in the working of the legal and judicial systems with the specific aim of redressing such paucities.

The formulation of a body of recommendations and reforms is a key part of this effort. Thus the authors propose the enactment of a Habeas Corpus Act for Sri Lanka, which is particularly engineered towards making the remedy more efficacious and better equipped to serve the cause of justice for the poor and disadvantaged.

From the Introduction
Habeas Corpus in Sri Lanka:
Theory and Practice of the Great Writ in Extraordinary Times

Kishali Pinto-Jayawardena & Jayantha de Almeida Gunaratne

Law & Society Trust

January 2011
Habeas Corpus in Sri Lanka: Theory and Practice of the Great Writ in Extraordinary Times

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'It is the spirit and not the form of law that keeps justice alive'

Earl Warren (1891-1974) 14th Chief Justice of the United States Supreme Court

In memory of our friend and colleague, the late Mr Suranjith Hewamanne, Attorney-at-law whose efforts to advance the cause of justice in Sri Lanka remain unparalleled
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## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AC</td>
<td>Appeal Cases</td>
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<tr>
<td>AER</td>
<td>All England Reports</td>
</tr>
<tr>
<td>ASP</td>
<td>Assistant Superintendent of Police</td>
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<tr>
<td>CA</td>
<td>Court of Appeal</td>
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<td>CID</td>
<td>Criminal Investigation Department</td>
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<tr>
<td>CLW</td>
<td>Ceylon Law Weekly</td>
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<td>ER</td>
<td>Emergency Regulations</td>
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<tr>
<td>HCA</td>
<td>High Court Application</td>
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<tr>
<td>HL</td>
<td>House of Lords</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICRC</td>
<td>International Committee of the Red Cross</td>
</tr>
<tr>
<td>IGP</td>
<td>Inspector General of Police</td>
</tr>
<tr>
<td>JVP</td>
<td>Janatha Vimukthi Peramuna</td>
</tr>
<tr>
<td>KB</td>
<td>King’s Bench</td>
</tr>
<tr>
<td>LESL</td>
<td>Legislative Enactments of Sri Lanka</td>
</tr>
<tr>
<td>LTTE</td>
<td>Liberation Tigers of Tamil Eelam</td>
</tr>
<tr>
<td>MCA</td>
<td>Military Commissions Act</td>
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<tr>
<td>NLR</td>
<td>New Law Report</td>
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<tr>
<td>OIC</td>
<td>Officer in Charge</td>
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<td>PC</td>
<td>Privy Council</td>
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<tr>
<td>PSO</td>
<td>Public Security Ordinance</td>
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<tr>
<td>PTA</td>
<td>Prevention of Terrorism Act</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>QB</td>
<td>Queen’s Bench</td>
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<tr>
<td>SC</td>
<td>Supreme Court</td>
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<tr>
<td>Sri.L.R.</td>
<td>Sri Lanka Law Reports</td>
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<tr>
<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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**Latin Maxims and Phrases – General Explanations**

<table>
<thead>
<tr>
<th>Latin Phrase</th>
<th>English Translation</th>
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<tbody>
<tr>
<td><em>A fortiorari</em></td>
<td>“all the more reason why”</td>
</tr>
<tr>
<td><em>Ab initio</em></td>
<td>“from the beginning; from the first act; from the inception”</td>
</tr>
<tr>
<td><em>Ad hoc</em></td>
<td>“not regular; for this special purpose”</td>
</tr>
<tr>
<td><em>Ad nauseam</em></td>
<td>“time and time again”</td>
</tr>
<tr>
<td><em>Amicus curiae</em></td>
<td>“a friend of the court”</td>
</tr>
<tr>
<td><em>Bona fide</em></td>
<td>“in good faith”</td>
</tr>
<tr>
<td><em>Corpus/corpora</em></td>
<td>“body”</td>
</tr>
<tr>
<td><em>Cursus curiae</em></td>
<td>“consistently established as judicial precedent”</td>
</tr>
<tr>
<td><em>Ex debito justitiae</em></td>
<td>“as a matter of right; as a legal obligation”</td>
</tr>
<tr>
<td><em>Ex facie</em></td>
<td>“on the face [of it]”</td>
</tr>
<tr>
<td><em>Ex mere motu</em></td>
<td>“of the court’s own accord”</td>
</tr>
<tr>
<td><em>Ex parte</em></td>
<td>“without the other party”</td>
</tr>
<tr>
<td><em>Habeas corpus</em></td>
<td>“you have the body”</td>
</tr>
<tr>
<td><em>In camera</em></td>
<td>“in chambers; in private”</td>
</tr>
<tr>
<td><em>In toto</em></td>
<td>“totally”</td>
</tr>
<tr>
<td><em>In vacuo</em></td>
<td>“in isolation”</td>
</tr>
<tr>
<td><em>Inter alia</em></td>
<td>“among other things”</td>
</tr>
<tr>
<td><em>Inter se</em></td>
<td>“that which is between”</td>
</tr>
<tr>
<td><em>Intra vires</em></td>
<td>“within powers”</td>
</tr>
</tbody>
</table>
Ipse dixit  
“an unsupported statement that rests solely on the authority of the individual who makes it”

Ipso facto  
“by the fact itself”

Mala fide  
“in bad faith”

Mutatis mutandis  
“the necessary changes having been made”

Non-sequitur  
“an argument in which the conclusion does not follow from the initial premises relied upon”

Obiter  
“not forming the crux or the ratio of the case”

Officio nominii  
“by name of office”

Per se  
“by itself; by themselves”

Prima facie  
“On the first appearance”

Ratio decidendi  
“binding core of the decision in issue”

Res Judicata  
“a matter already judged”

Status quo  
“the present position”

Uberrimae fides  
“duty to disclose”

Ultra vires  
“beyond the powers”
Preface

Initially conceived of in 2009 as a Study of a limited number of judgments on the writ of habeas corpus by Sri Lanka’s Court of Appeal, this effort ultimately exceeded its original objectives due to the unprecedented number of decisions and bench orders which came into our hands. This is testimony to the untiring endeavours of all those who worked with us on this research.

The final product is a comprehensive analysis of the functioning of this most vital constitutional remedy in relation to arbitrary detention and enforced disappearances.

We hope that this publication will be useful for scholars, legal practitioners, judicial officers, teachers of the law and students. However, that result by itself, should not suffice. Procedural and substantive changes to the current law and practice relating to habeas corpus are necessary, even imperative.

This is a key recommendation of the research and must yet be an achievable objective in the interests of breathing new life into the Constitution and the law for the sake of all people living in this country.

The authors,
Colombo, 2011
Executive Summary

The writ of *habeas corpus* remains one of the cornerstones of ensuring the liberty of persons and is a crucial antecedent to the right of judicial review of an enforced disappearance. Yet credible data as well as detailed analysis relevant to the functioning of the *habeas corpus* remedy in Sri Lanka is significantly lacking. The present Study attempts to fill this lacuna by examining the efficacy of the *habeas corpus* remedy in the context of arbitrary detention and enforced disappearances in Sri Lanka. The Study analyses 880 orders and substantive judgments along with relevant pleadings thereto from the pre-independence period up to the modern era.

The Historical Background to the Writ Remedy of *Habeas Corpus*

Early jurisprudence appeared to be conservative, as reflected in the case of *W. A. De Silva*\(^1\) (1915). In this case, the Court concluded that it had no power to review by *habeas corpus* the acts of military authorities in the exercise of their martial law powers, such as the legality of arrests and detentions. Yet in the celebrated case of *Bracegirdle*\(^2\) (1937), the Court categorically held that the Governor’s powers were not absolute and that the power may be exercised only under emergency conditions, which were subject to judicial scrutiny. Further advances were made in *Thomas Perera’s case*\(^3\) (1926), where the Supreme Court held the view that although it lacked the power to review the order of a Commissioner of Assize in issuing a warrant of commitment remanding a prisoner to custody, it could still order the discharge of the prisoner where such warrant is found to be *ex facie* defective.

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Judicial Responses during 1948-1977

The Study discusses several key decisions during this period. In *Thamboo v. the Superintendent of Prisons*⁴ (1958), it was held that a writ did not lie against an order of committal that is based on a judgment of the Supreme Court or against a committal after trial by an inferior court acting within its jurisdiction. The decision clearly limited the scope of the remedy to *ex facie* illegal detentions, thereby rejecting more liberal American jurisprudence on the subject.⁵ This conservatism gained an added dimension after 1971, following the promulgation of Emergency Regulations under the Public Security Ordinance No.25 of 1947 (PSO). Accordingly, in cases such as *Hidramani v. Ratnavale*⁶ (1971), it was held that where a detention order that is valid on its face is produced, the burden to prove facts necessary to controvert the matter stated in the detention order falls on the petitioner. It was, however, held that despite the good faith of the Permanent Secretary being essentially non-justiciable, an ouster clause contained in Emergency Regulations did not preclude a court from granting a remedy where the detention was unlawful.

A more liberal view was adopted by the Court in *Gunesekera v. De Fonseka*⁷ (1972). The Court held that where the arresting officer was not personally aware of the actual offence for which the suspect was arrested, such arrest was liable to be declared unlawful. Greater

⁴ (1958) 59 N.L.R. 573.
⁵ In the U.S., the courts have stressed on the flexible nature of the writ and moved away from its original English common-law roots. See *Jones v. Cunningham* 371 US 236 (US SC, 1963). Accordingly, the U.S. courts began to allow *habeas corpus* review not only in cases of illegal detention, but also in cases where the place of detention or the condition of detention was challenged. See *Walters v. Henderson* 353 F Supp 556, 557 (ND Ga, 1972). For a further discussion, see David Clark & Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (Clarendon Press, Oxford, 2000), at 125 and 223.
⁷ (1972) 75 N.L.R. 246.
caution was observed in *Gunasekera v. Ratnavale*\(^8\) (1972), as the application under consideration was against the Secretary of Defence. In this case, the affidavit of the respondents that the detention was under Emergency Regulation 18(1), and the absence of proof of an ulterior motive or collateral purpose, led the Court to hold that the detention order was *ex facie* valid. It was further held that the impugned Regulation 18(1) was *intra vires* the Public Security Ordinance (1947), and not subject to judicial review, which essentially undid the only positive feature of *Hidramani v. Ratnavale*.*\(^9\)

Based on the above analysis, the Study concludes that early jurisprudence on *habeas corpus* was generally marked by excessive conservatism and a manifest reluctance by the courts to challenge the executive.

**The Supreme Court’s Response under the 1978 Constitution**

The Study analyses several key judgements of the Supreme Court in this regard. In *Rasammah v. Major General Perera*\(^10\) (1982), it was held that where a *prima facie* case is made out by the petitioner in an application made under Article 141 of the Constitution, the Court of Appeal had a wide discretion to determine the stage at which the detainee should be produced. It was further held that when the Court of Appeal directs a judge of any court of first instance to inquire and report in terms of the proviso to Article 141, it is lawful for the Court to require the person alleged to be illegally or improperly detained to be brought up before such court at the earliest opportunity.

Another key case during this period was the case of *Chelliah*\(^11\) (1982), where there was disagreement between the judges with regard to what

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\(^8\) (1972) 76 N.L.R. 316.
\(^9\) *Supra* note 6.
\(^10\) [1982] 1 Sri L.R. 30.
constituted ‘unlawful activity’ under the Prevention of Terrorism Act No.48 of 1979 (PTA). Justice Weeraratne was of the opinion that the words ‘unlawful activity’ included not only acts that were not lawful, but also offences that are triable in a court. Justice Wimalaratne, however, expressed the view that the words ‘unlawful activity’ did not include offences for which a person could be taken to a court, but only acts connected with or concerned in the commission of an offence. Justice Victor Perera was of the opinion that there was evidence of the commission of a specified offence and that therefore the person concerned could not be detained for unlawful activity, but was liable to be charged with the offence. These divergent views resulted in the detainees facing different consequences. One of the detainees in particular was held to be in unlawful custody, as a cognizable offence was applicable in his case, which subjected him to the regular criminal justice system.

In the landmark decision of *Juwanis v. Lathif*¹² (1988), Justice Mark Fernando further developed the scope of *habeas corpus*. It was held that where the respondents denied the arrest and detention of the person concerned or denied having that person in their custody or control, it was not necessary for the Court of Appeal to satisfy itself in the first instance that the person was within the custody of, or detained by, or in the control of, the respondents, before referring the matter to the Magistrate’s Court for inquiry. This marked a significant step towards improving the efficacy of the remedy, as the mere denial of the respondents did not preclude the Court from ordering a further inquiry into the matter.

In *Shanthi Chandrasekeram’s case*¹³ (1992), the Supreme Court discussed the ambit of Article 126(3) of the Constitution, under which the Court of Appeal is required to refer a matter to the Supreme Court where there is *prima facie* evidence of an infringement of a

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xvi
fundamental right by a party to the application. Consequently, it was held that the jurisdiction of the Supreme Court extends not only to the question of infringement, but also to the entire application. A critical development in this regard took place following the Supreme Court decision in Machchavallavan\(^{14}\) (2005). In this case, the Court was confronted with the question of whether a petitioner had the burden of invoking the Supreme Court’s jurisdiction when evidence of the infringement of a fundamental right came to light in a \textit{habeas corpus} application being heard in the Court of Appeal. The Court responded by stating that it was the duty of the Court of Appeal to refer such matters to the Supreme Court. Moreover, despite a doubt as to the precise identity of the state officer responsible for the disappearance of the person concerned, it was concluded that army authorities were responsible to account for the whereabouts of the two sons of the appellant who had ‘disappeared’ and therefore the state was responsible for the infringement of the fundamental rights of the person guaranteed by Article 13(4) of the Constitution.

Though the Supreme Court has been responsible for some developments in the law during the past decades as evidenced by the above cases, the \textit{habeas corpus} remedy has remained vulnerable when confronted with the exigencies of emergency. Legal commentators including L.J.M. Cooray question the possibility of suspending the writ of \textit{habeas corpus} through regulations under the Public Security Ordinance.\(^{15}\) As pointed out by Cooray, the Court had occasion to consider this question in the case of \textit{Weerasinghe v. Samarasinghe}\(^{16}\) (1966), but unfortunately chose not to, despite the fact that it was a case where the doctrine of separation of powers was directly at issue. Since \textit{Weerasinghe},\(^{17}\) no clear opportunity has been presented to the Court to make a pronouncement on the matter. In light of recent U.S.

\(^{14}\) [2005] 1 Sri L.R. 341.
\(^{15}\) See L.J.M Cooray, \textit{Reflections on the Constitution and the Constituent Assembly} (1971).
\(^{16}\) (1966) 68 N.L.R. 361.
\(^{17}\) \textit{Ibid.}
jurisprudence, as seen in the trilogy of liberty cases, Hamdi,\textsuperscript{18} Hamdan\textsuperscript{19} and Boumedienne,\textsuperscript{20} and longstanding legislative prohibitions in the U.K., it is clear that Sri Lanka requires the immediate reaffirmation of the inviolability of the \textit{habeas corpus} remedy.

\textbf{The Response of the Court of Appeal}

The conservative judicial approach in Sri Lanka, which weakens the protection of liberty, owes its genesis to the conservative thinking of some English judges in the early stages of the development of this remedy. Despite Sri Lanka’s faithfulness to such conservatism, subsequent English cases have deviated from this approach.\textsuperscript{21} It must, however, be observed that with the change of political regime in 1994, the Court of Appeal appeared to show a more sympathetic response to writs of \textit{habeas corpus}, particularly during the second insurrection in the South. Yet, this judicial empathy was short-lived; judges began to revert to conservative attitudes in later years.

\textbf{The 1981-1993 Period}

In \textit{Senthilnayagam v. Seneviratne}\textsuperscript{22} (1981), the Court held that the statutory requirement that a person making an arrest shall inform the arrested person of the nature of the charge or allegation upon which he is arrested was mandatory. Furthermore, in interpreting the PTA, the

\textsuperscript{18} 542 U.S. 507 (2004).
\textsuperscript{19} 548 U.S 557 (2006).
\textsuperscript{20} 553 U.S. 723 (2008).
\textsuperscript{21} \textit{Liversidge v Anderson} [1942] A.C. 206 at 245 (majority opinion) which exemplifies the conservatism of the English courts and Lord Atkin’s bold dissent which went contrary to a conservative majority. Lord Atkin’s dissent was acknowledged in later years. See for example, \textit{IRC v. Rossminster} [1980] AC 953, 1011D (HL(E)), \textit{per} Lord Diplock: ‘The time has come to acknowledge openly that the majority of this House in \textit{Liversidge v Anderson} were expediently and, at that time, perhaps excusably, wrong and the dissenting speech of Lord Atkin was right’.
\textsuperscript{22} [1981] 2 Sri L.R. 187.
Court opined that there must be objective grounds for the minister to authorise the arrest and the continuing acts of detention. However, despite stating these admirable principles, the Court failed to apply such principles to the actual facts of the case, resulting in the dismissal of the application.

The Court adopted a more liberal stance in *Paramasothy v. Delgoda*\(^23\) (1981), where for the first time, an application was made before the Court of Appeal by way of a *habeas corpus* application seeking revision of an order of conviction and sentence imposed by the Magistrate’s Court. The Court held that although ordinarily, grounds for the award of a writ of *habeas corpus* are limited to jurisdictional errors and the writ cannot be used as a device for collaterally impeaching the correctness of an order made by a Court of competent jurisdiction, a writ would still lie where a committal is *ex facie* bad.

Some retrogression may be observed in the case of *Susila de Silva v. Weerasinghe*\(^24\) (1987), where the crucial question of whether a writ of *habeas corpus* would lie in respect of an arrest without warrant under Emergency Regulations was considered. Breaking from previous views expressed in *Gunasekera v. De Fonseka*,\(^25\) the Court held that the police officer making the arrest need not have firsthand knowledge and that it was through the conduct of his superiors that the police officer making the arrest became possessed of such sufficient material and information. The Court did not even insist that such material be presented for verification. Although public disclosure of the material could have been prejudicial to public or national security interests, it is moot to consider whether the Court ought to have required such material to be disclosed *in camera* so that the Court could convince itself that the authorities had acted objectively and not arbitrarily.

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\(^{24}\) [1987] 1 Sri L.R. 88.

\(^{25}\) *Supra* note 7.
This pattern of judicial conservatism was observed throughout the rest of the period. However, in the unique case of *Dhammika Siriyalatha v. Baskaralingam*\(^{26}\) (1988) the judges observed that there was no material to substantiate the opinion which the detaining authorities purportedly formed against the detainee. The Court insisted that even though the provisions empowering the authority to hold the detainee were subjectively couched, an objective state of facts should be alluded to in order to justify the arrest and detention. These objective facts must be such that if the person is not so detained, he is likely to act in a manner prejudicial to national security. The Supreme Court in *Hidramani v. Ratnavale*\(^ {27}\) had already dismissed a *habeas corpus* application in similar circumstances. Yet, remarkably, the Court of Appeal rejected this precedent by adverting to recent progressive developments in the realm of public law.\(^ {28}\)

**The 1994-2002 Period**

A total of 844 case records during this period were analysed for the purposes of this Study. The total number of applications dismissed was 676. By contrast, in 163 applications, the persons concerned were released. Moreover, writs of *habeas corpus* were issued in 19 applications. The year 2002 is taken as an approximate closing point in this period of examining case records of the Court of Appeal because from about this year (and subject only to a few exceptions), *habeas corpus* applications were increasingly lodged in Sri Lanka’s Provincial High Courts rather than in the Court of Appeal.

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\(^{27}\) Supra note 6.

Some key decisions upholding the merits of the applications during this period warrant discussion. Leeda Violet’s case\textsuperscript{29} (1994) was perhaps the most important decision amongst them all. It was the first occasion on which the Court recognised a presumption of liberty in respect of disappearances against the relevant authorities, and awarded exemplary costs to the petitioner. Deriving support from the Indian case of Sebastian M. Hongray\textsuperscript{30} (1984), the Court held that some affirmative action is necessary from a court invested with jurisdiction to issue writs of \textit{habeas corpus} when confronted with a case of an obvious disappearance of an individual held in custody and a false denial of such custody by a person in authority. This crucial precedent was followed in a number of subsequent cases including L.S. Perera’s case,\textsuperscript{31} Vajira Ranjani’s case,\textsuperscript{32} G.D. Ranjani’s case\textsuperscript{33} and Gonsul Wasan Tilakasena’s case,\textsuperscript{34} all of which were decided in 1995.

In Vajira Ranjani’s case,\textsuperscript{35} the Court was confronted with the question of whether delay in making the first complaint against the perpetrator could be held against a petitioner. The 1\textsuperscript{st} respondent, the Officer in Charge (OIC) of the police station involved with the arrest and detention, was implicated three years after the alleged incident in the petition. However, it was held that one could not fault the petitioner, placed as she was in the circumstances, for her failure to implicate the OIC in the statement made to his own police station. Similarly, in L.S. Perera’s case,\textsuperscript{36} it was held that no person could be faulted for not making a complaint where the allegation is directly levelled at the police being the lawful authority to carry out such investigations.

\textsuperscript{29} [1994] 3 Sri L.R. 377.
\textsuperscript{30} AIR (1) 1984 (SC) 1026.
\textsuperscript{31} H.C.A./13/91, C.A. Minutes of 15 September 1995.
\textsuperscript{34} H.C.A./67/92, C.A. Minutes of 13 January 1995.
\textsuperscript{35} Supra note 32.
\textsuperscript{36} Supra note 31.
The concept of Institutional Responsibility was also indirectly dealt with in the cases of *Vajira Ranjani*\(^{37}\) and *L.S. Perera*,\(^{38}\) as evidence clearly established that officers of a particular police station had caused the initial arrests resulting in the subsequent disappearances. In these cases, the OIC had also been implicated in the arrest. The question arises, however, as to what the position would have been, had such direct participation of the OIC in the initial illegal act not been proved. This is certainly an area of the law that invites judicial response in the future.

The principle regarding exemplary costs in *Leeda Violet’s case*\(^{39}\) was sporadically followed in subsequent cases such as *Murin Fernando*\(^{40}\) (1997) and *Rammenike v. Senaratne*\(^{41}\) (2002). However, a significant issue remains in respect of monitoring due compliance with the Court’s directives. As starkly highlighted in the analysis, notable executive avoidance or indifference may be observed in respect of the payment of exemplary costs against those found to be responsible, and the IGP’s and Attorney General’s responsibility to peruse the evidence and initiate further investigations where there may be a cognizable offence involved.

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

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\(^{37}\) *Supra* note 32.

\(^{38}\) *Supra* note 31.

\(^{39}\) *Supra* note 29.

\(^{40}\) [1997] 1 Sri L.R. 281.

\(^{41}\) [2002] 3 Sri L.R. 274.
390 of the applications examined were dismissed upon withdrawal on the basis of the detainee being indicted. A further 21 applications were dismissed upon withdrawal on the basis of the production of the detainee before a Magistrate or his or her placement in fiscal custody. In these instances, the Court commonly accepted the word of counsel for either the petitioner or the respondent(s) as to the fact of indictment. A rare exception to this trend was in *HCA/157/94*, 42 where the Court rejected the state counsel’s mere *ipse dixit* that the detainee had been indicted, and held that there was no authority whatsoever to justify his continued detention. This salutary approach, however, was not followed in the overwhelming number of later applications that were dismissed on this same ground. In *HCA/31/95*, 43 for instance, counsel for the petitioner stated that the detainee was indicted in the High Court of Colombo and moved to withdraw the application. State counsel appearing on behalf of the Attorney General, stated that he was unaware of the position. The Court, however, allowed the application for withdrawal and consequently dismissed the application. The question therefore is whether the Court should insist on documentation as to the fact of the indictment to be filed before Court rather than prefer to rely on the verbal assurances given by state counsel or counsel for the petitioner as the case may be.

In the analysis it is seen that several applications were dismissed upon withdrawal on the basis that the detainee was released or discharged. However, ‘released’ would mean release from custody without any proceedings being instituted. Under such circumstances, should there not be legal consequences visited upon the authorities when an individual’s personal liberty is violated without any reason? The Court of Appeal appears to have held a contrary view by summarily dismissing such cases without considering the wider implications of such detentions, including the violation of fundamental rights as envisaged in Article 13(1) and (2) of the Constitution.

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49 applications examined in this Study were dismissed on the basis of the petitioner being absent and unrepresented. It appears that when the Court of Appeal dismisses such applications, it does so on the perception that *habeas corpus* is a discretionary remedy. In *Heather Mundy*\(^44\) (2004), it was held by the Supreme Court that orders in the nature of writs, as contemplated in Article 140 of the Constitution, constitute one of the principal safeguards against excess and abuse of power, mandating the judiciary to defend the sovereignty of the people enshrined in Article 3. By extension of such judicial thinking to Article 141, it may be argued that since the writ of *habeas corpus* concerns an individual’s liberty, the Court of Appeal should consider the merits by reference to the pleadings of parties and depositions where the petitioner is absent and unrepresented. In such circumstances, there may be a need to legislatively vest the Court with a power, and consequently, a duty to appoint an *amicus curiae* to assist the Court.

At least 32 applications analysed in this Study were dismissed by the Court of Appeal after considering the merits. In *Nadarajah Sasikanth’s case*\(^45\) (2002), the Court dismissed the application stating that in terms of the report of the Magistrate, it appears that there were contradictions in the petitioner’s testimony and that his evidence was therefore unacceptable. But should accepting and acting on the findings of the Magistrate, *ipso facto*, with no independent analysis and evaluation of the evidence led at the magisterial inquiry be regarded as being a proper discharge of the constitutional jurisdiction conferred on the Court of Appeal? In the context of this particular case, a strong probability that the Magistrate had overlooked a notorious and widely documented practice on the part of the police not to record statements in their full content, particularly when the allegation is against the police itself, is a relevant factor.

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Similarly, in *Nadarajah Puthiyarajah’s case*\(^{46}\) (2002), the Court of Appeal found that the identity of the respondents had not been established. The omission on the part of the Magistrate of Colombo when he refused an application for a transfer of the case to the Magistrate’s Court of Jaffna is pertinent. It is clear that given the geographical and financial constraints in travelling to Colombo and procuring witnesses to travel to Colombo, the petitioner in the case may have been in a position to prosecute her application more effectively in the Magistrate’s Court of Jaffna. Furthermore, given the explicit reference to ‘the most convenient court’ in the proviso to Article 141 of the Constitution, it is relevant to query as to why the Court of Appeal referred the matter to the Magistrate’s Court of Colombo in the first place. This case may be compared with *Murin Fernando’s case*\(^{47}\) where a ‘totality of the evidence’ established that the person concerned had been at the police station during a certain period. It is this ‘totality of evidence’ that the petitioner in *Nadarajah Puthiyarajah’s case*\(^{48}\) might have been able to provide had the matter been transferred to the Magistrate’s Court of Jaffna.

Several other issues arise for consideration as well. For instance, as many as 65 applications were dismissed upon withdrawal by the petitioner or the petitioner’s counsel for *inter alia* inability to come to Colombo or inability to contact the petitioner or for undisclosed reasons. A perusal of the relevant orders reveals that, subject to a few exceptions, the liberty to re-invoke the appropriate High Court’s jurisdiction was not retained. Rule 3 of the Court of Appeal (Appellate Procedure) Rules of 1990 effectively rules out a plea of *Res Judicata* in *habeas corpus* applications, thereby rendering an order that grants liberty to file a fresh application redundant. However, could it yet be maintained that it is incumbent upon the Court to grant such a right,


\(^{47}\) *Supra* note 40.

\(^{48}\) *Supra* note 46.
given the fact that a citizen’s personal liberty is at stake? In certain applications, as in *HCA/11/95*, the Court dismissed the application for failure to name a respondent properly and specifically afforded the liberty to file a fresh application.

In *HCA/411/93*, the application had been dismissed on the ground that the caption was defective, as the Christian name of one of the respondents had not been specified. This was a peculiar instance where the Magistrate’s Court deemed that the army officer concerned was responsible for the abduction. Yet the Court of Appeal reversed the magisterial finding. In *HCA/48/97*, the respondent concerned had been described as ‘Director, (CID)’. However, the application had been dismissed on the ground that ‘Director, (CID)’ was not a legal persona. Rule 5(2) of the Supreme Court Rules of 1990, which permitted the naming of respondents *officio nominis*, is relevant in this context. Under the Rule, it is sufficient to describe such public officer in the caption by reference to his official designation or office. The question then arises as to whether, even if there was some doubt as to the exact title of the office held by the respondent, could the Court not have permitted the amendment of the caption and perhaps even engaged in an effort to ascertain the correct designation of the relevant respondent?

A further 37 cases were dismissed on the basis that the detainee had been sent for rehabilitation. The findings of this Study suggest that the submission of the state counsel that the detainee has been sent for rehabilitation has been accepted almost mechanically by the court. It is, however, a relevant concern that rehabilitation regimes could sideline ordinary criminal proceedings and fair trial-related due process and fair trial rights. There is no doubt that judicial officers should be sensitive to such a possibility.

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50 C.A. Minutes of 4 May 1998.
At least 10 cases under review were dismissed by the Court of Appeal despite a magisterial finding that a writ ought to be issued. For instance, in cases such as *Ratnaweera*52 (1997), *Alankarage Tulin*53 (1997) and *Appuhamilage Sriyawathie*54 (1998), the Court thought it fit to reverse the Magistrate’s finding with regard to the identification of the respondents. In each of these cases, the Magistrate held that the respondents were liable for the disappearance of the person concerned either directly or on the application of the Command Responsibility doctrine. However, unfortunately, the Magistrate’s Court proceedings were not accessible in order to discover how precisely the Magistrate may have come to such a conclusion. Another example is the case of *Gurusinghe*55 (1997), where the Magistrate had found the evidence of the petitioner’s witnesses as being credible and truthful. The Court of Appeal did not find anything perverse in the Magistrate’s findings with regard to the evidence of the witnesses. Yet the Court proceeded to dismiss the application on the basis that the identification of witnesses failed to comply with the principles laid down in the case of Regina v. *Turnbull*56 (1977). This application of evidentiary rules relevant to criminal trials to *habeas corpus* proceedings once again demonstrates the need for clarifying legislation.

Another illustrative example is the case of *Indrani Dagampala*57 (1998), where the Court dismissed the application on the basis that the petitioner spoke of an army jeep in which her husband was removed, whereas the other three witnesses referred to a van. Yet could such inconsistency be held to amount to a material contradiction in law affecting the petitioner’s testimonial credibility?

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In the case of *Gampola Paddeniyage Gdera Cecelia*\(^{58}\) (1998), the Court went to the extent of holding that an ordinary citizen making a serious allegation against a state official, which if true would amount to a crime, must prove such allegation ‘beyond reasonable doubt’. Yet a ‘balance of probabilities’ is a standard which is far more appropriate in *habeas corpus* applications, since the cumulative effect of the definition of proof contained in Sections 5 and 100 of the Evidence Ordinance\(^{59}\) (1895) seems inadequate to cater to *habeas corpus* applications. The casual treatment of the state’s responsibility in registering the deaths of persons while they were in the custody of police or army officials is also of singular account. The blatant disregard of the requirements under the Births and Deaths Registration Act\(^{60}\) (1981) also revealed the overpowering nature of the Emergency Regulations in Sri Lanka. Such Regulations permitted state authorities, both police and armed forces, to dispose of dead bodies of persons in any manner that departs from the stipulations and safeguards prescribed in the ordinary law.\(^{61}\)

**The Response of the Provincial High Courts**

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


\(^{59}\) Ordinance No. 14 of 1895.

\(^{60}\) Act No. 129 of 1981 following Act No. 17 of 1951.

\(^{61}\) See Regulations 54 to 58 of Emergency Regulations No. 1 of 2005 published in Gazette Extraordinary No. 1405/14 of 13 August 2005. The impugned Regulations were subsequently repealed in 2010 by virtue of the Regulations published in Gazette Extraordinary No. 1651/24 of 2 May 2010.
Vavuniya during 2010 and early 2011 for the purpose of uncovering some of the critical contemporary issues faced at the provincial level.

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

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

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

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

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

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

Another issue that arose from the consultations related to the need for a Special Division of the High Court to deal with surrendees on an expedited basis. Thousands of surrendees had been placed under arrest by the Sri Lankan government following the conclusion of military operations against the Liberation Tigers of Tamil Eelam (LTTE) in May 2009 leading to the filing of considerable numbers of *habeas corpus* applications. Yet approximately 80 judges serve in the High Courts in all parts of the country, which raises a critical issue in terms of capacity where High Courts in the North and East are particularly concerned. Thus, an interesting suggestion that emerged from the provincial consultations was that a Special Division of the High Court be created to expeditiously determine the cases of these surrendees. Surrendees are still entitled to be treated as equal citizens in terms of the Rule of Law and should be afforded the same constitutional rights and safeguards afforded to ordinary citizens.

The discussions also revealed that there were instances where the Vavuniya High Court had ordered that pending *habeas corpus* applications would be heard and determined by the High Court itself without any need for referral to the Magistrate’s Court. Though some voiced opposition to this practice, it appears that the practice is

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62 For further discussion, see Clark & McCoy, *supra* note 5.
63 Unofficial sources suggest that presently, there are 68 High Court Judges and another fifteen or so commissioned to sit as High Court Judges in Sri Lanka. These figures need to be verified by the Judicial Service Commission. According to official figures released by the Judges’ Training Institute as at 25 March 2009, there are 55 High Court Judges serving in the country. See http://sljti.org (last accessed on 18 March 2011).
permissible under the proviso to Article 141 of the Constitution, which remains an enabling and not a mandatory provision.

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

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

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

**Specific Legal Reforms**

This Study responds to these recurrent issues by recommending specific legal provisions to be made through a *Habeas Corpus* Act enabling a more efficacious functioning of the remedy. Such
enactment must recognise the principle that exemplary costs would be granted where the person concerned has disappeared subsequent to arrest and detention by state authorities. Also, it must be clearly stipulated that the respondent’s estate would stand charged with the exemplary costs awarded as a debt. Under the Act, warrants of committal must be made available to the court to enable the court to ascertain whether such order or warrant is *ex facie* defective.

Moreover, practical difficulties in overcoming time bars in circumstances where judges may be unsympathetic to the plight faced by those moving the court for relief needs to be countered. It is suggested therefore that there should also be a clear enunciation of the legal principle that despite the *habeas corpus* jurisdiction of the Court of Appeal being couched in language that is discretionary, the fact of delay in instituting proceedings should not be held as a bar to the grant of relief in cases where grave human rights violations are in issue.

The Act should recognise the principle of ‘Institutional and/or Command Responsibility’, whereby an Officer in Charge of the relevant police station, or a commanding officer of the specific division of the armed forces, may be made responsible for the arrests, detentions and subsequent disappearances of persons, which are carried out within the jurisdictions of those institutions. The Act must also insist that material be placed before a court to substantiate the position that the person concerned had been indicted or released before an application for writ is dismissed. Furthermore, clarifying provisions must be introduced to squarely place the burden of proof on the authorities that are responsible for suppressing the individual’s liberty, i.e. the burden of justifying the arrest and detention.

Apart from the enactment of a *Habeas Corpus* Act, it is recommended that greater judicial sensitivity be shown in terms of withdrawal without reasons, given the attendant dangers that such withdrawals may in reality be for extraneous reasons including intimidation or coercion by interested parties. Hence reform efforts should reflect
legislative advances as well as judicial sensitising in order to strengthen the *habeas corpus* remedy and establish it as one of the pillars of a functional democracy based on liberty and the Rule of Law.
1. Introduction

1.1 Initial Observations

The protection of liberty is an essential component of the right to life and is fundamental to the realisation of all other human rights. One of the antecedents to the right of judicial review of an enforced disappearance is the writ of *habeas corpus*, the basic objective of which is to ‘test the legality of any prisoner’s detention at his or her own or some friend’s instance.’ While each country has had its own peculiar history in relation to this right, the English law development of the ancient prerogative writ of *habeas corpus* and the principles enshrined in the *Habeas Corpus* Act of 1679 has perhaps the most far reaching influence in the Commonwealth. Traditionally, the legal standards regarding the application and issuance of the writ reflect the special recognition given to this remedy. Anyone may apply for the writ without any restriction regarding nationality. The writ is not discretionary, but rather, it is issued ‘as of right.’ Therefore, unlike in the case of other writs available under the common law, the writ cannot be denied on the basis of the availability of an alternative remedy. Moreover, there is no time bar to seeking a writ before the court. Yet the question of on whom the burden of proof lies does not seem to have received an unequivocal response.

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2 However, as discussed later, a contrary school of judicial thought appears to have emerged in Sri Lanka.
5 Wade & Forsyth, *supra* note 1, at 594.
6 Lord Atkin is of the view that ‘...in English law every imprisonment is *prima facie* unlawful and that it is for a person directing imprisonment to justify his act.’ See *Liversidge v Anderson* [1942] A.C. 206 at 245 (minority opinion). See, however, the majority decision in this case and generally the academic lament by Wade and Forsyth, *supra* note 1, at 294.
The grounds for granting the writ of *habeas corpus* are considered to be as wide as the grounds on which the writ of *certiorari* may be granted. For instance, the courts will consider not only the basis on which the detention was ordered, but also the ‘validity of preliminary steps, so that any legal flaw in those steps will invalidate the detention.’ The standard therefore is that any illegality related to the detention would attract the writ of *habeas corpus* in consonance with the literal meaning of this Latin term, which is ‘that you have the body’.9

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

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9 *Black’s Law Dictionary* (3rd Pocket Ed. 2006) at 322.
10 See European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5; 213 UNTS 221. Under Article 5 of the European Convention, the liberty of a person can be deprived only for identified cases and according to the due process of the law. The identified cases include lawful detention after conviction by a competent court and the lawful arrest or detention of a person for the purpose of bringing him before a competent legal authority. Article 5 of the European Convention is reproduced in the first schedule to the Human Rights Act of 1998 (United Kingdom).
11 See Wade & Forsyth, *supra* note 1, at 600. The authors comment: ‘A wide-ranging right to liberty and security of the person is conferred by Article 5 of the European Convention on Human Rights, enforced by the Human Rights Act of 1998...it may be predicted that the clear and concise provisions of this Article will supplant *habeas corpus* with its unhappy judicial history.’
terrorism laws in the context of a harsher protection of national security in the global war against terrorism.

Insofar as Sri Lanka is concerned, the writ remedy of *habeas corpus* has been exercised traditionally before the Court of Appeal in terms of Article 141 of the Constitution. Since 1990, the jurisdiction over the granting of the writ has been extended to the Provincial High Courts.\(^\text{12}\) Protections afforded by this remedy are of special importance in the Sri Lankan context. The country’s civil and ethnic conflict over the past several decades had resulted in the enforced disappearances and extra judicial executions of thousands of civilians of both majority and minority ethnicity. On the one hand, civilians of minority Tamil and Muslim ethnicity had been victims of the conflict between the separatist Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lankan state, which took place for much of the last three decades. Up until the military defeat of the LTTE in May 2009, both government forces and the LTTE had been responsible for numerous atrocities throughout the conflict. On the other hand, thousands of Sinhalese civilians had been subjected to state and antigovernment terror during the early 1970s and late 1980s, as a result of two attempts by the Janatha Vimukthi Peramuna (JVP) to overthrow the state by armed force.

While the abuses committed by non-state agents during these periods of conflict were numerous,\(^\text{13}\) the focus of this Study is on *state responsibility* and the consequent efficacy of the legal remedies

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\(^{12}\) High Court of the Provinces (Special Provisions) Act No. 19 of 1990 vested the High Courts with the power to issue orders in the nature of writs of *habeas corpus* in respect of persons illegally detained within the province. Prior to the 1978 Constitution, the writ of *habeas corpus* was sought under the Courts Ordinance of 1889. Even under the previous Constitution of 1972, the Supreme Court retained its jurisdiction under the Courts Ordinance of 1889. A special constitutional jurisdiction was granted to the Court of Appeal only under the 1978 Constitution.

\(^{13}\) The authors acknowledge in particular the brutal *modus operandi* of the LTTE in enforcing its totalitarian regime in the North and East when it had physical control over swathes of territory in that region.
available to victims. This focus is primarily due to the overriding responsibility of a state in this regard, as opposed to terrorist or dissident entities. During times of extraordinary conflict in Sri Lanka, people simply ‘disappeared’ under the cover of emergency laws, which conferred extraordinary powers on police and the armed forces. Paramilitaries acting with the direct or indirect blessings of the government were also responsible for a significant percentage of these violations. Violations of the rights to life and liberty, including arrest and incommunicado detention without valid reasons and for unreasonably long periods of time, were common during these times. Additionally, arbitrary arrests and detention, most often accompanied by the infliction of torture and cruel, inhumane and degrading treatment or punishment, occurred even during the short periods of time in which there was no active conflict in the country.\textsuperscript{14}

In this context, the writ remedy of \textit{habeas corpus} should have been of central importance in safeguarding the liberty rights of persons. However, the practical efficacy of this remedy appears to have faltered. Applications for writs of \textit{habeas corpus} have not generally yielded positive results in the appellate courts or in the Provincial High Courts, except in a few specific cases. Manifold factors explain this predicament including the severe dysfunction of the legal and judicial process. The deliberate negation of this remedy by the respondents to the applications, primarily army and police officers, has been a contributory factor in this regard. Moreover, common features that encourage impunity are evidenced even when grave human rights violations are brought to the attention of the court. Such features include the release of the suspect perpetrators on bail, intimidation of witnesses and family members of the victims, and

\textsuperscript{14}See Kishali Pinto-Jayawardena, A Praxis Perspective on Subverted Justice and the Breakdown of the rule of Law in Sri Lanka in Jasmine Joseph (ed.), \textit{Sri Lanka’s Dysfunctional Criminal Justice System, Asian Human Rights Commission, Hong Kong} (2007). The author discusses several cases of torture and grave human rights violations documented by activists during the post 2002 ceasefire period when emergency law had been withdrawn and the ordinary law was in force.
transfers of the cases to courts in Colombo at the instance of the alleged perpetrators. Such transfers often result in severe disadvantages to the petitioners due to financial costs as well as the difficulties of travelling from locations in the North and East to the capital. Delays in the court process, oftentimes stretching to ten years and more are also common. Such delays per se could defeat the *habeas corpus* remedy. A common requirement in many jurisdictions is that any application made on behalf of a detainee must expressly or impliedly be disposed of with reasonable expedition.\(^{15}\)

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

Though inevitably legalistic in its nature, an effort was made in this work to bring a practical mind to bear on the manner in which this remedy may be effectively used by lawyers, activists and victims in this country. The Study makes a sustained case for more sensitive judicial attitudes to be evidenced in relation to the protection of a right that is essential for the wellbeing of individuals, communities, societies and the very country itself.

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

\[^{15}\text{See for example, Article 22(5) Constitution of India.}\]
• What are the patterns of invocation of this remedy throughout the time period examined?
• What is the general nature of the court’s response?
• What is the degree of proof that a court should look for when a petitioner makes an allegation of disappearance or involuntary, unlawful removal?
• Should not an initial burden in the nature of an evidential burden suffice where a petitioner seeking *habeas corpus* invokes the jurisdiction of the court?
• Is there a role for the Attorney General to fulfil in this context?
• Is there a need for a *Habeas Corpus* Act for Sri Lanka?
• What other reforms of the law are warranted?
• Are there (and if so what are the) defects in the present implementation of the writ of *habeas corpus*?
• Has the absence of a witness protection mechanism in Sri Lanka had an adverse impact on the process of inquiry into *habeas corpus* applications and the effectiveness of the remedy?
• Are there delays in the hearing and determining of *habeas corpus* applications, and if so, what are the causes for it?
• How has this affected the prosecutorial justice system as a whole?

This Study initially outlines the historical background to the writ of *habeas corpus* in Sri Lanka and looks at three reported judgments of the Supreme Court, which are seminal in laying down the applicable judicial principles in the pre-independence period. These cases include *The case of W.A De Silva*,\(^\text{16}\) *The Bracegirdle case*\(^\text{17}\) and the *case of Thomas Perera alias Banda*.\(^\text{18}\) Thereafter, relevant decisions during the immediate post independence years and under the First Republican

\(^{16}\) (1915) 18 N.L.R. 277.
\(^{17}\) (1937) 39 N.L.R. 193.
\(^{18}\) (1926) 29 N.L.R. 52.
Constitution of 1972 are analysed. Such cases decisions include *Thamboo v. The Superintendent of Prison*,\(^{19}\) *Hidramani v. Ratnavale*,\(^{20}\) *Gunasekera v. De Fonseka*\(^{21}\) and *Gunasekera v. Ratnavale*.\(^{22}\)

This analysis forms the background to a detailed examination of the judicial response of the appellate courts under the current Constitution of 1978, both in terms of reported and unreported judgments. The judicial response of the Supreme Court is first looked at through five key decisions, namely *Rasammah v. Major General Perera and Others*,\(^{23}\) *Chelliah v. Inspector of Police and Others*,\(^{24}\) *Juwanis v. Lathif, Police Inspector, Special Task Force and Others*,\(^{25}\) *Shanthi Chandrasekeram v. D. B. Wijethunga and Others*\(^{26}\) and *Kanopathipillai Machchavallavan v. Officer in Charge, Army Camp Plantain Point, Trincomalee and Three Others*.\(^{27}\)

Thereafter, the judicial response of the Court of Appeal is examined. The period between 1981 and 1993, which was marked by both the JVP insurrection in the South, and by the ethnic conflict in the North and East between the LTTE and the government receives particular attention. Six substantive judgments, namely *Senthilnayagam v. Seneviratne*,\(^{28}\) *Paramasothy v. Delgoda and Another*,\(^{29}\) *Kodippilige Seetha v. Saravanathan*,\(^{30}\) *Susila de Silva v. Weerasinghe and*  

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\(^{19}\) (1958) 59 N.L.R. 573.  
\(^{21}\) (1972) 75 N.L.R. 246.  
\(^{22}\) (1972) 76 N.L.R. 316.  
\(^{23}\) [1982] 1 Sri L.R. 30.  
\(^{24}\) [1982] 1 Sri L.R. 132.  
\(^{26}\) [1992] 2 Sri L.R. 293, per Justice Mark Fernando.  
\(^{27}\) [2005] 1 Sri L.R. 341, per Justice Shirani Bandaranayake.  
\(^{29}\) [1981] 2 Sri L.R. 489.  
\(^{30}\) [1986] 2 Sri L.R. 228.
Others,\textsuperscript{31} Dhammika Siriyalatha v. Baskaralingam and Four Others\textsuperscript{32} and Seetha v. Sharvananda\textsuperscript{33} are analysed for this purpose. The analysis demonstrates the conservatism of the judicial response on the one hand as well as emerging trends of a bold jurisprudence—at least in terms of what are commonly termed as the ‘Southern enforced disappearances’—on the other.

The year 1994 signified political change with the election of President Chandrika Kumaratunga to the office of the Executive Presidency, heralding relative normalcy throughout the country until the return to active conflict in the North and East in 1996. New cases filed thereafter were primarily from the North and East. The period between 1994 and 2002 during which many of the applications filed in respect of enforced disappearances during the eighties and early nineteen nineties were considered by the Court of Appeal, is examined separately through the lens of 844 substantive judgments as well as bench orders.\textsuperscript{34} This analysis was carried out in the expectation of uncovering an even bolder jurisprudence and the consolidation of judicial thinking behind safeguarding the rights of subjects, which had emerged in the years immediately preceding 1994. However, such expectations were not to be fulfilled.

As will be seen, the Court’s response from 1994 onwards was marked by a few exceptional cases applying legal principles relating to the writ of \textit{habeas corpus} to ensure justice to the petitioner. Such exceptions included the case of Leeda Violet and Others v. O.I.C.

\textsuperscript{31} [1987] 1 Sri L.R. 88.
\textsuperscript{33} [1989] 1 Sri L.R. 94.
\textsuperscript{34} Brief orders of the Court dismissing or affirming a particular application are categorised by that name, as the orders are ordinarily dictated from the ‘bench’ by a particular judge and do not involve substantive judicial reasoning as to the merits of the application in question. In that sense, they are distinguished from substantive judgments of the court that are reserved to be delivered on a particular date and contain detailed judicial reasons as to the upholding or dismissal of the application.
Police Station, Dickwell and Others,\textsuperscript{35} followed in inter alia L.S. Perera v. I.G.P. and Others,\textsuperscript{36} Vajira Ranjani Maddhukumari v. O.I.C. Peliyagoda,\textsuperscript{37} G.D. Ranjani v. Commanding Officer, Army Camp, Panala and Three Others,\textsuperscript{38} Gonsul Wasan Tilakasena v. 2\textsuperscript{nd} Lt. Srinath Wickramasinghe and Five Others,\textsuperscript{39} Dharmasena v. S.I. Police Station Hakmana,\textsuperscript{40} Chandralatha v. Lt. Dissanayake and Three Others,\textsuperscript{41} HCA/42/90,\textsuperscript{42} and HCA/38/90.\textsuperscript{43}

Yet, despite the decision in the \textit{Leeda Violet case}, articulating admirably liberal principles in relation to the issuance of the writ, and despite some subsequent decisions endorsing such principles, the majority of later decisions do not appear to reflect these liberal principles. The charts categorising judicial responses in the 844 substantive judgments and bench orders analysed in this Study indicate that the consistent trend had been towards dismissal of the applications for the writ of \textit{habeas corpus} on various grounds. Such grounds are critically evaluated in this work.

Based on the foregoing analysis, several legal reforms are recommended, which are summed up in the conclusion to this Study. The need for such reforms is also borne out by the dysfunctional nature of the \textit{habeas corpus} remedy at the provincial level. This dysfunction is illustrated in the examination of 37 briefs and preliminary inquiry orders of the Provincial High Court of the Northern Province from the year 2002 onwards. Moreover, such examination indicates the difficulties in the effective use of this

\begin{footnotesize}
\begin{enumerate}
\item [35] [1994] 3 Sri L.R. 377.
\item [38] H.C.A. /255/89, C.A. Minutes of 13 January 1995.
\item [40] H.C.A. /15/92, C.A. Minutes of 13 January 1995.
\end{enumerate}
\end{footnotesize}
remedy and highlights the pungent observations of the judges of the lower courts themselves on the frustration of the writ, due to a variety of reasons including systemic problems.

This is the first time that a comprehensive study has been undertaken regarding the working and effectiveness of the *habeas corpus* remedy in Sri Lanka. The analysis is undertaken with the broad objective of not only illustrating judicial attitudes to the freedoms of life and liberty but also highlighting paucities in the working of the legal and judicial systems with the specific aim of redressing such paucities. The formulation of a body of recommendations and reforms is a key part of this effort. Thus the authors propose the enactment of a *Habeas Corpus* Act for Sri Lanka, which is particularly engineered towards making the remedy more efficacious and better equipped to serve the cause of justice for the poor and disadvantaged.

### 1.2 Methodology

The research was conducted during the year 2009 and the advocacy activities engaged in thereto during August 2010-January 2011. The methodology adopted for this Study involved a detailed examination of judgments, briefs and court documentation obtained from bound records maintained at the Court of Appeal. The provincial documentation was obtained through attorneys-at-law appearing in those cases. This document review was supplemented by interviews with judges, lawyers and court officials who wished to remain anonymous due to the contentious nature of this Study in the current context in Sri Lanka.

Certain obstacles in accessing data for this Study were evident. As frequently highlighted in research of this nature, there is no Right to Information Act and consequently no right of access to information in court registries or information in the hands of the Attorney General. Access to court records in Sri Lanka is not ‘of right’; court registries
only entertain requests for information on a particular case from a lawyer appearing in the case or a party proven to have a sufficient interest. Hence applications made in the public interest are generally disallowed. Moreover, the reporting of cases is ad hoc and many important decisions are not included in the law reports published by the Ministry of Justice. Thus judicial decision-making often takes place in a vacuum and the use of legal precedent is inconsistent, which adversely affects judges and lawyers. The lack of a reliable system of official or unofficial law reporting is a major obstacle to principled development of the law and the achievement of legal consistency—a major requirement of the Rule of Law.

Though statistical information regarding prosecutions for grave human rights violations is available in the periodic reports submitted to United Nations treaty bodies and Special Rapporteurs, this information is, at times, incoherent and disjointed. This makes the collection and analysis of credible data all the more vital in order to be effectively used as a tool for better advocacy. Sri Lanka’s legal and judicial systems have attracted national and international scrutiny in recent years. Thus it is deplorable that obstacles to obtaining credible data continue to persist, making the critical analysis of the performance of these systems and processes near impossible. Efforts should be taken to address this situation if such obstacles to obtaining basic data are not thought to be deliberate. A Right to Information law was drafted by representatives of the government and the media community in 2003 which, inter alia secured this right as an express

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44 I.e. irregular and intermittent law reporting. The Sri Lanka Law Reports published by the Ministry of Justice include only selected decisions relevant to public law and constitutional law and are typically characterised by delay in the publishing of its reports. There are also law reports published by individuals or by organisations (for example, the Law & Society Trust publishes the Appellate Law Recorder) as well as case books (for example, see R.K.W. Goonesekere, *Fundamental Rights and the Constitution-I* (1998) and *Fundamental Rights and the Constitution-II*, (2003)). Sri Lanka’s digital law library (Lawnet.lk) also does not include links to unreported judgments of the Court.
part of a new information regime. Despite Cabinet approval, this draft law still remains to be enacted.

In this background, the first step of obtaining such documentation was by itself no easy task. It was only through the most diligent of efforts that researchers involved in this Study were able to obtain the court orders, briefs and judgments that were vital to the analysis.

Furthermore, it is unfortunate that some in the legal and judicial community exhibited either ignorance of the writ remedy of *habeas corpus* or indicated reluctance to discuss their practical experiences due to fear of official sanction. We are grateful indeed to the many others who collaborated with us, albeit confidentially, in the hope of better improving the functioning of the remedy.
2. The Historical Background to the Writ Remedy of Habeas Corpus in Sri Lanka and Early Cases

The writ of *habeas corpus* first found statutory expression as a means of securing personal liberty in Sri Lanka in the Charter of Justice of 1833\(^{45}\) and then the Courts Ordinance of 1889.\(^{46}\) The then Supreme Court assumed the power to grant such writs on the basis of an implied power to do so under the First Charter of Justice of 1801 following the British Proclamation of 1798 when Ceylon (as Sri Lanka was known then) was finally ceded as a Crown Colony. The following sections discuss the early jurisprudence on *habeas corpus* by analysing some of the pre-independence cases that dealt with the subject.

2.1 The Case of W.A. de Silva\(^{47}\)

2.1.1 The Crux of the Decision

2.1.1.1 Background

By virtue of a Proclamation by the Governor\(^ {48}\) in 1914, an Imperial Order in Council of 1896 was brought into operation subjecting all persons in Ceylon to military law. By a further proclamation in 1915, the military officer commanding the troops was authorised to take all

\(^{45}\) See Section 49 of the Charter. Prior to this date, the writ of *habeas corpus* was granted under the Roman Dutch Law. See for example, *In re Siva Poonian* (1826) Ramanathan 84. Also see David Clark & Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (Clarendon Press, Oxford, 2000), at 27-28.

\(^{46}\) Order in Council of the British Government, Section 45. Also see *Gooneratnayaka v. Clayton* (1929) 31 N.L.R. 132 at 133.

\(^{47}\) *Application for a Writ of Habeas Corpus for the production of the Body of W. A. De Silva* (1915) 18 N.L.R. 277.

\(^{48}\) Her Majesty, the Queen’s representative in the Colony of Ceylon.
steps of whatever nature that he may deem necessary for the purpose of maintaining order and the defence of life and property. In pursuance of these provisions, the corpus in this case was arrested and detained in military custody, which was justified on the ground of martial law.

2.1.1.2 The scope of applicability of martial law

The Court held that martial law governed not only the discipline of an army engaged in actual war with a foreign enemy but also the assumption of powers by officers of the Crown, which they deemed necessary for the protection of the colony in view of the existence of an actual state of war. Such a ‘state of war’ was held to include a state of domestic disturbances.

However, counsel for the applicant contended that the functioning of the ordinary courts amounted to a negation of an actual state of war. Responding to this proposition, the Court held:

The circumstance that the ordinary Courts are open may constitute evidence, and material evidence, against the existence of such a state of war. But it is not conclusive. It is least of all conclusive where a country is in a state of unsettlement at a time when actual acts of violence may for the moment have ceased. The authorities, when they have to deal with such circumstances as these, may well regard the keeping open of the Municipal tribunals as being itself a part of the healing process which it must be their endeavour to induce.49

Moreover, the question of whether the superior courts had the power to inquire into the existence of an actual state of war was also raised. The Court answered this question in the affirmative, holding that the courts did possess the right to inquire—and indeed the duty to

49 Supra, note 47, at 279, per Wood Renton C.J.
inquire—into the question of fact, whether an actual state of war exists or not.\textsuperscript{50}

2.1.1.3 The power of superior courts to review by habeas corpus the legality of arrests and detentions

The Court held that although the superior courts had the right and duty to inquire into whether an ‘actual state of war’ existed even where martial law was in operation, the courts lacked the power to review by habeas corpus the acts of military authorities in the exercise of their martial law powers. It was consequently pronounced that the legality of acts of arrest and detention by military authorities under martial law were \textit{not} justiciable by way of habeas corpus. The Court cited the Privy Council decision in \textit{Ex Parte Marais}\textsuperscript{51} as binding authority for this proposition. Moreover, it was held that courts had no jurisdiction over questions concerning the continuance or need for relaxation of martial law. The relevant judicial response was as follows:

The Attorney-General states, from his place at the Bar, and on adequate instructions, that in the opinion of His Excellency the Governor the time has not yet come for a relaxation of martial law in the Colony. In view of all the circumstances, the utmost weight must be attached to a statement of that kind.\textsuperscript{52}

\footnotesize
\begin{enumerate}
\item \textit{Ibid.}
\item [1902] A.C. 109. The Privy Council was the apex Court of Ceylon at the time and continued to be so until the Court of Appeal (Abolition of Appeals to the Privy Council) Act, No.44 of 1971.
\item \textit{Supra}, note 47, at 280. Note that it is not clear from the judgment whether the Governor’s affidavit or his agent’s affidavits contained any averment to that effect.
\end{enumerate}
2.1.2 Reflections on the Ruling

2.1.2.1 Summary of the propositions of law established in the ruling

1) The question of whether an actual state of war (including a state of domestic disturbance) exists comes within the purview of judicial review.
2) The circumstance of the ordinary courts functioning during this period may constitute material evidence, but is not conclusive in respect of an actual state of war.
3) The courts have no power to review by *habeas corpus* the acts of military authorities in the exercise of their martial law powers, such as the legality of arrests and detentions.
4) The Attorney General’s *ipse dixit* that the Governor is of the opinion that a state of martial law must continue in a colony will not be reviewed by a court.
5) In any event, on the basis of the doctrine of binding precedent, the Privy Council decision in *Ex Parte Marais*[^53] was an express and binding authority with regard to the above propositions.

In response to the propositions of law established by the Supreme Court, the following observations may be made:

1) The initial premise on which the Supreme Court’s ruling was founded was salutary, as determining the question whether an actual state of war including a state of domestic disturbance exists ought not to be outside the purview of judicial review. However, this premise was negated by the subsequent view that the Court cannot review the Attorney General’s statement from the Bar table that the Governor is of the opinion that a state of martial law must continue. At the minimum, the two propositions remain irreconcilable.

[^53]: *Supra*, note 51.
2) Moreover, the Court appears to have sacrificed the liberty of the subject at the alter of executive discretion by holding that during a state of martial law, the courts cannot review the opinion of the executive and military authorities that any person may be arrested and detained if deemed necessary for the purpose of protecting and maintaining order and the defence of life and property. The Court thus divested itself from the duty of looking at a necessary nexus between the arrest and detention and alleged conduct that is harmful to the protection and maintenance of order and the defence of life and property.

3) The ‘un-reviewability’ of the subjective opinion of the executive and military authorities as to the need to arrest and detain a person and in effect, the un-reviewability of the existence of a state of actual war (including domestic disturbances) reflected the law as judicially expounded at a time when Sri Lanka was a crown colony. In later segments of this Study the authors examine a more liberal judicial response to the writ of habeas corpus following Sri Lanka’s independence and subsequent ‘republican status’ in the context of a changed constitutional scenario.

2.2 The Bracegirdle Case

The material question before the Court in this case was whether executive powers in regard to arrest and detention were subject to judicial review in a habeas corpus application. The statutory provision at issue was Article III.3 of the Order in Council of 1896, which provided:

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54 In re Mark Antony Lyster Bracegirdle (1937) 39 N.L.R. 193.
The Governor may order any person to quit the Colony, or any part of or place in the Colony, to be specified in such order and if any person shall refuse to obey any such order, the Governor may cause him to be arrested and removed from the Colony, or from such part thereof, or place therein, and for that purpose to be placed on board of any ship or boat.

In pursuance of this provision, an order signed by the Governor was served on Bracegirdle, requiring him to leave the colony within four days. On refusal to comply with the said order, Bracegirdle was arrested by the police purporting to act under the authority of the Governor. A further order was issued to the arresting police officer by a Deputy Inspector General of the Criminal Investigation Department (CID) to place him on board any ship from Ceylon to Australia (his last place of residence). The apparent reason for the Governor’s order was that Bracegirdle had expressed controversial views on certain political and racial aspects of life in Ceylon.\(^{55}\) The Governor consequently formed an opinion that such actions and utterances justified his removal from the country.

An application for *habeas corpus* was filed by a friend of the corpus. It was contended that, the Governor’s order was *ultra vires* in that such an order could be made only on the arising of an emergency and that no such emergency as contemplated by the relevant Order in Council had arisen. Furthermore, it was contended that even if such an emergency had arisen, no order could have been made without prior proclamation of the emergency. It was also alleged that the arrest itself was illegal, as certain constitutional changes introduced by the State Council Order in Council of 1931\(^{56}\) precluded the Governor from employing the police for the purposes of making the arrest. Additionally, it was contended that though the Order in Council of

\(^{55}\) The actual reason was that Bracegirdle was a strong critic of imperialism and his remarks about the living conditions of the estate workers had outraged the elite colonial planting community.

\(^{56}\) Commonly referred to as the Donoughmore Constitution.
1896 had placed every person within the limits of the colony under military law, this provision had been amended by an Order in Council of 1916.

The main argument put forward on behalf of the Crown was that the Governor issued the order affecting the arrest in the *public interest*, which he had absolute power to do, and that the Court had no authority to inquire into the circumstances under which such order was issued. It was further contended that though the expression ‘in terms of an emergency’ appeared in the preamble to the 1916 Order in Council, the article in question (Article III.3 of the 1896 Order in Council) was clear and unambiguous. Therefore, it was contended that the article in question could not be controlled by any other restriction, including the preamble. In other words, in order to exercise his power, the Governor need not have even stated that a ‘state of emergency’ had arisen, necessitating a proclamation of the same.

Asserting what has come to be one of the most definitive pronouncements on this question during this period, the Court categorically held that the Governor’s powers were not absolute and that the power may be exercised only under emergency conditions. It was further held albeit, *obiter*—that such powers were subject to judicial scrutiny. Meanwhile, answering the question as to whether the defence of ‘public interest’ was entitled to succeed, the Court held:

> But we are, however, absolved from considering any question as to whether the conditions attached to the exercise of the Governor's powers under the Order in Council have been fulfilled because, as I have said, it is not maintained that they have been so fulfilled. The Crown takes its stand upon what it submits are the unquestionable absolute powers of the Governor, and it is our duty to say that those powers are limited. The question whether it would be in the public interest that Mr. Bracegirdle should leave the Colony is not to the purpose. Were he an alien, that question might be one for decision

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57 39 N.L.R., at 212, per Abrahams C.J.
under Section 5 of ‘The Supervision of Aliens Ordinance, No. 14 of 1917’, but he is not, and we have to decide his rights as a British subject.\footnote{Ibid.}

Consequently, the Court ordered the release of the corpus on the grounds that the Governor’s order purporting to be made under Article III.3 of the 1896 Order in Council was made without authority, which rendered the arrest and detention illegal.

\section*{2.3 The Case of Thomas Perera alias Banda\footnote{In the Matter of the Trial of Thomas Perera alias Banda (1926) 29 N.L.R. 52.}}

The corpus in this case was in remand custody awaiting his trial upon a charge of murder, punishable under Section 296 of the Penal Code, and of ‘having caused evidence of the commission of that offence to disappear’, punishable under Section 198 of the Code. It was alleged in the petition that at the conclusion of the trial on October 28, 1926, the jury, divided as five to two, acquitted him on both counts. However, the Commissioner of Assize requested the jury to reconsider their verdict. When the jury returned the same verdict after further deliberation, the Commissioner discharged them, purporting to act under Section 230 of the Criminal Procedure Code. He thereafter remanded the prisoner to jail pending his trial before another jury.

In the circumstances, the petitioner (the wife of the corpus) claimed that since the jury acquitted the prisoner and the Commissioner had no right to remand him, his detention was under a warrant that was invalid. She prayed that he be ‘acquitted and discharged’ and that the body be returned to her.

A question of law arose at to whether a divisional bench of the Supreme Court could review a warrant of commitment issued by a Commissioner of Assize i.e. a single judge of the Supreme Court
sitting as such, remanding a prisoner to fiscal custody. In examining the matter, the Court concluded that the warrant exhibited as the authority for the detention by the Fiscal was defective and accordingly directed that he be discharged from imprisonment. It was further observed that this was a ‘matter of law which had not been adjudicated upon previously.’\textsuperscript{60} Notwithstanding the view that a decision on this question of law was no longer necessary, as the warrant in question was in any event defective, the Court proceeded to answer the question in the negative. The ruling of the Supreme Court insofar as the writ of \textit{habeas corpus} is concerned may be construed in the following terms: although the Supreme Court had no power to review the order of a Commissioner of Assize in issuing a warrant of commitment remanding a prisoner to custody, the Supreme Court can order the discharge of the prisoner where such warrant is found to be \textit{ex facie} defective.

It is observed that there must be provision in the law to accommodate circumstances such as those that transpired in the case under consideration, should they arise in the future. This observation brings into focus the need for the enactment of a \textit{Habeas Corpus} Act. Provision in such an Act may suitably decree that in such circumstances, upon application of a party seeking an order in the nature of a writ of \textit{habeas corpus}, an order or warrant committing the person to remand to await further trial by a fresh jury, shall be made available to Court in order to ascertain whether such warrant is \textit{ex facie} defective. The provision may also provide that where such order or warrant is found to be defective, the detained person would be \textit{ipso facto} discharged. Throughout this Study the authors have sought to highlight circumstances such as these to illustrate the need for Sri Lanka to enact a \textit{Habeas Corpus} Act.

\textsuperscript{60} \textit{Ibid.} at 53.
3. The Judicial Response to the *Habeas Corpus* Remedy During 1948-1977

3.1 The Period Prior to the First Republication Constitution (1948-1972)

During the period 1948-1973, the Courts Ordinance of 1889 continued to apply in relation to the issuance of writs of *habeas corpus*. Several cases during this period warrant comment.

3.1.1 *Thamboo v. the Superintendent of Prisons*[^61]

In this case, a writ of *habeas corpus* was sought in consequence of the accused being convicted and sentenced to imprisonment at the conclusion of the trial, a decision which was affirmed in appeal. The application for *habeas corpus* was made on the ground that the conviction and sentence were illegal, as the Magistrate erred when he decided to charge the corpus without first recording evidence.[^62] The Court, however, held that the English rule is that a writ of *habeas corpus* will not be granted to persons named in a warrant of committal, or to persons convicted, or in execution under legal process, or in execution of a legal sentence after conviction on indictment in usual course.[^63] The Court observed that this common law rule was incorporated in the English *Habeas Corpus* Act and was

[^61]: (1958) 59 N.L.R. 573. This was an apparent qualification to the decision in *Mohideen v. Inspector of Police, Pettah* (1957) 59 N.L.R. 217 where a divisional bench of the Supreme Court held that where an accused is brought before the Court in custody without process and a police report under the Criminal Procedure Code has been issued, the failure of the Court to record evidence on oath, as required by the specific provisions of the Code before a charge is framed, was an irregularity which was not curable by applying any provisions of the Code. That case did not involve any incidental application for a writ of *habeas corpus*.


[^63]: *Ibid.* at 574.
also found in the Indian jurisprudence on the matter. Hence it was held:

A writ of *habeas corpus* is not available against an order of committal which is based on a judgment of the Supreme Court or against a committal after trial by an inferior Court acting within its jurisdiction.\(^64\)

The Court rejected the American jurisprudence, which appeared to support the contrary position, on the basis that such principles ‘would not be applicable to Ceylon.’\(^65\) These principles are highlighted in a later section of this Study, which focuses on decisions of the Court of Appeal between 1997 and 2002. It is observed that a majority of the *habeas corpus* applications of this era were withdrawn and consequently dismissed by the Court on the basis that the person concerned had been indicted or arrested or placed in lawful custody. This approach will be critiqued in that section of the Study.

### 3.2 Writs of Habeas Corpus under the First Republican Constitution (1972-1977)

After the promulgation of the First Republican Constitution in 1972, the Courts Ordinance was repealed and replaced by the Administration of Justice Law No.44 of 1973. This law provided for a similar *habeas corpus* framework to that which was available under the Courts Ordinance.\(^66\) It is noted that the courts exhibited an increasingly conservative attitude to the issuance of the writ during this era.\(^67\) Furthermore, the promulgation of Emergency Regulations

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\(^{64}\) *Ibid.* at 576.

\(^{65}\) *Ibid.* at 574.


\(^{67}\) Notwithstanding the fact that the remedy of *habeas corpus* had now been statutorily enshrined pursuant to a sovereign Republican Constitution which claimed to confer sovereignty in the people (*vide* Article 3), it must be borne in mind that the relevant
under the Public Security Ordinance No.25 of 1947 (PSO) brought in an added dimension of conservatism. As one leading legal scholar in Sri Lanka warned, as far back as in 1971, that powers given to the executive under the PSO would include even the power to suspend the writ of *habeas corpus.*

3.1.2 *Hidramani v. Ratnavale*¹

This case came during a period in which the Supreme Court fell shy of reviewing decisions made in pursuance of the executive fiat. In this case, the Permanent Secretary to the Ministry of Defence and External Affairs (the 1st respondent), acting in good faith under Regulation 18(1) of the Emergency (Miscellaneous Provisions and Powers) Regulations, No.6 of 1971, caused a person to be taken into custody on 1st September 1971, with a view to preventing him ‘from acting in any manner prejudicial to the public safety and to the maintenance of public order.’ During the *habeas corpus* proceedings instituted by the wife, the permanent Secretary sought to justify his action through an affidavit in which he referred to the widespread armed insurrection which commenced in 1971. The Secretary also stated *inter alia* that he was satisfied, after considering certain material placed before him by the police, that the corpus had taken part in certain foreign exchange smuggling transactions which were under investigation and that he should be prevented in the future from engaging in similar constitutional provision paid only lip service to the concept of sovereignty, as it was not justiciable. In other words, a legal cause of action could not be based on the concept of the people’s sovereignty as contained in Article 3. By contrast, Article 3 read with Article 83(a) of the 1978 Constitution made this concept of the people’s sovereignty (theoretically at least) justiciable.

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transactions, which directly or indirectly helped to finance the insurgent movement prevalent at that time.\(^7\)

3.1.2.1 The crux of the decision

Regulation 18(1) authorized the Permanent Secretary to make an order for the arrest and detention of a person if the Permanent Secretary is of the opinion that such order is necessary for preventing that person from acting in any manner prejudicial to public safety and to the maintenance of public order. If the detention order was produced and was valid on its face, it was the detainee’s burden to prove facts necessary to controvert the matter stated in the detention order.

Here, it was held that the petitioner failed to establish a prima facie case against the good faith of the Permanent Secretary, and therefore the onus did not shift to the Permanent Secretary to satisfy Court as to his good faith. In the circumstances, the Permanent Secretary was not required to file an affidavit. Problematically, it was affirmed that a detention order issued by the Permanent Secretary in good faith was not justiciable.\(^7\)

3.1.2.2 Other propositions laid down in the decision

1) The petitioner’s right to cross-examine the Crown’s witnesses

It was held that the petitioner was not entitled to make an application to cross-examine the Permanent Secretary on the latter’s affidavit.\(^7\)

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\(^7\) Namely the first insurrection of the *Janatha Vimukthi Peramuna*.

\(^7\) As discussed later, this judicial thinking was departed from by the Court of Appeal under the present Constitution in *Siriyalatha v. Baskaralingam*, HCA 17/88, C.A. Minutes of 7 July 1988.

\(^7\) *Mansoor v. Minister of Defence and External Affairs* (1963) 64 N.L.R. 498 was hence overruled.
2) Ouster Clause contained in the Regulations under consideration

Regulation 55 of the said Regulations provided that Section 45 of the Courts Ordinance (which, according to the law that prevailed at that time, conferred jurisdiction on the Supreme Court to issue writs of *habeas corpus*) would not apply with regard to any person detained or held in custody under any Emergency Regulations. In what was possibly the only positive feature of this case, the Court ruled that this Regulation was not applicable in the case of a person unlawfully detained under an invalid detention order or made in abuse of the powers conferred by Regulation 18(1).

3.1.2.3 Some observations

This was probably one of the most unfortunate judgments of the Supreme Court in *habeas corpus* applications during that period, as it indicated clear reluctance on the part of the Court to review decisions of high ranking executive officers of the government despite the same resulting in the deprivation of a person’s liberty. Fortunately, as discussed later in this Study, the Court’s reasoning was departed from in subsequent cases.

3.1.3 Gunesekera v. De Fonseka\(^73\)

In this case, it was emphatically held that although Regulation 19 of the Emergency Regulations No.6 of 1971 empowers any officer mentioned therein to arrest without a warrant a person whom he has reasonable ground for suspecting to be concerned in an offence punishable under any Emergency Regulation, this power was not unfettered.

\(^73\) (1972) 75 N.L.R. 246.
It was held further that a condition precedent for such arrest is that the officer who arrests should *himself* reasonably suspect that the person arrested was concerned in some offence under the Emergency Regulations. In this case, an Assistant Superintendent of Police purported to arrest the corpus under Regulation 19 merely because he had orders to do so from his superior officer, the Superintendent of Police. Accordingly, the Court was of the view that where the arresting officer was not personally aware of the actual offence for which the suspect was arrested, such arrest is liable to be declared unlawful in *habeas corpus* proceedings. Upon such reasoning, the Court was inclined to issue the writ of *habeas corpus* sought by the petitioner.

3.1.4 *Gunasekera v. Ratnavale*\(^7^4\)

The corpus in this case was the same as in the previous application of *Gunasekera v. De Fonseka*.\(^7^5\) The earlier situation examined above concerned the arrest of the corpus on 5 December 1971 by a police officer purportedly acting under Emergency Regulations 19. As discussed above, the Supreme Court declared that the arrest was unlawful on a technical ground. The Court, however, had not examined other grounds. A few hours after his release on 21 January 1972, the corpus was once again taken into custody in pursuance of a detention order issued by the Permanent Secretary, Ministry of Defence and External Affairs on the same day. The detention order was signed by the Permanent Secretary before the order of release was made by the Supreme Court in the earlier application and was executed in the precincts of the adjacent Colombo Law Library while he was having a consultation with his lawyers.

\(^7^4\) (1972) 76 N.L.R. 316.

\(^7^5\) *Supra* note 73.
This second application, filed on the 14 February 1972, concerned the later custody on a detention order dated 21 January 1972, which was renewed again by a detention order dated 16 February 1972. The Permanent Secretary had issued the said detention orders under Emergency Regulation 18(1), which were formulated in terms of Section 5 of the Public Security Ordinance No. 25 of 1947 (PSO). Regulation 18(1) provided:

Where the Permanent Secretary to the Ministry of Defence and External Affairs is of the opinion, with respect to any person, that with a view to preventing such person from acting in any manner prejudicial to the public safety...it is necessary so to do, the Permanent Secretary may make order that such person be taken into custody and detained in custody.

The Permanent Secretary filed an affidavit on 2 March 1972 on information furnished to him by the police relating to the insurgent activities of the detainee in connection with an armed insurrection throughout the greater part of the country during April 1971. However, in contrast to Gunasekera v. De Fonseka,76 where the application for habeas corpus had been against an Assistant Superintendent of Police and was allowed by the Court, greater caution was observed this time around where the application under consideration was against the Secretary of Defence.77 In the instant case, the Supreme Court laid down the following propositions:

1) On the affidavit of the respondents that the detention was under Regulation 18(1), and in the absence of proof by the corpus that the Permanent Secretary had an ulterior motive or acted for a collateral purpose and not for the purpose stated, the detention orders of 21 January and 16 February were

76 Ibid.
77 This double standard leads us to the unenviable conclusion that the nature of the respondent dictated the nature of the judicial response.
ex facie valid. In such a case, an application for *habeas corpus* could not be successfully made.

2) The failure of the Crown to bring to the notice of the Divisional Bench, before the order of release was made on 21 January 1972, that there was a detention order under Regulation 18(1), which they intended to serve on the detainee after his release, did not amount to malice in law. Moreover, the mode of arrest in the precincts of the Colombo Law Library did not affect this position in any way.

3) The PSO was constitutionally valid, and nothing in the Ordinance indicated that Parliament abdicated its legislative authority. The Ordinance was hence one that could have been passed in the plenary exercise of legislative power.

4) Emergency Regulation 18(1) was *intra vires* of the PSO.

This decision also overturned the single positive feature in the earlier decision of *Hidramani v. Ratnavale*,78 whereby the ouster clause contained in Regulation 55 had not been upheld. By contrast, the majority in *Gunasekera v. Ratnavale*79 held that Emergency Regulation 18(10), provided that an order under Regulation 18(1) should not be called in question in any Court on any ground whatsoever and that such Regulation was *intra vires* of the Public Security Ordinance.80 Moreover, it was held that Emergency Regulation 55, which provides that Section 45 of the Courts Ordinance relating to issue of writs of *habeas corpus* by the Supreme Court shall not apply in regard to any person detained or held in custody under any Emergency Regulation, is also *intra vires* insofar as

78 *Supra* note 69.
79 *Supra* note 74.
80 76 N.L.R., at 330-331.
it refers to detention orders under Regulation 18(1).\textsuperscript{81} Hence it was concluded that in the case of a detention order under Regulation 18(1), which is \textit{ex facie} valid, the issue of good faith is not a justiciable matter.\textsuperscript{82} Regulation 55 ousted the jurisdiction of the Court even on the issue of good faith.\textsuperscript{83}

As discussed later, this retrogressive judicial thinking with regard to the upholding of the ouster clause was displaced in subsequent decisions of the Supreme Court as well as the Court of Appeal under the current Constitution.

However, as clearly illustrated above, the decisions of the Sri Lankan courts in the early years (excepting perhaps the \textit{Bracegirdle Case}\textsuperscript{84}) were primarily marked by excessive conservatism and a manifest reluctance by the courts to challenge the executive.

\textsuperscript{81} \textit{Ibid}.
\textsuperscript{82} \textit{Ibid.} at 334.
\textsuperscript{83} \textit{Ibid}.
\textsuperscript{84} \textit{Supra} note 54.
4. The Modern Remedy in Issue: Responses of the Supreme Court and the Court of Appeal to the *Habeas Corpus* Remedy Under the 1978 Constitution

4.1 Introductory Comments

In the post-1978 constitutional era, while the Administration of Justice Law itself was repealed and replaced by a new statute,\(^8\) the writ of *habeas corpus* was elevated to a constitutional remedy.\(^9\) The importance of the aforesaid constitutional changes is demonstrable from the manner in which the judiciary attempted to positively respond to the writ of *habeas corpus* as a remedy to protect individual freedom and liberty. Yet such efforts were not always consistent and may have ultimately fallen short of transforming the practical efficacy of the remedy.

In the ensuing sections, the authors examine the most important judicial decisions of the different eras in Sri Lanka’s modern constitutional history with the objective of highlighting the legal principles enunciated in these decisions and assessing the extent to which the writ of *habeas corpus* has worked as an effective remedy in Sri Lanka. International standards relevant to the modern utilising of this remedy preface this chapter.

The judicial decisions under this category may, for both clarity and convenience, be classified as follows:

1) Decisions of the Supreme Court on appeal from the lower courts;
2) Decisions of the Court of Appeal in the exercise of its *habeas corpus* jurisdiction under Article 141 of the Constitution.

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\(^8\) The Judicature Act, No. 2 of 1978.

Prior to delving into the Sri Lankan case law, a brief overview of the applicable international standards is warranted.

### 4.2 International Standards

The right to judicial review of detention without trial is recognised in the International Covenant on Civil and Political Rights (ICCPR).\(^\text{87}\) Some prominent commentators observe that Article 9 of the ICCPR was developed from the common law principle of *habeas corpus*.\(^\text{88}\) Moreover, the Human Rights Committee has considered several communications in relation to the violation of Article 9(4).\(^\text{89}\) The Committee has also observed that speedy and effective recourse to writs of *habeas corpus* must be available particularly during

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\(^{87}\) GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967). Article 9(1) declares: ‘(1) Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’ Article 9(4) declares: ‘Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.’


emergency periods. Article 9(3) of the ICCPR is a key provision in this regard, as it insists on the right of a detained person to have the lawfulness of his or her detention tried by a court (or the relevant authority) within ‘reasonable time’. The Committee has observed that what constitutes ‘reasonable time’ is a matter of assessment in the particular case; however, lack of financial resources or delays in investigations does not justify a detention lasting several years without adjudication.

The right to judicial review of detention is not a ‘non-derogable’ right under the ICCPR. However, according to a General Comment of the Human Rights Committee, the right to judicial review of unlawful detention, amounts to a non-derogable right by implication. Both the Inter-American Court of Human Rights and the European Court of

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91 In F. Kone v. Senegal, Communication No. 386/1989, U.N. Doc. CCPR/C/52/D/386/1989, Fillastre v. Bolivia, Communication No. 336/1988, U.N. Doc. CCPR/C/40/D/336/1988 and P. Chiiko Bwalya v. Zambia, Communication No. 314/1988, U.N. Doc. CCPR/C/48/D/314/1988, it was established that Article 9(3) was breached, since the suspects were all detained for 1-4 years without having their cases tried before a judicial authority. The duration of detention without trial could not be justified due to the fact that the state parties were unable to satisfactorily explain the reason for detention without trial.

92 See General Comment 29, at para.6, which states: ‘The fact that some of the provisions of the Covenant have been listed in article 4 (paragraph 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists. The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for state parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation.’ Also see Jordan J. Paukt, Judicial Power to Determine the Status and Rights of Persons Detained without Trial 44 Harv. Int’l L.J. 509 (2003), at 508-509.
Human Rights have recognised this right to judicial review of detention by relying on the provisions of the American Convention on Human Rights and the European Convention on Human Rights. *Habeas corpus* jurisprudence in Commonwealth jurisdictions has also recognised the ‘non-derogable’ nature of the right to review unlawful detention. Furthermore, consistent with Article 9(3) of the ICCPR, it has been recognised that detentions must always be subject to a reasonableness requirement. Some of the more specific jurisprudential advances in these jurisdictions would be referred to in this Study wherever appropriate.

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94 Article 7(6) of the American Convention on Human Rights, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969), provides: ‘Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In State Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.’
95 Article 5(4) of the European Convention declares: ‘Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.’ Also see Principle 4 in the Annex of *The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, adopted by the United Nations General Assembly, 9 December 1988, A/RES/43/173.
96 See for example, *Thet Tun v. Deputy Commissioner, Shwebo* [1952] BLR 33, 35–6 (Burma SC) (a power to hold on a temporary order pending an investigation cannot be used to detain for nearly 4 years); *State v. Nasamu* (Nigeria) (1976) 12 CCHCJ 2735 (held one year before being charged—not a reasonable time in the circumstances); *Noah v. AG of the Federal Republic of Nigeria* (1990) 1 CCHCJ 378 (Lagos State HC) (held for 6 years without being charged); *Kawalya v. Officer Commanding Government Prison, Luzira* (1993) 3 Kampala LR 64 (Uganda SC) (applicant arrested by the Army in 1988 but not brought before a court for 3 years, 4 months—a violation of the constitutional requirement that a detainee be brought to trial within a reasonable time).
97 For further discussion, see Clark & McCoy, *supra* note 45.
Moreover, the UN General Assembly Resolution on ‘Disappeared Persons’\(^{98}\) and the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly in 1992\(^{99}\) are two documents that reflect ‘soft law’ regarding the prohibition against enforced disappearances.

The Inter American Convention on Forced Disappearance of Persons\(^{100}\) was perhaps the first internationally binding legal instrument specifically dealing with enforced disappearances. The Convention provides for a definition of the crime of enforced disappearance\(^{101}\) and includes specific provisions as to the responsibilities of the state parties. In 2006, the International Convention for the Protection of All Persons from Enforced Disappearance was adopted by the United Nations.\(^{102}\) The Convention recognizes *inter alia* the rights of individuals to be protected from enforced disappearances, the rights of the victim’s next of kin to obtain information regarding the person disappeared, and also the right to the review of an enforced disappearance that has either

\(^{98}\) UN G.A. Resolution No. 33/173. This resolution identified that an enforced disappearance violates a number of human rights including the right to life, the right to liberty and security of the person, right to be free from torture and the right to a fair and public trial.

\(^{99}\) As stated in this Declaration, an ‘enforced disappearance’ is a violation of human rights for the primary reason that it places an individual outside of the protection of the law. See Article 1 of the Declaration.

\(^{100}\) OAS Treaty Series No. 68, 33 ILM 1429 (1994).

\(^{101}\) Article 2 of the Convention states: ‘For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.’

\(^{102}\) A/RES/61/177; 14 IHRR 582 (2007).
occurred or is planned to be carried out. Following the twentieth ratification by a state party, the Convention entered into force on 23 December 2010, marking a significant development in international law, which no doubt concretised the norm against enforced disappearance. Sri Lanka is yet to sign or ratify this treaty and is hence not bound by its provisions.

4.3 The Standard Procedure Adopted by the Courts in Habeas Corpus Applications

Generally, a standard procedure is followed in instances where habeas corpus applications are filed alleging the enforced disappearance of a person. Upon the invocation of the jurisdiction of the Court of Appeal under Article 141 of the Constitution, notice is issued by the Court on the perpetrators of the alleged arrest and detention of the disappeared person. Where the respondents deny the arrest and detention in their affidavits, the Court refers the matter to the Magistrate’s Court of Colombo for inquiry and report in terms of the proviso to Article 141 of the Constitution.

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103 See Article 18(1); Article 23(3) of the Convention for the Protection of all Persons from Enforced Disappearance.

104 Article 141 declares: ‘The Court of Appeal may grant and issue orders in the nature of writs of habeas corpus to bring up before such court – a) the body of any person to be dealt with according to law; or b) the body of any person illegally or improperly detained in public or in private custody.’

105 The proviso to Article 141 states: ‘Provided that it shall be lawful for the Court of Appeal to require the body of such person to be brought up before the most convenient Court of First Instance and to direct the judge of such court to inquire into and report upon the acts of the alleged imprisonment or detention and to make such provision for the interim custody of the body produced as to such Court shall seem right; and the Court of Appeal shall upon the receipt of such report, make order to discharge or remand the person so alleged to be imprisoned or detained or otherwise deal with such person according to law, and the Court of First Instance shall conform to, and carry into immediate effect, the order so pronounced or made by the Court of Appeal.’ It is noted that this is the same procedure followed by the Provincial High Courts. However, during consultations held in Vavuniya in December 2010, the
4.4 Judicial Response of the Supreme Court to Writs of Habeas Corpus

An important aspect of this Study concerns the opinions expressed by the Supreme Court in the determination of *habeas corpus* applications on appeal from the lower courts.

4.4.1 Rasammah v. Major General Perera and Others[^106]

In this case, the Supreme Court was called upon to determine the precise stage at which a person should be produced by the authorities alleged to have unlawfully detained him. The Court determined this question in the following terms:

1) When a *prima facie* case is made out by the petitioner in an application made under Article 141 of the Constitution, there is no mandatory requirement that the body of the person alleged to be wrongfully detained should, in every case, be brought up before the Court of Appeal (or the most convenient court of first instance) before proceeding to inquire into the legality of the detention. Accordingly, the Court of Appeal has a wide discretion to determine the stage at which the body should be produced. When the Court of Appeal directs a judge of any court of first instance to inquire and report in terms of the first proviso to Article 141, it is lawful for the Court of Appeal to require the body of the person alleged to be illegally or improperly detained to be brought up before such court at the earliest opportunity.


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[^106]: The authors were made aware of an alternative practice amongst the High Courts in the Northern Province. The Vavuniya High Court, in particular, ordered that pending *habeas corpus* applications be heard and determined by the High Court without any need for referral to the Magistrate’s Court.
2) Even when the Court of Appeal is not satisfied that a prima facie case has been made out, the Court is entitled to order the issue of notice on the respondents in terms of Rule 49 of the Supreme Court Rules of 1978.

4.4.2 Chelliah v. Inspector of Police and Others\textsuperscript{107}

In this case, the Supreme Court examined the validity of detention orders under the Prevention of Terrorism (Temporary Provisions) Act\textsuperscript{108} (PTA), and in particular, the meaning to be attached to the phrase ‘unlawful activity’.

On 25 March 1981, in Neerveli, an armed gang ambushed two vehicles carrying currency to the value of Rs.8.1 Million to the People’s Bank in Jaffna. The members of this gang shot and killed two officers who were escorting the vehicle, and escaped with the money and two rifles. The petitioners were not members of this gang. However, two of the petitioners, A and S, assisted in concealing and disposing the money. K, another petitioner, was a close associate of the two members of the gang, who resided close to their home. Further, two persons who were prevented from leaving the country and who were found to be in possession of part of the stolen money were seen in the vicinity of his home. M harboured and concealed one member of the gang and failed to report to the police that such person had committed an offence and that he was concerned in collecting explosives without authority. The four petitioners were arrested on various dates in April 1981 and detained at the Panagoda Camp on the orders of the Minister.

\textsuperscript{107} [1982] 1 Sri L.R. 132.  
\textsuperscript{108} Act No.48 of 1979. The Act was thereafter regularised under the Prevention of Terrorism Act No. 30 of 1981.
The first detention order stated that the Minister had reason to suspect that all four persons named in the application were connected with or concerned in terrorist activity. The second detention order stated that except in the case of M, the Minister had reason to suspect that the other three persons were connected with or concerned in an unlawful activity; i.e. the abetment of and conspiracy to commit robbery of the People’s Bank. In the case of M, the order had been made on the ground that the Minster had reason to suspect that he was connected with or connected in unlawful activity, namely harbouring and concealing members of the gang and failing to report that such persons had committed such offence. This decision is characterised by the individual opinions of the judges sitting on the bench with regard to the core issues for determination.

4.4.2.1 What constitutes ‘unlawful activity’?

Justice Weeraratne was of the opinion that the words ‘unlawful activity’ included not only acts that were not lawful, but also offences that are triable in a court.\(^{109}\) Hence it was held that all four petitioners had committed acts connected with or concerned in unlawful activity and were justifiably detained by the Minister’s Orders under Section 9.\(^ {110}\)

By contrast, Justice Wimalaratne expressed the view that the words ‘unlawful activity’ did not include offences for which a person could be taken to a court, but only acts connected with or concerned in the commission of an offence.\(^ {111}\) Accordingly, it was held that the detentions of A, S and K were justified, but that M should be remanded and brought to trial for the offence to be disclosed.\(^ {112}\)

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\(^{109}\) [1982] 1 Sri L.R., at 136-137, per Weeraratne J.

\(^{110}\) Ibid. at 142.

\(^{111}\) [1982] 1 Sri L.R., at 152, per Wimalaratne J.

\(^{112}\) Ibid. at 153-154.
Hence it is observed that there was disagreement between two of the three judges constituting the bench with regard to what constituted ‘unlawful activity’, resulting in different consequences to the detainees concerned.

4.4.2.2 Executive opinion regarding ‘strong suspicion’

Justice Victor Perera, also drew a distinction between the first three detainees and M. He was of the view that the affidavits did not disclose that the three suspects, A, S and K, actually committed an offence. However, since there was strong suspicion of their involvement, the Minister was justified in making the detention orders.\(^{113}\) In the case of M, however, Perera J. held that there was evidence of the commission of a specified offence and therefore he could not be detained for unlawful activity but was liable to be charged with the offence. In such circumstances, it was opined that the detention order in M’s case was not warranted by law.\(^{114}\)

4.4.3 *Juwanis v. Lathif, Police Inspector, Special Task Force and Others*\(^{115}\)

In this case, the Supreme Court had occasion to determine the scope of jurisdiction and discretion vested in the Court of Appeal in *habeas corpus* applications. The petitioner filed an application for a writ of *habeas corpus* in the Court of Appeal alleging that on or about 12 November 1987, the 1\(^{st}\) respondent (Chief Inspector of Police and Officer Commanding, Special Task Force Camp, Morayaya) with some of his officers came in a jeep and removed the 4\(^{th}\) respondent

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\(^{113}\) [1982] 1 Sri L.R., at 161-162, per Victor Perera J.

\(^{114}\) *Ibid.* at 162.

\(^{115}\) [1988] 2 Sri L.R. 185.
(the petitioner's brother) on the instructions of the 2nd respondent (Inspector General of Police) and was holding him in unlawful and illegal detention. The 1st and 2nd respondents filed affidavits denying that the 4th respondent had been taken into custody.

When the matter was taken up in the Court of Appeal, counsel for the petitioner moved that the matter be referred to a court of first instance for inquiry. The Additional Solicitor-General objected to this motion on the ground that under Article 141 of the Constitution, the Court had no jurisdiction to direct an inquiry unless the Court is satisfied that the detained person is in the custody of or within the control of the respondents.

Article 141 of the Constitution provides:

The Court of Appeal may grant and issue orders in the nature of writs of *habeas corpus* to bring up before such Court -

(a) the body of any person to be dealt with according to law; or

(b) the body of any person illegally or improperly detained in public or private custody,

and to discharge or remand any person so brought up or otherwise deal with such person according to law:

Provided that it shall be lawful for the Court of Appeal to require the body of such person to be brought up before the most convenient Court of First Instance and to direct the judge of such Court to inquire into and report upon the acts of the alleged imprisonment or detention and to make such provision for the interim custody of the body produced as to such court shall seem right; and the Court of Appeal shall upon the receipt of such report, make order to discharge or remand the person so alleged to be imprisoned or detained or otherwise deal with such person according to law, and the Court of First Instance shall conform to, and carry into
immediate effect, the order so pronounced or made by the Court of Appeal.

The Court of Appeal was of view that an interpretation of the Constitution was involved. Thus the matter was referred to the Supreme Court for determination. In the Supreme Court, Justice Mark Fernando construed the questions referred by the Court of Appeal into one consolidated question:

The only matter in dispute, and for determination by us, is whether the Court of Appeal can exercise its power under the first proviso only if it is first ‘satisfied’ that the corpus is in the custody or control of the respondents (emphasis added).116

Justice Fernando determined the consolidated question in the following terms:

(1) The Court of Appeal has jurisdiction, in terms of the proviso to Article 141 of the Constitution, to direct a ‘Judge of a Court of First Instance to inquire into the alleged imprisonment or detention of the corpus,’ and to make report thereon, despite the respondents denial of having taken the corpus into custody or detention; or of having the corpus in their custody or control.

(2) Where the respondents deny having taken the corpus into custody or, detention, or deny having the corpus in their custody or control, it is not necessary for the Court of Appeal to satisfy itself in the first instance, after hearing, that the corpus is within the custody of, or detained by, or in the control of, the respondents, before the matter is referred to a Judge of a Court of First Instance for inquiry and report in terms of the proviso to Article 141.117

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116 Ibid. at 188.
117 Ibid. at 194-195.
Justice Fernando’s observations with regard to the practice followed by our courts under the Constitution are noteworthy and may be summarised as follows:

1) The practice of the court has generally been to issue notice of the application _ex parte_ in the first instance, thereby requiring the respondents to respond.\(^{118}\)

2) Orders can sometimes be made—before the final determination of the application—where the respondents admit the custody and detention of the corpus. However, where it is denied, such orders being in the nature of interim orders would not be made, for it would amount to pre-judging the respondents’ case. Consequently, the practice of the Sri Lankan courts is to issue the writ as a final step in the proceedings, which corresponds to the modern practice in England.

3) The language used in the Courts Ordinance of 1889 and its legislative successor—Section 12 of the Administration of Justice Act of 1973, which employed the phrase ‘cause of the alleged imprisonment’, may be contrasted with the language in Article 141 of the present Constitution, namely ‘..acts of the alleged imprisonment or detention…’. The latter terminology illustrates a clear legislative intention to permit an inquiry into the facts where detention is denied. Thus the Court of Appeal is vested with jurisdiction and discretion to delegate inquiries to the court of first instance i.e. the Magistrate’s Court.

\(^{118}\) Article 136(1) of the Constitution provides: ‘Subject to the provisions of the Constitution and of any law, the Chief Justice with any three Judges of the Supreme Court nominated by him, may from time to time make rules regulating generally the practice and procedure of the Court including…’ in consequence of which the Supreme Court Rules of 1978 and 1990 were made. See Rule 46 of the 1978 Rules and Rule 3 with its sub rules of the 1990 Rules respectively.
4.4.4 Shanthi Chandrasekeram v. D.B. Wijethunga and Others\textsuperscript{119}

This case was the first instance where the Supreme Court had occasion to discuss the ambit of Article 126(3) of the Constitution as impacting on applications for \textit{habeas corpus} filed in the Court of Appeal under Article 141 of the Constitution. Two preliminary questions with regard to the nature of the jurisdiction and powers of the Supreme Court under the Article were considered. Article 126(3) provides:

Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of \textit{habeas corpus, certiorari, prohibition, procedendo, mandamus or quo warranto}, it appears to such Court that there is \textit{prima facie} evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court.

Chapter III and IV of the Constitution respectively deals with fundamental rights and language rights, the violation of which is contemplated in Article 126(3). Further, Article 126(4) of the Constitution provides:

The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundament right or language right.

The two questions that arose in this case were as follows. First, whether upon such reference, the Court was required to determine the application in all its ramifications, including the question of the

\textsuperscript{119} [1992] 2 Sri L.R. 293, per Mark Fernando J.
infringement of fundamental rights, or only the latter question as to whether rights had been infringed. Second, whether a reference was permissible only in respect of an infringement having a close connection with the facts and grounds which gave rise to the principal habeas corpus application, or whether the question could be construed more broadly even in respect of an infringement having no such nexus.

In response, the Court observed as follows:

If Article 126(3) is considered in isolation, ‘such matter’ may be understood to refer either to the writ application, or to the question of infringement (of which there was prima facie evidence). However, for several reasons, I am of the view that this expression does not refer to the question of infringement, but to the entire application.

Article 126(4) empowers this Court, if it finds that there was no infringement, to refer ‘the matter’ back to the Court of Appeal. Thus if the question whether there was an infringement is answered in the negative, the matter must-be sent back to the Court of Appeal; obviously, that matter cannot be the question of infringement, which has already been decided, but that which yet remains to be determined, namely the application. On the other hand, if this Court finds that there has been an infringement, there is no requirement that the substantive writ application be sent back; hence this Court must determine that as well. It may be that in an appropriate case Article 126(4) may empower this Court to give a direction requiring the substantive application to be determined by the Court of Appeal, perhaps after taking evidence. However, Article 126(4) presupposes that this Court would, in general, determine the entire application. The ‘matter’ thus means the ‘application’.

Consequently, it was held that the jurisdiction of the Supreme Court extends not only to the question of infringement, but also to the entire

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120 Ibid. at 296.
application. Having perused the affidavit filed on behalf of the detained persons by their respective wives, the Court found that the only assertions relating to ‘torture, cruel and inhuman and degrading treatment’ involved allegations of ‘blindfolding’ and ‘merciless assault’ with unstated consequences and with no particulars as to the nature of treatment meted. The Court held that the petitioners were not entitled to relief under Article 11 for the following reasons.

The alleged infringements of Article 11 could not have been the basis of references under Article 126(3), firstly because there was only an assertion, and no prima facie evidence of such infringements, and secondly because there was no averment or evidence that the infringements were by a party to the habeas corpus applications.121

Where the alleged arrest and detention in breach of Article 13(1) and (2) were concerned, it was observed that the detained persons in fact had been produced within 30 days before the Magistrate Court upon an Emergency Regulation,122 which authorised detention for 90 days. Upon the expiry of that period, the Defence Secretary had issued detention orders under Regulation 17. The justification for the initial arrest and continued detention of the detainees, as revealed from the affidavit of the 2nd defendant (Director, Crime Detective Bureau), was that this was the first occasion on which the police had arrested an upcountry politician involved in harbouring LTTE cadres. Hence it was necessary to investigate the involvement of the said organisation to which the detainees were allegedly linked.

Yet it was found that the subsequent detention order filed after the habeas corpus applications were not supported by an affidavit from the Defence Secretary. Thus there was no material explaining how the Defence Secretary could have formed an opinion that the arrest and detention of the detainees was necessary. Though it was conceded that

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121 Ibid. at 298-299.
122 Regulation 19(2) of the prevailing Emergency Regulations.
the Court would not lightly interfere with the subjective *bona fide* opinion of the competent authority, Justice Fernando observed:

…that is not to say that this Court will surrender its judgment to that of the Executive, for that would imperil the liberty of every citizen. Sufficient material must be placed before the Court to satisfy us that the deprivation of liberty, not limited in point of time, was not arbitrary, capricious or unreasonable. The unexplained failure of the respondents to place any material whatsoever leads but to one conclusion, that there was no such material, and therefore that the Detention Orders were unreasonable.\(^\text{123}\)

Ordinarily, this judicial finding would have led to an order that the detainees be released. However, by that time, they were to be indicted in the High Court. Consequently, counsel representing the respective parties agreed that if indictments were duly filed and served on them, the question of their custody pending trial according to law, should be determined by the High Court. On the contrary, it was agreed that if such indictments were not filed or served on or before 18 May 1992, they would be released forthwith. The Court confirmed this direction to the authorities to produce the detainees before the High Court to enable Court to determine whether their custody pending trial was according to law, and to release them if indictments have not been filed and served on or before the date that proceedings in the said High Court were scheduled to commence.

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\(^{123}\) [1992] 2 Sri L.R., at 301. Thus violation of Article 13(1) and (2) of the Constitution had been established.
4.4.5 Kanapathipillai Machchavallavan v. Officer in Charge, Army Camp Plantain Point, Trincomalee and Three Others\textsuperscript{124}

4.4.5.1 The crux of the decision

In this recent decision, the Supreme Court was called upon to consider an appeal against the judgment of the Court of Appeal dismissing a \textit{habeas corpus} application. The appellant, the father of the persons concerned, filed two \textit{habeas corpus} applications (HCA/244/94 and HCA/245/94) in respect of his sons, who were arrested at a cordon and search conducted by Plantain Point Army Camp, Trincomalee. At the time of the arrest (which took place on 6 July 1990) the persons were aged 22 years and 25 years respectively.

The Court of Appeal referred the two applications to the Chief Magistrate of Colombo to inquire into and report upon the said arrest and alleged imprisonment or detention of the persons concerned. Upon a positive report filed by the Magistrate, the Court of Appeal issued a Rule \textit{Nisi} on the respondent army officer directing him to bring up their bodies. However, the army officer filed an affidavit denying the arrest and detention. Accordingly, the Court of Appeal discharged the Rule \textit{Nisi} and dismissed the \textit{habeas corpus} applications. It was held that the Appellant had not succeeded in discharging his burden of proof. The Appellant thereafter sought special leave to appeal to the Supreme Court against the judgment of the Court of Appeal.\textsuperscript{125} Leave was granted on the following two questions of law:\textsuperscript{126}

1) Whether at the time the Court of Appeal made the impugned order, there was evidence of the infringement of the

\textsuperscript{124} [2005] 1 Sri L.R. 341, per Shirani Bandaranayake J.
\textsuperscript{125} In terms of Article 128(1) of the Constitution.
\textsuperscript{126} [2005] 1 Sri L.R.\ldots, at 343.
fundamental rights of the persons concerned at least under Article 13(4) of the Constitution caused by the 1st respondent, or by another state officer, for whose acts the state was liable. In the circumstances, it was arguable that the Court of Appeal should have rendered the entire matter for determination by the Supreme Court under Article 126(3) of the Constitution; and

2) Whether the 1st respondent and the state were liable for the arrest and the subsequent presumed death of the persons.

Article 13(4) decrees that ‘[n]o person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment.’

At the hearing before the Supreme Court, a preliminary objection was raised by the respondents that there was no allegation of a fundamental rights violation in the petitioner’s application to the Court of Appeal and that therefore, this failure barred the Supreme Court from considering whether a violation had occurred. The Supreme Court rejected this objection by noting the words ‘if it appears to the Court of Appeal’ contained in Article 126(3). It was accordingly held that the said Article does not cast a burden on the petitioner to move court with his application. On the contrary, it was held that the burden was with the Court of Appeal, which had the duty to decide in the course of the hearing of a writ application as to whether an infringement of a fundamental right was apparent.

The respondents raised a second preliminary objection on the basis that every *habeas corpus* application that refers to arrest and

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disappearance cannot be referred to the Supreme Court in terms of Article 126(3). Again rejecting this argument, the Court observed:

It is to be borne in mind that, it is not every *habeas corpus* application that would be referred to the Supreme Court in terms of Article 126(3) of the Constitution. Provision is made in terms of Article 126(3) for the Court of Appeal to refer to the Supreme Court the writ application only when it appears to such Court that there is *prima facie* evidence of an infringement or an imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application. Therefore it would not be correct to say that all *habeas corpus* applications would invariably be referred to the Supreme Court by the Court of Appeal as such reference should strictly be in terms of Article 126(3) of the Constitution.\(^{129}\)

A further question considered by the Court was whether the time limit of one month in Article 126(2) prevented the Court of Appeal from referring the matter to the Supreme Court under Article 126(3). Admittedly, the persons concerned had been taken into custody in July 1990 and the appellant had gone before the Court of Appeal only in June 1994 although he had been making inquiries and searching for his sons in the meantime. The Court endorsed the academic opinion of Professor H.W.R Wade\(^ {130}\) that there is no time limit for *habeas corpus*

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\(^{129}\) *Ibid.* at 347. *Shanthi Chandrasekaram’s case* [1992] 2 Sri L.R. 293 was cited as authority for this proposition. See, however, *Karunatileke v. Liyanage, Inspector of Police (Crimes) Gampaha and Others* [2005] 1 Sri L.R. 276, where the Supreme Court dismissed a petitioner’s contention that since there was *prima facie* evidence of an infringement or imminent infringement of a fundamental right during the hearing of a *habeas corpus* application in the Court of Appeal, the matter should have been referred to the Supreme Court to determine the matter. Exhibiting a contrary judicial approach to the *Machchavallavan* case, the Court in this instance did not accept this argument on the basis that the petitioner had sought relief after 49 days of the alleged arrest or detention and as such, had not complied with the 30 days time limit prescribe by Article 126(2) to come before the Supreme Court on an alleged fundamental rights violation. Such judicial deference exemplifies the problems of reliance on one or two ‘liberal’ judgements in the context of the absence of legislating on the matter.

\(^{130}\) *Wade & Forsyth supra* note 1, at 594.
applications and noted that it was not the appellant who had moved the Court in terms of Article 126(2) but the Supreme Court which had granted Special Leave to Appeal to consider the question of any violation in respect of Article 13(4) of the Constitution.\textsuperscript{131} Hence this objection too was dismissed.

The Court meanwhile also considered the question as to whether there was justification for the issue of \textit{habeas corpus} and \textit{prima facie} evidence of an infringement of fundamental rights at least in terms of Article 13(4). The material placed by the appellant, the 1\textsuperscript{st} respondent’s contention that his duties did not authorize him to cause any arrest, and the existence of two units of the Army Camp who were alleged to have caused the arrest, cumulatively cast doubt as to who might be responsible for the disappearance. The Court thus held:

\begin{quote}
It is clear on the evidence that the corpora were arrested and detained in or around 06.07.1990 at a cordon and search operation...It is reasonable to conclude that the corpora were kept in the Army Camp with the knowledge and connivance of the Army officers. Hence Army authorities are responsible to account for the whereabouts of the two sons of the appellant.\textsuperscript{132}
\end{quote}

Consequently, the Supreme Court found no difficulty in granting the writs of \textit{habeas corpus}. It was further held that since the grounds for issuing the writs were established i.e. the illegal deprivation of personal liberty, the complaint being related to the arrest and detention of the persons concerned as envisaged in Article 13(1) and 13(2), and the subsequent disappearance of such persons, it was apparent that an alleged violation of fundamental rights contrary to Article 13(4) of the Constitution had taken place.\textsuperscript{133}

\textsuperscript{131} [2005] 1 Sri L.R., at 355.
\textsuperscript{132} \textit{Ibid.} at 348-349.
\textsuperscript{133} \textit{Ibid.} at 351.
4.4.5.2 Reflections on the ruling

The Constitution does not define ‘disappearance’ as a violation of fundamental rights. Furthermore, the right to life itself is not explicitly contained in the Constitution. However, the Supreme Court’s interpretation of Articles 13(1), (2) and (4) in this decision established the proposition that where state authorities arrested and detained a person and that person subsequently disappeared, a presumption would arise that the person disappeared while in the custody of those authorities. It was accordingly held that this constituted an infringement of fundamental rights under Article 13(4).

On the question of disappearances and the drawing of a presumption of death, the Supreme Court approved a doctrine espoused in the Indian case of Sebastian M. Hongray v. Union of India where Desai J. referred to persons who had gone missing. The Indian judge had commented:

*Prima facie*, it would be an offence of murder...It is not necessary to start casting a doubt on anyone or any particular person. But *prima facie* there is material on record to reach an affirmative conclusion that the [detainees] are not alive and have met an unnatural death.

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134 In two earlier decisions the Court had already construed an implied right to life from Article 13(4). The Court thus observed: ‘Considering the contents of Article 13(4), this Court has taken the position that no person should be punished with death or imprisonment except by an order of a competent court. Further, it has been decide in Sriyani Silva v. Iddamalgoda, Officer-in-Charge, Police Station Paiyagala and Others [2003] 2 Sri L.R. 63 and Lama Hewage Lal (Deceased), Rani Fernando (Wife of Deceased Lal) and Others v. Officer-in-Charge, Minor Offences, Seeduwa Police Station and Others [2005] 1 Sri L.R. 40, that if there is no order from Court no person should be punished with death and unless and otherwise such an order is made by a competent court, any person has a right to live. Accordingly Article 13(4) of the Constitution has been interpreted to mean that a person has a right to live unless a competent court orders otherwise.’ *Ibid.* at 351.

135 AIR (1) 1984 (SC) 1026.

Further important principles may be elucidated from this decision. Having held that the 1st respondent was not personally responsible,\(^{137}\) the Court proceeded to hold that since the commanding officer had authority to arrest and to detain and was in overall charge of such operations, the state was responsible for the infringement of the fundamental rights of the persons concerned guaranteed by Article 13(4). Consequently, it was held that the fundamental rights of the persons concerned had accrued to or devolved upon the appellant, hence justifying the payment of a sum of Rs.150,000 as compensation and costs to the appellant for each person.

4.5 *The Impact of the Doctrine of the Supremacy of Parliament and Separation of Powers on the Right to Seek Habeas Corpus*

In *Aziz v. Thondaman*,\(^ {138}\) the view had been expressed—albeit, *obiter*—that:

The right of a citizen to invoke the aid of the courts is one that cannot be taken away by the rules of any association or body of persons. It is so fundamental that it cannot, in my view, be taken away even by our legislature itself. It is unnecessary for the purpose of this judgment to elaborate this view; it is sufficient to say that a power to legislate for peace, order and good government, does not include a power to deny access to the courts which are the living symbols of peace, order and good government, for the denial of such right would be a negation of the very purpose for which legislative power is conferred on the legislature.\(^ {139}\)

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\(^{137}\) Thus, permitting no justification for the granting of exemplary costs.

\(^{138}\) (1959) 61 N.L.R. 217.

\(^{139}\) *Ibid.* at 222-223, per Basnayake, C.J.
In *Anthony Naide v. The Ceylon Plantations*, a doubt was expressed—again, *obiter*—as to whether Parliament had the power to interfere with the jurisdiction of the Supreme Court in connection with the issue of prerogative writs and *habeas corpus*, although it was conceded that Parliament could alter the jurisdiction of the courts even retrospectively. However, the Privy Council in the case of *Liyanage v. The Queen* recognised the existence of the separate power of the judiciary that cannot be taken away even by Parliament, except by way of a constitutional amendment.

Nevertheless, according to *Anthony Naide* the position of the Court appeared to have been that the alteration of jurisdiction of the Courts has nothing to do with judicial power and is therefore valid. L.J.M. Cooray examines this issue and presents a contrary view:

The question may still be posed whether a denial of access of the Courts or interference with the issue of the writs (particularly the writ of *habeas corpus*) maybe regarded as something more fundamental than a mere alteration of the jurisdiction of the Courts such that it amounts to an interference with judicial power and is therefore invalid.

Moreover, a further question arises whether the suspension or derogation of the writ of *habeas corpus* under regulations, expressly or impliedly, in the exercise of powers conferred by the Public Security Ordinance (PSO) during a time of emergency could be impugned. As pointed out by Cooray, the Supreme Court had occasion to consider this question in the case of *Weerasinghe v.*

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140 (1966) 68 N.L.R. 558.
142 Supra note 140.
143 Being the *ratio decidendi* in *Anthony Naide’s Case* (supra).
145 Ordinance No. 25 of 1947.
146 Cooray, *supra* note 144.
Samarasinghe\textsuperscript{147} but unfortunately chose not to despite the fact that it was a case where the doctrine of separation of powers was directly at issue.

In the context of the ‘War on Terror’ prosecuted by the U.S. government, several attempts had been made to suspend the writ of 
*habeas corpus* and limit the scope for judicial review of possibly illegal detentions. Three cases warrant discussion in this regard.

First, in *Hamdi v. Rumsfeld*,\textsuperscript{148} the U.S. Supreme Court considered the legality of the detention of a U.S. citizen on U.S. soil as an ‘enemy combatant’. In this case, the father of the detainee filed a writ of *habeas corpus* seeking the release of the detainee who was held indefinitely as an ‘enemy combatant’. Sandra Day O’Connor J. was of the view that although congress authorised the detention of such combatants,\textsuperscript{149} ‘due process’ demanded that a citizen held in the U.S. as an enemy combatant be given a meaningful opportunity to contest the factual basis for detention before a neutral decision maker.\textsuperscript{150} It was accordingly held that to limit the role of a court to merely considering the legality of the broader scheme of detention is to condense power into a single branch.\textsuperscript{151} It was opined that a state of war is not a ‘blank check’ for the President when it comes to the rights of the nation’s citizens.\textsuperscript{152} Thus it was concluded that when individual liberties are at stake, all three branches of government must play a role, and the writ of *habeas corpus* remains a means for judicial check on executive discretion.\textsuperscript{153} This system of checks and balances

\begin{itemize}
\item \textsuperscript{147} (1966) 68 N.L.R. 361.
\item \textsuperscript{148} 542 U.S. 507 (2004).
\item \textsuperscript{149} 18 U.S.C s.4001 (a) provides: ‘no citizen shall be imprisoned or otherwise detained by the U.S except pursuant to an Act of Congress.’
\item \textsuperscript{150} 542 U.S. at 537, per O’Connor J.
\item \textsuperscript{151} *Ibid.* at 536.
\item \textsuperscript{152} See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
\item \textsuperscript{153} 542 U.S. at 536, per O’Connor J.
\end{itemize}
requires that citizens have a right to come to court to challenge the factual circumstances under which they were detained.\footnote{Ibid, at 536-537. Cf: the judicial thinking in the Bracegirdle Case, supra notes 54-58.}

Secondly, in \textit{Hamdan v. Rumsfeld}\footnote{548 U.S 557 (2006).} the Supreme Court dealt with an executive order establishing military commissions with jurisdiction to try anyone who is not an American citizen who the President had reason to believe was a terrorist. Under this scheme, the right of appeal was only to the President or Defence Secretary. The scheme specifically denied defendants the privilege of seeking any remedy, including a writ of \textit{habeas corpus} in the U.S. However, Hamdan filed a petition for a writ of \textit{habeas corpus}, arguing that the military commission convened to try him was illegal and lacked the protections required under the Geneva Conventions\footnote{Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force on 21 October 1950.} and United States Uniform Code of Military Justice.\footnote{64 Stat. 109, 10 U.S.C. Chapter 47.} It was held that the military commission system was indeed illegal because it had several procedural deficiencies including the exclusion of the defendant from proceedings, and inability to examine certain evidence, which in turn violated the Geneva Conventions and United States Uniform Code of Military Justice.

In response to the above judicial interventions in favour of the liberty rights of the detainees, the U.S. government passed the Military Commissions Act of 2006 (MCA).\footnote{Public Law 109-366, Stat.120 Stat. 2600.} The Act specifically denied \textit{habeas corpus} review, but provided that each detainee had a right to appeal to the U.S. Court of Appeals for the District of Columbia Circuit. If that appeal is unsuccessful, a \textit{certiorari} review by the Supreme Court could be sought. However, this scheme was once
again challenged as being an insufficient alternative to the *habeas corpus* remedy.

The last of the trilogy of cases was the case of *Boumediene v. Bush*, 159 where an application for a writ of *habeas corpus* was made in a U.S. civilian court on behalf of Lakhdar Boumediene, a naturalised citizen of Bosnia and Herzegovina, held in military detention at a U.S. detention camp in Guantánamo Bay, Cuba. Anthony Kennedy J., holding for the majority, concluded that the prisoner had a right to *habeas corpus* under the U.S. Constitution and that the MCA was an unconstitutional suspension of that right. It was accordingly held that the review mechanism stipulated by the MCA was not an adequate and effective substitute for the *habeas writ*. 160

Other countries prosecuting the U.S.-led ‘War on Terror’, have been less successful in curbing its negative impact on the *habeas corpus* remedy. In Pakistan for example, it has been alleged that the Pakistani government has committed human rights violations against hundreds of Pakistani and foreign nationals. 161 Hundreds of people have been arbitrarily arrested and detained in secret; becoming victims of enforced disappearances. It has been observed by international human

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159 553 U.S. 723 (2008). A critical feature of advocacy surrounding the *Boumediene* case was the involvement of civil society. For instance, the Center for Constitutional Rights (CCR) filed an *amicus* brief in this case amidst coordinating the largest ever coalition of *pro bono* lawyers to defend the prisoners at Guantánamo Bay, ensuring that nearly all have been represented. CCR’s legal team comprises leading experts on human rights and related legal issues. See Centre for Constitutional Rights, *Guantanamo Attorneys to Justices: Restore the Constitution*, available at http://ccrjustice.org/newsroom/press-releases/guant%20%3A%20namoattorneysjustices%20%203A-restore-constitution (last accessed on 20 January 2011).

160 *Ibid.* per Kennedy J.

rights monitors that the right to *habeas corpus* has been systematically undermined in Pakistan.\(^{162}\)

In the interest of individual liberty and the Rule of Law, the legislature of Sri Lanka ought to address the issue of *habeas corpus*, perhaps by enacting a *Habeas Corpus* Act, which specifically prohibits regulations that suspend the writ of *habeas corpus*. Such legislative reform may, however, require a constitutional amendment due to the definition of ‘law’ provided in Article 15(7) of the Constitution, which necessarily includes Emergency Regulations issued under the PSO.\(^{163}\)

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\(^{163}\) Article 15(7) declares: ‘The exercise and operation of all the fundamental rights declared and recognised by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph ‘law’ includes regulations made under the law for the time being relating to public security.’ This provision may be contrasted with Article 170 of the Constitution in which ‘law’ is expressly construed *not* to include Emergency Regulations. Further, the term ‘law’ in Article 15(7) has been observed by the Supreme Court as not to include regulations made under the Prevention of Terrorism Act No. 48 of 1979. See *Thavaneethan v. Dayananda Disanayake* [2003] 1 Sri.L.R. 74, at 97-98, per Mark Fernando J: ‘The word ‘includes’ in Article 15(7) does not bring in regulations under other laws. ‘Law’ is restrictively defined in Article 170 to mean Acts of Parliament and laws enacted by any previous legislature, and to include Orders-in-Council. That definition would have excluded all regulations and subordinate legislation. The effect of the word ‘includes’ was therefore only to expand the definition in Article 170 by bringing in regulations under the law relating to public security. While at first sight ‘public security’ may seem to cover much the same ground as ‘national security and public order’, it is clear that ‘the law relating to public security’ has been used in a narrow sense, as meaning the Public Security Ordinance and any enactment which takes its place, which contain the safeguards of Parliamentary control set out in Chapter XVIII of the Constitution. Article 15 does not permit restrictions on fundamental rights other than by plenary legislation – which is subject to pre-enactment review for constitutionality. It does not permit restrictions by
In any event, drawing from recent U.S. jurisprudence and longstanding legislative prohibitions in the U.K., it is clear that Sri Lanka requires the immediate reaffirmation of the inviolability of the habeas corpus remedy.

In the interest of individual liberty in the context of the habeas corpus remedy, the principles expounded by the progressive decisions of the Supreme Court adverted to above, compel the establishing of a legal regime with the objective of making habeas corpus a potent remedy in the hands of an aggrieved party. In this context, the authors have argued for the enactment of a Habeeas Corpus Act, or in the alternative, for the formulation of Supreme Court Rules under Article 136 of the Constitution to enable the effective working of the habeas corpus remedy.

4.6 Judicial Response of the Court of Appeal to Writs of Habeas Corpus

Sri Lanka experienced a wave of enforced disappearances both during the ethnic conflict in the North and East, which escalated after 1983, and during the second JVP insurrection, which gained momentum in mid-1987. There had been disappearances during the first Southern insurrection of 1971 as well, but it was in the eighties that enforced executive action (i.e. by regulations), the sole exception permitted by Article 15(1) and 15(7) being emergency regulations under the Public Security Ordinance because those are subject to constitutional controls and limitations, in particular because the power to make such regulations arises only upon a Proclamation of emergency, because such Proclamations are subject to almost immediate Parliamentary review, and because Article 42 provides that the President shall be responsible to Parliament for the due exercise of powers under the law relating to public security. It is noteworthy that Article 76(2) expressly recognizes that Parliament may delegate to the President the power to make emergency regulations under the law relating to public security. Other regulations and orders which are not subject to those controls made under the PTA and other statutes, are therefore not within the extended definition of ‘law’.
disappearances emerged as a systematic and organised practice in Sri Lanka.\textsuperscript{164}

The decisions examined in the following section appear to indicate a generally strict response by the Court where the \textit{habeas corpus} applications were in respect of detainees under the PTA or the Emergency Regulations. When critically analysing these cases, the principle espoused in the dissenting opinion of Lord Atkin in \textit{Liversidge v. Anderson}\textsuperscript{165} may be recalled. This principle has rightly been categorised as one of the pillars of liberty in \textit{habeas corpus} cases:

That every imprisonment is \textit{prima facie} unlawful and it is for a person directing imprisonment to justify his act.

In other words, it is for the arresting authority alone to justify detention.\textsuperscript{166} However, this principle—interlinked as it were to the burden of proof—does not appear to have been consistently considered by the Sri Lankan courts in \textit{habeas corpus} applications. In many of the orders examined in this Study, errors in naming the abductor or the particular army camp or location where the detainees were being held, were considered sufficient grounds for dismissing the application.

Moreover, the mere denial of the allegations of the petitioner by the head of the police or the head of the army has also led to the dismissal of the applications. This judicial approach in Sri Lanka, which


\textsuperscript{165} [1942] A.C. 206 at 245, per Lord Atkin.

\textsuperscript{166} This principle is very clear where alleged illegal immigrants or overstaying foreign visitors are concerned, where there is power to detain and where the identity of the detaining authority is ascertainable without any difficulty. The fact that the burden of proof lies upon those who have power to detain and remove immigrants is explained very well in \textit{R v. Home Secretary ex p. Khawaja}, [1984] A.C. 74.
weakens the protection of liberty, owes its genesis to the conservative thinking of some English judges. Such thinking, parting as it did with the principle enunciated by Lord Atkin in the *Liversidge’s case*,\(^{167}\) instead, persisted with placing the burden of proof on the petitioner.\(^{168}\) This restrictive approach adopted by the majority in *Liversidge’s case* and subsequently adopted by the Sri Lankan courts will be illustrated in the following discussion.

It must, however, be observed that with the change of political regime in 1994, the Court of Appeal appeared to show a more sympathetic response to writs of *habeas corpus*, particularly in regard to those brought in respect of persons who had disappeared during the second insurrection in the South. However, this judicial empathy was demonstrable only during a short period (1994-1995); it was absent in later years where writs of *habeas corpus* were sought in respect of persons who had been ‘disappeared’ under the emergency laws, particularly from 1997 onwards.

The judicial response during the periods 1981-1993 and 1994-2002 is separately analysed. This division is made with the intention of demonstrating changes in judicial attitudes during these particular time periods.

### 4.6.1 Orders of the Court of Appeal during 1981-1993

This period saw some decisions of significance which, given their importance, will be analysed in detail.

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\(^{167}\) [1942] AC 206 at 245, per Lord Atkin (in His Lordship’s dissenting order).

4.6.1.1 Orders made in the context of the ethnic conflict

Two key judgments relate to persons suspected of ‘terrorist activity’ and will hence be analysed first.

4.6.1.1.1 Senthilnayagam v. Seneviratne¹⁶⁹

In this case, four persons¹⁷⁰ were arrested without warrant by the police and detained in army camps under the PTA. It was alleged that they had been tortured and physically assaulted while in detention. The reasons for the arrests were not disclosed and the validity of the detention orders was also in issue. The Court of Appeal, however, dismissed all four applications on the following bases:

1) Re: Arrest without warrant and non-disclosure of reasons for arrest

The Court noted that under Article 13(1) of the Constitution, ‘no person shall be arrested except according to procedure established by law [and] [a]ny person arrested shall be informed of the reason for his arrest.’ It was noted further that the added statutory requirement that a person making an arrest ‘shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested’¹⁷¹ was ‘mandatory’ and that ‘any infraction of such requirement was illegal and must be strongly condemned as a serious encroachment on the liberty of the subject guaranteed under the Constitution.’¹⁷²

However, despite laying down these admirable legal principles, the Court held that in view of the said allegations and denials thereof

¹⁷⁰ The father in two cases, the wife in one and the brother in the other made the applications.
¹⁷¹ Section 23(1) of the Code of Criminal Procedure Act, No. 15 of 1979.
contained in the respective affidavits and counter-affidavits, it was not possible to state affirmatively that these provisions had not been observed by the police.

A critical question arises as to whether the so-called mandatory requirements of arrest upon warrant and the disclosure of reasons for arrest could be overcome merely by averments in an affidavit. The Court appears to have begged this question, apparently taking refuge in Section 6(1) of the PTA. In the process, the Court overlooked the conflict between Section 6(1) of the said Act and Article 13(1) of the Constitution, which ought to have been resolved in favour of the constitutional provision, as it was the higher norm. In the wake of such a higher norm, the Court should have permitted the petitioner to cross-examine material witnesses by allowing evidence to be led, particularly those in the area of disputed facts. Since the liberty of a subject was in issue, the Court ought to have exercised its plenary powers in its discretion on the principle, viz., ‘what is not prohibited must be permitted’.

2) Re: The allegations of assault and torture by the army

The Court also rejected the allegations of torture although it was noted that non-grievous contusions on part of the body were found. Such allegations were rejected on a three-fold basis: (1) the denials by army officers at the respective camps; (2) the detainees’ failure to state the

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173 Section 6(1) provides: ‘Any police officer not below the rank of Superintendent or any other police officer not below the rank of Sub-Inspector authorised in writing by him in that behalf may, without a warrant and with or without assistance and notwithstanding anything in any other law to the contrary -
(a) arrest any person;
(b) enter and search any premises;
(c) stop and search any individual or any vehicle, vessel, train or aircraft; and
(d) seize any document or thing, connected with or concerned in or reasonably suspected of being connected with or concerned in any unlawful activity.


precise nature of the alleged acts of torture to the judicial medical officer; and (3) the apparent contradictions between the averments in their affidavits and what was told to the medical officer with regard to the place in which the alleged acts of torture took place.

It is regrettable that the Court chose to draw a distinction between assault resulting in grievous injuries that may amount to torture and assault resulting in non-grievous injuries that may not amount to torture. There is little doubt that the latter category of assault would amount to torture or at least degrading treatment as contemplated by Article 11 of the Constitution\textsuperscript{176} or an offence under the Penal Code.\textsuperscript{177} Such acts would also amount to an offence under the Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment Act No.22 of 1994.

3) Re: Validity of detention orders

Given that the writ of \textit{habeas corpus} is sought to secure the release of a person unlawfully detained, the validity of detention orders was an issue that had direct links to the remedy sought. The relevant provisions of emergency law in issue were as follows:

Section 9(1) of the PTA:

Where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity, the Minister may order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister,

\textsuperscript{176} See for example, \textit{Adhikary and Another v. Amarasinghe and Others} [2003] 1 Sri L.R., 270, where it was held ‘...the test which has been applied by our Courts is that whether the attack on the victim is physical or psychological, irrespective of [that] fact, a violation of Article 11 would depend on the circumstances of each case.’

\textsuperscript{177} See Section 342 of the Penal Code, which defines ‘simple assault’.
and any such order may be extended from time to time for a period not exceeding three months at a time:

Provided, however, that the aggregate period of such detention shall not exceed a period of eighteen months.

Section 31(1) of the Act defines ‘unlawful activity’ as follows:

‘Unlawful activity’ means any action taken or act committed by any means whatsoever, whether within or outside Sri Lanka, and whether such action was taken or act was committed before or after the date of coming into operation of all or any of the provision of this Act in the commission or in connection with the commission of any offence under this Act or any act committed prior to the date of passing of this Act, which act would, if committed after such date, constitute an offence under this Act.

The initial detention orders described the grounds for detention as ‘terrorist activity’, which the Court found to be lacking in particularity and did not fall under the definition of ‘unlawful activity’ envisaged in Section 31(1) of the PTA. Accordingly, it was held to be invalid *ab initio*. However, subsequent orders were issued stating that the minister ‘had reason to believe or suspect that the detainees were connected with or concerned in unlawful activity’ which *per se* the Court found to be a specified offence under the Act. The subsequent orders were accordingly held to be valid *ex facie*.

Consequently, it was held that the subsequent detention orders could cure the defects of prior orders and that the subsequent valid orders, which were in operation at the time of adjudication, may be accepted as justifying the continued detention of the persons concerned. It was also held that the non-naming of the custodian of the detainees in the detention orders was only a technical matter insofar as Section 9 of the Act did not require the custodian to be named in the order itself.
4) Re: Judicial response to established principles of statutory intervention

Construing the words ‘where the minister has reason to believe or suspect’ appearing in Section 9 of the Act, the Court opined that there must be objective grounds for the minister to authorize the arrest and the continuing acts of detention. Yet, though affirmed in theory, the Court did not apply this principle to the actual facts of the case, as such grounds were not stated in the detention orders. The same were not even revealed in the affidavits of the executive authorities concerned. The question then arises as to what material existed to link the detainees to the ‘unlawful activity’ contemplated by the Act in question, justifying their arrest and the continued detention. In the absence of such material, there appeared to be no rational basis for the minister to issue the said detention orders. Hence a considerable jurisprudential gap is revealed in the Court of Appeal ruling on this issue.

5) The statutory ouster clause contained in the Act

Section 10 of the Act in question when read with Section 22 of the Interpretation (Amendment) Act, No. 18 of 1972 decrees that the minister’s decision in authorising an arrest and detention is beyond the pale of judicial review. Section 22 reads:

Where there appears in any enactment, whether passed or made before or after the commencement of this Ordinance, the expression ‘shall not be called in question in any court’ or any other expression of similar import whether or not accompanied by the words ‘whether by way of writ or otherwise’ in relation to any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall, in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction or finding, made or issued in the exercise or the apparent exercise of the power
conferred on such person, authority or tribunal:

Provided, however, that the proceeding provisions of this Section shall not apply to the Court of Appeal in the exercise of its powers under Article 140 of the Constitution in respect of the following matters, and the following matters only, that is to say—

(a) where such order, decision, determination, direction or finding is *ex facie* not within the power conferred on such person, authority or tribunal making or issuing such order, decision, determination, direction or finding; and

(b) where such person, authority or tribunal upon whom the power to make or issue such order, decision, determination, direction or finding is conferred, is bound to conform to the rules of natural justice, or where the compliance with any mandatory provisions of any law is a condition precedent to the making or issuing of any such order, decision, determination, direction or finding, and the Court of Appeal is satisfied that there has been no conformity with such rules of natural justice or no compliance with such mandatory provisions of such law:

Provided further that the preceding provisions of this Section shall not apply to the Court of Appeal in the exercise of its powers under Article 141 of the Constitution to issue mandates in the nature of writs of *habeas corpus*.

However, the Court was not called upon to go into this particular question on account of the state apparently conceding that the said ouster clause would not apply to the issue of a mandate in the nature of a writ of *habeas corpus*.178

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178 *Senthilnayagam’s case* [1981] 2 Sri L.R., at 206.
6) Justification for the dismissal of the *habeas corpus* applications

Nowhere in the judgment could one find any act or conduct on the part of the detainees that related to any ‘unlawful activity’ within the meaning of the PTA, which justified their arrest and continued detention. The Court itself determined that such arrest and detention had to be on ‘objective grounds and a rational basis.’

A perusal of the judgment in relation to the facts reveals that three of the persons concerned were alleged to have been involved in a bank robbery and the fourth was accused of harbouring criminal offenders and collecting explosives. While the first three cases could never have fallen under the PTA, there was no material forthcoming with regard to the allegation advanced. Hence it is important to question the legal basis of the arrest and subsequent detention of the persons concerned.

Moreover, it is regrettable that although the principles regarding the liberty of subjects were expounded upon in the ruling, the Court did nothing more than pay mere lip service to such principles. The Court’s ruling stands as an illustrative example of judicial failure to respond to and apply those very principles to the facts and circumstances of *habeas corpus* applications.

7) Some positive features in the ruling

Despite the infirmities observed above, two positive features in the ruling may be commented upon.

- Right of access to legal representation

Counsel for the petitioners posed the pertinent question of whether the four detainees ought to be remanded in fiscal custody. The Court responded to this question by declaring that ‘it is not in their interest in view of recent disturbances to incarcerate them with other persons."
In their own interest we think that they should continue to be detained at the Army camp…[but that] their lawyers should have access to them at the Army camp.\textsuperscript{179} 

- Right to periodic medical examination

The Court also directed that the judicial medical officer of Colombo or a deputy be required to periodically examine the suspects.

\section{4.6.1.1.2 Paramasothy v. Delgoda and Another\textsuperscript{180}}

This case dealt with the applicability and impact of the criminal law and procedure to writs of \textit{habeas corpus}. This was the first occasion in Sri Lanka on which an application was made before the Court of Appeal by way of a \textit{habeas corpus} application seeking revision of an order of conviction and sentence imposed by the Magistrate’s Court—a court with \textit{ex facie} jurisdiction to do so.

1) Procedural Aspects

The first question for determination was whether a revision application could be combined with an application for a writ of \textit{habeas corpus}. The Court of Appeal adverted to the untrammelled

\textsuperscript{179} \textit{Ibid.} at 211. It must be noted, however, that the right of suspects to confidential legal counsel is still not part of the law in this country and is practically denied in innumerable instances under emergency regulations. See for example an enumeration of such instances in Kishali Pinto-Jayawardena, \textit{The Rule of Law in Decline; Study on Prevalence, Determinants and Causes of Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment in Sri Lanka}, The Rehabilitation and Research Centre for Torture Victims (RCT) Denmark (2009) at 124-125.

\textsuperscript{180} [1981] 2 Sri L.R. 489.
nature of its revisionary jurisdiction conferred under the Constitution\(^{181}\) and observed:

Once facts and circumstances, which would justify the exercise of such revisionary powers vested in this Court, have been brought to the notice of this Court, it appears to me that this Court should then exercise such powers, notwithstanding any technical objections - even if such objections were tenable - that an application for revision cannot be combined with an application for a writ of \textit{habeas corpus}.\(^{182}\)

2) Combining revisionary jurisdiction and an application for \textit{habeas corpus}

The Court of Appeal next addressed the issue of whether combining revisionary jurisdiction and an application for \textit{habeas corpus} could be permitted substantively. Accordingly, it was held:

…although ordinarily grounds for the award of a writ of \textit{habeas corpus} are limited to jurisdictional errors and the writ cannot be used as a device for collaterally impeaching the correctness of an order made by a Court of competent jurisdiction, yet, where a committal is, on the face of it, bad, as for instance where the sentence is illegal, a writ of \textit{habeas corpus} would lie.\(^{183}\)

3) Jurisdictional error

The Magistrate’s Court in its order (affirmed by the Supreme Court in appeal) had found the detainee guilty of contempt of court as well. Nevertheless, the question remained as to whether the committal by the Magistrate’s Court was legal in view of the relevant provisions of

\(^{181}\) Article 138(1) states: ‘The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of errors in fact or of law…and exclusive cognizance, by way of appeal, revision and \textit{restitution in integrum}.’

\(^{182}\) [1981] 2 Sri L.R., at 496, per Ranasinghe, J. (as he was then).

\(^{183}\) \textit{Ibid.}
the Judicature Act\textsuperscript{184} and the Code of Criminal Procedure Act of 1979.\textsuperscript{185}

The Court of Appeal held that the Magistrate’s Court was in error. It was found that the Magistrate’s Court was only empowered to impose a fine and not a sentence of two years’ rigorous imprisonment. This meant that the Magistrate’s Court had acted in excess of its jurisdiction and its order was \textit{ultra vires}. Significantly, the Court of Appeal did not employ in its reasoning the view that \textit{habeas corpus} would lie in the facts and circumstances of the case owing to the constitutional framework and the concept of people’s sovereignty. This concept will be commented on later in this Study.

\subsection*{4.6.1.2 Orders relating to the second Southern insurrection}

In contrast to the conservative judicial response in the above cases, the following decisions primarily concern petitioners and persons who had been subjected to enforced disappearances during the second Southern insurrection. These cases articulate several principles, which expanded the law relating to \textit{habeas corpus}.

\subsection*{4.6.1.2.1 Kodippilige Seetha v. Saravananthan\textsuperscript{186}}

This case involved a reference to the Magistrate for inquiry upon an application for \textit{habeas corpus} to the Court of Appeal, and consequential aspects relating to the adversary system in Sri Lanka.

\begin{footnotesize}
\footnote{184} Act No.2 of 1978, Section 55(1).
\footnote{185} Under Section 388(1), a Magistrate is empowered only to impose ‘a fine not exceeding five hundred rupees and in default of payment to [impose] simple imprisonment which may extend to two months unless such fine be sooner paid. However, the Magistrate in this case had imposed a two-year sentence of rigorous imprisonment.
\footnote{186} [1986] 2 Sri L.R., 228.
\end{footnotesize}
The case also dealt with certain aspects of the applicable burden and standard of proof.

The petitioner was the wife of the person who had been ‘involuntarily removed’, and in her application alleged that at a time when a curfew was in operation, the respondent police officers, including the Officer in Charge of the police station concerned, had entered their house and forcibly taken her husband away. He was the chief organizer of the Sri Lanka Freedom Party. The respondent denied the allegation and presented an alibi to demonstrate that he was elsewhere at that time. The matter was thereafter referred to the Magistrate for inquiry, and the alleged eyewitnesses to the incident of involuntary removal completely retracted from what they had stated in their affidavits. Hence the only direct evidence of the incident was that of the petitioner. The Magistrate, in his report, admonished both the petitioner and the officer in charge for giving evidence without any sense of responsibility, and concluded that such evidence cannot be accepted. The Magistrate, on his own initiative, thereafter called another witness, perhaps in a quest to ferret out the truth in a situation where the evidence of both parties was found to be laconic.

1) The adversarial nature of the magisterial inquiry

The petitioner’s counsel assailed the procedure adopted by the Magistrate and contended that though the inquiry expected of a Magistrate is directed at the finding of facts, the inquiry before the Magistrate had taken more of the form of an adversary proceeding. The Court of Appeal rejected this argument and acknowledged the adversarial nature of the procedure followed by the Magistrate as being the correct procedure. It was thus held:

This adversary method, having its origins in the concept of a duel and borrowed from England, has come to stay in our legal system

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187 In terms of the proviso to Article 141 of the Constitution.
and in the absence of any other more prudent procedure, will no doubt continue to hold its sway in our legal arena.\footnote{188}

2) Burden of Proof: the Rule and the Exception

On this question, the Court of Appeal concluded that in a \textit{habeas corpus} application, the burden of proving that a person has been removed rested with the party making the assertion.\footnote{189} This principle would apply unless the authorities admitted the fact of taking into custody, in which event, the burden of proving that the act of taking into custody was lawful rested with the authorities.\footnote{190}

3) Standard of proof

The Court of Appeal disagreed with the standard of ‘the balance of probabilities’ employed by the Magistrate, and noted that \textit{habeas corpus} proceedings did not fall within ordinary civil or criminal procedure. Hence it was held that the applicable standard was ‘proof beyond reasonable doubt’.\footnote{191}

\textbf{4.6.1.2.2 Susila de Silva v. Weerasinghe and Others}\footnote{192}

This case dealt with the issue of whether a writ of \textit{habeas corpus} would lie in respect of an arrest without warrant under Emergency Regulations. The detainee was a journalist and translator and was taken into custody by the police without warrant under Emergency Regulations. The petitioner, the wife of the detainee, sought \textit{habeas corpus} complaining that she was unaware of her husband’s

\begin{footnotesize}
\begin{enumerate}
\item[188] [1986] 2 Sri L.R., at 231, per Deeraratne J.
\item[189] \textit{Ibid.} at 232.
\item[190] \textit{Ibid.}
\item[191] \textit{Ibid.} at 234. This amounted to a misconstruction of the law, which will be commented upon later in this Study.
\item[192] [1987] 1 Sri L.R. 88.
\end{enumerate}
\end{footnotesize}
whereabouts. It transpired that the police officer making the arrest had no firsthand knowledge of the facts but had informed the detainee at the time of the arrest that the reason for the arrest was that he was reasonably suspected of inciting others to commit offences falling under the Emergency Regulations. Police investigations revealed that the detainee was the secretary of a movement affiliated to the JVP, a proscribed organisation that had vowed to overthrow the legally elected government. Following the arrest, detention orders were made by the Inspector General of Police (IGP) under the Emergency Regulations\(^\text{193}\) and thereafter by the Minister of National Security under the PTA.\(^\text{194}\) The affidavits filed by the police authorities and the Minister of National Security revealed that the said action had been pursued on information received that the detainee was committing preparatory acts of a subversive nature.

It was contended on behalf of the petitioner that the police officer making the arrest had no firsthand knowledge of the detainee’s alleged involvement in subversive activities and accordingly, that the arrest was unlawful. It was further contended that the subsequent detention orders were also illegal, as they had been made for a collateral purpose, which was to legalize or ‘cover up’ the illegal arrest.

1) The police officer making the arrest need not have firsthand knowledge

The Court of Appeal rejected the petitioner’s contention, and following an earlier decision of the same Court,\(^\text{195}\) held:

There is no such requirement [to have firsthand knowledge]...Knowledge may be firsthand or acquired on statements

\(^{193}\) See Section 19(2) of Emergency Regulations of 1985.

\(^{194}\) See Section 9 of Prevention of Terrorism (Temporary Provision) Act No. 30 of 1979 as amended by Act No. 10 of 1982.

by others in a way which justifies a police officer giving them credit.\textsuperscript{196}

Consequently, the Court also rejected the contention that the detention orders were for the collateral purpose of justifying an illegal arrest.

2) Need for objective evaluation of the grounds of arrest

A perusal of the ruling of the Court of Appeal reveals that the police officer making the arrest had done so on the instructions of his superior officer, the Assistant Superintendent of Police (ASP), on the basis that the said ASP had sufficient material and information relating to the subversive activities of the detainee. It is through the conduct of the ASP that the police officer making the arrest became possessed of such sufficient material and information. Hence the Court only had before it the affidavit of the ASP, who averred that he had sufficient material and information.

The Court, however, did not consider the question of how the said ASP came by such sufficient material and information. It may be contended that insisting on public disclosure of the material on which the ASP and consequently the other police authorities and the Minister of National Security had acted could be prejudicial to public or national security interests. Nevertheless, the Court ought to have required such material to be disclosed \textit{in camera} so that at least the Court could have convinced itself that the authorities had acted objectively and not arbitrarily, in response to the now well-established

\textsuperscript{196} [1987] 1 Sri L.R., at 93 citing \textit{Nanayakkara v. Henry Perera} [1985] 2 Sri L.R. at 383. This position remains contrary to the principle later enunciated in \textit{Sunil Rodrigo (On Behalf of B. Sirisena Cooray) v. Chandananda De Silva and Others} (1997) 3 Sri.L.R. 265, which required the Defence Secretary to place material before the Supreme Court to justify his actions in arresting and detaining a person. Also see \textit{Dhammika Siriyalatha v. Baskaralingam and Four Others} HCA 7/88, C.A. Minutes of 7 July 1988 for a comparable approach adopted by the Court of Appeal.
concept of ‘Public Interest Privilege’ in which regard the authors reflect as follows.

3) The impact of Section 124 of the Evidence Ordinance

Section 124 of the Evidence Ordinance of Sri Lanka\(^{197}\) provides:

No Public Officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would suffer by the disclosure.

Though Section 124 of the Evidence Ordinance does not directly apply to \textit{habeas corpus} applications, it nevertheless may be a useful guidance by way of analogy. Hence a modified formulation of this provision may be apt for adoption in \textit{habeas corpus} proceedings. It must be legislatively provided that, whether or not made in official confidence, the material and information upon which an arrest is made must be disclosed to the judges to enable them to satisfy themselves that the said arrest has been made on objective grounds.

\textbf{4.6.1.2.3 \textit{Dhammika Siriyalatha v. Baskaralingam and Four Others}\(^{198}\)}

In this case, the Court of Appeal set an admirable precedent in the context of the present Constitution in regard to the scope and availability of the writ of \textit{habeas corpus} in the face of detention orders made in pursuance of Emergency Regulations. In so doing, the Court parted company with past precedents established under the previous Constitutions of Sri Lanka, utilising to good effect the republican nature of the present Constitution, which vests sovereignty in the people.

\(^{197}\) Ordinance No. 14 of 1895 (as amended).
In this case, a 37-year-old vegetable salesman was arrested on 18 December 1985 by police officers without stating reasons and thereafter detained in four different places, including one Army camp and two prisons between 18 December 1985 and 21 March 1987 with no charges preferred against him. The petitioner, the wife of the detainee, alleged that the arrest and detention had been orchestrated for a collateral purpose following her husband’s refusal to testify in a criminal case where several accused had been indicted under the PTA.\(^{199}\) Accordingly, it was contended that the arrest and detention was made in bad faith.

Upon notice being issued, the authorities concerned admitted the arrest and the continued detention. This was sought to be justified on the basis that the Defence Secretary, in pursuance of the powers vested in him under the PTA read with the current Emergency Regulations, had formed an opinion that ‘he had reason to believe or suspect’ that the detainee was ‘connected with or concerned in unlawful activity.’\(^{200}\) The first detention order contained the terms ‘connected with or concerned in causing an armed struggle intended to cause harm and cause communal disharmony between different communities’. The subsequent orders, however, merely extended the detention periods. Moreover, there was no detention order at the time of the arrest and immediately thereafter, which lapse the IGP sought to explain in his affidavit.\(^{201}\) It was explained that the detention orders were subsequently issued upon material for the arrest being placed before the Defence Secretary, and he being satisfied of the necessity thereof.

\(^{199}\) It is noted that the accused in that case were later discharged.
\(^{200}\) See Section 9 of the Prevention of Terrorism Act No. 30 of 1981.
\(^{201}\) The absence of a valid detention order would have obliged the police to produce the detainee before the Magistrate’s Court under the ordinary law i.e. The Criminal Procedure Code Act of 1979 read with Article 13(2) of the Constitution.
The petitioner contended that apart from the arrest being for a collateral purpose, there was also no material to substantiate the opinion that the detaining authorities purportedly formed against the detainee. It was, however, argued on behalf of the state that the opinion so formed in pursuance of the Emergency Regulations was beyond the pale of judicial review and that the allegation of bad faith was not substantiated. It was contented that in any event, judicial review was ousted by virtue of Section 8 of the PSO202 and Regulation No. 17 of the applicable Emergency Regulations.203

1) Power of the Defence Secretary to be exercised on objective grounds

Several crucial questions arise in this context: would a writ of *habeas corpus* lie? Was the Defence Secretary’s power in forming an opinion against a detainee a subjective power exercisable on a subjective standard? Or was it a power though conferred in subjective terms, exercisable only on objective grounds? The Court responded to these questions by dissecting the relevant Emergency Regulation of the time: Regulation 17(1)(a). The said Regulation reads:

Where the Secretary to the Ministry of Defence is of the opinion with respect to any person that; with a view to preventing such person from acting in any manner prejudicial to the national security or to the maintenance of essential services it is necessary to do so; the Secretary may make order that such person be taken into custody and detained in custody.

Having expressed the view that the words ‘is of the opinion’ or ‘is satisfied’ in relation to an authority vested with statutory power, in effect, means the same thing, the Court held that the opinion of the authority should be based on his satisfaction that certain action is

202 Section 8 of the PSO declares: ‘No emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any court.’
203 This Regulation has the same effect as Section 8 of the PSO.
necessary due to the existence of an objective state of facts.\textsuperscript{204} Consequently, a further question arose as to the nature of such facts, which necessitated the forming of such an opinion.

At this point, it would be appropriate to extract the several legal techniques or judicial reasoning employed by the Court in arriving at its conclusion. The Court utilised ordinary and logical principles of language construction and sought to draw a necessary nexus between the subjectively couched power and the existence of objective state of facts for the use of that power.

The objective state of facts should render it ‘necessary’ to detain the person. The required objective state of facts is revealed, if the question is posed, why is it necessary to detain this person? The answer lies in the component ‘with a view to preventing such person from acting in any manner prejudicial to the national security or to the maintenance of essential services’. Therefore, the objective state of facts must be such that if the person is not so prevented, he is likely to sit in a manner prejudicial to the national security or to the maintenance of the essential service. The existence of the objective state of facts can be deduced from the conduct of the person proximate from the point of time. Conduct in the wider sense of, is referable to (sic) acts done, words spoken, behaviour and association with others of that person, as coming to the knowledge of the Secretary.\textsuperscript{205}

2) Reference to principles of international law

Having taken the position that the Regulation in question was to be considered in a broader perspective, the Court opined as follows:

The detainee is an individual with a basic human right to liberty and security of person. In terms of Article 3 of the Universal Declaration of Human Rights read with the preamble to the Declaration, the state

\textsuperscript{204} Supra note 198.
\textsuperscript{205} Ibid.
has pledged to observe that ‘Every person has the right to life, liberty and the security of person’. The Secretary is a constituent of the executive which is an organ of the state. Is it conceivable that such functionary is vested with power, that by forming a mere opinion that it is necessary to do so, he can deny to a person this cherished Human Right to Liberty? The answer has to be in the negative. To answer that in the affirmative is to sacrifice the individual at the altar of executive expediency (sic.).

3) Reference to the concept of people’s sovereignty and the relevance of fundamental rights jurisprudence

The Court correctly alluded to the constitutional shift that took place from the post-independence Constitution, which preserved sovereignty in Her Majesty, the Queen of England to the present Republican Constitution, which confers sovereignty in the people. The Court thus noted that in view of Article 3 read with Article 83(a) of the Constitution, the concept of ‘People’s Sovereignty’ had become an entrenched and justiciable concept.

It was noted further that fundamental rights were a manifestation of the People’s Sovereignty, which included Article 13(1) and 13(2) of

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206 Ibid.

207 Article 3 provides: ‘In the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.’

208 Article 83(a) provides: ‘Notwithstanding anything to the contrary in the provisions of Article 82—a Bill for the amendment or for the repeal and replacement of or which is inconsistent with any of the provisions of Articles 1, 2, 3, 6, 7, 8, 9, 10 and 11, or of this Article…shall become law if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present), is approved by the People at a Referendum and a certificate is endorsed thereon by the President in accordance with Article 80.’

209 By contrast, the people’s sovereignty was not entrenched and justiciable under the First Republican Constitution of 1972.
the Constitution.\footnote{Article 13 provides: ‘(1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest. (2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.’} Thus it was held that restrictions could be placed on Article 13(1) and (2) by way of such an Emergency Regulation only for the purposes laid down in Article 15(7), under which such regulations fell within the meaning of ‘law’. It was further opined that these freedoms could be limited only ‘in the interests of national security and public order.’\footnote{See Article 15(7) of the Constitution.} Hence the forming of a mere opinion could not suffice, since such opinion must be based on an objective state of facts which is a precondition to the forming of such opinion to issue a detention order. The Court referred to the applicable jurisprudence of the Supreme Court, particularly, \textit{Joseph Perera v. Attorney General},\footnote{[1992] 1 Sri L.R., 199.} where in a fundamental rights application the Supreme Court had held:

The basis of the three petitioners’ applications is that they were unlawfully arrested and kept in unlawful detention. The respondents admit the arrest and detention. The question then arises as to on whom the burden of proof lies to establish the legality of the arrest and detention. One of the essential attributes of the Rule of Law is that executive action to the prejudice of or detrimental to the right of an individual must have the sanction of law. The state has got no power to deprive a person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the Rule of Law. Lord Atkin said ‘in accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice.’\footnote{\textit{Ibid.} at 217 citing \textit{Eshugbayi Elcko v. Govt. of Nigeria} [1931] A.C. 662 at 670.}
Thus it was pointed out by the Court of Appeal that the burden rests on the respondents to justify the arrest and detention of the petitioners. The respondents must show that the regulation that gives them the power to arrest and detain is covered by one of the permissible grounds of restriction, i.e. the interests of national security or public order stipulated by Article 15(7) of the Constitution. If the impugned regulation imposes a restriction upon a fundamental right, the burden of proving that the restriction falls within one or more of the constitutionally permitted limitations lies upon the respondents.\(^{214}\)

The Court noted that the Supreme Court in *Hidramani v. Ratnavale*\(^ {215}\) had dismissed a habeas corpus application in similar circumstances on the strength of discredited English precedents including *Liversidge v. Anderson*.\(^ {216}\) Yet the Court rejected this precedent by adverting to recent progressive developments in the realm of public law.\(^ {217}\) Accordingly, the Court of Appeal concluded:

> [I]t is seen that the English decision that guided the Supreme Court in the case of *Hidramani v. Ratnavale* is, in England itself, freely considered an aberration. On the consideration of the provisions of our Constitution, the dicta of the Divisional Bench of the Supreme Court and the aberrations contained in the English cases, I hold that the decision in the case of *Hidramani v. Ratnavale* is not binding on this Court.\(^ {218}\)

The constitutional relevance of fundamental rights jurisprudence, which the Court of Appeal employed in rejecting the *ratio in


\(^{215}\) *Supra* note 69.

\(^{216}\) *Supra* note 165.


\(^{218}\) *Supra* note 198.
*Hidramani’s case*, is clearly evident in the Court’s decision. Curiously, for reasons unknown, the latter case of *Senthilnayagam v. Seneviratne*[^219] did not attract any criticism, notwithstanding the fact that it too was a Supreme Court ruling which dismissed a *habeas corpus* application in similar circumstances to *Hidramani’s case*—and more importantly, in the context of the present Constitution.

4) The burden of proof: what is necessary to discharge the same and on whom does the burden lie?

Following the line of reasoning in the judgment of the Court of Appeal, it may be argued that it is not the burden of the applicant to establish that the detainee was not ‘connected with or concerned in’ any unlawful activity (whether terrorist or otherwise) harmful to ‘national security or the public order’. This also follows from the well-established principle of evidence that no burden lies on a party to prove a fact *unless* decreed by some statute or common law rule.

In the absence of such statutory considerations impacting on the case under review, a question arises as to which party had the burden to justify the detention as being lawful. Since *mere opinion* as held by the state authorities was insufficient, it was incumbent on the state authorities to establish grounds for arrest and detention in their pleadings by reference to objective facts such as the conduct of the detainees involving acts done, words spoken, behaviour and association with others. In this case, however, it was held that the state authorities had failed to discharge this burden. Accordingly, the Court opined:

The respondents have not disclosed any material to justify the arrest and the detention of the corpus. They have had a period of nearly 6 months to file objections. The affidavits filed did not say that they are in any way prevented from placing the material before court in

the form of affidavits or other documentary evidence. Therefore, I consider it inappropriate to pursue the respondents further to discover material which they did not consider it fit to place before court.

5) Rejection of the ouster clause

It was further contended that the ouster clause contained in Section 8 of the PSO and Regulation 8 of the Emergency Regulations was sufficient ground to deny the application. However, this objection was also rejected. It was held:

As regard to the objection based on Section 8 of the Public Security Ordinance, it was held in the case of *Siriwardene v. Liyanage* [1983 2 Sri.L.R.164] that the provision did not preclude the court from examining and ruling upon the validity of an order made under the Emergency Regulations. It is now a well-accepted proposition of law that similar clauses do not apply where the impugned order is illegal. This objection has not been urged by the state in the later cases referred to above. The same observation applies to the ouster clauses contained in Regulation 17(10). In any event, an Emergency Regulation cannot validly fetter the jurisdiction vested in this Court by Article 141 of the Constitution.220

4.6.1.2.4 *Seetha v. Sharvananda*221

This case dealt with the right of the Attorney General to appear in *habeas corpus* applications. The petitioner was the wife of the person concerned. She filed an application under Article 141 of the Constitution alleging that the Officer in Charge (OIC) of the police station along with two other police officers had come to their abode and removed her husband. The OIC and the Inspector General of

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220 *Supra* note 198.
221 [1989] 1 Sri L.R. 94.
Police (IGP) were cited as respondents. Following support of the application before the Court of Appeal, and notice being issued by the Court, a state attorney of the Attorney General’s Department filed proxy on behalf of the said respondents. Moreover, a senior state counsel representing the Attorney General entered an appearance on behalf of the said respondents and objected to the application while denying the petitioner’s allegations. The Court thereafter directed the Chief Magistrate of Colombo to inquire and report on the matter in terms of the proviso to Article 141.

The Chief Magistrate submitted his report after inquiry, and the Court of Appeal thereafter dismissed the application, presumably after having gone into the matter. The matter was appealed to the Supreme Court, which held that the magisterial findings had been unsatisfactory and proceeded to make order as follows:

We therefore quash the order of the Court of Appeal and the connected inquiry and findings of the learned Magistrate and direct that a full inquiry into the real issues in this case be held, namely, whether or not the 1st respondent and or other police officers abducted the corpus. The Magistrate in his discretion would be entitled to record any evidence which he considers relevant and necessary to decide this issue apart from the material submitted by the parties. We expect the Inspector General of Police to give all assistance to the Court to help the Magistrate to arrive at a finding in this matter.  

At no stage in the initial proceedings did the petitioner object to the Attorney General or any state counsel appearing for the OIC and the IGP. However, for the first time at the fresh inquiry, an objection was raised in respect of the Attorney General’s representative appearing for the OIC on the following grounds:

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1) That in terms of the order of the Supreme Court, the I.G.P. has to give all assistance to the Court to help the Magistrate to arrive at a finding in this matter. It was submitted that a conflict of interests would arise in the Senior State Counsel appearing for the I.G.P. and the 1st respondent. The role of the I.G.P. is to assist Court whereas the 1st respondent has to defend himself in respect of the allegations made against him by the petitioner.

2) That the Attorney General has to act in the public interest considering the extensive statutory power vested in him in the administration of justice especially in the area of criminal matters. Therefore, from a broader perspective, there is a conflict of duty in the Attorney General representing the purely, partisan interests of the 1st respondent whose sole concern is to defend himself against the allegation made by the petitioner.\(^{223}\)

Rejecting the said grounds of objection, the Court held that under the Sri Lankan law, the Attorney General is empowered to defend public officers in civil actions and to secure the acquittal of public officers in criminal prosecutions.\(^{224}\) Moreover, it was opined that the possibility that the proceedings may result in a public officer being prosecuted and punished could not debar the Attorney General from appearing for that officer.\(^{225}\)

This aspect of the law should be critically assessed, as there is no specific law that requires the Attorney General to defend a person accused of a crime because he happens to be a public servant. On the contrary, the Attorney General has a responsibility to prosecute public servants when there is sufficient evidence against them. The Attorney General may of course defend the state where it is made a party on the basis that it is responsible for the unlawful actions of public servants. It is noted that the Attorney General’s Department adopted an unofficial policy of refusing to defend public servants accused of

\(^{223}\) *Ibid.* at 97.

\(^{224}\) *Ibid.* at 100.

torture, particularly where leave to proceed had been granted in a fundamental rights application before the Supreme Court. Yet, this policy appears to have waned in recent times, as the Department seldom refuses to defend public officers accused of violating fundamental rights. This position is routinely reflected in *habeas corpus* jurisprudence as well, which is no doubt illustrated in the present case.

4.6.2 *Orders of the Court of Appeal in Habeas Corpus Applications during 1994-2002*

**Chart 1: Orders delivered by the Court of Appeal during 1994-2002 subdivided by judgments upholding applications on their merits, bench orders dismissing applications, and bench orders ordering release and discharges.**

A total of 844 case records were analysed during this period. 368 applications were examined in 1994, 127 applications in 1995, 142 applications in 1996, 137 applications in 1997, 31 applications in 1998, 6 applications in 1999, 11 applications in 2000, 7 applications in 2001 and 15 applications in 2002. The total number of applications dismissed was 676. By contrast, in 163 applications the detainees concerned were released. Moreover, writs of *habeas corpus* were issued in 19 applications, while there were two applications that were included in the ‘unspecified’ category. In the chart below, the total percentage of applications in which writs were issued stands at two percent. The percentage for the ‘unspecified’ category is given as zero, as the figure is rounded to the closest possible digit. In one of those cases, the application was sent to the Magistrate’s Court for inquiry and in the other, the application was dismissed on the basis that the detainee will be discharged. It must be noted that the total of the breakdown in the outcome of the applications exceed 844. This is due to the fact that in certain applications there was more than one outcome. For instance, in H.C.A. No. 383/93 (decided on 13 January
1994), the application in respect of one detainee was dismissed, while the other detainee in the case was released.

Chart 2: Dismissals in *habeas corpus* applications delivered by the Court of Appeal during 1994-2002 subdivided by categories of dismissals.

The number of applications in each category is as follows:

1) Dismissal upon withdrawal on the basis of the detainee being indicted: 390

2) Dismissal upon withdrawal on the basis of the production of the detainee before a magistrate or his lawful arrest or his placement in fiscal custody: 21
3) Dismissal on the basis of the petitioner being absent and unrepresented: 49

4) Dismissal upon withdrawal by the petitioner or the petitioner’s counsel for _inter alia_ inability to come to Colombo, inability to contact the petitioner or for undisclosed reasons: 65

5) Dismissal after considering the merits: 32

6) Dismissal on the basis that the detainee has been sent for rehabilitation: 37

7) Dismissal by the Court of Appeal upon finding of misdirection or error by the Magistrate’s Court: 10

8) Dismissal with liberty to file fresh application: 9

9) Dismissal on basis that the petitioner was absent at the inquiry at the Magistrate’s Court: 43

10) Dismissal for unspecified reasons: 35\textsuperscript{226}

\textsuperscript{226} The ‘unspecified category’ also includes the Application H.C.A No. 1/99 decided on 24 February 1999, where the Court erroneously recorded a petitioner being absent and unrepresented, but where legal representation for the petitioner was, in fact, noted as of record.
The total number of dismissals during this period was 676. However, it must be noted that the total of the breakdown of applications exceeds this number, as there was more than one reason for dismissal in some cases. For instance, in H.C.A. No. 292/93 (decided on 28 July 1994), the application was dismissed because the petitioner was absent and unrepresented and the Court also found that the petitioner had filed another application on same matter before Court.

The two charts detailed above appear to indicate an overwhelming trend of applications being dismissed during the eight-year period examined. As explained previously, the year 1994 was taken as a
dividing point in the analysis due to the fact that it was during this year that the Court of Appeal decided what came to be popularly known as the *Leeda Violet Case*,\(^{227}\) in which the Court significantly liberalised the law relating to *habeas corpus*. Despite this promising start, the disappointing judicial response in later years is perhaps one of the most deplorable revelations of this Study. The year 2002 is taken as an approximate closing point in this period, because from about this year, *habeas corpus* applications were increasingly lodged in Sri Lanka’s Provincial High Courts rather than in the Court of Appeal.\(^{228}\)

### 4.6.2.1 Decisions Upholding the Merits of the Applications

#### 4.6.2.1.1 *Leeda Violet and Others v. O.IC Police Station, Dickwell and Others*\(^{229}\)

In this landmark decision, the Court recognised a presumption of liberty in respect of disappearances against the relevant authorities and awarded exemplary costs.\(^{230}\) The applications in this case were filed

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\(^{227}\) [1994] 3 Sri L.R. 377, per Sarath N. Silva J (as he was then).

\(^{228}\) A rare exception is the *habeas corpus* case filed in connection with the disappearance of journalist Prageeth Ekneligoda. Ekneligoda, a freelance journalist for the Lanka-e-News website, went missing on 24 January 2010. Subsequent to his disappearance, a *habeas corpus* petition was filed in the Court of Appeal by his wife and two children naming the DIG of the Criminal Investigations Department, the OIC of the Homagama Police Station and the IGP as respondents. This application is still pending in Court.

\(^{229}\) *Supra* note 227.

\(^{230}\) The United Nation’s most clear elaboration of relevant principles with regard to the payment of reparations including exemplary costs is the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, 21 March 2006. Article VII describes the three components of a victim’s right to a remedy as access to justice, reparations, and truth. The second of these components must necessarily include the payment of exemplary costs to the victim’s family in the case of disappearance.
by the mothers of the three persons, all of whom were fishermen. The Magistrate found that there was evidence of arrest and custody despite the denial by authorities as to the whereabouts of the persons concerned and their subsequent disappearance. The Magistrate believed the evidence of the three petitioners that the persons concerned were taken to the police station and had disappeared after being kept there for four days. Given the fact that disappearance per se is not an offence under the penal law of the country, the Court of Appeal had to consider what kind of order could be made in the circumstances where the explanation by the police authorities appeared to suggest that army personnel may be responsible for the disappearance.

The Court of Appeal acknowledged that the shifting of responsibility in respect of the disappearance from the police to the army and vice versa was of little solace or comfort to the petitioner. Deriving support from the Indian case of Sebastian M. Hongray v. Union of India and other material from international fora, the Court held that ‘some affirmative action is necessary from a Court invested with jurisdiction to issue writs of habeas corpus, when confronted with a case of an obvious disappearance of an individual held in custody and a false denial of such custody by a person in authority.’ It was also acknowledged that while the persons concerned had been arrested, detained and subsequently disappeared in 1988, the applications had been filed in 1989. Taking these matters into consideration, the Court

231 The Supreme Court in Juanis v. Lathif [1988] 2 Sri L.R. 185 had by that time, determined that in terms of Article 141 of the Constitution, the Court of Appeal had jurisdiction to refer the matter to the Magistrate’s Court for report and inquiry where the authorities deny arrest and detention. See discussion supra.
233 Supra note 135.
ordered exemplary costs against the Officer in Charge of the police station in question.

As noted earlier, the police officers who were held responsible for the initial arrest and detention had sought to shift the responsibility for the subsequent disappearances on army officials. The Court rejected that stand and recognised a presumption of liberty in respect of disappearances against the authorities last seen or found to have held the persons concerned in custody, rendering such authorities liable to pay exemplary costs.

Since the decision in Leeda Violet’s case,\(^{236}\) the implied presumption of liberty and the imposition of exemplary costs was applied and followed by the Court of Appeal in several cases. These included:

1) *L.S. Perera v. I G P and others*\(^{237}\)
2) *Vajira Ranjani Maddhukumari v. OIC Peliyagoda*\(^{238}\)
3) *G.D. Ranjani v. Commanding Officer, Army Camp Panala and Three Others*\(^{239}\)
4) *Gonsul Wasan Tilakasena v. 2\(^{nd}\) Lt. Srinath Wickramasinghe and Five Others*\(^{240}\)
5) *Dharmasena v. S.I. Police Station Hakmana*\(^{241}\)
6) *Chandralatha v. Lt. Dissanayake and Three Others*\(^{242}\)
7) *HCA/42/90*\(^{243}\)
8) *HCA/38/90*\(^{244}\)

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\(^{236}\) *Supra* note 227.


\(^{243}\) C.A. Minutes of 21 June 1995.

\(^{244}\) C.A. Minutes of 21 June 1995.
It may be noted that the Supreme Court in *Machchavallavan’s case*\(^{245}\) was also guided by the principle laid down in the Indian case of *Sebastian Hongray*,\(^{246}\) which was endorsed in *Leeda Violet’s case*.\(^{247}\)

### 4.6.2.1.2 Vajira Ranjani Maddhumakumari v. OIC Peliyagoda\(^{248}\)

In this case, the Court was confronted with the question of whether delay in making the first complaint against the perpetrator could be held against a petitioner.\(^{249}\) One of the grounds of challenge advanced against the granting of the writ was that the 1\(^{st}\) respondent, OIC of the police station involved with the arrest and detention, has been implicated *three years* after the alleged incident in the petition. The petitioner, the wife of the person concerned, had not made reference to the 1\(^{st}\) respondent even at the inquest held in respect of the death of her husband’s brother whose dead body had been found in mysterious circumstances. The petitioner’s husband and his brother had been arrested on the same night. The petitioner, who was cross-examined at the magisterial inquiry, stated that she avoided any reference to the 1\(^{st}\) respondent with the idea of securing the release of her husband from the custody of the 1\(^{st}\) respondent, given the fact that only the brother’s

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\(^{245}\) *Supra* note 124.

\(^{246}\) *Supra* note 135.

\(^{247}\) *Supra* note 227.


\(^{249}\) Also see in this regard the case of *Leelawathi v. Sunderalingam, Head Quarters Inspector of Police, Mirihana* [2006] 1 Sri L.R. 326. In this case, the Petitioner had previously made a *habeas corpus* application, which was dismissed by the Court of Appeal on the basis that the arrest and detention had been lawful. The petitioner thereafter sought a reference of her case to the Supreme Court on the basis that her son’s fundamental rights had been violated (under Article 126(3) of the Constitution). The Court of Appeal refused to make that reference on the basis that there was a delay of over 14 years and therefore the application failed to satisfy the time bar for fundamental rights applications under Article 126(1) of the Constitution.
dead body was discovered. The inquest into the death of the brother was held at the same police station where the 1st respondent was the OIC.

The Court of Appeal rejected the objections of the 1st respondent and held that one could not fault the petitioner, placed as she was in the circumstances, ‘on her failure to implicate the OIC in the statement made to his own police station.’

In *L.S. Perera v. I.G.P and Three Others*, a similar argument was advanced on behalf of the 2nd respondent, the OIC of the police station that had caused the arrest and detention. In that case, the petitioner, the father of the person concerned had implicated the 2nd respondent for the first time one and a half years after the arrest alleged in the petition. The Court of Appeal, however, held ‘the delay in making the complaint could well be understood considering the circumstances which existed at the relevant period. No person could be faulted for not making a complaint where the allegation is directly levelled at the police being the lawful authority to carry out such investigations.’

4.6.2.1.3 Reflections on the Cases

It is clear that where a statute confers the right of an appellant, the party invoking the jurisdiction of the appellate body is mandated to comply with the time limits imposed therein. The same applies to

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252 The incident had taken place in July 1989, at the height of the second Southern insurrection, where the government of the day had launched a full-scale counter subversive campaign.
253 Supra, Note 251, at 9.
254 See for example, the Code of Criminal Procedure Act and the Civil Procedure Code.
applications concerning fundamental fights violations.\textsuperscript{255} By contrast, the invocation of the revisionary jurisdiction of an appellate court\textsuperscript{256} and the writ jurisdiction\textsuperscript{257} of the Court of Appeal\textsuperscript{258} are couched in language that indicates the discretionary nature of the remedies and the courts may decline relief when applications are belated. However, no time limit is specifically mentioned in the constitutional provisions that govern such jurisdiction.

The position in respect of \textit{habeas corpus} applications remains unique. The Supreme Court in \textit{Juwaniis v. Lathif, Police Inspector, Special Task Force and Others}\textsuperscript{259} held that the writ of \textit{habeas corpus} ‘not discretionary, in that it is right which issues \textit{ex debito justitiae} when the applicant has satisfied the court that his detention was unlawful.’\textsuperscript{260} It may be appropriate for the courts to specify that \textit{habeas corpus} applications should be filed ‘as soon as may be possible’, taking into account the exigencies of the circumstances and affording the highest priority to the liberty of the individual. Such a framework would not require a constitutional amendment and could perhaps be achieved as a matter of procedure through the Supreme Court Rules under Article 136 of the Constitution.

\begin{footnotesize}
\begin{enumerate}
\item Article 126(2) of the Constitution, subject to the impossibility of performance principle. See\textit{Gamethige v. Siriwardene} [1988] 1 Sri L.R. 384.
\item Article 138 of the Constitution.
\item Article 140 of the Constitution of Sri Lanka i.e. orders in the nature of writs known to English law. Also see J. de Almeida Gunaratne, New Vistas for Judicial Review in the Sphere of Employment and other Contractual Relationships, \textit{Law College Law Review} (2005) at 3-12 for a discussion on the constitutional significance in the shift of language between ‘prerogative writs’ known to the English law and ‘orders in the nature of writs’ referred to in Article 140 of the Constitution.
\item Article 141 of the Constitution.
\item \textit{Ibid.} at 190, per Mark Fernando J. A similar argument in the context of writs of \textit{certiorari} and \textit{prohibition} may be advanced subject, however, to the consideration that no prejudice could be caused to third party rights on account of the delay in filing applications for such orders. See\textit{Biso Menika v. Cyril de Alwis (SC)} [1982] 1 Sri L.R. 368.
\end{enumerate}
\end{footnotesize}
1) The extent to which the Court of Appeal would review the findings of the magisterial inquiry

In the cases of *Vajira Ranjan*\(^{261}\) and *L.S. Perera*,\(^{262}\) the Court of Appeal was called upon to respond to this question. In the former case, counsel for the state authorities involved in the arrest and detention sought to assail the Magistrate’s findings particularly in regard to the evidence of the petitioner’s witnesses concerning the identity of the perpetrators. Accordingly, the Court of Appeal in *Vajira Ranjani’s case*\(^{263}\) observed:

The findings on questions of fact made by the Court of First Instance would not be ordinarily disturbed by this Court which has not had the benefit of seeing or hearing the witnesses. The Learned Chief Magistrate was best equipped to [determine] findings of fact on the disputed questions. His findings would therefore be departed [from] by this Court only if there are cogent reasons to do so.\(^{264}\)

This judicial approach was reiterated in *L.S. Perera’s case*.\(^{265}\)

2) Whether a principle of Institutional/Command Responsibility should be recognised in *habeas corpus* applications

The principle of Vicarious Liability of superior officers for abuses committed by their subordinates has been judicially recognised by Sri Lanka’s Supreme Court in the context of fundamental rights applications.\(^{266}\) This principle has been recently extended to what may

\(^{261}\) *Supra* note 248.

\(^{262}\) *Supra* note 251.

\(^{263}\) *Supra* note 248.

\(^{264}\) H.C.A./103/ 91, at 6.

\(^{265}\) *Supra* note 251.

be described as the recognition of the principle of Institutional Liability. The latter concept acknowledges that in the case of certain human rights violations, the responsibility for a large part of these violations, with respect to the chain of military command as well as the political and administrative responsibility, reaches the highest levels of the army, police or governmental agencies. Hence when individuals acting on the pre-planned orders of high-ranking officials commit human rights violations, the entire institution is said to bear the responsibility for such violations. A good example of this phenomenon could be seen in the case of the Chilean Army admitting institutional responsibility for abuses perpetrated during General Augusto Pinochet’s rule.

L.R. 365; Sriyani Silva v. Iddamalgoda, Officer-in-Charge, Police Station Paityagala and Others, [2003] 2 Sri L.R. 63; Lama Hewage Lal (Deceased), Rani Fernando (Wife of Deceased Lal) and Others v. Officer-in-Charge, Minor Offences, Seeduwa Police Station and Others [2005] 1 Sri L.R. 40. The Supreme Court generally uses the phraseology of ‘Vicarious Liability’ in these cases. In Liyanage v. de Silva [2000] 1 Sri. L.R. 21, which was a retrogressive decision, the Supreme Court refused to hold the commanding officer of an army camp responsible for the torture and disappearances of school children by junior officers serving in that camp.


268 See Eduardo Gallardo, For First Time, Chilean Army takes Institutional Responsibility for Pinochet-era Abuses (Associated Press, November 2004). The distinction between ‘Institutional Responsibility’ and ‘Command Responsibility’ appears to be slightly underdeveloped in the area of enforced disappearances. ‘Institutional Responsibility’ is a term often used when making institutions such as companies or organizations liable for human rights and environmental abuses. However, more recently, in the Chilean context of disappearances and arbitrary arrests and detentions, the fine distinction between the two concepts was further explored. In the case of Institutional Responsibility (or Vicarious Liability as is more commonly used in the Sri Lankan context), the commanding officer becomes responsible as a result of being the head of the institution, whereas in command responsibility, a nexus between the act and the commanding officer needs to be established through the chain of command. While any superior officer could be made liable under the doctrine of Command Responsibility, generally it is the head of the institution who would be made liable under Institutional Responsibility. However, this
In the cases of *Vajira Ranjan*\(^{269}\) and *L.S. Perera*\(^{270}\) discussed above, the evidence clearly established that officers of a particular police station had caused the initial arrest resulting in the subsequent disappearances. Crucially, the challenge to magisterial findings in regard to the identity of the OIC who was directly involved in the arrest failed. The question arises, however, as to what the position would have been, had such direct participation of the OIC in the initial illegal act not been proved. There is no reason for the principle of Institutional Responsibility or Vicarious Liability, which is recognised in the context of fundamental rights applications, not to be followed and applied in regard to *habeas corpus* litigation as well. This is certainly an area of the law that invites judicial and/or legislative response in the future.

4.6.2.1.4  *Developments in the post-1994 period*

1)  Two post-1997 cases of note

After the year 1997, however, the judicial invocation of the principles first laid down in the *Leeda Violet case*\(^{271}\) became less frequent. Significant amongst such principles is the principle that exemplary costs should be ordered where a person has been arrested and detained by the authorities and disappears thereafter. The general trend of disregarding this principle was departed from in *Murin Fernando v. Sergeant Sugathadasa*\(^{272}\) and *Ranmenike v. Senaratne*\(^{273}\) where the remains a largely underdeveloped distinction. Hence the use of the terms interchangeably is still common.

\(^{269}\) *Supra* note 248.
\(^{270}\) *Supra* note 251.
\(^{271}\) *Supra* note 227.
\(^{272}\) [1997] 1 Sri L.R. 281.
\(^{273}\) [2002] 3 Sri L.R. 274.
Court of Appeal reiterated the principle laid down in *Leeda Violet’s case*.\(^{274}\)

Though the *cursus curiae* established in *Leeda Violet’s case*\(^{275}\) was followed in the two decisions referred to above, no particularly new contribution was made to the existing jurisprudence. The one somewhat novel development since *Leeda Violet’s case*,\(^{276}\) however, was that the Supreme Court began to direct the Registrar to forward copies of the proceedings recorded in the Magistrate’s Court to the Inspector General of Police to peruse the evidence and to direct further investigations if there is evidence as to the commission of a cognizable offence. The Registrar of the Court was also directed to forward a copy of the proceedings with the judgment of the Court to the Attorney General for appropriate action to be taken by the Attorney General.\(^{277}\)

2) Judicial refusal to accept the *ipse dixit* of counsel regarding the indictment of the detainee

As disclosed in the chart above, a majority of the dismissals of *habeas corpus* applications had been on the basis that the detainee was indicted. In these cases, it was a common practice for the Court to accept the word of counsel for either the petitioner or the respondent(s) as to the fact of indictment. This practice is critiqued in the analysis below, which deals with the several grounds on which dismissals of *habeas corpus* applications are based.

\(^{274}\) *Supra* note 227.

\(^{275}\) It is noted that special leave to appeal against *Leeda Violet’s case* was refused by the Supreme Court.

\(^{276}\) *Supra* note 227.

\(^{277}\) See for example *Heen Menike’s case* at [1995] 1 Sri L.R., 242, at 244, *Murin Fernando’s case* [1997] 1 Sri L.R., 281, at 285 per Yapa, J.
One rare exception to this trend was in *HCA/157/94*, a case involving arrest and detention by the state authorities. Evidence was placed before Court as to the adverse medical condition of the detainee and the state moved for as many as five dates to file objections on behalf of the respondents. On the last date afforded by the Court for the state’s objections, state counsel representing the Attorney General and the state authorities alleged to have caused the incarceration of the detainee submitted that the detainee had been indicted. The state counsel apparently relied on the judicial trend in dismissing *habeas corpus* applications upon being informed that the detainee was indicted. However, it was held:

> Learned state counsel submits that [an] indictment has been forwarded against the corpus. There is no evidence before us to support that submission. The respondents have not produced any authority whatsoever to justify the continued detention of the corpus.

The Court of Appeal thereafter granted the writ of *habeas corpus* declaring that ‘in the circumstances, the detention of the corpus is not authorised by law and is illegal…’

- The extent to which this judicial initiative has been followed and acted upon

As the analysis below reveals, the Court of Appeal has regrettably failed to subsequently follow the thinking reflected in the above case. Hence it may be necessary for legislative reform to be introduced to establish the thinking advanced in that case. In other words, where it

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279 It was not revealed as to whether the police or armed forces had caused the ensuing plight of the detainee, who at the time in question was held in prison.
280 *HCA/157/94*, at 1-2, per the President of the Court of Appeal, Justice Sarath N. Silva (as he was then).
is submitted to Court that an indictment has been filed, there must be material available to substantiate that position to the satisfaction of Court. Nothing less would satisfy the interests of protecting the liberty of the subject. This position is reiterated in the analysis below dealing with dismissals of *habeas corpus* applications.

- Further aspects of this decision

There were other compelling circumstances and factors that apparently influenced the President of the Court of Appeal to grant a writ of *habeas corpus*.

a. The detainee was found to be languishing in prison and had been receiving medical treatment while his health continued to deteriorate.

b. State counsel had moved for as many as five dates to file objections to the application for the writ.

c. The state officials had failed to produce any authority to justify the continued detention of the detainee.

It is on account of these cumulative factors that the Court granted the writ, and not merely for the reason of rejecting the state counsel’s submission that the detainee had been indicted. This may be inferred from the fact that in several other cases, the applications for *habeas corpus* had been dismissed upon court being informed by state counsel that the detainee had been indicted.282 The same result may be observed in several other cases where the court was informed that the detainee had been released.283 These cases are discussed in a later part of this Study.

It is imperative that material be placed before court to substantiate the position that the detainee was indicted or released before an application for writ is dismissed. Moreover, in addition to the exemplary costs payable under the principles established in *Leeda Violet’s case*, compensation should be paid where the person concerned is incarcerated without legal basis and then released.

3) Monitoring the Court’s directives: the implications of executive disregard of judicial decrees

In the cases examined thus far, the Court of Appeal had decreed the following:

a. The payment of exemplary costs against those found to be responsible;

b. The state authorities, generally, the Inspector General of Police, to peruse the evidence recorded and to consider initiating further investigations if there is evidence as to the commission of a cognizable offence; and

c. The Attorney General to consider appropriate action as arising from (b) above.

This analysis raises the question as to whether the said directives of Court had been implemented in the cases under consideration. Unquestionably, the cases where directives were ignored and rendered a dead letter, awaken parallels with many such instances in the context of fundamental rights applications where the Supreme Court’s orders to like effect were ignored.\(^\text{285}\)

\(^{284}\) *Supra* note 227.  
Simply stated, this appears to be an instance of the executive machinery blatantly ignoring judicial decrees, with the judiciary not given teeth to ensure that its decrees are carried out. If such executive avoidance continues, the country’s adherence to democratic doctrines such as the Rule of Law, public trust and good governance will be negated and would certainly stand substituted by a rule of executive arrogance. Professor H.W.R. Wade describes this phenomenon as the Rule of Law degenerating to a ‘rule of administrative (executive) discretion’, like reducing ‘rock to sand.’ The prevalent deadlock situation requires urgent resolution. The starting point for such resolution may be Article 136 of the Constitution, which decrees:

(1) Subject to the provisions of the Constitution and of any law the Chief Justice with any three Judges of the Supreme Court nominated by him, may, from time to time, make rules regulating generally the practice and procedure of the Court including:

(a) Rules as to the procedure for hearing appeals and other matters pertaining to appeals including the terms under which appeals to the Supreme Court and the Court of Appeal are to be entertained and provision for the dismissal of such appeals for non-compliance with such rules;

(b) Rules as to the proceedings in the Supreme Court and Court of Appeal in the exercise of the several jurisdictions conferred on such Courts by the Constitution or by any law, including the time within which such matters may be instituted or brought before such Courts and the dismissal of such matters for non-compliance with such rules.

- Setting time limits

It is imperative that under the above framework, the Supreme Court formulates rules setting time limits for state functionaries to comply

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with orders, decrees and directives made by the Court of Appeal in the context of habeas corpus applications. Such time limits may, in fact, be prescribed even in regard to fundamental rights applications under Article 126 of the Constitution.

- Rules on contempt of court

Moreover, if any state authority is found to be lax in complying with orders, decrees or directives of any court, the matter should be treated as a contempt of court. This aspect amplifies the need for a Contempt of Court Act from a wholly different perspective, in comparison to the views expressed thus far and the available literature on the issue. The focus has so far been on the untramelled power that the Supreme Court possesses to charge and convict a citizen of Sri Lanka for acting in contempt of court. One of the most recent decisions of the Court was the case of a lay litigant who raised his voice in the Supreme Court while urging his application. Such actions together with his zeal in filing motions before the Court resulted in his conviction for contempt, with the Court sentencing him to one year’s rigorous imprisonment.

If this is the strict position taken by the Court, then a similar approach must be adopted towards state functionaries who blatantly ignore

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288 S.C. Minutes of 6 February 2003, Order of Sarath N. Silva C.J. (with Yapa J. and Edussuriya J. agreeing). In Anthony Michael Emmanuel Fernando v. Sri Lanka, Communication No.1189/2003, U.N. Doc. CCPR/C/83/D/1189/2003, the UN Human Rights Committee, considered an individual communication lodged under the Optional Protocol to the International Covenant on Civil and Political Rights by the contemnor in respect of this sentencing by the Supreme Court. The Committee ruled that there had been a violation of the right against arbitrary detention. Crucially, Sri Lanka was directed, inter alia, to enact a Contempt of Court Act. This recommendation remains unimplemented even though draft legislation has been forwarded to successive governments by the Bar Association of Sri Lanka, the Editors Guild of Sri Lanka and other media reform advocacy bodies.
court orders. Thus, there is an imperative need for legislative provisions enabling the Supreme Court and the Court of Appeal *inter alia* to:

a. Monitor and determine whether orders, decrees and directives made by the said Courts have been complied with; and

b. In cases of non-compliance, to charge such functionaries for contempt.

State responses to these issues must ultimately reflect the commitment of state functionaries to good governance and the Rule of Law, as decreed by the tenets of democracy. Hence rules regarding monitoring and compliance must be incorporated into the existing framework either by their inclusion in the Supreme Court Rules, or in the alternative, must be adopted through a new *Habeas Corpus Act*.

4) Un-implementable orders for payment of exemplary costs

In three cases during this period, the Court made orders directing the respondent concerned to pay the petitioner exemplary costs.\(^{289}\)

However, when the matter was later taken up and counsel informed the Court that the respondent is deceased, the Court was compelled to decree that ‘no further action is necessary.’\(^{290}\)

- ‘No further action’

These are cases where the arrest and detention were proven to be illegal or unjustified, thus forming the basis for the award of

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\(^{290}\) *Ibid.*
exemplary costs against the particular state official\textsuperscript{291} who had been found to be responsible for the illegal or unjustified deprivation of personal liberty. Yet there seems to be little basis for simply decreeing that ‘no further action’ is warranted merely because the respondent official subsequently became deceased.

- Charging the deceased respondent’s estate with the exemplary costs

It is submitted that in such situations, the deceased state official’s estate must be made liable, enabling a petitioner to recover the costs awarded by Court as a debt due to the petitioner. At present, there is no constitutional or statutory provision in law to cover this situation, which is another reason for enacting a \textit{Habeas Corpus} Act. It is noted that the present Article 141 of the Constitution, given its bland nature, cannot be amended to cater for all kinds of situations. The provisions of Article 141 are addressed \textit{ad nauseam} in this Study in respect of its limits. Hence there is no legislative framework at present to supplement consequential issues, as in the case under consideration, and to make the remedy of \textit{habeas corpus} an effective civil and political right. Policy makers must address this inadequacy as a matter of priority.

4.6.2.2 \textit{Dismissals by the Court of Appeal}

Apart from Charts 1 and 2 above indicating the general nature of the judicial response of the Court of Appeal during the period 1994-2002, the charts below indicate a breakdown of this data respectively for two sub-periods, namely 1994-1996 and 1997-2002. Similar patterns in judicial responses to \textit{habeas corpus} applications appear to be discernible.

\textsuperscript{291} It is not clear from the order whether the respondent concerned was a police officer or an officer of the armed forces.
Chart 3: Orders delivered by the Court of Appeal during 1994-1996 subdivided by judgments upholding applications on their merits, bench orders dismissing applications and bench orders ordering release or discharges.

The total number of applications for the period 1994–1996 was 637. It must be noted, however, that the total number of outcomes of these applications exceeds 637, as there was more than one outcome in some of the applications. During this period, 499 applications were dismissed, while the detainee was released in 126 applications. Furthermore, writs were issued in 16 applications. One application was dismissed on the basis that the detainee would be released.

Chart 4: Dismissals in *habeas corpus* applications delivered by the Court of Appeal during 1994-1996 subdivided by categories of dismissals

The number of applications in each category is as follows:
1) Dismissal upon withdrawal on the basis of the detainee being indicted: 298

2) Dismissal upon withdrawal on the basis of production before a Magistrate, or lawful arrest or placement in fiscal custody: 8

3) Dismissal on the basis of the petitioner being absent and unrepresented: 33

4) Dismissal upon withdrawal by the petitioner or petitioner’s counsel for *inter alia* inability to come to Colombo, inability to contact the petitioner or for undisclosed reasons: 48

5) Dismissal after considering the merits: 11

6) Dismissal on the basis that the detainee has been sent for rehabilitation: 36

7) Dismissal by the Court of Appeal upon a finding of misdirection or error by the Magistrate’s Court: 0

8) Dismissal with liberty to file fresh application: 3

9) Dismissal on the basis that the petitioner was absent at the inquiry at the Magistrate’s Court: 43

10) Dismissal for unspecified reasons: 17

The total number of dismissals during this period was 499. However, it must be noted that the total of the breakdown of applications exceeds that number, as there was more than one reason for dismissal in some cases.
Chart 5: Orders delivered by the Court of Appeal during 1997-2002 subdivided by judgments upholding applications on their merits, bench orders dismissing applications and bench orders ordering release and discharges.

The total number of applications for 1997-2002 was 207, but the total number of the outcomes in these applications exceeds that number, as there was more than one outcome in some of the applications. 176 applications were dismissed during this period, while the detainee was released in 37 applications. Moreover, in three applications, the writ
was issued. In one application, which falls into the ‘unspecified’ category, the matter was sent to the Magistrate’s Court for inquiry.

Chart 6: Dismissals in *habeas corpus* applications delivered by the Court of Appeal during 1997-2002 subdivided by categories of dismissals

The number of applications in each category is as follows:

1) Dismissal upon withdrawal on the basis of the detainee being indicted: 92

2) Dismissal upon withdrawal on the basis of production before a Magistrate or lawful arrest or placement in fiscal custody: 13

3) Dismissal on the basis of the petitioner being absent and unrepresented: 16
4) Dismissal upon withdrawal by the petitioner or petitioner’s counsel for *inter alia* inability to come to Colombo, inability to contact the petitioner or for undisclosed reasons: 17

5) Dismissal after considering the merits: 21

6) Dismissal on the basis that the detainee has been sent for rehabilitation: 1

7) Dismissal by the Court of Appeal upon a finding of misdirection or error by the Magistrate’s Court: 0

8) Dismissal with liberty to file fresh application: 6

9) Dismissal on basis that the petitioner was absent at the inquiry at the Magistrate’s Court: 10

10) Dismissal for unspecified reasons: 0
Dismissal upon withdrawal on the basis of corpus being indicated
Dismissal upon withdrawal on the basis of production before Magistrate/arrested/lawful/fiscal custody
Dismissal on the basis of petitioner being absent and unrepresented
Dismissal upon withdrawal by petitioner/counsel for *inter alia* inability to come to Colombo, inability to contact petitioner or for undisclosed reasons
Dismissal after considering the merits
Dismissal on basis that corpus has been sent for rehabilitation
Dismissal by Court of Appeal upon finding of misdirection and/or error by Magistrate’s Court
Dismissal with liberty to file fresh application
Dismissal on the basis that petitioner was absent at inquiry at Magistrate’s Court
Apart from the categories listed above, several cases remain pending before the courts. These cases are not shown as a category in the chart due to their imprecise nature and the lack of information regarding the exact number of such cases—mainly due to lack of court records.

Some general observations may be made with regard to certain patterns evident in the nature of the dismissals. The petitions filed during this period were overwhelmingly by persons of Tamil ethnicity in relation to enforced disappearances that occurred during the then heightened conflict in the North and East. A few orders concerned applications filed on behalf of persons of Muslim ethnicity. Among the even fewer orders concerning persons of Sinhala ethnicity, one application was in regard to the person’s suspected links to the LTTE.\(^{292}\) The Court later discharged this person.

Judicial attitudes towards these applications were (generally) strictly legalistic, which is evident by the sheer numbers of dismissals. In these applications, the liberal rule articulated in previous cases including in the *Leeda Violet case*\(^{293}\)—that if custody was initially shown to be in the hands of the army or police, they should be able to account for the whereabouts of the person concerned, or else be held responsible—appeared to have been not addressed.

In many instances, the victim disappeared after being voluntarily handed over to the army or police. The fact of community or family representation at the time of handing over does not appear to make a difference. For example, H.C.A. No. 20/99 was a case involving the application by a parent of the person concerned, V. Uthayakumar, who was voluntarily handed over to the OIC, Army Camp Eravur (accompanied by the school principal, the Grama Sevaka Niladhari, the family members and relatives) on 17 June 1997, after the OIC made inquiries about him. He however, ‘disappeared’ thereafter and,

\(^{292}\) C.A No. 25/99 decided on 6 June 2000.

\(^{293}\) *Supra* note 227.
(on the records available to the researchers at the time of writing this analysis), his case remains pending.

In the majority of applications where the detainee concerned was of Tamil ethnicity, the detainee was indicted and the application was subsequently withdrawn. The Court thereafter dismissed the application on that basis. In one instance, in addition to the fact that the detainee had been indicted, the application was also dismissed on the basis that the detainee was absent and unrepresented. This was notwithstanding the fact that a lawyer had marked appearance for the petitioner as noted in the court order itself. 294

In some cases, the applications were withdrawn on the basis that the petitioner was unable to travel to Colombo to pursue the case. This was often due to delays of more than two years in the hearing of the application, testifying to the perennial problems of laws’ delays that have rendered this remedy ineffectual. For instance, the 1998 All-Island Disappearances Commission noted that the extreme delay and frustration affecting petitioners in *habeas corpus* applications was pervasive. 295

The specific categories of dismissals will now be considered in detail.

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294 For example, H.C.A No. 1/99 decided on 24 February 1999, where dismissal was on the basis that the petitioner was absent and unrepresented. However, an attorney-at-law marked appearance for the petitioner on record.
4.6.2.2.1 Dismissals upon withdrawal on the basis that the detainee is indicted, or is arrested, or is produced before the Magistrate’s Court and remanded or otherwise placed in lawful or fiscal custody

At the *prima facie* level, such dismissals may appear to be in order, given the fact that the criminal justice process has been put into operation. However, several aspects of such orders need further reflection.

As stated previously, a vast number of cases fall into this category. However, even after belated indictment, (which often takes from one to two years or even later in some instances), these cases had been dragged on indefinitely within the legal system. It is observed that in most Commonwealth jurisdictions, the term ‘reasonable’ is affixed to the requirement to bring the detainee before a court within a reasonable time.\(^\text{296}\) This requirement appears to have fallen outside the scope of judicial cognizance in Sri Lanka.

1) Discussion of some cases: Informing the court that the detainee was indicted

The Court of Appeal is so informed by either the petitioner’s own counsel or counsel appearing for the alleged perpetrators. As discussed above, the Court of Appeal in the unique decision of

\(^\text{296}\) See Clark & McCoy, *supra* note 45, at 138-142. The authors’ note that in one Nigerian case it was held that a remand in custody *sine die*, which had amounted to a period of two years and five months detention, was not a reasonable period under the applicable statute. Also see *Wabali v. Commissioner of Police* [1985] 6 NCLR 424 (Ahoada HC) (breach of rights in s. 32(4) of the 1979 Constitution to be brought before a court of competent jurisdiction within a reasonable time); *Olaosun v. Ofana* (1981) Fawehinmi 311, 314, (Ibadan HC) (on the facts no breach was evident, since the courts were not open at the weekend—the court was nevertheless critical of the practice of deliberately arresting prior to the weekend knowing that the court would not be open until Monday: 315–16).
refused to accept the _mere ipse dixit_ of counsel as to the fact of indictment. This salutary approach however, was not followed in the overwhelming number of later applications that had been dismissed on this same ground.

Even in such cases of dismissals based on an application to withdraw, it is important to ponder whether the Court should feel obliged to inquire into the circumstances under which the person concerned was kept in police or military custody on a detention order. The Court would certainly have been obliged to record what took place during the period of the initial arrest until its jurisdiction was expended at the stage of the detainee’s production before a Magistrate’s Court. This aspect becomes all the more important, given that several applications falling into this category indicate that periods as long as two to five years had lapsed between the initial arrest and the filing of the indictment or a magisterial order for remand.

However, in one particular case, the Court had dismissed the application upon being merely informed that the indictment was under preparation. Although the petitioner was absent and unrepresented, was the Court not obliged to leave the case open until the state informed it that the indictment had been filed? In such cases of indictment or magisterial remand, ought the Court not be obliged to record the fact of inordinate delay in filing indictment or securing an order for remand, and to record the reasons for such delay (in the very least) as justifying further incarceration of the detainee? This is an aspect which the authors of this work propose to address by way of legal reform.

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2) HCA/31/95

This case dealt with the issue of discharging the constitutional function of the Court in regard to applications of habeas corpus. In this case, counsel for the petitioner stated that the detainee was indicted in the High Court of Colombo and moved to withdraw the application. State counsel appearing on behalf of the Attorney General, who was present in Court to oppose the habeas corpus application, stated that he was unaware of the position. The Court, however, allowed the application for withdrawal and consequently dismissed the application.

The question arises as to whether the mere ipse dixit of the petitioner’s counsel from the Bar table as to the fact of indictment should have been accepted by the Court. Moreover, the fact that indictment was filed against the detainee ought to have been within the firsthand knowledge of the state counsel, who nevertheless categorically denied knowledge thereof. In those circumstances, the material before Court to allow the application for withdrawal appeared to have been insufficient. Consequently, since the liberty of a subject was at issue, the question arises as to whether the Court ought to have required the petitioner’s counsel to place material substantiating the submission that the detainee was indicted. In the alternative, the Court ought to have called upon the state counsel to ascertain the position and report to Court, and ultimately furnish a copy of the indictment. Yet the Court of Appeal chose to dismiss the matter, thereby putting at issue the incarceration of a subject in whom sovereignty is supposed to reside in terms of Article 3 of the Constitution. To this date, there is no record as to what fate might have been visited upon the detainee.

The offshoot of the foregoing evaluation is that, as the authors of this work perceive, there is a duty on Court to ascertain upon specific material the truth of the assertion that the detainee was indicted.

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300 C.A. Minutes of 3 of July 1995.
Without such material, the Court ought not to act upon the mere Bar table statement of the petitioner’s counsel, particularly when the state counsel, who is best placed to inform the Court regarding the *status quo*, pleads ignorance.

This is an issue that warrants serious attention, as the liberty of the subject ought not to be treated lightly. While want of discharge of forensic duty by counsel is an aspect that this Study highlights *ad nauseam*, it must, however, be noted that whatever shortcomings on the part of the counsel, the overruling consideration is the duty cast on the Court, which is constitutionally decreed to exercise power on behalf of the people in whom sovereignty resides.

3) Whether dismissals by the Court of Appeal in such cases are appealable

Although Article 128 provides that any order of the Court of Appeal is appealable subject to the conditions and grounds decreed therein, historically, no right of appeal has existed against the refusal of a writ of *habeas corpus* in cases of imprisonment where there is a charge of a criminal nature. This irrational defect was remedied in the United Kingdom in 1960.\(^\text{301}\) However, similar to some other Commonwealth jurisdictions,\(^\text{302}\) the lack of appeal against a dismissal may still be urged and upheld in Sri Lanka. *A fortiorari* a dismissal upon withdrawal would not be appealable. Hence legislative reforms are imperative to remedy this obvious defect.

Given the judicial inconsistencies evident from the preceding discussions in this Study, the need for a *Habeas Corpus* Act becomes imperative in order to provide for the situation envisaged above. Such an enactment must compel the state to make available to the courts


\(^{302}\) See *AG of Trinidad and Tobago v. Phillip* [1995] 1 A.C. 396.
material to substantiate the fact that an indictment was filed, which may justify the dismissal of the *habeas corpus* application.

### 4.6.2.2.2 Dismissals upon withdrawal on the basis that the detainee is released or discharged

A clear distinction may be drawn between a ‘release’ and a ‘discharge’, though both ultimately result in the securing of the individual’s personal liberty. ‘Released’ would mean release from the custody of either the police or the military authorities without any proceedings being instituted. By contrast, ‘discharged’ would mean that the Court discharged the individual upon proceedings having been instituted.

If arrest and detention in cases of ‘discharges’ could arguably be justified to some extent given that a *prima facie* case had been established for the institution of legal proceedings, there ought to be some legal consequence visited upon the authorities who violate an individual’s personal liberty without any reason being adduced in the case of ‘releases.’ This Study reveals that several persons were kept in custody without any legal proceedings being instituted, often for periods exceeding a year. Ought the Court not have inquired into the reasons as to why the persons had been kept in custody in limbo for so long? Moreover, ought the Court not have ascertained whether there was any justification for infringing the personal liberty of the individual and commented on this aspect in its order before dismissing the *habeas corpus* application, whether in the context of ‘release’ or ‘discharge’?

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303 See for example, several cases in which individuals of Tamil ethnicity were finally released: H.C.A No. 15/96 decided on 28 May 1997; H.C.A No. 39/96 decided on 18 June 1997; H.C.A No. 46/96 decided on 29 January 1997; H.C.A No. 9/96 decided on 26 March 1997; H.C.A No. 90/96 decided on 12 March 1997; H.C.A No. 101/96 decided on 28 May 1997.
1) Whether the Court could be required to state such reasons

As pointed out above, the right of the person concerned to allege a violation of fundamental rights in terms Article 126 of the Constitution would have long passed at the point of ‘release’ or ‘discharge’. Consequently, if the Court of Appeal denies the person relief or at least acknowledges inordinate delays beyond the control of the person, there is no other court before which the person may obtain redress.

2) Civil case for damages for unlawful imprisonment or malicious prosecution

Given that the Prescription Ordinance stipulates a prescriptive period of two years for an action based on unlawful imprisonment or malicious prosecution, the aforesaid remedy would stand shut out to a significant number of affected persons.

3) The need for remedial measures

Consequently, there is a need to address two basic issues in the context of habeas corpus applications. First, the period that a person is held in custody before releasing or producing him or her before a Magistrate must be exempted from the limitation periods envisaged in Article 126(1) of the Constitution and Section 9 of the Prescription Ordinance.

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304 Under Article 126 of the Constitution, all fundamental rights applications must be brought within one month since the alleged violation took place.
305 It is noted that the decisions of the Supreme Court with regard to the time limit of one month have not been consistent to enable the detainee to come by way of a continuing violation of a fundamental right.
306 See Section 9 of the Prescription Ordinance No.22 of 1871.
307 Article 126(1) of the Constitution provides: ‘The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right declared and recognised by Chapter III or Chapter IV.’ Hence, for this recommended change, a constitutional amendment will be necessary.
Ordinance. Second, legislative provision must be introduced to place the burden of proof on the authorities who are responsible for suppressing the individual’s liberty, to justify at least on the standard of balance of probabilities that there was reasonable suspicion that the person concerned had committed or was involved in an attempt to commit an offence. The burden should revert to the petitioner only where his case is based on an allegation of bad faith, breach of natural justice or fraud or some such vitiating element.

4) Enactment of a *Habeas Corpus* Act

It is imperative that the issues discussed above are resolved legislatively, perhaps through the enactment of a *Habeas Corpus* Act.

Even in the category of cases where the Court of Appeal dismisses an application upon counsel’s submission that the detainee was released, the Court must be required to insist on material being placed to substantiate that position. Ideally, the Court should require the detainee to present himself or herself in Court. Apart from this, the reasons for the initial incarceration ought to be recorded; particularly whether there was any ‘reasonable suspicion’ to have arrested the detainee in the first instance. The Court should inquire into these aspects in a *habeas corpus* application, given the fact that the liberty of the detainee was severely affected and, on occasion, that he or she was held incommunicado for several years. Hence the Court should satisfy itself that the detainee was, in fact, released and remains at liberty.

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308 Section 9 provides: ‘No action shall be maintainable for any loss, injury, or damage unless the same shall be commenced within two years from the time when the cause of action shall have arisen.’

309 See the *Habeas Corpus* Act of 1816 of the United Kingdom.

310 For example, in C.A. Minutes of 13 January 1994, an application was dismissed where out of the two detainees who had been arrested and detained together, one had been released and the other had been indicted.
The aforesaid reflections bring into focus the shortcomings in the present Constitution. Additionally, these shortcomings appear to be exacerbated by the incompetence or apathy of counsel.

5) Judicial Response to applications under Article 141 of the Constitution and the impact of the fundamental rights jurisdiction

Article 140 deals with orders in the nature of writs of certiorari, mandamus and prohibition, where jurisdiction is vested in the Court of Appeal and the High Court of the Province.\(^{311}\) By contrast, the fundamental rights jurisdiction is vested solely in the Supreme Court.\(^{312}\)

Yet, in a landmark decision, the Supreme Court has laid down that ‘by entrenching the fundamental rights in the Constitution, the scope of the writs has become enlarged [and] is implicit in Article 126(3).’\(^{313}\) Article 126(3) of the Constitution declares:

Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of habeas corpus, certiorari, prohibition, procedendo, mandamus or quo warranto, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court.

In the light of such provisions, the Supreme Court rejected the Attorney General’s argument that the petitioner in that case ought to

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\(^{311}\) See Article 154(P)(3)(a) read with Section 7 of the High Court of the Provinces Act No.16 of 1990.

\(^{312}\) Article 126 of the Constitution.

have moved the Supreme Court by way of a fundamental rights violation under Article 12\textsuperscript{314} and not by way of an order in the nature of a writ under Article 140.\textsuperscript{315}

Similarly, in \textit{Heather Mundy v. CEA and Others},\textsuperscript{316} which was again an application under Article 140 dismissed by the Court of Appeal, the Supreme Court found that the material, as disclosed by the pleadings, showed a violation of the petitioner’s fundamental rights to equality under Article 12(1) of the Constitution. It was thus held that the Court of Appeal was obliged to have referred the matter to the Supreme Court to treat and determine the matter as a fundamental rights violation. That case involved the property rights of the aggrieved petitioner. If such a position is adopted in respect of a socio-economic right, then it ought to be applicable with equal force in respect of a civil and political right where the liberty of a subject has been restrained. This position appears to be compelling, and is further substantiated in the \textit{Machchavallavan case}\textsuperscript{317} discussed above.

The relevant constitutional provisions in this regard may be reproduced at this point. Article 13(1) of the Constitution decrees:

\begin{quote}
No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason of his arrest.
\end{quote}

Article 13(2) decrees:

\begin{quote}
\textsuperscript{314} Article 12 of the Constitution entrenches the right to equality and, concomitantly, the right to non-arbitrary treatment.
\textsuperscript{315} 1995 (1) Sri L.R. 148. This case involved a petitioner’s grievance that she had been arbitrarily deprived of her university degree through a misconstruction of the examination criteria.
\textsuperscript{317} Supra note 124.
\end{quote}
Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before a judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of an order of such judge made in accordance with procedure established by law.

Moreover, Article 13(4) states:

No person shall be punished or put to death to imprisonment except by an order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment.

Article 12(1) provides:

All persons are equal before the law and are entitled to equal protection under the law.

The Sri Lankan jurisprudence linking these fundamental rights provisions to the *habeas corpus* remedy is spearheaded by the *Machchavallavan* case.\(^{318}\) In *Machchavallavan’s case*,\(^{319}\) the Court determined that the fundamental rights of the petitioner had been violated. By contrast, in the cases under consideration, proceedings stood terminated upon counsel informing the Court of Appeal that the detainees were released. However, since a deprivation of liberty is involved, the Court of Appeal would still be constitutionally obliged to inquire whether there was a violation of a fundamental right as envisaged in Article 13 read with or without Article 12 of the Constitution.

\(^{318}\) *Ibid.*

\(^{319}\) *Ibid.*
If the Court is required to inquire into the causes of the initial arrest or abduction and, if found to be unjustified, if it refers the matter to the Supreme Court as a violation of fundamental rights, that would provide an opportunity for the Supreme Court to grant relief for the period the detainee had been subjected to unjustifiable incarceration. These are the aspects that the Court of Appeal had not been invited by counsel to address, particularly in cases where counsel had merely informed Court that the detainee/s had been released, leading to the dismissal of the *habeas corpus* applications.

A further aspect of this question involves the principle of ‘Vicarious Liability’. This principle has been recognised and entrenched in fundamental rights litigation.\(^3\) In *Machchavallavan’s case*,\(^4\) though the particular army officer alleged to have arrested the person concerned was not held to be personally responsible for the subsequent disappearance, the Supreme Court determined that the army authorities were responsible for the eventual disappearance.\(^5\)

However, these principles emerged from the Supreme Court’s jurisprudence in recent years. Hence it is conceded that the Court of Appeal did not have the benefit of such expanded jurisprudence when considering the *habeas corpus* cases critiqued in this Study, which were decided prior to *Machchavallavan’s case*.\(^6\)

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\(^3\) See inter alia, *Sanjeewa, Attorney-at-Law (on behalf of Gerald Mervin Perera) v. Suraweera, Officer-in-Charge, Police Station, Wattala and Others* [2003] 1 Sri L.R. 317; *Lama Hewage Lal (Deceased), Rani Fernando (Wife of Deceased Lal) and Others v. Officer in Charge, Minor Offences, Seeduwa Police Station and Others*, [2005] 1 Sri L.R. 40. While these cases clearly recognised the doctrine of ‘Vicarious Liability’, the recognition of the liability of an ‘Officer in Charge’ of a particular police station may also be regarded as an appreciation of the doctrine of ‘Institutional Responsibility’. However, in such cases, the distinction between the two doctrines is negligible. Also see supra footnote 268.

\(^4\) *Supra* note 124.

\(^5\) \[2005\] 1 Sri L.R., at 357.

\(^6\) *Supra* note 124.
6) The need for statutory provision to recover costs from the state in *habea corpus* applications: an alternative remedy

This issue, once again, amplifies the need for special legislation to enable a petitioner to recover from the state certain costs awarded against state officials on the principle of Command or Institutional Responsibility. This provision is particularly important where a responsible state official becomes deceased before a petitioner recovers costs awarded in his or her favour.

4.6.2.2.3 *Dismissals upon withdrawal with no reasons disclosed*

In some of the dismissal cases analysed in this study, the Court of Appeal appears to have dismissed the case upon an application for withdrawal without any reasons even being disclosed for such withdrawal.\(^{324}\)

1) Whether the Court should allow such applications

Given the possibility of collusion or intimidation, applications for withdrawal without even a token reason—let alone an acceptable reason—the question arises whether such applications should be allowed by Court as a matter of policy. In the context of fundamental rights applications, the Supreme Court of Sri Lanka has held:

There may be certain occasions where in the circumstances of a particular case, the Court may permit the withdrawal of an application for infringement of fundamental rights...Each case must depend on its own circumstances, leave to withdraw being a matter within the absolute discretion of the Court.\(^{325}\)

\(^{324}\) See for example, H.C.A./10/98, C.A Minutes of 4 December 1998.

\(^{325}\) In *Herath Banda v. Sub Inspector of Police* [1993] 2 Sri L.R. 324 at 326, per Amarasinghe J.
2) Necessary reform

If in the case of fundamental rights applications, the Supreme Court has absolute discretion in respect of leave to withdraw, *habeas corpus* applications, by analogy, should be subject to a similar rule, as it also involves the liberty of the individual and is within the realm of public law. However, it appears that this is yet another matter that must be addressed by the legislature.

4.6.2.2.4 Dismissals upon application for withdrawal due to the inability of the petitioner to travel to Colombo

This Study reveals that on several occasions, applications were withdrawn and dismissed on the abovementioned ground. The majority of these applications had been in respect of persons affected in the war-torn areas of the North and East. It is hence regrettable that in such applications, the Court of Appeal had not been addressed by counsel appearing in these applications in regard to applicable personal and geographical constraints preventing the petitioners from appearing in court. In such circumstances, the Court of Appeal *ex mere motu*, perhaps, could have directed a transfer of the cases to the appropriate High Court to hear and determine them.

4.6.2.2.5 Dismissals on the basis that the petitioner is absent and unrepresented

The question arises as to what the Court of Appeal’s approach ought to be if a petitioner who has invoked the jurisdiction of the Court under Article 141 of the Constitution in respect of an abducted and subsequently ‘disappeared’ person is found to be absent and unrepresented. It is noted that it is not always appropriate for a court vested with the constitutional power to grant orders in the nature of writs to simply dismiss an application without further ado.
1) Appellate, revisionary and writ jurisdiction of superior courts

The right of an aggrieved party to invoke the appellate power of the superior courts against judgments and orders of lower court whether in civil or criminal cases remains a matter of right. On the other hand, revisionary power, has been consistently held to be discretionary; dependent on considerations such as the *uberimma fides* of the person invoking the court’s jurisdiction, absence of inordinate delay, observation of due diligence and the non-availability of alternative remedies.

Writ jurisdiction is often treated on par with revisionary jurisdiction. However, commentators have posited a contrary view that in the context of the Constitution of Sri Lanka, which vests sovereignty in the people, read with the constitutional link between ‘orders in the nature of writs’ and the entrenchment of fundamental rights, writ jurisdiction must be treated as a remedy available as a matter of right.

2) Whether the jurisdiction regarding writs of *habeas corpus* is discretionary

Article 141 of the Constitution is couched in such terms that reveal a ‘jurisdiction conferring provision’ as opposed to a ‘right conferring provision’. It is observed in the context of English Law that ‘the

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326 Section 754(1) of the Civil Procedure Code No. 2 of 1889 (as amended).
327 See Section 320 of the Code of Criminal Procedure No.15 of 1979 (as amended) concerning appeals against orders of Magistrates’ Courts.
328 See Article 138 of the Constitution.
330 Similar to Article 138 of the Constitution (re: revisionary jurisdiction) and Article 140 of the Constitution (re: jurisdiction to issue orders in the nature of writs).
331 For example, see Section 753 of the Civil Procedure Code No. 2 of 1889 (as amended).
modern use of the writ is yet another instance of the Crown’s legal armoury into remedies beneficial to the subject.\textsuperscript{332} Furthermore, the House of Lords has held in no uncertain terms that the writ issues as of right.\textsuperscript{333}

Thus, it would appear that when the Court of Appeal dismisses an application for the writ of \textit{habeas corpus} on the ground that a petitioner is absent or unrepresented, it does so on the perception that it is a discretionary remedy. As pointed out earlier, the reason for this stems from the wording of Article 141 of the Constitution. Unlike in fundamental rights applications where an entrenched and justiciable right is involved,\textsuperscript{334} the \textit{habeas corpus} jurisdiction, does not appear to create a right in similar terms.\textsuperscript{335} Yet, the Constitution itself demands that an equitable approach be followed—where \textit{habeas corpus} writs are concerned. Article 3 of the Constitution vests sovereignty in the people of Sri Lanka and is entrenched and justiciable. Accordingly, the Supreme Court has held:

By entrenching fundamental rights in the Constitution, the scope of the writs has become enlarged and is implied in Article 126(3).\textsuperscript{336}

Moreover, in \textit{Heather Mundy v. Central Environmental Authority and Others},\textsuperscript{337} the Supreme Court held as follows:

\begin{itemize}
\item \textsuperscript{332} Wade & Forsyth, \textit{supra} note 1, at 592.
\item \textsuperscript{333} \textit{R. v Home Secretary, ex p. Khawaja} [1984] A.C. 74, at 111.
\item \textsuperscript{334} Article 17 decrees: ‘Every person shall be \textit{entitled} to apply to the Supreme Court in respect of an infringement...of a fundamental right...’ (emphasis added).
\item \textsuperscript{335} Article 141 of the Constitution states: ‘The Court of Appeal may grant.... Orders in the nature of writs of \textit{habeas corpus} to bring before such Court: a) a body of any person to be dealt with according to law; or b) the body of any person illegally or improperly detained in public or private custody.’
\item \textsuperscript{336} \textit{W.K.C Perera v. Professor Edirisinghe} [1995] 1 Sri L.R. 148, per M.D.H Fernando J.
\item \textsuperscript{337} \textit{Supra} note 316.
\end{itemize}
The jurisdiction conferred by Article 140, however, is not confined to *prerogative writs* or extraordinary remedies but extends, subject to the provisions of the Constitution, to *orders in the nature of writs*. Taken in the context of constitutional provisions, these orders constitute one of the principal safeguards against excess and abuse of power, mandating the judiciary to defend the sovereignty of the people enshrined in Article 3 against infringement or encroachment by the Executive, with no deference due to the crown and its agents…(emphasis added).

Article 140 deals with orders in the nature of writs of *certiorari*, *mandamus*, and *prohibition* etc, which are concerned with rights to person, property and office. Though there is nothing in the Constitution to extend such judicial thinking to Article 141 as well, it may be argued that since the writ of *habeas corpus* concerns an individual’s liberty linked as it were to his or her freedom of movement (which incidentally is an entrenched fundamental right), that judicial approach ought to be applied with greater force in the context of Article 141. Thus the argument that the jurisdiction conferred on the Court of Appeal is discretionary must stand refuted. Consequently, an application should not be dismissed merely where a petitioner is presumed to be non-diligent in being absent or unrepresented to prosecute his or her application for *habeas corpus*. In a case of a statutory right to appeal, a court is obliged to consider the merits and dispose of an appeal even where an appellant is absent and unrepresented. Similarly, where a petitioner is absent and unrepresented in a *habeas corpus* application, the Court of Appeal should consider the merits by reference to the pleadings of parties and depositions. If the Court needs assistance, then the Court must be enjoined to appoint an *amicus curiae* on behalf of the Court.

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340 Article 14(1)(h) of the Constitution.
341 H.C.A./196/99, C.A. Minutes of 26 July 1999 where the application had been dismissed for ‘failure to diligently pursue the application.’
Furthermore, it must be pointed out that traditionally, the writ of *habeas corpus* has become the means by which the legality of a detention is challenged. If the petitioner’s application is successful and the detainee is released, that in effect quashes the order; an additional writ of *certiorari* is an unnecessary and pointless formalism.\(^{342}\) So would a writ of *mandamus*, which would be rendered redundant if the detainee is released. This link between *habeas corpus* and the writ remedies of *certiorari* and *mandamus* provides a further pointer to the necessary and logical extension of the thinking reflected in the Supreme Court decisions of *W.K.C Perera*\(^{343}\) and *Heather Mundy*.\(^{344}\) Despite this logical extension, it may ultimately be necessary to legislatively provide for the manner in which *habeas corpus* applications ought to be dealt with by a court when a petitioner is found to be absent and unrepresented.

On the one hand, in certain cases where the petitioner was absent and unrepresented, the Court has, while dismissing the application *ex mere motu*, saved in its order the right of the petitioner, ‘with leave of Court [to] have [the] matter restored on a later date if he so desires.’\(^ {345}\) Yet, on the other hand, despite specifically recording that ‘counsel for the petitioner accepts that the corpus is in lawful custody and he moves for a date to consider whether to withdraw the application…’ the Court had, on occasion, proceeded to make orders of the following nature:

Today, the petitioner is absent and unrepresented and it seems that, the petitioner has no interest in this application. In view of these facts, I dismiss the application.\(^ {346}\)

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342 See Wade & Forsyth, *supra* note 1, at 597.
344 *Supra* note 316.
An individual’s personal liberty and other rights, whether substantive or procedural, must not be made to depend on an individual judge’s approach. This accentuates the need for legislative intervention to make the writ of *habeas corpus* a real and enforceable remedy.

A perusal of the relevant applications that were dismissed on this basis reveals that they were primarily concerned with persons of Tamil ethnicity from the North and East. As observed previously in this section, it is commonly accepted that at that time, the petitioners involved in such cases faced significant restrictions on their freedom of movement including the risk of getting past military check points and barriers. In such circumstances, the question arises whether the Court of Appeal ought to treat a *habeas corpus* application as an ordinary private matter and *ipso facto* dismiss the application because the petitioner is absent and unrepresented.

In this regard, it is instructive to consider the approach of the Supreme Court in the context of fundamental rights applications. In one instance, where the respondents had been absent and unrepresented, the Court had directed the matter be set down for another date and the Attorney General had been requested to assist the Court on the question of whether a request of the petitioner should be acceded to.\(^{347}\) A pertinent question arises as to why a petitioner who is absent and unrepresented should not be afforded the same opportunity whether in an application for an alleged violation of a fundamental right or an application for *habeas corpus* where personal liberty is in issue.

The reasons for a petitioner being absent and unrepresented may be manifold. The petitioner may be unable to travel to Colombo due to geographical constraints. Furthermore, the petitioner may be apprehensive of intimidation by the relevant authorities. It may even be that the petitioner’s counsel had not been ‘properly retained’ (a

term understood in legal parlance to mean that the counsel had not
been paid legal fees) to continue with the case. As observed
previously, the hearing of the applications themselves may have been
unduly delayed thus making it difficult for the petitioner to constantly
travel to the capital. Moreover, intimidation of litigants and lawyers
by state functionaries has become a common occurrence in the social
fabric of this country. Added to this is the lack of a Victims and
Witness Protection Law even though a draft Act has been pending in
Parliament for a number of years. These are realities that the courts
must be expected to be alive to, to the extent of taking judicial notice
thereof.

Nevertheless, it is hoped that in the future, judges would be sensitive
to such realities and determine habeas corpus applications on their
merits. Judges must take into consideration the material before court
rather than dismiss per se an application on the ground that a petitioner is
absent and unrepresented.

A further relevant concern is the pressures that the judiciary may be
subjected to from the executive and the legislature as these cases typically
concern sensitive issues of state accountability. Notwithstanding the
same, it is reasonable to call for a more sensitive judicial approach,
perhaps even to the extent of appointing an amicus to assist the Court
when a petitioner in a habeas corpus application is found to be absent
and unrepresented. Such a line of thinking in habeas corpus
applications presently does not find expression in the Sri Lankan
jurisprudence. Accordingly, there is a need to legislatively vest the
Court with a power, and consequently, a duty to appoint an amicus
curiae in situations where a petitioner is found to be absent and
unrepresented.

Meanwhile, for the purpose of greater certainty, the present
constitutional provision (Article 141) needs to be amended to read as
follows:
Any person may apply to the Court of Appeal for the grant and issue of orders in the nature of writs of *habeas corpus* to bring before such Court –

a. The body of any person to be dealt with according to law; or

b. The body of any person illegally or improperly detained in public or private custody.\(^{348}\)

Such an amendment would transform what presently appears to be a discretionary jurisdiction, and would oblige the Court to determine an application on the merits without dismissing it on the mere ground of a petitioner being absent and unrepresented.

3) Whether the Magistrate’s Court has jurisdiction to dismiss an application for non-prosecution of an application

The constitutionally imposed jurisdictional limits on the Magistrate’s Court are clear from the provisions of Article 141 read with the proviso thereto. Upon the Court of Appeal referring an application for inquiry and report, the Magistrate’s Court’s jurisdiction is limited to ‘inquire and report’. If a petitioner had been found to be absent and unrepresented, the only step that the Magistrate’s Court could have taken was to report that fact to the Court of Appeal. This is what indeed had occurred in several cases where the Court of Appeal had dismissed *habeas corpus* applications on the basis that the petitioner had been absent and unrepresented.\(^{349}\)

\(^{348}\) This expansion is suggested in line with the developments in Commonwealth jurisprudence.

\(^{349}\) See for example, C.A./441/92, C.A./391/92 and C.A./184/92, C.A. Minutes of 6 March 1996.
However, this Study reveals that in at least three cases, the Magistrate’s Court itself had proceeded to dismiss the applications. Very clearly, the said Court is not possessed of jurisdiction to do so. Moreover, the Court of Appeal’s treatment of the said situation also requires some reflection. In *H.C.A./523/93*, the Court of Appeal had held thus:

The petitioner has failed to appear before the Magistrate. Therefore, he had dismissed the application. The petitioner is absent and unrepresented. The petitioner has not shown due diligence in prosecuting this application. Accordingly, the application is dismissed.

On scrutiny of this order, it is clear that the Court of Appeal had not commented on whether the Magistrate’s Court could have decreed a dismissal, which the Court of Appeal was obliged to do as a court with revisionary jurisdiction. The Court of Appeal’s order of dismissal may have been defended on the basis that it also had found that the petitioner had not ‘shown due diligence in prosecuting the application.’ However, it is observed that the Magistrate’s Court had no jurisdiction to dismiss the application in the first place; hence it was the duty of the Court of Appeal to have addressed that matter.

4) Lackadaisical treatment of *habeas corpus* applications and failure to discharge the forensic duty devolving on counsel

Quite apart from the unprecedented practice of two courts ordering dismissals, with the lack of jurisdiction of the Magistrate’s Court to dismiss such applications having apparently gone unnoticed, another key issue of concern may be reflected upon. This is the lamentably slipshod manner in which counsel appearing on behalf of persons

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351 See Article 141 and the proviso thereto.
under the aegis of petitioners had been performing their forensic function.

Regrettably, on the whole, this analysis illustrates some applications replete with errors,\(^{352}\) and the failure of counsel to discharge their forensic duties.

\section*{4.6.2.2.6 Dismissals on the basis that the issue of the writ was not warranted}

1) Dismissals on the basis of contradictions in the petitioner’s testimony

The case of \textit{Nadarajah Sasikanth (Corpus): Maheswari Nadarajah v. The Officer in Charge and two others}\(^ {353}\) may be examined in this regard. In this case, personnel attached to the Jaffna Army Camp arrested the person concerned, a G.C.E. (Advanced Level) student of 19 years, along with two friends on 28 August 1996, as they were returning from a tuition class. The petitioner was the mother of this person. She alleged in her petition that her son and his two friends were detained at the said Army Camp without any reasons for the arrest and detention and that though 36 months had elapsed, her son has not been produced before any court of law. The personnel in the camp did not furnish any information as to the whereabouts of the person concerned. When the application was taken up for hearing in the Court of Appeal on 10 June 2002, the Court informed the petitioner that an appropriate order would be made on the evidence already placed before the Magistrate. Subsequently, when the matter

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\(^{352}\) See for example, H.C.A./322/93, C.A. Minutes of 13 January 1994, where the short order made by Court reads: ‘counsel for the petitioner moves to withdraw this application \textit{as indictment has not been forwarded}. The application is dismissed’ (emphasis added). If the word ‘not’ in the emphasised phrase is a typographical error, the order may make sense. If not, the order would be incomprehensible.

was taken up on 17 September 2002, the order stated that the petitioner had been absent and unrepresented. Yet the Court dismissed the application on the following basis:

In terms of the report of the Magistrate, it appears that there were contradictions in the petitioner’s testimony of the case and his evidence therefore is unacceptable (*sic.*).³⁵⁴

The Court of Appeal appears not to have given its independent mind to the merits of the case, as revealed from the pleadings and depositions of the parties. This is adequately demonstrated by the words, ‘in terms of the report of the Magistrate’s Court, it appears…’ Yet there was no proper examination of the Magistrate’s apparent finding in his report that there were contradictions in the petitioner’s testimony. This case reveals the need to provide, by express legislative means, for the Court of Appeal to entertain a fresh application before a different bench and make a determination on the merits, notwithstanding the fact that it has refused a similar application. A useful judicial precedent for this proposition may be provided in one of the earliest cases on *habeas corpus* in Sri Lanka, where it had been held:

Each judge of the Supreme Court³⁵⁵ is bound to entertain an application for a writ of *habeas corpus* and to determine the application on its merits, notwithstanding the fact that another judge has refused a similar application by the applicant.³⁵⁶

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³⁵⁵ The then Supreme Court had comparable status to the present Court of Appeal. The apex Court in the country at the time was the Privy Council.
³⁵⁶ *In the Matter of a Contempt of Court by P.C. Siriwardene* (1929) 31 N.L.R. 7, per Akbar J.
2) Dismissals on the basis of the identity of the respondents not being established

The case of *Nadarajah Puthiyarajah (Corpus): Nadarajah Lethcumi v. Officer in Charge Kopay, Army Compound and Others*\(^{357}\) may be examined in this regard. In this case, army personnel attached to the Kopay Army Camp arrested the person concerned, a 28-year-old mechanic, on 26 September 1996. The person thereafter had gone missing. Yet the Army Commander in his affidavit denied such allegations of arrest and detention as contained in the petition and affidavit.

On an examination of the evidence led before the Magistrate’s Court of Colombo, the Court of Appeal had found that the identity of the respondents had not been established. Furthermore, the Court observed that the petitioner (the mother of the person concerned) was unable to establish the particular regiment to which those who arrested her son were attached. The Court ultimately held that the material was insufficient to find the respondents responsible for the acts alleged by the petitioner, and had thus dismissed the application. The following questions become relevant in the context of this case.

- Whether the petitioner’s allegations were *mala fides*

There was no finding to this effect, nor was there even a suggestion that some outside source had instigated the allegation against the Sri Lanka Army to bring it into disrepute.

- Applicability of the doctrine of Command Responsibility and/or Vicarious Liability

In the circumstances, the petitioner had been unable to establish the names of the particular personnel of the army and the particular

regiment of the army. Given the cluster of army camps in the Jaffna district, the petitioner presumably might well have named the nearest army camp personnel as being responsible for the arrest. Consequently, a question arises as to whether the Army Commander could be found responsible on the principle of Command Responsibility and/or Vicarious Liability. In the least, the Army Commander could have been called upon to produce the rosters of the several army camps in the Jaffna District and the rosters of all detainees detained in them.

This phenomenon is greatly influenced by the context of a particular conflict. Where violations occur in ostensibly ‘normal’ times, a police officer or a prisons officer could be vicariously held liable in terms of constitutional law principles. Yet, that same rationale does not apply to these officers or their colleagues in the services during time of conflict when prosecutions are brought against them under the criminal law or when fundamental rights petitions are filed on the basis of Command Responsibility.\(^\text{358}\)

3) The onus and degree of proof in *habeas corpus* applications

As discussed earlier, several cases that the Court of Appeal dealt with in regard to the enforced disappearances of persons during the eighties indicate a sympathetic response by the Court to the issue of burden of proof in *habeas corpus* applications. Similarly, there must be consistency shown in judicial reasoning in later cases where the Court must be seen to adopt a more ‘petitioner-oriented’ approach in regard to the question of onus and degree of proof, rather than strictly insisting on the identity of the particular abductors and the particular service unit, whether it be an army camp or a police station.

\(^{358}\) Comments made by some of the participants during the consultations held with the Badulla Bar and the Kandy Bar respectively on 10 and 11 September 2010 and on 29 January 2011. The reluctance of the Supreme Court to hold commanding officers responsible for acts of their subordinates in times of conflict was well seen in Liyanage v. de Silva [2000] 1 Sri L.R. 21.
4) Reflections on ‘the most convenient court’

Another feature of Nadarajah Puthiyarajah’s case pertains to the issue of ‘the most convenient court’. Counsel for the petitioner argued that the Magistrate’s Court of Colombo refused an application for a transfer of the case to the Magistrate’s Court of Jaffna. The Court of Appeal rejected the argument observing that there was no journal entry reflecting that position, and that if there had been such a refusal, the petitioner could have appealed to the Supreme Court. Since the record indicated no such appeal, the Court inferred that the petitioner must have acquiesced in the proceedings.

However, a more petitioner-friendly approach would have led to the transfer of the case to the Magistrate’s Court of Jaffna despite certain procedural lapses that may have tainted the petitioner’s case. For practical reasons, the Magistrate’ Court in Jaffna may have been in a better position to ascertain either the particular identities of the personnel alleged to have arrested the person concerned, or at least the particular regiment and camp that was responsible for the arrest. Ironically, the Court of Appeal expressed a certain degree of judicial regret when it observed:

Unfortunately the petitioner has been unable to call any other evidence before the Magistrate.

Yet this regret does not seem to have dissuaded the Court from adopting an extremely strict approach. It is clear that given the geographical and financial constraints in travelling to Colombo and procuring witnesses to travel to Colombo, the petitioner may have been in a position to prosecute her application more effectively in the Magistrate’s Court of Jaffna. Furthermore, it is pertinent to query as to why the Court of Appeal referred the matter to the Magistrate’s Court

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359 Supra note 357.
360 Ibid.
of Colombo in the first place. The proviso to Article 141 of the Constitution decrees:

Provided that it shall be lawful for the Court of Appeal to require the body of such person to be brought up before the most Convenient Court of first instance to inquire into and report... (emphasis added).

Thus the Magistrate’s Court of Colombo may not have been the most convenient court of first instance, when the incident, as alleged, took place in the Jaffna District. On the contrary, the Jaffna Magistrate’s Court would be the most inconvenient court of first instance. This approach on the part of the Court Appeal appears to have crystallised into an inveterate practice, which, ex facie is contrary to the constitutional decree in the proviso to Article 141. However, the Court of Appeal has pursued this practice regardless of the said constitutional decree. By way of illustration, the initial order made in the case of Nagaratnam Sivaruban (Corpus): and between Kandiah Nagaratnam v. The Officer in Charge, Army Camp 512 Division, Clock Tower Road, Jaffna and Two Others361 may be examined. The Court, having examined the pleadings of the parties, proceeded to make the following order:

We are of the view that since a specific allegation has been made by the petitioner that the Corpus has been arrested by the Army in the Jaffna Army Camp, this matter has to be inquired into by the Magistrate. We accordingly direct the Chief Magistrate of Colombo under Article 141 of the Constitution to inquire and report expeditiously.362

There appears to be no justification for the Court to direct the Chief Magistrate of Colombo and not the Magistrate’s Court of Jaffna to inquire and report. Given the illustrative cases examined in this Study where applications were withdrawn on account of the petitioner’s

362 Ibid. at 3.
inability to travel to Colombo or to procure witnesses for the purpose of presenting themselves at the magisterial inquiry, the Court of Appeal’s directions to the Magistrate’s Court of Colombo ‘to inquire and report expeditiously’ amounts to a contradiction in terms. This practice of the Court may be one of the main factors that had hitherto contributed to delays in disposing of *habeas corpus* applications. This aspect will be commented upon in greater detail later in this Study.

The judicial approach in *Murin Fernando v. Sergeant Sugathadasa and Others* may be compared with the case of *Nadarajah Puthiyarajah*. In the former case, the Magistrate expressed doubt with regard to the specific identity of the abductors. However, such doubt did not deter the Court of Appeal from finding the respondents responsible, particularly in view of the Magistrate’s observation that the totality of the evidence established that the person concerned had been at the police station during a certain period. It is perhaps this ‘totality of evidence’ that the petitioner in *Nadarajah Puthiyarajah’s case* might have been able to provide had the matter been transferred to the Magistrate’s Court of Jaffna.

The question of onus and degree of proof in *habeas corpus* applications and the precise approach to be adopted in respect of transfer applications are two issues that warrant immediate legislative intervention. Such issues require attention particularly because matters of individual liberty and freedom ought not to be treated lightly and technically.

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365 *Supra* note 357.
366 1997] 1 Sri L.R. 281, at 282, per H.S Yapa J.
367 *Supra* note 357.
5) Dismissals on account of failure to name the respondents properly

- **HCA/11/95**\(^{368}\) – Order dismissing ‘with liberty to file a fresh application’

In **HCA/11/95**, the Court of Appeal, in the first instance, referred the matter to the Chief Magistrate of Colombo for inquiry in terms of the proviso to Article 141 of the Constitution. The Magistrate’s Court in turn sent the case back to the Court of Appeal ‘for steps’ to be taken by counsel. On reading this magisterial order, it is apparent that the Magistrate had, quite correctly, referred the matter back to the Court of Appeal due to the fact that, inadvertently, the petitioner failed to name the respondents properly. Counsel himself had initially stated that it was necessary to amend the petition, which ordinarily ought to have been permitted by the Court. However, instead of permitting the amendment of the petition, the Court of Appeal dismissed the application with liberty to file a fresh application.

The following reflections may be made with regard to this peculiar order. Such an order may not have been necessary in the first place insofar as the doctrine of *Res Judicata* has no application in the context of *habeas corpus* applications. The effect of the applicable Court of Appeal (Appellate Procedure) Rules of 1990\(^{369}\) formulated by the Supreme Court in pursuance of powers conferred on it by Article 136\(^{370}\) of the Constitution are relevant in this regard. Rule 3(1) (a) of the aforesaid Rules provides:

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\(^{368}\) C.A. Minutes of 12 February 1997.


\(^{370}\) Article 136 provides: ‘Subject to the provisions of the Constitution and of matters of any law the Chief Justice with any three Judges of the Supreme Court nominated by him may from time to time make rules regulating the practice and procedure of Court...’
Every application made to the Court of Appeal for the exercise of powers vested in the Court of Appeal by Articles 140 or 141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments therein and shall be accompanied by the originals of documents material to such application (or duly certified copies thereof) in the form of exhibits. Where a petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave of Court to furnish such document later. Where a petitioner fails to comply with the provisions of this rule the Court may, ex mero motu or at the instance of any party, dismiss such application.

Rule 3(2) states:

The petition and affidavit, except in the case of an application for the exercise of powers conferred by Article 141 of the Constitution shall contain an averment that the jurisdiction of the Court of Appeal has not previously been invoked in respect of the same matter. If such jurisdiction has previously been invoked, the petition shall contain an averment disclosing relevant particulars of the previous application. Where any such averment as aforesaid is found to be false or incorrect the application may be dismissed.

Furthermore, Rule 3(8) states:

A party may, with the prior permission of the Court amend his pleadings, or file additional pleadings, affidavits or other documents, within two weeks of the grant of such permission, unless the Court otherwise directs. After notice has been issued, such permission shall not be granted ex parte.

Rule 3(15) declares as follows:

These Rules shall not apply, mutatis mutandis, to applications made to the Court under any provision of law, other than Articles 138, 140 and 141 of the Constitution, subject to any directions as may be given by the Court in any particular case.
The cumulative effect of the said rules clearly rules out a plea of *Res Judicata* in *habeas corpus* applications, thereby rendering an order that grants liberty to file a fresh application redundant. However, could it yet be maintained that it is incumbent upon the Court to grant such a right, given the fact that a citizen’s personal liberty is at stake?

- *HCA/ 411/93*\(^{371}\) – Caption defective for want of Christian name

In the case referred to earlier, the proceedings did not reveal what exactly the insufficiency was in naming the errant respondent. In this case, however, the deficiency was apparent on the record: the respondent, an army officer who in fact the Magistrate’s Court deemed responsible for the abduction, was described in the caption only as ‘Brigadier Soyza, Army Camp, Kommanthurai’. The Court of Appeal reversed the magisterial finding and dismissed the application on the following basis:

[T]here is no Brigadier Soyza in the Sri Lankan Army and there may be many Soyzas’ in the Sri Lankan Army.\(^{372}\)

Thus the failure to ‘specify the Christian name’\(^{373}\) proved fatal in the eyes of Court. The Court also stated that the problem of issuing a civil warrant would arise on account of the failure to identify the respondent properly.

Yet the Court of Appeal had not examined several important aspects of this case. For instance, there might have been a ‘Captain’ or even a ‘Corporal’ Soyza at the Army Camp in question, who might have been described in the caption. The Court neither perused the averments in the petition nor the affidavit of Soyza, who could be

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\(^{371}\) C.A. Minutes of 4 May 1998.


\(^{373}\) *Ibid.*
presumed to have filed one. Unless such averments and subsequent affidavit existed, the Magistrate’s Court could not have found this elusive ‘Soyza’ to be responsible for the abduction. It must also be noted that the Court did not make any observation faulting the Magistrate’s Court’s finding or the basis on which the Magistrate’s Court identified Soyza as the ‘Soyza’ responsible for the abduction.

Although the Court granted the petitioner liberty to file a fresh application, a more sensitive approach should have been adopted. Given the general delays in disposing *habeas corpus* applications, it would be little solace to a petitioner who files a *habeas corpus* application on behalf of a person, who had been under incarceration for more than five years, to be told that he or she is at liberty to file a fresh application.

- *HCA/48/97*[^374] – Respondent named *officio nomini*

The Supreme Court, in the early decision of *Ladamutypillai v. Lands Commissioner*,[^375] laid down the legal position in respect of applications for orders in the nature of writs where respondents are named only by office under the provisions of a relevant statute. It was held that if such office does not pass the test of a statutory functionary by being referred to as such in the relevant statute, such applications were liable to be dismissed. However, the present Supreme Court, in pursuance of its powers under Article 136 of the Constitution, provided for the following Rules in the year 1990:

Rule 5(1):

This Rule shall apply to applications under Articles 140 and 141 of the Constitution, in which a public officer has been made a respondent in his official capacity, (whether on account of an act or

[^375]: (1957) 59 N.L.R. 313.
omission in such official capacity, or to obtain relief against him in such capacity, or otherwise).

Rule 5(2):

A public officer may be made a respondent to any such application by reference to his official designation only (not by name), and it shall accordingly be sufficient to describe such public officer in the caption by reference to his official designation or the office held by him, omitting reference to his name. If a respondent cannot be sufficiently identified in the manner, it shall be sufficient if his name is disclosed in the averments in the petition.

And Rule 5(3):

No such application shall be dismissed on account of any omission, defect or irregularity in regard to the name, designation, or address of such respondent, if the Court is satisfied that such respondent has been sufficiently identified and described, and has not been misled or prejudiced by such omission, defect or irregularity. The Court may make such order as it thinks fit in the interests of justice, for amendment of pleadings, fresh or further notice, costs, or otherwise, in respect of any such omission, defect or irregularity.

In the case under consideration, the respondent alleged to have been responsible for the detention was described as ‘Director, Criminal Investigation Department’ (CID) in the caption. Although the proceedings revealed that there were other grounds also that may have justified dismissal of the application, the Court of Appeal thought it fit to dismiss the application on the ground that ‘Director, (CID)’ was not ‘a legal persona.’

- *HCA/273/93*[^376] – Failure to name the alleged abductor in the caption

[^376]: C.A. Minutes of 30 March 1998.
This was yet another case where, though there were apparently other grounds warranting dismissal, the Court of Appeal held against the petitioner on the ground of failure to name the alleged abductor in the caption. No reference was made to Rule 5(2) of the Supreme Court Rules, which obliges the Court to ascertain whether such *person’s name has been disclosed in the averments in the Petition*. It is regrettable that the order of the Court revealed no attempt to make such an inquiry as provided by the Rule.

A question arises as to how such eventualities might be avoided. The law is comprehensive insofar as it provides for the amendment of pleadings in *habeas corpus* applications, and thus needs no reform in this particular context. The imperative need then is to sensitise the judicial mind in regard to the importance of securing the liberty of the subject without resorting to such anachronistic and technical obstacles in order to defeat a constitutional remedy which safeguards the very essence of life and liberty.

6) Dismissals on the basis of the Magistrate’s Court findings that the allegations have not been established

In two cases, the Court was prompted to dismiss the applications on the basis of mere denial by the respondents\(^{377}\) in their affidavits of the alleged arrest, coupled with the magisterial finding that the allegation of arrest and disappearance had not been established. In another case, the Court held:

The Chief Magistrate has come to a finding that the petitioner had failed to establish that the Corpora were arrested by the 1\(^{st}\)

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respondent. Therefore, I am of the view the respondent cannot be held responsible for the arrest.  

- Surrender of discretion or failure to exercise jurisdiction

The constitutional jurisdiction to ‘grant and issue orders in the nature of writs of habeas corpus’ is primarily conferred on the Court of Appeal, although the provision vests further discretion in the Court to refer the matter to the most convenient court of first instance to inquire and report upon the acts of the alleged imprisonment or detention, whereupon ‘the Court of Appeal shall…make order to discharge or remand the person so alleged to be imprisoned or detained or otherwise deal with such person according to law…’

Consequently, accepting and acting on the findings of the Magistrate, *ipso facto*, with no independent analysis and evaluation of the evidence led at the magisterial inquiry cannot be regarded as being a proper discharge of the constitutional jurisdiction primarily conferred on the Court of Appeal. Even where counsel for the petitioner concedes that the Magistrate’s findings are correct and moves to withdraw the application, it ought to be incumbent on the Court to independently assess and evaluate the evidence before dismissing the application. An approach to the contrary would amount to an abdication or surrender of the constitutional jurisdiction conferred on the Court of Appeal.

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379 Article 141 of the Constitution.
380 Proviso to Article 141.
381 *Ibid*.
• The burden of proof: adversarial or inquisitorial?

Two other cases in this regard require fuller reflection. In *HCA/40/90*, the Magistrate’s Court found that ‘the [p]etitioner has failed to establish the case.’ The counsel for the petitioner, however, challenged this finding in the Court of Appeal. The Court’s response was as follows:

Having regard to the finding of the learned Chief Magistrate and the contradictory position taken up by the supporting witnesses of the petitioner, I am of the view that there is no reason to disagree with the finding of the learned Chief Magistrate of Colombo. Accordingly the application is dismissed.

The Court’s ruling, however, makes no reference to the grounds of challenge against the Magistrate’s report and findings, which the counsel for the petitioner advanced in the Court of Appeal. Moreover, there is also no evaluation of the evidence of the supporting witnesses or any intimation of the reason as to why the Court found that they had taken contradictory positions. Consequently, the Court’s ruling stands reduced to an *ipso facto* acceptance of the Magistrate’s finding.

In *HCA/36/91*, an allegation of abduction and subsequent disappearance was made against the police. The Chief Magistrate held that the two eyewitnesses who identified one of the respondents had not mentioned this in their statements to the police. The Magistrate thus concluded that it was ‘unsafe to act on such evidence.’

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• Disregard of police practice in recording statements

It would appear that the Chief Magistrate overlooked the fact that it is a notorious practice on the part of the police not to record statements in their full content, particularly when the allegation is against the police itself. Furthermore, the Magistrate seems to have held that it was ‘unsafe to act on such evidence…’ because the respondent police officer had not been well disposed towards the petitioner, and therefore ‘the petitioner would have suspected the [said respondent].’\textsuperscript{387}

To say the least, such reasoning would amount to a non sequitur. On the contrary, these factors may well have prompted the police to specifically omit any reference in the witnesses’ statements to the said police officer. In any event, whether the witnesses were examined and cross-examined on these aspects is not revealed in the Court of Appeal’s ruling, leading to the further observation that there was a gross failure at all levels to assess and evaluate the evidence led at the magisterial inquiry.

Based on the foregoing reflections, it would be pertinent to raise the following issues:

• The non-applicability of the Evidence Ordinance in \textit{habeas corpus} applications

Section 101 of the Evidence Ordinance\textsuperscript{388} provides:

\begin{quote}
Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
\end{quote}

\textsuperscript{387} \textit{Ibid.}

\textsuperscript{388} Act No.14 of 1895.
When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Accordingly, the following rules are firmly entrenched in the jurisprudence of this country.

(a) The burden of proving a fact is on the party that asserts it.  
(b) The degree of proof to establish a case is proof ‘beyond reasonable doubt’ in criminal cases and ‘on a balance of probabilities’ in civil cases.

An important question arises as to where these principles of evidence stand in respect of *habeas corpus* applications. In the seminal dissenting opinion of Lord Atkin in *Liversidge v. Anderson*,\(^\text{390}\) it was held:

In English Law every imprisonment is *prima facie* unlawful and it is for the person directing imprisonment to justify his act.\(^\text{391}\)

- Need for extension of the principle enunciated by Lord Atkin

The history of the remedy of *habeas corpus* originated in the context of unlawful imprisonment and detention. Enforced abductions and disappearances is a phenomenon that has surfaced in countries, which have undergone prolonged conflict. Sri Lanka is a good example. In an inevitably large number of such cases, the enforced disappearances are alleged to have been perpetrated by state organs. Thus, when a petitioner names and avers the alleged abductors, the court must be empowered to examine the truth of the facts set forth in the respondents’ affidavits and not act on a mere denial of the petitioner’s

\(^{389}\) With some exceptions, for instance in statutory offences in criminal cases.


\(^{391}\) *Ibid.* at 245.
allegations or on what may be conceived as the ‘contradictory’ or ‘unsatisfactory’ nature of evidence led by the petitioner.

Furthermore, the approach on the part of the courts in Sri Lanka, as demonstrated in the foregoing analysis, reveals a failure to address the questions of the burden and degree of proof in the context and circumstances in which enforced abductions and disappearances take place. Once a petitioner names an alleged perpetrator and accounts of the alleged incident are led through eyewitness, additional proof ought not to be strictly required.\(^{392}\) An individual should not be put in danger of continuing to remain ‘disappeared’, while a petitioner who seeks the production of such a person is in no position to prove anything more. Given the fact that the perpetrators are named and the time and place of the alleged abduction are averred—and more so when evidence had been led in that regard—it should at least suffice to require the alleged perpetrator to produce enough evidence to counter allegations by means of appropriate defences as contemplated by Section 103 of the Evidence Ordinance.\(^{393}\) For example, the defence of alibi would be a simple counter that a court ought to be in a position to assess. In proof of such defence, a court should require official records to be placed before it.\(^{394}\)


\(^{393}\) See Section 103 of the Evidence Ordinance, which reads: ‘The burden of proof as to any particular fact lies on that person who wishes the court believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.’

\(^{394}\) See in particular, H.C.A./76/92, C.A. Minutes of 17 July 1998, where the defence of alibi had been employed by the Court of Appeal to reverse the Magistrate’s Court’s finding of liability. N.B. instances where the Court of Appeal has dismissed applications notwithstanding findings of liability by the Magistrate’s Court will be discussed in a separate Section, \textit{infra}.  

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• Need for legal reform and judicial hindsight: an inquisitorial rather than an adversarial approach

In order to address the above concerns, legal reforms either through an additional proviso to Article 141 of the Constitution or through a separate Act of Parliament would be imperative, given the familiarity and commitment of the Sri Lankan judiciary to an adversarial system of justice. Such reforms must be directed towards a more inquisitorial ethic rather than adversarial, in the interest of preserving the liberty and security of citizens in whom, as the Constitution provides, sovereignty resides. Wade and Forsyth opine:

In the past, unfortunately, the protection of liberty has been weakened by Judges who have held that a return from the Custodian which is valid on its face puts the burden of disposing it upon the prisoner, for the return is merely a statement of the facts which are alleged to justify the detention, and does not itself provide any evidence of their existence. Administrative detention is a different matter from detention by order of a Court of Competent Jurisdiction, where the return is conclusive. To throw the burden of proof onto administrative prisoners...puts the individual in danger of being detained upon allegations which he may have no means of disproving.395

7) Dismissals on the basis of reversal of the Magistrate’s Court’s finding with regard to the identification of the respondents

This category of cases deals with the opposite of situations discussed previously. In such cases, the Court of Appeal has in fact reversed the magisterial findings as to the identification of perpetrators in circumstances that leave the Court open to criticism.

395 Wade & Forsyth, supra note 1, at 395.
• **HCA/45/90**\(^{396}\) – An illustrative case

The facts and the evidence led before the Magistrate in this case were as follows. In an alleged joint operation by the police and the army, an army officer, the 1\(^{st}\) respondent, had arrested the *corpora*. These persons were then taken to a police station where the inspector in charge, the 2\(^{nd}\) respondent, had acquiesced in the arrest and later allowed them to be taken away (presumably) by army officers upon them showing their identity cards. Such army officers, however, were not named as respondents. Thereafter, the persons who had been detained had disappeared. The two vehicles used in the incident were also identified by their serial numbers by witnesses appearing on behalf of the petitioner. A witness called on behalf of the army, however, stated that according to the relevant register, the army had never arrested the relevant persons.\(^{397}\)

*The Magistrate’s findings*

a. That the 1\(^{st}\) respondent and the 2\(^{nd}\) respondent were directly responsible for the disappearance of the persons concerned.

b. That the 3\(^{rd}\) respondent (Major General of the Army Camp), 4\(^{th}\) respondent (The Inspector General of Police) and the 5\(^{th}\) respondent (the Army Commander) were responsible as the superior officers of the 1\(^{st}\) and 2\(^{nd}\) respondents.

*The Court of Appeal Ruling*

In reversing the Magistrate’s findings, the Court of Appeal adduced the following reasons for the dismissal of the application:

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\(^{396}\) C.A. Minutes of 14 May 1997.  
\(^{397}\) The proceedings do not reveal whether the said register was even produced.
a. That the 1
st respondent (the alleged army officer named in the caption as Corporal Judy) had not appeared either in the Magistrate’s Court or the Court of Appeal.

b. That it was brought to the notice of the Court that there was no such person by the name of Corporal Judy in the Army.

c. That the 5
th respondent (Army Commander) had filed an affidavit stating that there was no person called Corporal Judy in the Sri Lankan Army.

Comments on the order of the Court of Appeal: whether the non-appearance of the 1
st respondent was a ground to reverse the Magistrate’s finding

As the record reveals, after notice of the application was issued, only the 2
nd, 4
th and 5
th respondents filed affidavits denying the arrest of the persons concerned. The Court did not hold that notice issued on the 1
st respondent had been returned. If notice had not been returned, the 1
st respondent must be deemed to have been served with notice. Hence a question arises as to who would have accepted the notice. These are aspects that the Court was obliged to ascertain. Moreover, the Magistrate, after inquiry, had accepted the evidence of the petitioner and two other witnesses that the person named as ‘Corporal Judy’ was responsible for the initial arrest. The Court of Appeal did not find any misdirection on that aspect. Furthermore, the Magistrate appears to have rejected the 2
nd respondent’s affidavit denying the arrest. Yet the Court of Appeal made no comment on that aspect.

The Court also treated the defective caption as the other apparent ground for dismissal i.e. the lack of reference to a Christian name or surname. As evident in other previously discussed cases, the lack of a
Christian name or surname appears to have proved fatal to the application.

- *Ratnaweera v. Army Commander and Four Others*\(^{398}\)

In this case, the facts and the evidence led before the Magistrate revealed that on the day in question some army officers along with the 2\(^{nd}\) respondent (a Captain of the army) had come to the residence of the person concerned in the early hours of the morning and taken him away. The person had disappeared thereafter. Additionally, the petitioner, who was the brother of the person, stated in his evidence before the Magistrate’s Court that on receipt of a message that the person had been taken away by the army, he had visited the Army Camp in question. The petitioner stated that when he visited the Camp, he had seen his brother and had even met with the 2\(^{nd}\) respondent, but had not been permitted to speak to his brother. The learned Magistrate accordingly found the 2\(^{nd}\) respondent and 1\(^{st}\) respondent (Army Commander) responsible for the disappearance of the person concerned.

*Reasons for reversal of the Magistrate’s findings by the Court of Appeal*

Noting that there was a serious discrepancy between what the petitioner had stated in his affidavit and in his oral evidence at the magisterial inquiry, the Court of Appeal reversed the Magistrate’s findings and dismissed the application.\(^{399}\)

*Whether there ought to be provision for amendment of pleadings and a rehearing*

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\(^{399}\) Counsel for the petitioner had stated before Court that he was not pressing the application on account of the said discrepancy.
It is unlikely that the petitioner concocted such a story in his evidence, as he would have little motive to implicate the 2nd respondent. However, the discrepancies that did arise also cast doubt over the role played by the petitioner’s counsel in allowing such evidence to be given by his client, particularly since the counsel would have presumably drafted the affidavit sworn to by the petitioner.

It is for these reasons that there ought to be specific provision in the law permitting a rehearing with fresh pleadings inasmuch as the liberty and freedom of the subject is in issue. It is observed that had the Magistrate noted this discrepancy during the hearing, an amendment or an opportunity for a fresh application may have been granted at that stage.\footnote{For example in H.C.A./ 438/89, C.A. Minutes of 2 May 1997, where the petition (and affidavit) had not identified any particular abductor by name but the oral evidence had revealed the name of a person who was found to be in the compound of the residence of the abducted person among the crowd that had come to arrest him, the Magistrate thought it fit to return the record to the Court of Appeal for filing of fresh papers. The matter was dismissed by order of the Court of Appeal on 9th July 1997.}

- \textit{Alankarage Tulin v. Anura Obeysiri and Others}\footnote{\textit{Ibid.}}

This was an instance where in the original application the 1st respondent had not been named as a respondent. However, the 1st respondent’s name was revealed, during the hearing of oral evidence before the Magistrate. It was only after the Magistrate returned the record to the Court of Appeal for amendment that an amended application was filed naming the 1st respondent. While the Magistrate had found the 1st respondent responsible for the arrest and removal, the Court of Appeal proceeded to reverse that finding.
Reasons adduced by the Court of Appeal for reversing the Magistrate’s findings

a. That while during the examination-in-chief the petitioner stated that there was a crowd of about 40 persons in her compound at the time of the arrest and removal of the person concerned, in cross examination she stated that there were more than 20 persons and therefore the evidence given by her was contradictory and unreliable.

b. That if there was such a large crowd in the compound of her residence, she could not have identified the 1st respondent.

c. That the petitioner’s evidence was supported only by rumours. The petitioner stated that there was enmity between the person concerned and the 1st respondent, and that as a result of rumours her belief that the 1st respondent was responsible for the arrest of the person was confirmed. This suggested that her implication of the 1st respondent with the arrest of the person was based merely on rumours.\footnote{Ibid. at 7.}

d. That while the petitioner’s evidence was that she did not observe that the three persons who came to arrest the person concerned were armed, according to the evidence of the supporting witness, three persons who came were armed and dressed in civilian clothing. Again, while according to the petitioner’s evidence, two of the said three persons were dressed in army uniform and one was in civilian clothing, the supporting witness’s evidence was that all three were in civilian clothing, which constituted contradictory evidence.
Comments on the order of the Court of Appeal

Evidence that there was a crowd of 40 persons and evidence that there were more than 20 persons does not *ex facie* amount to a contradiction. Also, notwithstanding the fact that the number 40 is in any case ‘more than 20’, the petitioner was giving evidence around seven years after the incident.

Furthermore, if reason c) above is incomprehensible, the reason given in d) above cannot constitute a contradiction. Also, if reason b) given by the Court was to be sustained, a question still arises as to what the purpose of amending the original application was.

The Court held:

It may be stated that even if the evidence given by the petitioner that the 1st respondent was present among the crowd of people at the time of the arrest of the corpus by three persons is accepted as true for the purpose of argument, still it does not establish that the 1st respondent was the person who arrested the corpus. Therefore what is stated in the amended affidavit of the petitioner that the 1st respondent took the corpus away is contradictory.403

The said reasoning, however, does not draw a distinction between the direct physical involvement and constructive physical presence in the perpetration of an illegal act, as laid down in the celebrated Indian case of *Barendra Kumar Ghose*,404 wherein it was held:

Even if the Appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things, they also serve who only stand and wait.405

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403 Ibid. at 8-9.
405 Ibid.
The respondent’s presence in the crowd that came to arrest and ultimately removed the person concerned was firmly established in the magisterial order. Yet this is an aspect that appears to have been bypassed.\footnote{The case of \textit{Aluth Hewage Agnes v. Anura Obeysiri and Others}, H.C.A./439/89, C.A. Minutes of 9 July 1997 proceeds on similar lines.}


In this case, the petitioner, who was the wife of the person concerned, along with the person’s sister gave evidence identifying without any demur, one of the alleged abductors (the 1\textsuperscript{st} respondent), as a police constable attached to a named police station. Both witnesses stated how the person concerned was brought to their respective houses where the person had been assaulted and then removed. At the inquiry, the Magistrate found the 1\textsuperscript{st} respondent liable and also found the OIC of the said police station, vicariously liable. The Magistrate referred to the OIC as the 2\textsuperscript{nd} respondent.

The Court of Appeal held that the Magistrate’s finding against the 2\textsuperscript{nd} respondent ought to be reversed mainly because of a defective caption. The Inspector General of Police (IGP) and not the OIC of the police station concerned had been named in the caption as the 2\textsuperscript{nd} respondent. The magisterial findings of liability in that respect were opined to have been ‘a careless mistake on the part of the Learned Magistrate,’\footnote{\textit{Ibid}. at 3.} given that the 2\textsuperscript{nd} respondent was identified as the IGP. Accordingly, the order was reversed. The Court also reversed the Magistrate’s findings against the 1\textsuperscript{st} respondent on several other grounds:

\textit{A deficiency in the petitioner’s case:} In her affidavit, the petitioner stated that the 1\textsuperscript{st} respondent had come to her house with the other
police personnel, arrested and taken the person concerned to his mother’s place where he had been assaulted. From there, he had next been taken to his sister’s place where once again he had been assaulted before being taken away. The petitioner in her oral evidence stated that the person concerned was assaulted at his sister’s place. The evidence of the sister also confirmed this story. Yet the Court of Appeal held that ‘there was no evidence led before the Magistrate to show that the corpus was arrested at some other place as well.’ It was held that this was a deficiency in the petitioner’s case.\(^{409}\)

*A vital contradiction:* The petitioner’s evidence was that three persons from the named police station had come to her house in civilian clothes whereas the evidence of the sister of the person concerned was that some of them were clad in army uniform, some in police uniform and the others were in civilian clothes. Consequently, the Court of Appeal held that the Magistrate ‘has failed to consider this vital contradiction in the evaluation of the evidence led before him.’\(^{410}\)

*Evidence that was highly improbable:* A witness who claimed to have seen the person concerned at the police station in question during the examination-in-chief stated that while he was going to the lavatory, the person called him through a window, whereas in his cross-examination, he stated that when the person called him through a window, the person was seated on the floor. Holding that this evidence was highly improbable, the judge of the Court of Appeal stated:

I am of the view that these deficiencies created a doubt in regard to the testimonial trustworthiness of the petitioner’s story.\(^{411}\)

\(^{409}\) *Ibid.* at 5.
\(^{411}\) *Ibid.*
*Defence of alibi:* The 1st respondent denied the arrest and produced through another police officer an extract from the information book, which revealed that he was a member of a police party that went on a raid of illicit liquor at 4 a.m. on 13 February 1990 and had come back to the station at 6 p.m. The other police officer who sought to corroborate the 1st respondent’s evidence stated that after they returned at 6 p.m., the 1st respondent and other officers who took part in the raid attended to marking relevant entries regarding the raids and the productions and that the 1st respondent was in the police station until 8 p.m.

*Conclusion of the Court of Appeal:* The Court accepted the above alibi by taking into consideration the petitioner’s version that the 1st respondent had come to her house and the sister’s house at 7 or 7.30 p.m. and the evidence of the 1st respondent’s supporting witness that the distance between the residence of the person concerned and their police station was about 20 miles. Furthermore, given the additional evidence of the said witnesses that the police division which the person came under was not within their own jurisdiction, it was ultimately held that such arrest ‘would have required permission from higher authorities…’

Consequently, it was judicially concluded that ‘in the totality of evidence, I am of the view that the alibi pleaded by the 1st respondent should succeed…’ This conclusion prompted the Court to set aside the Magistrate’s order.

*Comments on the order of the Court of Appeal*

*On discharging the 2nd respondent:* The Magistrate found the OIC of the police station concerned vicariously liable but failed to take into

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412 Ibid. at 9.
413 Ibid.
414 Ibid.
account the fact that the 2nd respondent named in the caption was not the OIC but the IGP. In the circumstances, one may not be able to fault the discharge of the 2nd respondent. Yet the question may be raised as to why the Court did not add the correct party inasmuch as the relevant Rules are wide enough to permit such addition.

On reversing the findings against the 1st respondent: The evidence of both the petitioner and the sister of the person concerned that the person was arrested at the latter’s residence stood established. It is on that evidence that the Magistrate found the 1st respondent liable. Consequently, it is unreasonable to treat an omission relating to the allegation of arrest at some other place as a deficiency affecting the petitioner’s case.

It was also unclear as to what exactly the Court of Appeal found to be ‘highly improbable’ in the evidence of the witness who stated that the person concerned called him through a window. The Court seemed to think that because the person was seated he could not have called through a window. Yet it is once again unreasonable to hold that the person could have called through a window only if he had been standing and not if he had been seated.

The extracts of the information book, even if taken at face value, showed that the police party had returned at 6 p.m. and that the 1st respondent had thereafter remained in the police station until 8 p.m. to mark relevant entries. The Magistrate, however, did not accept these assertions. Yet, even if the 1st respondent had returned by 6 p.m., it would not have taken the respondent all that much of time thereafter to cover the distance of 20 miles between the police station and the residence of the person concerned so as to go beyond 7.30 p.m., which is the time the petitioner and the sister of the person respectively stated as being the times that the 1st respondent had come to their residences.
The precise reasons for the Magistrate’s rejection of the 1st respondent’s alibi are not publicly discernible given that the magisterial order does not form part of the proceedings of the case. By contrast, the Court of Appeal appeared to have been satisfied in merely accepting the explanation of the respondent police officer as to his whereabouts during that time. This readiness may be criticised, given a common pattern of police records being falsified to provide defences to police officers implicated in acts of grave human rights violations.415

Furthermore, neither a gazette nor any other material was placed before the Court in support of the respondent’s position that the person concerned did not come under his jurisdiction. This deficiency should have been taken into account even if the Court accepted the respondent’s contention that permission from higher authorities would have been required in order for him to arrest the person concerned.

Some reflections on the evidence of Nilanthi Karunaratne, the sister of the person concerned

This witness stated as to how the crowd including the 1st respondent that came to her residence with the person concerned, harassed and

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415 See the observations of K.M.M.B. Kumatunge J. in Kemasiri Kumara Caldera v. Somasiri Liyanage and Others, S.C. (F.R.) 343/99, S.C. Minutes of 6 November 2001: ‘…the manner in which the GCIBs, RIBs etc have been altered with impunity and utter disregard of the law makes one wonder whether the supervising ASPs and SPs are derelict in the discharge of their duties or in the alternative condone such acts. In my view, it is unsafe for a Court to accept a certified copy of any statement or notes recorded by the police without comparing it to the original.’ Also, in Nayana Kumudinie Lasanthi Vidianage v. Udaya Šeneviratne and Others, S.C. (FR) 148/99, S.C. Minutes of 26 September 2001, the Supreme Court observed as follows: ‘In the face of this material and the pack of falsehoods relating to the arrest of the petitioner, the alterations in the GCIB and the false entries therein…the 1st respondent has…not only infringed the petitioner’s fundamental rights guaranteed by articles 13(1) and 13(2) but has also had the audacity to file in this Court a false affidavit in an attempt to mislead the Court which is a more grave offence.’
undressed her. She also stated that the 1st respondent got her to kneel down and then arrested her brother in her presence, an occurrence that had commonly taken place during the time under consideration.\textsuperscript{416}

While the Court of Appeal makes no reference to this matter, it is unfortunate that the Magistrate’s Court proceedings are not accessible in proceedings of this nature in order to discover how the Magistrate may have dealt with the issue.

\begin{itemize}
  \item \textit{Gurusinghe v. Corpl. Priyanga Perera, Army Camp, Walasmulla et al.}\textsuperscript{417}
\end{itemize}

\textit{Basis of Magistrate’s findings}

In this case, the petitioner and her husband stated in evidence that they saw their son, the person concerned in the Army Camp in question. The Magistrate accepted this evidence as being truthful and credible in the main even though there were some minor discrepancies.

\textit{Reasons adduced by the Court of Appeal in reversing the Magistrate’s findings}

These reasons were as follows:

\begin{itemize}
  \item a. That the evidence of identification given by the two witnesses was extremely weak.
  \item b. That the distance from the road to the Army Camp and the obstacles that may have been posed as to the proper
\end{itemize}

\begin{footnotes}
\textsuperscript{416} See the Final Report of the Presidential Commission of Inquiry into Disappearance and Involuntary Removal in the Southern, Sabaragamuwa, and Western Provinces (1997).
\end{footnotes}
vision of what took place in the Army Camp was not pleaded.

c. That the Magistrate’s approach was contrary to the principles relating to proper identification as laid down in the case of *Regina v. Turnbull*.418

*Comments on the Court of Appeal judgment*

First, it is observed that the two witnesses had not expressed any doubt as to the identity of their son whom they had seen at the Army Camp. The difficulty was with regard to the vision of what had taken place in the camp. Consequently, there was no reason to have pleaded the distance from the road to the Army Camp or indeed the obstacles that may have impeded a proper vision of what took place in the Camp. Thus the relevance of such obstacles to the petitioner’s case may be questioned. Furthermore, the petitioners did not make any allegations against any army personnel in regard to the treatment of their son. The Court of Appeal’s approach on that aspect could be said to constitute a misdirection.

Secondly, the Magistrate found the evidence of the witnesses as being credible and truthful. The very fact that they conceded there was some interference with the vision of what took place in the Camp—instead of making wild allegations—ought to have been held in their favour. This appears to have been the approach adopted by the Magistrate.

Thirdly, it is an established principle of law that findings of a judge who had seen the witnesses ought not to be ordinarily interfered with by an Appellate Court, unless there is some error or perversity in those findings.419 The Court of Appeal did not find anything perverse in the Magistrate’s findings with regard to the evidence of the witnesses in

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419 See for example, 6 C.L.W. 8 and 22 C.L.W. 85.
respect of the identity of the person inside the Army Camp. Consequently, it may be contended that there was no basis for the Court of Appeal to have reversed the findings of the Magistrate.

Finally, it may be observed that the Court of Appeal gravely misdirected itself on the law by reversing the Magistrate’s findings and holding that the evidence of the two witnesses identifying their son and testifying their son’s presence in the Army Camp had not been analysed and evaluated according to the principles laid down in *Turnbull’s case.* In that case, the English Court of Appeal convened a full court of five judges to consider several appeals against conviction where the cases against the appellants were based wholly or substantially on ‘identification evidence’. The principles laid down in *Turnbull* are as follows:

When summing up in a case involving disputed identity, the judge must:

a. Warn the jury of the special need for caution before convicting on evidence of identification;
b. Direct the jury to examine closely circumstances surrounding identification;
c. Leave identification evidence to the jury only where the quality of evidence is good;
d. Order an acquittal if the quality of identification evidence is not good and there is no other evidence to support it;
e. Identify to the jury evidence capable of supporting identification; and
f. Explain circumstances in which a rejected alibi might amount to support for identification evidence.

Several observations may be made with regard to the above principles. First, *habeas corpus* applications are not trials by jury. Article 141 of

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420 *Supra* note 418.
the Constitution requires the Magistrate concerned to inquire and report to the Court of Appeal on the evidence placed before him. He is both judge on the law, and jury on the facts. Secondly, evidence by identification in the case under consideration did not involve the identities of the alleged perpetrators. The issue might have been different if the Court of Appeal had reason to fault the Magistrate on the identities of the alleged abductors in regard to the initial arrest. The Court of Appeal makes no comment on that aspect. Accordingly, the issue was whether the person concerned was seen at the Army Camp, in which regard the Magistrate had believed the evidence of the witnesses. Consequently, the Court’s preferred application of the principles laid down in *Turnbull’s case* appears to have been questionable, as this case clearly ought to have fallen into the category of ‘arrest, detention and disappearance’ commencing with the benchmark in *Leeda Violet’s case*.\(^\text{421}\) Furthermore, the facts of this case should have entitled the petitioner to exemplary costs.\(^\text{422}\)

*Need for Legal Reform: A Habeas Corpus Act*

The misconceived application of evidentiary rules relevant to criminal trials to *habeas corpus* proceedings once again demonstrates the need for clarifying legislation. Unless comprehensive legislation is passed, judicial inconsistencies will continue and the law of evidence would be misapplied with the attendant serious consequences for the liberty of the subject and the Rule of Law. Regrettably, *Gurusinghe’s case*\(^\text{423}\) appears to be illustrative of a general trend of judicial paucity in this field.

\(^\text{421}\) *Supra* note 227.

\(^\text{422}\) Exemplary costs may be awarded on the principles adopted by the Court of Appeal as laid down in the Indian case of *Sebastian M Hongray v. Union of India* AIR (1) 1984 (SC) 1026.

\(^\text{423}\) *Supra* note 417.
In this case, the petitioner, her sister and two other witnesses gave evidence regarding the arrest. The petitioner deposed to the fact that when she was waiting at the bus stand with the person concerned and with the petitioner’s sister, an army jeep with army officers had come and removed the person. She identified the 1st respondent among them. Her sister in her evidence corroborated the evidence of the person’s removal, but stated that army officers came in a van and made no reference to the identity of the 1st respondent. Out of the other two witnesses who gave evidence, the witness named Sunil also stated that the person concerned was taken away in a van. Witness Gamini, who was also arrested on the same date as the person concerned deposed to the fact that he was put into the same van as the person and that both of them were taken to the same Army camp. This witness had not known any officer there carrying the name of the 1st respondent.

The Court of Appeal commenced its review of the Magistrate’s findings by querying as to how the petitioner found the name of the 1st respondent, as she had stated in her evidence that she obtained this name three or four days after the arrest. Accordingly, the Court of Appeal held:

Anyway there was no direct evidence before the Learned Magistrate as to how she found the name of the 1st respondent.

However, the record does not reveal that the petitioner was cross-examined on that aspect viz, on how she had come to know the name of the 1st respondent. Hence the question of how the petitioner came to

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426 Ibid.
know the name of the said respondent was not in issue. The identity of the 1st respondent was established on the petitioner’s uncontroverted evidence, which the Magistrate had correctly acted upon, though the Court of Appeal thought otherwise.

The petitioner in her evidence stated that the army personnel including the 1st respondent who removed the person concerned came in an army jeep, whereas, all the other witnesses referred to a van. The Court of Appeal thus concluded:

[T]hese contradictions *inter se* and deficiencies in the petitioner’s version as to the arrest of the corpus cast a strong doubt as to the testimonial credibility of the petitioner.

The main ground upon which the Court of Appeal was prompted to reverse the findings of the Magistrate in regard to the 1st respondent’s culpability was that only the petitioner testified to the name of the 1st respondent and the contradictions in the type of vehicle used.

*Comments on the Court of Appeal order*

It is conceded that the petitioner spoke of an army jeep in which her husband was removed whereas the other three witnesses referred to a van. However, this error hardly amounts to a contradiction in law affecting the petitioner’s testimonial credibility, so as to result in a dismissal of her application. The fate of the person concerned is not known to date. In such a context, a question arises as to where the responsibility for upholding the Rule of Law, good governance and sovereignty of the people would lie. It is indeed inconceivable that such hallowed concepts should hinge on a trivial inconsistency such as a vehicle’s description.

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This may be critiqued as a classic illustration of the failure of the Court to address legal aspects in regard to the law relating to contradictions and testimonial credibility. It is observed that a ‘contradiction’ arises under the law only if certain prerequisites have been complied with:

If it is intended to bring the credit of a witness into question by proof of anything he may have said or declared touching the case, the witness is first asked upon cross-examination, whether or not he had said or declared that which is intended to be proved. 428

It is observed that the petitioner was not cross-examined as to whether it was an army jeep or a van that had taken the person away. Had she been cross-examined, perhaps she might have even clarified what she saw. Such a trivial issue should not have been a determinative factor that affected the case. Three witnesses had described the vehicle in which the person concerned was removed as being a van. The petitioner stated that it was an army jeep. Yet there is no material contradiction in such descriptions.

*The petitioner’s evidence that the person concerned was held in police custody and thereafter in army custody*

The petitioner led evidence to show that after her husband, the person concerned was removed, his name had appeared in the police list as No. 8, and then in the army list of detainees as No. 81. The Court of Appeal’s approach and response were as follows:

She found the corpus’s name in the police list at No. 8 and of the Army list at No. 81. This evidence itself creates a doubt whether the corpus was arrested by the Army or Police.

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428 See *The Queen’s case* (1820) 22 R.R. 662.
The petitioner and her supporting witnesses stated that the alleged abductors were in army uniform thus underpinning an army abduction. Yet whoever who came could have been clad in army uniform even if these were police personnel, as such tactics were commonly resorted to during these times. The magisterial finding supported the petitioner’s case. But the Court of Appeal chose not to dwell upon the Magistrate’s treatment of the matter. Neither does the Court take into account that notwithstanding any doubt over whether the abductors were army personnel or police, the fact that the 1st respondent was an army officer was established by evidence. Moreover, the Court of Appeal did not fault the petitioner’s position that her husband’s name was in the lists of the police or the army.\(^{429}\)

Furthermore, the two official witnesses attached to the District Secretary’s office in the relevant district, stated that the name of the person concerned had not been included in any of the lists submitted by the army or the police in respect of ‘persons arrested in the year 1989’. This was reflected in a document produced by the respondents marked as ‘1V1’. In that regard, the Court observed:

\[\ldots\] the Learned Magistrate has failed to consider these contradictions \(\textit{inter se}\) of the petitioner’s evidence (and that of the said official witness attached to the District Secretary’s office).\(^{430}\)

This contradiction \(\textit{inter se}\), however, could not have been regarded as a contradiction, for a contradiction must flow from a self-same source. This is trite law, which needs no elaborate elucidation. If the evidence of the petitioner on that aspect was found to be inconsistent with the official witness called by her, then it was the Court of Appeal that misdirected itself when it held:

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\(^{429}\) H.C.A. 77/92, at 6.

\(^{430}\) \textit{Ibid.}

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[T]he Learned Magistrate has summarily dismissed [the document ‘1V1’ as being ‘untenable in law’] on the basis that in cases when the authorities were unable to produce the persons so arrested, their names were not included in the list of determinations…\(^\text{431}\)

However, what the learned Magistrate had previously observed is precisely what was taking place during the terror climate in the period during 1988 and 1998.\(^\text{432}\) Complaints made to the police in regard to abductions and subsequent disappearances of persons had not been properly recorded. It was highly unlikely for the police to have recorded complaints made against it and other state authorities if they were even remotely aware that involuntarily removed persons who had thereafter gone missing could be linked to the police or to such state authorities. \textit{A fortiori} the police or army were also unlikely to maintain genuine records or lists of detainees taken into custody if officers of the police or army could be shown to have caused their disappearance.

\textit{A Classic Illustration:} In the year 1990, the President at the time initiated a Presidential Mobile Service to look into grievances of persons whose kith and kin had disappeared. State officials operating such mobile services were commonly known to advise aggrieved persons including mothers of ‘disappeared’ persons to make fresh complaints stating that the disappearance had been caused by insurgents and not by any state agency, for otherwise they would not be able to recover any compensation.\(^\text{433}\) Such was the reliance or expectation one could have placed on records maintained by the

\(^{431}\) \textit{Ibid.}


\(^{433}\) \textit{Ibid.}
police, army or any other state authority. This reality probably prompted the Magistrate to dismiss the official list on the basis that ‘in cases where the authorities were unable to produce the persons so arrested, their names were not included in the list of detainees.’ This was a notorious fact that the Court of Appeal, however, rejected as being ‘untenable in law.’

*The evidence of witness Gamini*

Witness Gamini stated in evidence that on 22 August 1989, he and the person concerned were taken to the Army Camp in question. He stated that after being harassed for some days, he was discharged on 2 September 1989. Another witness, Shirley, in his evidence stated that he saw the person concerned on some date either in late September or early October at the Kegalle camp. The Court of Appeal held:

> As regards the place of detention too there is a vital contradiction *inter se* of witness Gamini and Shirley…the learned Magistrate has failed to give his mind to this aspect as well.

On the face of that very evidence as recounted by the Court of Appeal, the following observations may be made:

a. According to witness Gamini, the person concerned was at the Army camp in question from 22 August 1989 to 2 September 1989.

b. According to witness Shirley, the person was seen on some date either in late September or early October at the Kegalle camp.

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434 H.C.A. 77/92, at 7.
435 Ibid.
436 Ibid. at p. 8.
There appears to be no vital contradiction whatsoever in these two accounts. The person concerned could have been removed from the Army Camp in question to the Kegalle camp on some date after 2 September 1989. It is noted that another witness, Sunil, deposed to the fact that he had been taken along with the person in a van on 22 August 1989 to the Army Camp in question. This witness had seen the person inside the said camp on the following day as well. Thus witness Gamini’s evidence stood corroborated insofar as the person concerned had been seen in the said Army Camp at the material time. Consequently, the state counsel’s contention that the Magistrate has given undue weight to the evidence of Gamini, which appears to have influenced the Court of Appeal, remains invalid, as no contradiction is revealed between the evidence of witness Gamini and the evidence of witness Shirley. However, apparently relying on the legal precedent in Seenitamby Samithamby v. Lalith Atulathmudali et al,\textsuperscript{437} the Court of Appeal concluded:

> These deficiencies and vital contradictions which I have referred to, in my view create a dent in regard to the testimonial trustworthiness of the petitioner’s story.\textsuperscript{438}

\textit{Seenithamby Samithamby’s case}\textsuperscript{439}

Had the Court of Appeal applied the proposition laid down in the above case correctly, the following should have been affirmed:

a. That witness Gamini’s evidence stood corroborated by the evidence of witness Sunil.

b. That there was no contradiction between witness Gamini’s evidence and the evidence of witness Shirley.

\textsuperscript{438} H.C.A. 77/92, at 8.
\textsuperscript{439} \textit{Supra} note 437.
A positive role for Commissions of Inquiry in the administration of justice

The Commissions of Inquiry Act No. 17 of 1948 empowers the President of Sri Lanka to appoint commissions for the purpose of holding an inquiry or obtaining information on:

a. The administration of any department of government or of any public or local authority or institution; or

b. The conduct of any member of the public service; or

c. Any matter in respect of which an inquiry will, in the President’s opinion, be in the interests of the public safety or welfare.

Several Commissions of Inquiry have been appointed over the years in respect of inquiries into grave human rights violations including enforced disappearances that are so often the subject of *habeas corpus* applications. Yet the role and purpose of such Commissions have more often than not been questioned.\(^\text{440}\)

However, the cases under review demonstrate that these Commissions could still fulfil a useful purpose if properly utilised, as distinct patterns have been disclosed by these Commissions in respect of arrest, detentions and subsequent disappearances of hundreds of persons. In the case under consideration, however, there was nothing

to suggest that the Commission reports\(^4\) were before the Court. Yet this case was argued before the Court of Appeal in the year 1998, which is after the date of the Sessional Papers pertinent to the 1994 Disappearances Commissions. The provisions in the Evidence Ordinance relating to judicial notice are perhaps not wide enough for a Court to have taken note of events of 1989 as revealed in these Commission reports. However, Section 56 of the Evidence Ordinance declares:

No fact of which the Court will take judicial notice need be proved.

Given the current approach of the Court of Appeal, both the Evidence Ordinance and the Commissions of Inquiry Act should be amended, enabling a court to take judicial notice of the proceedings of Commissions of Inquiry.\(^4\) In the alternative, such provision must be made in a new *Habeas Corpus* Act. Such reforms are greatly needed in order to secure the liberty of the subject and the Rule of Law, and will also demonstrate that Commissions of Inquiry could play a positive role in the administration of justice in Sri Lanka.

\(^4\) Interim and Final Reports of the 1994 Western, Southern and Sabaragamuwa Disappearances Commission, the 1994 Central, North Western, North Central and Uva Disappearances Commission and the 1994 Northern and Eastern Disappearances Commission, *op. cit.* It is noted that though dated 1997, these Reports were publicly available only some years thereafter.

\(^4\) It must be noted that under Section 26 of the Amendment Act No. 16 of 2008 to the Commissions of Inquiry Act No. 17 of 1948, the Attorney General and his/her officers are specifically authorised to appear before any Commission, to place any material before the Commission that is determined by the Attorney General to be relevant to the investigation or inquiry and to examine any witness summoned by the Commission if ‘it appears to him that the evidence of such witness is material to or has disclosed information relevant to, the investigation or inquiry, as the case may be.’ However, what is called for in this Study, is not legislative provision dependant upon the will of the Attorney General to act or not to act, as the case may be, but rather to empower the court to take decisive action in this regard.
• *Gampola Paddeniyage Gedera Cecelia v. Inspector Sarath Kumara, O.I.C and Three Others*\(^{443}\)

This was a case where the 1\(^{st}\) respondent admitted the arrest by another police officer named Karunanayake, and stated that the detainee had died during crossfire when he was taken to recover some hidden weapons. According to the 1\(^{st}\) respondent, the detainee was thereafter buried under the Emergency Regulations on which aspect other state witnesses also gave evidence.

It seems that the need to continue with the application arose as a result of the petitioner’s rejection of the positions of the respondents that the detainee had died.

*Nature of evidence led before the Court*

While the petitioner did not see the detainee at any time after the date that the 1\(^{st}\) respondent mentioned as the date on which the detainee had died, she had come to know through other sources that the detainee had been held at different times in different Army Camps. Yet the Court of Appeal correctly held this to be hearsay evidence. The petitioner’s sister, Seelawathie, however, claimed to have seen and spoken with the detainee at the Kandy hospital more than two months after the alleged date of his death. The respondents led evidence of three witnesses including witness Priyantha (carrying the same middle name as the detainee) who had been in the Kandy hospital during the time that Seelawathie claimed to have seen and spoken with the detainee. The learned Magistrate considered this evidence and held that there was material to issue a writ of *habeas corpus*.

The Court of Appeal, however, reversed the Magistrate’s order on the following bases:

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a. That Seelawathie’s testimony was the only evidence that alleged that the detainee was alive after the alleged date of his death, and that the petitioner’s evidence was based on hearsay.

b. That the Magistrate failed to evaluate the evidence of Seelawathie in the light of the evidence of three witnesses including witness Priyantha.

c. That Seelawathie had stated more details in her oral evidence when compared to her affidavit, which was given closer to the date of the alleged incidents, and that therefore, her evidence was an attempt to support the petitioner’s case.

The Court of Appeal relied on the case of *Kodippilige Seetha v. Saravanathan and Others*, which laid down the rule that an ordinary citizen making a serious allegation, which if true would amount to a crime, must prove such allegation beyond reasonable doubt. Accordingly, the Court dismissed the application and held that ‘the evidence presented by the petitioner was not creditworthy and it would be unsafe to act on such evidence to hold the 1st, 2nd and 3rd respondents responsible for the arrest and detention of the corpus.’

*Comments on the Court of Appeal order*

On the whole, it is conceded that the Court of Appeal order bears up under scrutiny. Nevertheless, some issues arise from the order that require further reflection.

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446 H.C.A./69/90.
First, the Court seems to imply that the petitioner may have established her case on a lesser standard of proof than ‘proof beyond reasonable doubt’. Moreover, doubts may be raised over whether the evidence of Priyantha and the other two witnesses were adequate to reject Seelawathie’s evidence that she had seen and spoken with the detainee after the date on which the respondents alleged he had died, thus rendering Seelawathie a false witness. These issues, once again, highlight the need for a Habeas Corpus Act, which recognises the standard of proof in habeas corpus applications to be that of ‘a balance of probabilities’. Such a standard is far more appropriate, since the cumulative effect of the definition of proof contained in Sections 5 and 100 of the Evidence Ordinance seems inadequate to cater to habeas corpus applications.

Section 5 provides:

Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant and of no others.

Furthermore, Section 100 provides:

Whenever in a judicial proceeding a question of evidence arises not provided for by this Ordinance or by any other law in force in Ceylon, such question shall be determined in accordance with the English Law of Evidence for the time being.

Proof beyond reasonable doubt and balance of probabilities as standards of proof have been embraced as sacrosanct principles in the jurisprudence of the country. In any event, once the 1st respondent admitted the arrest, it was incumbent on the respondents to have proved that the detainee in fact was arrested according to law and had died in the circumstances alleged by the respondents. If the respondents’ position was that the detainee was buried under the

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447 See for example, Rajapakse v. Fernando (1951) 52 N.L.R. 361.
provisions of the Emergency Regulations, it appears that Sri Lanka has been relegated to such an uncivilised country so as not to require under its legal system, the maintenance of some record of persons who die in the custody of state authorities. It is unacceptable that the Emergency Regulations could so casually override the Births and Deaths Registration Act.  

Section 10(1) of the said Act provides:

It shall be the duty of every registrar to inform himself carefully of every birth and death occurring in his division, and to register accurately and with all convenient dispatch in the language specified for the purpose by the Registrar-General, in the registers provided by him, the particulars of the matters set out in forms A and B of the Schedule.

Section 11(1) and (2) casts a further duty on Registrars of Divisions to transmit duplicates of every registration entry. Furthermore, Section 29(2) states:

When a death occurs in a place other than a house or building, every relative of the deceased having knowledge of any of the particulars concerning the death required to be registered under this Act, and in the absence of such a relative every person present at the death, the person taking charge of the corpse, and the person causing the corpse to be buried, cremated or otherwise disposed of, shall, within five days from the date of the death, give information of such of the particulars relating to the death required under this Act to be registered as is known by such person or persons to the appropriate registrar and shall, if called upon by the registrar, sign in his presence the register of deaths in the appropriate place.

Moreover, Section 29(3) of the Act provides:

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448 Act No. 129 of 1981, following Act No. 17 of 1951.
When a corpse is found in a place other than a house or building, every relative of the deceased having knowledge of any of the particulars concerning the death required to be registered under this Act and, in the absence of such relative, the person finding the corpse, the person taking charge of the corpse, and the person causing the corpse to be buried, cremated or otherwise disposed of, shall, within five days from the date of the finding of the corpse, give information of such of the particulars relating to the death required under this Act to be registered as is known by such person or persons to the registrar of the division in which the corpse was found and shall, if called upon by the registrar, sign in his presence the register of deaths in the appropriate place.

It would be an understatement to state that the respondent in this case had been in breach of a statutory duty imposed under the Act, which is precisely the reason why the respondent sought refuge under Emergency Regulations. It is a reflection of our times that past statutes, which impose far more rigorous duties in this regard, have steadily been eroded by successive Emergency Regulations.

*The Registration of Deaths (Emergency Provisions) Ordinance*\(^449\)

This Ordinance modified the law at that time relating to the registration of deaths, and burials and cremation of dead bodies, in the case of deaths of persons subject to military law or members of the armed forces of the enemy. The Ordinance was passed at a time Sri Lanka was a Crown Colony and at a time Britain was confronted with the Second World War. However, even this Ordinance laid down a procedure for disposal of bodies *inter alia* of persons subject to military law for the purpose of having a record of deceased persons.

Section 11 of the said Ordinance enacted as follows:

\(^{449}\) Ordinance No. 24 of 1945.
‘[a] person subject to military law’ includes a person subject to the naval, military, or air force law of any foreign power allied with the Republic of Sri Lanka or of any foreign authority recognized by the Republic of Sri Lanka as competent to maintain naval, military, or air forces for service in association with the Armed Forces of Sri Lanka, but does not include—

a) a member of the Sri Lanka Army, Navy, or Air Force, who is absent from his unit on leave or otherwise than on duty; or

b) a member of the Sri Lanka Army, Navy, or Air Force, who is on the Reserve thereof.

Given the above provisions and despite the fact that these statues have been superseded by Emergency Regulations, the respondents in the instant case cannot be permitted to merely state in evidence that the detainee was buried under Emergency Regulations and consequently escape from further responsibilities in this regard.

*The draconian effect of emergency law*

The above analysis reveals the draconian nature of the Emergency Regulations in Sri Lanka that have been in operation for almost three decades. These Regulations permit state authorities, both police and armed forces, to dispose of dead bodies of persons in any manner that departs from the stipulations and safeguards prescribed in the ordinary law.

For example, Emergency Regulations No. 1 of 2005,\(^{450}\) prescribed in Regulations 54 to 58, the procedure that must be followed with regard to the death of persons caused by the police or the army, or the death of persons while in the custody of the police or army. Provisions of the ordinary law relating to inquests are bypassed under the Regulations, and special procedures are laid down vesting

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\(^{450}\) Published in Gazette Extraordinary No.1405/14 of 13 August 2005.
extraordinary authority in police officers, including the power to move
the High Court to inquire into the death of such persons. While in
some respects, these Regulations are an improvement on earlier
Emergency Regulations, in that they brought in an element of judicial
supervision into the process, such Regulations cannot be construed as
being in consonance with the Rule of Law.451

Legal provisions must be made in order to qualify the uncontrolled
power that seems to be vested in the state authorities to dispose of
bodies of dead persons under Emergency Law with a blatant sense of
impunity. This analysis once again focuses attention on the need for a
comprehensive Habeas Corpus Act.

_Clash of arms and the law: the need for bare minimum standards of
decent governance_

Even if some emergency measures are required to modify the
Atkinian decree in _Liversidge v. Anderson_452 that ‘in the face of the
clash of arms the laws are not silent,’ there must at least be some
legislative and governmental commitment to conform to the bare
minimum standards of decent governance. Accordingly, authorities
should be compelled to maintain a record of dead persons in a
country, let alone the relevant religious tenets that require respect to
be shown to dead persons.453

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451 Regulations 54 to 58 were subsequently repealed in 2010 by virtue of Regulations
published in Gazette Extraordinary No.1651/24 of 2 May 2010.
452 [1942] A.C. 206, per Lord Atkin.
453 It is noted that even on the analogy of Sections 101 and 102 of the Evidence
Ordinance, the authorities should have maintained a record of the dead. Section 101
provides: ‘Whoever desires any court to give judgment as to any legal right or liability
dependent on the existence of facts which he asserts must prove that those facts exist.
When a person is bound to prove the existence of any fact, it is said that the burden of
proof lies on that person.’ Section 102 provides: ‘The burden of proof in a suit or
proceeding lies on that person who would fail if no evidence at all were given on
either side.’
The correct procedure that ought to be adopted

Admittedly, the petitioners took up the position that the detainee was still alive. However, upon the respondents taking a contrary position while admitting the arrest, the Court could have adopted an alternative course of action i.e. to refer the matter to the Attorney General to consider indictment after investigations through the proper channels. It is, however, noted that in the circumstances, relying on ordinary police channels to pursue such investigations may be unsuitable. In other jurisdictions, bodies like the Independent Commission Against Corruption in Hong Kong, the Crimes and Misconduct Commission in Queensland and the Independent Police Complaints Commission in the United Kingdom have been utilised to investigate police misconduct.

Yet, as has been pointed out recently, Sri Lanka faces significant challenges in respect of investigative and prosecutorial independence.

Presently, there is no dedicated team of police officers entrusted with an investigative function that could maintain its independence and effectiveness when investigating alleged human rights violations. Those officers attached to various units established for investigations are liable to be arbitrarily transferred at any given point of time. In an evident conflict of interest and faced with the prospect of arbitrary transfer, these officers are expected at times to investigate the actions of their own colleagues as the basis for the Attorney General Department’s decision on whether or not to file an indictment. This practice has resulted in poor investigations and lacklustre prosecutions.454

The concept of Command Responsibility and/or Vicarious Liability

Neither the petitioner nor any of her witnesses had identified the persons who had arrested the detainee from his workplace. The

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454 Pinto-Jayawardena, supra note 440, at 8.
petitioner had succeeded in only identifying the relevant police station. Thus, while the finding that the 2\textsuperscript{nd} and 3\textsuperscript{rd} respondents\footnote{Namely, the Commanding Officer of the Army Camp in which it was alleged that the person concerned had been seen, and the Commander of the Army respectively.} were not responsible for any arrest or detention may be reasonable, the finding that the 1\textsuperscript{st} respondent was not responsible for the arrest defies comprehension, for the 1\textsuperscript{st} respondent was named as such in his official status as the OIC of the relevant police station responsible for the arrest. Consequently, once the 1\textsuperscript{st} respondent admitted that a police officer attached to his police station arrested the detainee,\footnote{H.C.A./69/90, at 7.} then on the application of the doctrine of Command Responsibility and/or Vicarious Liability, the 1\textsuperscript{st} respondent stood responsible for the arrest. Yet this analysis appears to have escaped the attention of the Court of Appeal.


This was another case where the Magistrate had found the alleged perpetrators liable but where the Court of Appeal proceeded to dismiss the application reversing the Magistrate’s findings. The Court of Appeal commenced its order by alluding to a number of purported errors committed by the Magistrate. It was accordingly held:

We have considered the representations personally made by the petitioner [and] it is apparent that the Learned Magistrate had made certain errors and has misdirected himself in arriving at his findings.\footnote{\textit{Ibid.} at 2.}

The Magistrate had considered the evidence of the 1\textsuperscript{st} respondent (an army officer) and had reasoned that, it was inconceivable that during the period of violence which existed in September 1989, army officers
would have embarked on a discovery mission with an informant during the night with the objective of locating guns, explosives and ammunition hidden by terrorists.\textsuperscript{459} The Court of Appeal, however, held that the Magistrate’s finding that the 1\textsuperscript{st} respondent was not a trustworthy witness had been flawed, as it had been based on an inherent error and misdirection.\textsuperscript{460} In explaining the ground on which it found the Magistrate’s rejection of the 1\textsuperscript{st} respondent’s evidence to be an error or misdirection, the justices of the Court of Appeal observed:

Both of us who have held death inquests in the High Court in regard to death caused by parties who had complicity in terrorist activities have had the experience of hearing numerous cases where Police or Army Officials record statements from an informant and proceed immediately both during day time and at night to recover such weapons which are hidden, without allowing much time to lapse.\textsuperscript{461}

The observation of the Court of Appeal was indeed based on personal judicial experience, while the Magistrate preferred conjecture. Yet there was no clear evidence to suggest that on this occasion, the 1\textsuperscript{st} respondent had in fact conducted a search operation in the night. The 1\textsuperscript{st} respondent was certainly obliged to place some documentary evidence to substantiate his version. The Court of Appeal itself noted this requirement.\textsuperscript{462} Nonetheless, the Court preferred to accept the version of the respondent and to declare that the Magistrate had erred.

The petitioner in his evidence stated that after he handed over his son, (the person concerned), to the army, the 1\textsuperscript{st} respondent informed him that the person had fled. The petitioner also stated that he was unable to lead evidence rebutting the statement that his son fled while leading the army officers in the surveillance campaign. The Court of Appeal

\textsuperscript{459} \textit{Ibid.}  
\textsuperscript{460} \textit{Ibid.}  
\textsuperscript{461} \textit{Ibid.} at 3.  
\textsuperscript{462} \textit{Ibid.}
reviewed this evidence and concluded that ‘if as asserted, the corpus had taken to his heels and fled away, the 1st respondent would not be in a position to produce the corpus.’ Accordingly, the Court proceeded to dismiss the application.

Relevantly however, the Magistrate had accepted the petitioner’s version that the person concerned had disappeared while in the custody of the 1st respondent and others. Thus, in effect, the Magistrate had rejected the respondent’s version that the person had fled while in their custody. In any event, if the 1st respondent’s version was to be accepted, the 1st respondent and his party should have produced some documentary evidence in that regard, at least some official entry to that effect, which was not discernible on the facts of the case. This magisterial finding was summarily disregarded by the Court of Appeal.

- *Ariyawathie v. Officer in Charge, Police Station Maharagama and Six Others*  

In this case, the Magistrate found sufficient material only against the 2nd and 3rd respondents, who were respectively a sub-inspector and a sergeant attached to the police station of Polgahawela. The initial allegation of arrest and detention was against the OIC of the police station, the 1st respondent. Following the alleged arrest, the petitioner’s evidence was that she had seen the person concerned (her son) in a police cell at yet another police station in Mirihana.

*The grounds on which the Court of Appeal reversed the Magistrate’s order*

a. The long delay of two years and three months in filing the application, which was not explained.

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b. Contradictions and deficiencies in the petitioner’s case.
c. Discrepancies in the petitioner’s affidavit and oral evidence.
d. Inconsistencies in the evidence of the petitioner’s witnesses in respect of all aspects relating to identification and other alleged acts.

The Court of Appeal order may ultimately be justified, particularly given the fact that the evidence seeking to implicate the Mirihana and Mahagarama police stations was rejected by the Magistrate, while such evidence was intrinsically linked to the Polgahawela Police station. Consequently, the conclusion of the Court of Appeal that these infirmities were not considered by the Magistrate when he decided to hold the 2nd and 3rd respondents responsible for the arrest and detention\(^{465}\) appears to be justified. However, there are few matters that warrant further reflection.

First, the Court of Appeal appears to have treated \textit{habeas corpus} applications as a discretionary remedy, a position already criticised in this Study. Secondly, the Court had not addressed the question of the reliability of the detention register. The 2nd respondent had taken up the defence that if the person concerned had been taken into custody, his name would have appeared in the detention register. The register produced by him did not contain the name of this person. Although the Court of Appeal did not make any specific reference to this aspect, this may have been a factor that influenced the Court against the petitioner. As discussed above, the genuineness of such registers is doubtful. Had the Court reviewed the matter from a different perspective, perhaps the outcome may have been different. The plight of a woman who had lost her son may have been fairly balanced as against state authorities possessed of the resources to easily deny an allegation of unlawful arrest, detention and disappearance, delete

\(^{465}\) \textit{Ibid.} at 16.
relevant references in official records and/or change such references with impunity.

4.6.2.2.7 Dismissals on the basis that the detainee was imprisoned after arrest and the High Court or the Magistrate had granted bail

No reflections appear to be warranted in these two situations, since the liberty of the subject had been temporarily secured and the criminal justice system had been put into motion.

4.6.2.2.8 Dismissals on the basis that the detainee has been sent for rehabilitation

In several cases, the Court had been informed that the detainee was sent for rehabilitation, and on that basis the application was dismissed.\(^{466}\) This type of dismissal raises two questions relevant to the security and liberty of the individual. One question is whether depriving an individual of his liberty without a legal basis can subsequently be justified on the grounds that such person has been sent for rehabilitation. The issue should be whether or not the person was arrested lawfully. If the arrest is found to be illegal, the remedy envisaged by the habeas corpus application is either that the detainee be released or that the person be dealt with according to the law.

The second question concerns the procedure that should be followed in entrusting persons for rehabilitation. Ordinarily, a person should not be sent to a rehabilitation programme unless such person is found guilty of criminal activity. Furthermore, there appears to be no standard to determine whether or not a person should be submitted to rehabilitation. The findings of this Study suggests that the Court accepts the submission of the state counsel that the detainee has been sent for rehabilitation, almost mechanically, rather than apply a judicial mind to such questions. It is specifically noted that Emergency Regulations that prevailed during the time provided for such rehabilitation programmes. Such rehabilitation regimes often sideline ordinary criminal proceedings and fair trial related due process and fair trial rights. The it has been observed:

Administrative detention without charge or trial is...permitted for purposes of the rehabilitation of ‘surrendees’ under Regulation 22 of the Emergency Regulations 2005 (ER 2005 as amended by ER 1462/8, 2006). Administrative detention of a ‘rehabilitatee’ may continue without judicial review or access to legal representation for up to two years. These regulations and procedures deny the right of detainees to have the lawfulness of their detention and other rights determined by a court, as established in ICCPR article 9.

467 For a more in-depth discussion on the subject, see International Commission of Jurists (ICJ), Beyond Lawful Constraints: Sri Lanka’s Mass Detention of LTTE Suspects (2010).
5. The Modern Remedy in Issue: *Habeas Corpus* Applications before the Provincial High Courts under the 1978 Constitution

5.1 Introductory Comments on the Provincial High Court of the Northern Province 2003–2004

The Government of Sri Lanka initiated a military offensive codenamed ‘Rivirasa’ in October 1995, in order to recapture the Jaffna peninsula from the LTTE, which had *de facto* control over large areas of the peninsula at that time. The entire Jaffna peninsula was brought under government control by February 1996. Consequent to the government troops regaining control over the peninsula, villages in that area were regularly cordoned for the purpose of screening the inhabitants and searching the area. During these cordon and search operations, the general practice adopted by the army was to order the people to assemble in a public place common to the respective villages. As soon as the people were assembled in these places, selected individuals were arrested and taken to the army camps. These arrests were mostly made in the presence of the *Gramam Niladhari* (local administrative) officer, the next of kin of the arrested persons, and the other villagers. After such arrests took place, it became a common practice for army officers to deny the fact of arrest whenever the next of kin visited the respective army camps and inquired about the arrested persons.

During the period between February 1996 and December 1996, some 900 persons were arrested by the army in the above circumstances. Thirty-seven *habeas corpus* applications were filed in respect of these persons in the Provincial High Court of the Northern and Eastern Provinces.

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469 Jurisdiction to hear and determine *habeas corpus* applications was conferred on the High Court in pursuance of the High Court of the Provinces Act, No 19 of 1990 (Section 7) read with Article 154(P) of the Constitution (the 13th Amendment to the Constitution).
Province in Jaffna. These applications sought *inter alia* the Court’s direction to the army to produce the arrested persons before Court. The applications were filed primarily during October 2003 and they cited the commanding officers of the respective army camps, the overall army commandant for the Jaffna Peninsula, the Sri Lankan Army Commander, and the Attorney General as respondents.

Subsequently, these applications were supported before the Provincial High Court of Jaffna, which issued notice of the applications to the respondents. As per ordinary procedure, following notices, the respondents filed their objections. A state counsel represented the respondents. A legal officer for the Army also appeared on their behalf. In February 2004, the Provincial High Court, being satisfied that there were *prima facie* cases of disappearances in respect of these *habeas corpus* petitions, had referred these applications to the relevant Magistrates who had jurisdiction over the areas where the persons were arrested. The Provincial High Court had referred these applications to the respective Magistrates Courts only after the High Court was satisfied that there was *prima facie* evidence that the army had arrested all thirty-seven persons. In all thirty-seven applications, the Provincial High Court directed the Magistrates of the respective areas to hold inquiries in respect of the arrests by the army and to report back to the High Court.

The segment below examines the magisterial orders and the relevant briefs in these cases. Importantly, it must be noted that these applications are still pending, some at the stage of the Provincial High Court, while others are pending at the Court of Appeal upon applications being made by the respondents to transfer the matters to the appeal court situated in Colombo.\(^470\) Some matters have been reportedly transferred to the High Court of Anuradhapura but attempts by the researchers to ascertain the current status of these cases were unsuccessful. Prior to the conflict ending in mid-2009, such

\(^{470}\) *Ibid.*
applications for transfers had been commonly made on the basis that the respondents found it difficult or hazardous to attend court sittings in the North and East. The security perils and the financial expenses faced by the petitioners and family members in travelling to Colombo for court hearings in the Court of Appeal or for that matter, travelling to the High Court of Anuradhapura during an ongoing conflict at that time, appeared however, not to have been taken into consideration.

5.2 Overview of the Case Records and Findings

These thirty-seven case records of habeas corpus applications made to the Provincial High Court of Jaffna in 2003 and 2004\(^{471}\) included the petitions and affidavits of parties, journal entries regarding the applications and the orders issued at the conclusion of the inquiry at the Magistrate’s Court at Chavakachcheri. Out of those thirty-seven case records, twenty-four case records were complete up to the point in which the order of the Magistrate’s Court was taken up at the Provincial High Court.\(^{472}\)

In twenty-two of the applications, the arrest was carried out on 19 July 1996 in an operation conducted by the army together with the local Police in the Kaithady area from Navatukuli to Maravanpuli. In all cases, the inquiry at the Magistrate’s Court had been concluded with the finding that army personnel were responsible for the arrest of the person concerned. However, the subsequent whereabouts of the


person was not evident. This finding is troublesome, as on the face of the case records themselves, it appeared that there was no regard for due process in the very manner in which arrests were made on 19 July 1996. This disregard for due process continued to the extent that the whereabouts of these twenty-two persons were not established thereafter.

The objective of this Study was to identify patterns, if any, in the proceedings regarding *habeas corpus* applications in a given Provincial High Court and in a relevant Magistrate’s Court. Particular attention was paid to the factors that led to delays in each of the applications reviewed in this analysis. The findings are remarkable in that it revealed a consistent failure of the *habeas corpus* application process at the provincial level. The court records clearly reveal the different obstacles faced by the judiciary in giving effect to this remedy. Some of the main factors that lead to the negation of the remedy are discussed below.

1) Continued serving of the respondent army officers in the army (and even in higher positions) despite implication in a considerable number of enforced disappearances

This phenomenon lends itself to the inference that these respondents are able to threaten and intimidate the petitioner and relatives of the person concerned to withdraw their applications. Such threats have now become an inevitable part of the invocation of the legal process, particular due to the absence of a Witness Protection Law. This is the reality in respect of violations of human rights in ‘ordinary’ times (as for example, in regard to cases of alleged petty theft) as well as during extraordinary times of conflict.
2) Extreme delays in the hearing and determination of the applications

Typically, many *habeas corpus* applications that had been lodged in the Provincial High Court from 2002 onwards had not been determined yet. The ordinary practice is that upon the filing of an application in the High Court, the High Court refers it to a relevant Magistrate’s Court despite the fact that the High Court may itself determine such application. Upon reference to a normally overburdened Magistrate’s Court, the preliminary inquiry takes about three years or so. In the cases that were examined in this Study, bitter complaints were recorded from the relevant Magistrate’s Court that the High Court of Jaffna should have determined the applications in the first instance without occasioning delays. Moreover, due to such delays, the petitioners had undergone hardships with no redress.

A good illustration would be the following observation made by the Magistrate’s Court of Chavakachcheri in Case Illustration 1, Application No: 684/2003.473

[The] further stand of this court is that the High Court of Jaffna should have conducted the inquiries on the original application when the application was first made and should have come to a conclusion. For some reason the High Court without conducting the inquiries has transferred this case to a lower court. Even after the transfer no compensation or decision was given for the last three years.

A further example is Case Illustration 4, Application No: 686/2003.474 In this case, it was observed:

Subsequent to the appointment of the present Magistrate on 01.08.2005 the case has been called (sic) for 7 times. Due to the State Counsel’s reasoning, this case has been postponed. At each time the losses incurred by the petitioner were pointed out. Every time requests were made to postpone the case due to the country’s situation, closure of roads, security, etc. The court fears that if this continues, this case to bring up the missing persons itself may go missing (sic.).

In addition to the factors discussed above, three other factors that contribute to the negation of the remedy of *habeas corpus* may be cited:

3) Technical objections raised by respondents relating to the non-naming of officers identified as being responsible for the disappearance of the person concerned in the application.

4) Frequent postponements applied for by lawyers appearing for the respondents. Alternately, postponements had been occasioned by the disturbances in the province for that day, including the imposition of curfew.

5) Frequent applications made by the respondents to transfer the cases to the courts in Colombo due to the perception that the security of the respondent army officers may be at issue in the courts of the Northern and Eastern Provinces.

However, the transfer of these cases involves extremely negative consequences as far as the petitioners are concerned. They have to then travel to Colombo with the increased risk of circumventing the security barriers and increased financial cost including the cost of accommodation and hiring a lawyer to appear in courts situated in the capital on higher fees. As discussed earlier, such transfers are often a good way of ensuring that the petitioners abandon the applications. The applications are liable then to be dismissed by the courts without further inquiry on the basis that the petitioner is absent and
unrepresented. This symbolizes the vicious cycle that these petitioners are caught up in.

5.3 Failure or Inability to Efficaciously Exercise the Remedy at the Provincial Level

5.3.1 General Reflections

During provincial consultations conducted for the purpose of the Study, two interesting concepts emerged as coming into conflict when the theory of the law is contrasted against its practicality.

On the one hand, there is the accepted legal rationale underlying *habeas corpus* applications where the court is expected to take all appropriate measures to compel the legal authorities to bring the body of a person before the courts. The production of the person before the court implies that the person is alive and whatever legal process applies, it does so with the assurance that the person is still alive. As against this concept on the other hand, a forced disappearance is an instance where a person is killed and his body is made to ‘disappear’ by state agents in order to avoid any legal responsibility imposed on the particular officers who had been engaged in such illegal actions. Any attempt by the courts to enforce the rule on producing the body or ascribing the responsibility for the failure to do so on state agents would then go against the state policy that allows and indeed encourages such disappearances to take place. In that instance, any court that insists on the strict legal rule will, in fact, be faced with the consequences of going against that very state policy authorizing arrests leading to abductions and killings and secretive disposal of the bodies.

Added to the state’s authorisation of the disappearances as a matter of policy, there is also the social objective, which at a given time, presents such a state policy as an unavoidable or necessary step as a
matter of the survival of law and order under circumstances of civil unrest. The official position of the state under those circumstances is that, given the situation of an insurgency and/or terrorism coupled with the perceived threat of social instability, the state is forced to take the necessary steps to ensure the end of such an insurgency and/or terrorism. Thus, by way of political propaganda, spread through the mass media controlled by the state either overtly or covertly, society is made to believe that the action taken by the security forces under those circumstances, though extreme, are actions which are deemed necessary for the common good. Thus the state presents the concept of the ‘common good’ and at a given moment, this ‘common good’ is what the court would have to challenge if it were to examine the actual situations relating to the failure of the state agencies to produce the body of a person as required in a habeas corpus action.

In such a context, is it possible to reasonably expect that the judiciary would live up to its avowed constitutional role as protector and guardian of constitutionalism and the Rule of Law?

The situations in Sri Lanka, Nepal and Myanmar as compared underscores the fact that, to better understand this challenge, ‘we must draw a line…between a judiciary seeking its own adjustments and answers to the pressures of the times and one that has been integrated with the goals and objectives of the political authorities.’ On the one hand, during periods of dictatorship, some judiciaries in South Asia have been coerced into making compromises with executive authorities, but have retained a degree of autonomy. For example, after the overthrow of Nepal’s absolute monarchy, the Supreme Court brought forward hundreds of habeas corpus applications that it had kept pending indefinitely. Through such applications the Court ‘condemned the government for the incidence of enforced disappearances and the failure to investigate, and directed it to pass a

475 Nick Cheesman, Writ of Habeas Corpus in Myanmar, LST Review, Volume 21 Issue 277 November 2010, at 47.
law to criminalize the offence in accordance with international standards and establish a special inquiry body with a view to prosecuting perpetrators, as well as compensating families of victims. By contrast, the Supreme Court of Myanmar is ‘altogether subordinate to and integrated with other parts of the state.’

The state interest in this type of setting is lexically superior, indeed supreme, rather than placed on the same plane with individual interests wherein the two could be ‘balanced’.

Such relatively uncomplicated categorising cannot however be easily applied in the Sri Lankan context which is far more complex. In the country’s history, the judiciary has, at times, been compelled to bow to the will of the state and has accommodated executive excesses when faced with attacks on the very integrity of the state. At other times, powerful judicial pronouncements have been made on the liberties of citizens and a direct confrontation has thereby ensured with an overpowering executive.

In the post-war context, it is time that these inconsistencies are reconciled and a happier balance is struck whereby the independence of the judiciary is re-asserted and the sanctity of the law and of the Constitution is given a paramount place.

5.3.2 Inordinate Delays

In thirty cases reviewed of enforced disappearances during the 1990’s in Jaffna, the *habeas corpus* application had been filed seven years after the

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476 Ibid.
477 Ibid.
arrest of the person concerned. According to the records, the delay seems to be a result of the family of the person attempting to use other means to either obtain the release of the person or obtain some information of the same. In addition to making a police complaint, in all the cases, the petitioner pleaded that he/she had made complaints to the Human Rights Commission, the International Committee of the Red Cross (ICRC), the Northern Army Commander, the Divisional Secretariat of Chavakachcheri, Amnesty International and the President. In some cases complaints were also made to United Nations High Commissioner for Refugees (UNHCR), Ministry of Defence and the Government Agent of Jaffna. It is possible to conclude therefore that the *habeas corpus* petition had been filed as a last resort. The inability of the aforementioned institutions to respond effectively in cases such as these is highlighted.

**Chart 7: Categorisation of applications filed in the Provincial High Court of Jaffna (2003-2004) on basis of delays between date of arrest and date of filing**

![Chart showing categorisation of applications filed in the Provincial High Court of Jaffna (2003-2004) on basis of delays between date of arrest and date of filing. The chart shows a pie chart with different colored sections representing cases filed after 7, 6, and 8 years.]

According to the records analysed, in twenty-five of the cases the

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480 695/2003 (Government Agent and Ministry of Defence); 698/2003 (UNHCR).
petitioner had made a complaint to the Human Rights Commission.\textsuperscript{481} Except in one of those complaints (where only a copy of the complaint is available),\textsuperscript{482} the Human Rights Commission had issued findings that the person concerned had been taken into custody by the Army and had confirmed the disappearance of the person. These finding had been confirmed by the Committee of Inquiry into Disappearances of Persons in the Jaffna Region appointed by the Human Rights Commission (October 2003). However, as evidenced by the petitions, the findings did not result in information regarding the person concerned being subsequently released by the Army or any other action being initiated in that regard.

Chart 8: Findings of the Committee of Inquiry of the Human Rights Commission (October 2003) in respect of the provincial cases

Several factors had combined to frustrate the effective working of the \textit{habeas corpus} writ. In twenty-two of the cases, the inquiry in the Magistrate’s Court had been concluded only eleven years after the

\begin{itemize}
  \item 685/2003.
\end{itemize}
date of arrest of the person concerned\textsuperscript{483} and in one of those cases, it had taken ten years.\textsuperscript{484} Each of the inquiries conducted in the Magistrate’s Court had held that army personnel had been responsible for the arrest of the person. On the one hand, that finding can be considered as a form of justice in that the responsibility for the person had been cast on the army. On the other hand, such a finding after a decade since the purported disappearance of a family member carried no meaning for the victims. This had been aggravated by the fact that no action had been taken on the basis of the finding of the Magistrate’s Court, to identify and punish those responsible for the disappearance of the person.

The delay in conducting the inquiry at the Magistrate’s Court was clearly identifiable as the main reason for overall delay in the \textit{habeas corpus} application itself. From filing the application to its completion, this process had taken four years in twenty-two cases examined\textsuperscript{485} and three years in two cases examined.\textsuperscript{486} In those cases, the inquiry in the Magistrate’s Court had taken three years in twenty cases and two years in two cases.

**Chart 9: Categorisation of cases filed in the Provincial High Court of Jaffna by the number of years from the date of arrest to the completion of the hearing in the Magistrate’s Court**
5.3.3 Nature of the Complaint

In all the cases, a family member of the person concerned had applied for the writ claiming that the person had been arrested during a search operation carried out by the Army. Thereafter, the family members made inquiries at the camp that they thought the person had been detained at. The general reaction of army officers to such inquiries was to chase the inquirers away with harsh words and in one or two cases, using physical violence. Having failed to obtain a satisfactory response from the Army, the family members thereafter made a police complaint and also made complaints and appeals to other institutions that could potentially guarantee the due process of the law, such as the Human Rights Commission and the President of Sri Lanka.

An additional factor was the claim that was made in many cases that the person concerned had been the breadwinner of the family, and that the family had been rendered destitute as a result of the disappearance. The emotional trauma that was experienced by the family was evident in the substance of the petitions and the appeals made to other institutions. This complaint in the petitions was also upheld by the Magistrate in several of the inquiries. For instance, the Magistrate has observed in one of the cases that 'the petitioners of these cases are
living in poverty without any income since their husbands, children were arrested by the Army. At this stage the petitioner will not be able to pay…transport expenses for the witnesses.”

5.3.4 The Defences Advanced by the Respondents

At the outset it must be noted that the parties in all case records examined do not appear in court for the inquiry. The counsel usually requested that a postponement be granted so that the evidence of the respondents can be led. In two of the cases, the counsel stated that an application had been made for the transfer of the inquiry to a court in Vavuniya or Colombo, in light of the security threat to one of the parties. The Magistrate had rejected the request for postponement on that ground, making two observations: first, that the Magistrate was not informed of any such application; and second, that the petitioner will not be able to attend the inquiry if the case was so transferred, due to indigent circumstances resulting from the disappearance of the person concerned.

In all the cases examined, the Magistrate had rejected the request for such postponement. Consequently, the defences of the respondents could be gathered only from the affidavits they submitted. It is also significant that, by and large, the defence in all of the cases was similar, so much so that certain clauses seem to be reproduced in the affidavits.

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489 For example, the clauses explaining that certain documents related to the arrests have been destroyed due to terrorist attacks and the clauses where a formal objection is made to the naming of ‘Commandant’ as a respondent are identical in the affidavits submitted in most cases.
In all of the cases, except one, the arrest of the person concerned was
denied. This defence was made even in cases where the Human
Rights Commission had issued a finding that the army had taken the
person into custody. Yet there was no evidence as to the subsequent
release or detention of the person.

One of the defences raised was that even though the entire operation
(during which the person concerned was arrested) had been carried
out by the Military Intelligence Corps and the local police, all persons
arrested had been handed over to the relevant police station on the
same day and none were detained by the army. Apart from denying
the arrest, the defence also claimed consistently that documentation
regarding the relevant operation had been destroyed due to terrorist
attacks and cannot therefore be submitted to court.

In most of the cases, the defence raised a formal objection that the
petitioner had incorrectly cited one of the respondents. This was in
reference to the citing of ‘Army Commandant’ of Palaly Camp as a
respondent. These general patterns in the defence to the 

d application illustrate the means whereby the arms of the state seek to
frustrate the remedy. The blatant disregard for the application and the
proceedings is evident, as in most instances the parties do not
participate in the proceedings in spite of the stern observations of the
court. Moreover, the denial of the arrest in toto and the consistency in
which that position is taken in almost all the cases analysed
demonstrates the degree of impunity with which the respondents have
acted.

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490 In case 738/2004, the defence claimed that the detainee had escaped custody.
5.3.5  Delays at the Inquiry in the Magistrate’s Court

5.3.5.1  Delays due to political conditions

In eighteen cases, inquiry dates had to be postponed due to prevailing political conditions. In four cases the postponement took place on only one occasion. In six cases there were two postponements due to curfews and ‘tension’. Three postponements took place only in one case, while there were four postponements in eight cases. However, it must be noted that many of the cases were postponed on the same dates. The journal entries of the court describes the political climate resulting in postponements, in the following terms:

‘Unusual situation. Curfew imposed tension prevails’, ‘Inquiry cannot be held in this situation’, ‘Unusual situation, case not called’, ‘No conducive situation to hold inquiry’ and ‘Situation tense’.

Chart 10: Categorisation of cases filed in the Provincial High Court of Jaffna by the number of postponements

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495 The dates being 8 May 2005, 9, 10 and 11 May 2006, 28 August 2006 and 15 November 2006.
496 For example, see 697/2003 and 699/2003.
5.3.5.2 Delays due to security concerns

Another related cause for delay in the inquiry was the claim made by the state counsel appearing for the respondents that he/she was unable to be present in court due to security reasons. In fifteen of the cases analysed, the security concerns of the state counsel were formally mentioned as the reason for non-appearance of the counsel in court.\textsuperscript{497}

In all the cases, the state counsel was absent in the final inquiry. The legal officer of the army who was present, usually informed the court that he was unable to cross-examine witnesses due to the absence of the state counsel. The legal officer also informed the court that the state counsel was absent due to security concerns and the lack of transport facilities.

Security concerns are also relied on by the respondents in justifying their non-appearance for the inquiry. In most of the cases, the legal officer had pleaded that the inquiry be postponed pending an application for transfer due to security concerns. In eighteen cases, the counsel had particularly pleaded that the life of a respondent would be at risk if he appeared before the Magistrate.\textsuperscript{498} In these cases, the defence had generally stated that other army officers had died due to attacks on their way to the Chavakacheri Magistrate’s Court.

5.3.5.3 Observations of the Magistrate

In each of the cases where the respondents repeatedly requested postponement, the Magistrate had rejected the request, stating that ‘it


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is questionable that even by giving a date, whether the respondents or their attorney-at-law could attend the Court and proceed with this case.  Moreover, the Magistrate had observed that ‘it is more importantly pointed to the Court that from the date of the lodging of this application, in all dates either in this Court or in the High Court of Jaffna no respondents appeared in Court in this case. On this basis the application of the Legal Officer is rejected (sic.).”

The observations of the Magistrate on the one hand suggest that the security concerns raised by the defence are not serious enough to validate a postponement. For instance, during the inquiry in many of the cases, the Magistrate had observed that requests to postpone based on ‘cunning reasons’ should be rejected. On the other hand, the observations also imply a sense of judicial frustration that security concerns are being used as a ploy to consistently undermine the purpose and objective of the inquiry.

5.3.5.4 Appointment of an interpreter

In six of the cases analysed, the proceedings in the Magistrate’s Court had to be postponed until an interpreter was appointed by the Judicial Service Commission. This finding highlights another problem that is regularly faced by the judiciary in ensuring that the language rights of parties appearing before the court are protected. This finding is even more significant considering the fact that the courts concerned

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are situated in the North and East where Article 22 of the Constitution read with Article 24 decrees that the language of administration (and thereby of the courts) is the Tamil language.

5.3.5.5 Other factors

Personal reasons of attorneys-at-law regarding inability to appear in court on a given date, leave taken by the judge, and the non-appearance of state counsel due to appearance in another case were some of the reasons that were consistently provided in the journal entries as reasons for delays in the inquiry.

5.3.6 Contemporary Issues faced at the Provincial Level

As against this theoretical analysis of relatively old habeas corpus applications, the authors of this Study together with the researchers held consultations with the Provincial Bar Associations of Galle and Matara, Trincomalee, Mutur, Kanthale, Jaffna, Ampara, Vavuniya and Kandy during 2010 and early 2011 in order that theoretical aspects examined in the Study may be tested against current practicalities. These consultations revealed a number of critical contemporary issues faced at the provincial level. The following sections analyse these issues in greater detail and cite individual views wherever they become relevant. The identities of the participants have been kept confidential on their request.

503 See for example, the journal entry on 22 August 2005 of 675/2003 and the journal entry on 20 June 2006 in case 676/2003.
504 See for example, the journal entry on 28 November 2003 of application 694/2003 and journal entry on the 28 November 2003 in application 696/2003.
505 See for example, the journal entry on 17 July 2005 in application 695/2003.
This judicial practice is completely contrary to the established jurisprudence in the Commonwealth. David Clark and Gerard McCoy observe:

The general rule is that where a detention has expired through the expiry of a time period, especially if that period has been set by a judge, then the detaine must be released. A renewal after the expiry of the period in the absence of a power to uit the detaine to be further incarcerated. Under such circumstances, the Court is obliged to make order that the detaine be released immediately. However, the state counsel’s request for further time to be granted as the order was on the way amounted to nothing more than an indulgence to condone an executive or administrative lapse or delay. Such a submission inadverently seeks to replace the Rule of Law with a rule of discretion.

5.3.6.1 Non-existing (or ‘lapsed’) detention orders

A general trend in courts in the North and East was discernible whereby on a ‘motion date’ or ‘inquiry date’, the petitioners’ counsel submitted that the relevant detention order under which the detaine was being held, had lapsed and consequently that there was no detention order in existence for the detaine to be further incarcerated. Under such circumstances, the Court is obliged to make order that the detaine be released immediately. However, the state counsel’s request for further time to be granted as the order was on the way amounted to nothing more than an indulgence to condone an executive or administrative lapse or delay. Such a submission inadverently seeks to replace the Rule of Law with a rule of discretion.
detention. This follows from the language. Where a period of detention is to be renewed the expiry of the period means that there is nothing to be renewed.\textsuperscript{507}

However, some of the participants at the provincial consultations posed the question as to whether immediate release would be wise, given that such a release could conflict with the dictates of national security. Yet on a strict application of the Rule of Law, the Court indeed ought to order the release of the detainee.

Meanwhile, an order instructing the authorities to produce the detainee on the next day still raises the question of what alternative a judge may have in the circumstances.\textsuperscript{508} Some lawyers who were

\textsuperscript{507} Clark & McCoy, supra note 45, at 133. The authors cite several cases in support of this proposition: \textit{R v. Board of Control, ex p. Winterflood} [1938] 2 KB 366, 374–5, 380 (CA) (continuation order under mental health legislation to be made on immediate expiry of earlier order; not done here and thus there was a period of five or six days where there was no order to continue); \textit{F v. New Zealand Customs}, M 1616/94 (23 December 1994) (NZ HC) (a case where expiry of a period of detention under s.13H of the Misuse of Drugs Amendment Act 1978 (NZ) could also be triggered by the change in the status of the detainee thus permitting them additional rights under the Act. Renewal of a detention warrant on 22 December occurred 3 days after the expiry of the first warrant, therefore nothing to be renewed); \textit{Minister for Home Affairs v. York} 1982 (2) Z LR 48, 51 (Zimbabwe SC) (break in continuity could not be cured by a renewal order since the original order had lapsed).

\textsuperscript{508} Discussions in the North in particular revealed a startling incident where in a \textit{habeas corpus} application in a Northern High Court, the Defence Secretary had been cited as a respondent and the Court issued notice. Two personnel (identifying themselves as being attached to the Defence Ministry) had then come into the High Court Registry, ‘pulled up’ the Registrar who had, in his defence said, that he had only performed an administrative function and notice on the Secretary Defence had been sought by the petitioner’s counsel in his application. When the Registrar had brought the matter to the attention of the state counsel, to his credit, he is supposed to have advised the Registrar to report the matter to Court to charge the said personnel for contempt of court. Presumably, the Registrar must have brought the matter to the notice of the Court but no contempt proceedings are reflected in the said proceedings. There is little doubt that further intimidation, harassment and threats to the judge would have followed in consequence. Thus the Court may have opted to ignore the whole incident.
consulted recommended that attention be given to recourse to *habeas corpus* in instances of lapsed detention orders, laying down a procedure either in the proposed *Habeas Corpus* Act or in the form of a Rule framed under Article 136 of the Constitution by the Supreme Court. Such Rule may state: ‘Whenever the Court is satisfied that there is no valid detention order in existence or a pre-existing detention order has lapsed, it shall be lawful for the Court to make order immediately releasing a detainee in question.’\(^{509}\)

5.3.6.2 The question of surrendees and the need for a Special Division of the High Court to deal with them

An issue that surfaced during the consultations in Jaffna was that *habeas corpus* applications relating to thousands of former LTTE combatants (who had surrendered to the government during the last stages of the conflict in the North in May 2009), were still pending.\(^{510}\) These applications had been filed by their relatives. The authors were informed that there are only 68 High Court Judges\(^{511}\) and only another fifteen or so commissioned to sit as High Court Judges. Thus, as suggested during discussions with members of the Jaffna and

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\(^{510}\) It is noted that *habeas corpus* applications are less in number in Jaffna and Trincomalee as compared to the several thousands of such applications which had been filed at Vavuniya. This was due to the fact that the place of surrender of many LTTE combatants to the government came within the Judicial zone of Vavuniya.

\(^{511}\) The numbers may have to be clarified though further examination of the court records. According to official figures released by the Judges’ Training Institute as at 25 March 2009, there are 55 High Court Judges serving in the country. See http://sljiti.org (last accessed on 18 January 2011).
Vavuniya Bar Associations, a Special Division of the High Court ought to be created to expeditiously determine the applications of these surrendees.

While most were in favour of the creation of a Special Division, one senior lawyer contended that surrendees are persons who have admitted ‘guilt’, and that such cases did not warrant a full-scale inquiry ordinarily warranted in 

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While most were in favour of the creation of a Special Division, one senior lawyer contended that surrendees are persons who have admitted ‘guilt’, and that such cases did not warrant a full-scale inquiry ordinarily warranted in habeas corpus applications. Thus it was contended that the Court ought to dismiss such applications inasmuch as, once legal detention is admitted, the essence of habeas corpus was rendered academic. It was observed that the proposal to establish a Special Division to determine the cases pertaining to surrendees would only cause further delays in terms of the applicable legal process, whether under the Code of Criminal Procedure, the Prevention of Terrorism Act (PTA) or the application of Emergency Regulations made in pursuance of the Public Security Ordinance (PSO).

Arguably, the expressed view that a Special Division is not needed is the stronger view, given the fact that neither the Emergency Regulations pertaining to surrendees nor the PTA makes specific provision for the issuance of detention orders applicable to surrendees. Yet since the surrendees are still citizens of Sri Lanka, notwithstanding the admission of their allegiance to a separatist ideology at one point, they are still entitled to be treated as equal citizens in terms of the Rule of Law. Consequently, the Judicial

512 The discussions took place in mid December 2010. The names of those whom the authors met are kept confidential on their request.
513 Whose identity is kept confidential on his request.
514 Act No.15 of 1979 (as amended).
515 Act No.48 of 1979.
516 Act No.25 of 1947.
517 See clause 22 of the Emergency Regulations published in Gazette Extraordinary No.1651/24 of 2 May 2010.
Service Commission should be requested to direct the respective High Courts to deal with the cases of surrendees on a priority basis.

5.3.6.3 The High Court’s jurisdiction to hear and determine (ipso facto) habeas corpus applications

This issue came up for discussion during several consultations, particularly in Galle, Matara and in Trincomalee. One of the participant lawyers observed that in view of the proviso of Article 141 of the Constitution, it is incumbent on the High Court to refer the matter for a preliminary inquiry to the ‘most convenient Magistrate’s Court’. This constitutional provision, which refers to the Court of Appeal, is made applicable mutatis mutandis to the High Court by virtue of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990.518

Based on discussions held with lawyers and judicial officers, it appears that the widely held view is that there is no impediment to a High Court Judge opting to hear and determine a habeas corpus application without referring the matter to the Magistrate’s Court for inquiry and report.519 In fact, the discussions revealed that there were instances where the Vavuniya High Court had (creditably) ordered that pending habeas corpus applications would be heard and determined by the High Court without any need for referral to the Magistrate’s Court. The unanimous view of participants at the consultations was that this approach obviated delays in the determining of the applications.

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518 Section 7 read with Article 154(P)(a) of the Constitution.
519 The proviso to Article 141 of the Constitution states ‘it shall be lawful… to refer to the…Magistrate’s Court,’ which is an enabling and not a mandatory provision.
Although the relevant legal provisions\textsuperscript{520} are self-sufficient in justifying the approach adopted by the Vavuniya High Court, such approach may well be the exception. Given the advantages of this approach, it may therefore be necessary to apprise all High Court Judges of the said advantages.\textsuperscript{521}

\textbf{5.3.6.4 Issues relating to duplicity of indictments}

On this issue, the consultations\textsuperscript{522} revealed that state authorities commonly resorted to filing multiple indictments under various courts against the same individual. One senior lawyer based in Vavuniya recalled an incident where a Killinochchi resident who was arrested and released was indicted on the very next day in Colombo, though the indictment was subsequently withdrawn. It appears that a practice has emerged where several indictments are filed in different High Courts, thereby putting lawyers, the accused and witnesses through significant difficulties.

\textbf{5.3.6.5 Issues of rendering the writ of habeas corpus irrelevant or inapplicable}

A further issue that surfaced generally during the consultations was the manner in which the writ of \textit{habeas corpus} was being rendered meaningless through the collective actions of state functionaries. As one lawyer pointed out, in some pending \textit{habeas corpus} applications, the Attorney General continues to hold on to detention orders signed by the President even after filing an indictment. Under normal circumstances, once indictment is filed, the accused is placed under

\begin{flushleft}
\footnotesize{\textsuperscript{520} The proviso to Article 141 and Article 154(P)(4), read with Section 7 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990.}\\
\footnotesize{\textsuperscript{521} An additional option would be for training initiatives to be put into place with the collaboration of the Judges Training Institute to sensitle High Court Judges.}\\
\footnotesize{\textsuperscript{522} Particularly in Jaffna.}
\end{flushleft}
judicial custody, subject to the right to move for bail. However, the continued application of the detention order stifles this process and renders the pending *habeas corpus* application meaningless.

This practice raises several issues. First, it is very unlikely that a detention order could override the concept of judicial custody. Second, the practice of the Attorney General’s Department appears to be in conflict with the provisions of Article 3 read with Article 4(c) of the Constitution. Third, a question arises as to whether the President’s act of signing such a detention order—in his capacity as Minister of Defence—on the initiative of the Attorney General is protected by Article 35 of the Constitution, which decrees presidential immunity. Such issues require further attention, and perhaps ought to be within the scope of a further study.

5.3.6.6 *Furnishing of the order of the prima facie inquiry in the Magistrate’s Court to the petitioner as of right*

This issue was raised particularly by those consulted in Trincomalee. It was disclosed that though the ordinary practice was for the Magistrate to make available his order relating to the *prima facie* inquiry, a practice had developed where the state counsel moves the Magistrate not to release the said report. Furthermore, during consultations held in Mutur, Trincomalee and Jaffna, it was revealed that, as a result of this practice, the petitioners were totally unaware of the status of their cases after giving evidence in the Magistrate’s Court. For instance, several petitioners who had lost their sons or husbands in 2007 had given evidence before the Trincomalee Magistrate’s Court, but did not know what had happened to their cases.

A few lawyers were of the view that it was up to the High Court to make the order available and that petitioners need not have access to the magisterial order as of right at the conclusion of the Magistrate’s
Court inquiry. Their stand was that the matter had been referred to the Magistrate’s Court by the High Court and therefore, the responsibility of releasing the order was with the High Court and not the Magistrate’s Court. However, the majority of participants were opposed to this position. They pointed out that given laws delays in the High Court, many years may lapse by the time the matter is referred back to the High Court and ultimately taken up. Until such time, the petitioner would be left completely unaware as to the fate of his or her application. Hence the recommendation of a majority of the participants was that the magisterial order should be made available at the conclusion of the Magistrate’s Court inquiry without waiting for the High Court to take action.

5.3.6.7 General issues

The following general issues were evident during the provincial consultations;

1) That most lawyers and even some judges at the provincial level in Sri Lanka are generally unaware of the principles of *habeas corpus*;

2) That, even when a writ is issued, adequate procedures are not provided in the legal system to ensure enforcement;

3) That no ‘contempt’ procedures are resorted to if decrees issued by a court are not complied with, sometimes due to the sensitivities surrounding such cases;

4) That there are no forensic facilities to link DNA evidence to the persons concerned;\(^{523}\)

\(^{523}\) This is a common problem in regard to the prosecution of torture perpetrators as well.

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5) That there is no Witness Protection Law;

6) That the prevailing opinion of many judges and lawyers is that when the state is under threat, extra-judicial killings are unavoidable and that habeas corpus is futile;

7) That the Magistrate only plays a supporting role to the police in their investigations and rarely brings an independent mind to bear on the case; and

8) That when the Attorney General submits that the person concerned is detained, the courts are reluctant or perceivably lack the power to question whether such detention is lawful or not.
6. Conclusion: The Virtual Eclipse of *Habeas Corpus* in Respect of Enforced Disappearances in Sri Lanka

It is recognised that when gross violations of human rights take place, those affected have an inalienable right to know the truth about what happened to their loved ones, to access a judicial remedy, and to receive reparations. Hence the writ of *habeas corpus* remains one of the cornerstones of ensuring the liberty of persons and is a crucial antecedent to the right of judicial review of an enforced disappearance. ⁵²⁴

Apart from the obvious descriptive use of the remedy i.e. to produce the body of a person before a court of law, the remedy has been put to at least four other specific uses.⁵²⁵ First, *habeas corpus* proceedings have been used to locate ‘the disappeared’. While the remedy has historically been used to bring the live person before a court to examine the legality of the detention, in some jurisdictions, including in Sri Lanka, petitioners have sought to use the remedy to find persons who had disappeared while in official custody. Secondly, the remedy has been used to deal with torture in custody. In a number of Commonwealth countries where torture and abuse of prisoners is widespread, the remedy has been used to address this problem. As revealed in this Study, and as observed by other Commonwealth commentators, ‘there are cases where torture in detention has been held by the courts to have rendered the detention unlawful, on the basis that the purpose of the detention allowed for by the statute does not contemplate detention for the purposes of torture[;] torture is an

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⁵²⁴ A number of jurisdictions have adopted local *Habeas Corpus* Acts. For example, several Acts were passed in Canada for the regions of Quebec, Ontario, Nova Scotia and Prince Edward Island. Similarly, a *Habeas Corpus* Act was enacted in Ghana in 1964 and in post-Independence Nigeria in 1979. See Clark & McCoy, *supra* note 45, at 23.

⁵²⁵ For a further discussion of these uses in the Commonwealth context, see Clark & McCoy, *supra* note 45, at 30-33.
impermissible purpose for detention, and necessarily renders the detention unlawful.\(^{526}\)

Thirdly, the remedy has been used to institute specific inquiries on behalf of the court. As highlighted in this Study, the courts have possessed a power since 1889 to direct inquiries throughout Sri Lanka in *habeas corpus* cases, a power now afforded constitutionally under Article 141 of the Constitution. Such powers of inquiry are evident in other Commonwealth jurisdictions such as India and Pakistan, and are often used to investigate allegations of torture.\(^{527}\) Finally, *habeas corpus* applications have been used to seek damages or compensation for a person who was unlawfully arrested and detained. As exemplified by the *Leeda Violet case*,\(^{528}\) this concept has been extended to the award of exemplary costs to a victim’s family in the case of enforced disappearances.

Such advances in terms of the added uses of the writ of *habeas corpus* have indeed enhanced its importance during recent times. Thus the protection and maintenance of the systems and processes that pertain to this remedy require careful attention. Yet, as evidenced in this Study, serious violations of human rights that have occurred in Sri Lanka during the past decades have not been met by swift and efficacious legal responses. The efficacy of legal remedies including *habeas corpus* has been in serious doubt due to a variety of reasons including the lack of political will in pursuing investigations and prosecutions and widespread judicial conservatism. Further, the country’s legal system lacks a properly defined crime of enforced disappearance with appropriately severe penalties.

This predicament is aggravated by a chronically dysfunctional legal system with serious problems of laws’ delays, lack of witness

\(^{526}\) *Ibid.*
\(^{527}\) *Ibid.*
\(^{528}\) *Supra* note 227.
protection and a manifest insensitivity towards victims. The lack of political will to ensure accountability for grave human rights violations is reflected in systematic patterns of delays in indictments, routine denials of arrests and detentions and a consistent reluctance to investigate and prosecute perpetrators of enforced disappearances. Furthermore, the deliberate negation of the *habeas corpus* remedy by the respondents to the applications, primarily army and police officers, has also been a contributory factor in this regard. As discussed in this Study, common features that encourage impunity are evidenced even when grave human rights violations are brought to the attention of courts. Such features invariably include the intimidation of witnesses and family members of the victims and transfers of the cases to courts in Colombo at the instance of the alleged perpetrators. Such transfers often result in severe disadvantages to the petitioners due to financial costs as well as the difficulties of travelling from locations in the North and East to Colombo.

As this Study highlights—and as emphasized in other works of this nature—Sri Lanka’s investigative and prosecutorial system is seriously flawed. It has been pointed out that the ‘[l]ack of independent investigations and a hostile prosecutorial and overarching legal system have led to victims being penalized at all stages of the process, from the very first instance of lodging a first information in the police station to the protracted and intensely adversarial nature of legal proceedings, resulting in many victims and witnesses being coerced and compelled to change their testimony, again reinforcing the cycle of impunity that prevails.’ This general observation is no doubt relevant to the contemporary challenges faced in the post-war context in Sri Lanka.

This Study analysed the response of Sri Lanka’s judiciary to the specific remedy of the writ of *habeas corpus* and traced important changes in the role of the judiciary and its relationship to the

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529 See Pinto-Jayawardena, *supra* note 440, at 6.
executive branch during a timeframe spanning from the colonial period to the modern era. The examination of numerous cases that have shaped the country’s jurisprudence on habeas corpus illustrates a distinct judicial conservatism, which no doubt requires immediate legislative attention. This conservatism is clearly evidenced by the sheer numbers of dismissals of habeas corpus applications, particularly during the period 1994-2002. Moreover, the Study distinctively reveals a laxity on the part of counsel appearing in some of these applications, which also accounts for a significant portion of the dismissals.

Meanwhile, a common requirement in many Commonwealth jurisdictions is that any application made on behalf of a person must be disposed of with reasonable expedition. By contrast, this Study reveals that delays in the court process are pervasive, oftentimes stretching to ten years and more. Such delays per se could easily defeat the habeas corpus remedy.

For most of the past three decades, failures in accountability for grave human rights violations have been abetted by emergency laws that have replaced the country’s criminal procedure and evidence laws. This emergency regime has contributed heavily to the proliferation of arbitrary arrests, incommunicado detention and enforced disappearances. In the context of civilians caught up in conflict, these difficulties have been enormous. As illustrated in one petition that was brought before the United Nations Human Rights Committee in terms of the 1st Optional Protocol to the International Covenant on Civil and Political Rights by a father whose son had ‘disappeared’ in army custody in 1990 and whose habeas corpus application filed thereto was to no avail, the Committee found a violation of the rights to liberty and security and freedom from torture of the son and also of his parents who, the Committee opined, had suffered ‘anguish and

The State was directed to expedite current criminal proceedings against individuals implicated in the disappearance, to ensure the prompt trial of all persons responsible for the abduction and to provide the victims with an effective remedy including a thorough and effective investigation into his disappearance and fate, immediate release if he was still alive, adequate information resulting from its investigation and adequate compensation for the violations suffered by him and his family. However, these directions have not yet been complied with.

There is little doubt that much reflection and reform is needed in regard to our domestic legal systems and processes. This Study establishes that the failure of the justice system as well as the patterns of impunity are systemic, and hence requires systemic reform coupled with effective political will. Importantly, the nature and efficacy of judicial remedies should be subjected to critical scrutiny and deficiencies in the applicable legal, judicial and prosecutorial processes should be effectively addressed in order that legal accountability for human rights violations is secured and public confidence in the Rule of Law is renewed. In this post conflict period, reform must be seen as a matter of overriding concern for the majority as well as the minority communities, rather than as a question that ought to be addressed within the ethnic paradigm alone. It is axiomatic that, for the legal system to work, the constitutional process must be strengthened and the power of the executive curbed.

This Study calls for a complete reform package on the law relating to 
\textit{habeas corpus} in Sri Lanka. Such amendments in summary should include the following:
Specific legal provisions to be made in an Act of *Habeas Corpus*:  

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

ii) In cases where the arrest and detention have been proven to be illegal or unjustified, thus forming the basis for the award of exemplary costs against a respondent state official who had been found responsible for the illegal or unjustifiable deprivation of personal liberty, and where that respondent is deceased, the respondent’s estate must stand charged with the exemplary costs awarded as a debt.

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

iv) Explicit provision must be made to prevent the suspension of the writ of *habeas corpus* particularly in view of the definition of the law given in Article 15 (7) of the  

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531 Comprising the minimum principles to be formulated thereto.
Constitution, which allows the remedy to be restricted by emergency regulations.

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

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

vii) Where the petitioner’s counsel or the Attorney General submits (without objection by the petitioner’s counsel) that, the corpus has been discharged and released, indicted or committed for rehabilitation, the court must be imposed with the duty to require material to be placed substantiating the same before terminating proceedings. In the case law analysed previously, the Court of Appeal has followed this approach only in a minority of applications. Judicial inconsistency must be avoided. Mandatory procedural requirements must therefore supply the present lack of an adequate procedural law governing such applications. Upon such material being placed before it, the court must be required to state its reasons in the event of it making order terminating proceedings. This is for the reason that if a petitioner is aggrieved, he/she could have it reviewed by a higher court.
viii) Provision should be made to award compensation to a person who had been incarcerated without legal justification and then released. Such provision is analogous to the principle regarding payment of exemplary costs on the basis that the person had been arrested and detained by state authorities, and had subsequently disappeared while in the custody of state authorities.

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

x) Whenever it appears to a court that, there are ‘mere discrepancies’ (as opposed to material contradictions) between the affidavits filed and the oral evidence given by and on behalf of a petitioner at the magisterial inquiry in a habeas corpus application, the court shall order a rehearing after considering whether fresh pleadings should be filed, if necessary by substituting or adding new parties. This is taking into account the time lag between the date on which a witness swears an affidavit and the date on which he/she is ultimately called upon to give evidence. As disclosed in the preceding analysis, oftentimes, such a time lag may range up to seven years after the incident and applications are liable to be dismissed for the reason that discrepancies have arisen in the evidence of witnesses for the detainee or a ‘disappeared’ person as to whether the alleged perpetrator was wearing a sarong or shorts or whether there had been
forty persons or twenty persons in a crowd on a relevant day.

xi) Proceedings of Commissions of Inquiry appointed under the Commissions of Inquiry Act No.17 of 1948 may be taken judicial notice of by any court inquiring into applications relating to *habeas corpus*.

xii) In applications relating to *habeas corpus*, a petitioner shall be required to establish his or her case on a balance of probabilities.\(^{533}\)

xiii) Whenever, state officials who have been made respondents to *habeas corpus* applications plead that the detainee has subsequently died after being detained, official records and evidence of the circumstances in which the detainee is said to have died must be produced before the Court inquiring into such applications.\(^{534}\)

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

\(^{533}\) This provision is to overcome the rule laid down in *Kodippilige Seetha v. Saravanathan* [1986] 2 Sri L.R. 228, at 234.

\(^{534}\) This is to deter respondent officials taking up the defence of a detainee’s alleged death as a bar to the maintenance of a *habeas corpus* application, as exemplified by the circumstances in H.C.A. No 69/90 decided on 10.03.1998 where the Court of Appeal reversed the Magistrate’s order. Such a mandatory provision will at least, bring about some measure of judicial supervision of the powers of state authorities to dispose of dead bodies under successive emergency regulations.
Connected principles:

i) Where a person is detained and subsequently released without legal proceedings being instituted, the Court of Appeal or the appropriate High Court must be mandatorily required to refer the case record to the Supreme Court to inquire and determine whether there had been a violation of such person’s fundamental rights. Where a person has been detained and subsequently released without any legal proceedings being instituted, such person should be permitted from the time of such release to pursue any civil action for damages for unlawful imprisonment or malicious prosecution notwithstanding Section 9 of the Prescription Ordinance No. 22 of 1871 and/or an application by way of fundamental rights violation notwithstanding the provisions of Section 126(1) of the Constitution. The liberty of a subject should not be lightly treated. Moreover, such provisions will obviate arbitrary police/military action and compel such authorities to act more responsibly.

ii) Legislative provision must be introduced to place the burden of proof on the authorities who are responsible for suppressing the individual’s liberty, to justify, on the standard of balance of probabilities at least, that there was reasonable suspicion that the detainee had committed or was involved in an attempt to commit a crime. The burden should revert to the petitioner only where his or her case is based on an allegation of bad faith, breach of natural justice, fraud or some such vitiating element.
In addition, the following amendments to the Constitution and Supreme Court Rules may be contemplated as part of this package of law reform.

**Constitutional Amendments:**

Article 141 of the Constitution which is presently couched in a jurisdiction conferring manner must be amended to make it a “rights” conferring provision. This is for the reason that the liberty of a subject is involved. Why should the remedy be discretionary? Further, judicial inconsistencies could be avoided if such a constitutional change is made.

Article 141 should be amended to read as follows:

‘Any person may apply to the Court of Appeal for the grant and issue of orders in the nature of writs of *habeas corpus* to bring before such Court –

a) The body of any person to be dealt with according to law; or

b) The body of any person illegally or improperly detained in public or private custody.’

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

The Supreme Court may formulate rules under Article 136 of the Constitution setting time limits for state functionaries to comply with orders, decrees and directives made by the Court of Appeal in *habeas corpus* proceedings. Furthermore, the Supreme Court and the Court of Appeal may be enabled to:
i) Monitor and determine whether orders, decrees and directives made by the said courts have been complied with; and

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

Meanwhile, areas warranting greater judicial sensitivity in this regard include the following:

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

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

iii) Wherever in an application for *habeas corpus*, alleged perpetrators are sufficiently named and described as respondents, and facts pertaining to the incident are averred and supported either by affidavit or oral evidence or both, it shall be incumbent upon the respondents to either justify imprisonment or detention or establish by appropriate defences, by placing documentary or leading oral evidence that they are not responsible for the alleged acts. A mere denial should not satisfy the requirements of ‘appropriate defences’. The court must inquire into the truth of the facts set forth in the respondents’ affidavits and not act on what may be conceived as the ‘contradictory’ or ‘unsatisfactory’ nature of evidence led by the petitioner. Such an approach will minimise
difficulties currently faced by petitioners in placing more evidence than they could practically place in regard to contentious events that involve acts of state agents and also meet technical problems implicit in the adversarial system of justice.

iv) In any event, and as a matter of general practice, the petitioner being absent and unrepresented should not result in an automatic dismissal of a *habeas corpus* application. There may be many reasons for such absence; difficulties associated with travel, indigent circumstances and intimidation coupled with the lack of a witness protection law. The relevant court must consider the merits as contained in the petitioner’s pleadings and depositions and then dispose of the matter. The court must appoint an *amicus curiae* should it feel that assistance is necessary. The Supreme Court has followed this practice in the hearing of fundamental rights petitions under Article 126 of the Constitution so there is no reason why the Court of Appeal and/or the Provincial High Court cannot follow suit.

*Concluding Remarks*

Apart from the enactment of a *Habeas Corpus* Act with or without the introduction of relevant amendments to the Constitution or at least (in the minimum) the framing of necessary Supreme Court Rules, greater judicial sensitivity should be shown towards victims and the petitioners who represent interests of detainees, particularly given the attendant dangers of intimidation or coercion by various parties.

But legal reforms and sensitising of judges may ultimately be ineffective without the strengthening of the institutional fabric of the socio-political system. In the absence of socio-political will or commitment to ensure the Rule of Law in its most fundamental sense,
the law would run the risk of being reduced to a dead letter. As observed by numerous legal commentators, the impact of the 1978 Constitution and the immunity afforded to the Executive President engenders a culture of impunity, which may nullify the effects of legislative and judicial reform.\textsuperscript{535}

Hence reform efforts should reflect legislative and judicial advances, as well as an overhaul of the socio-political culture of this country in order to strengthen the \textit{habeas corpus} remedy and establish it as one of the pillars of a functional democracy based on liberty and the Rule of Law. Then and only then, would Sri Lanka be able to proudly proclaim that it stands committed to the tenets of good governance and the upholding of the concept of People’s Sovereignty as enshrined in Article 3 of the Constitution of Sri Lanka in a practical and material sense without reducing this vital constitutional protection to a mere lip serving theoretical redundancy.

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\textbf{\textsuperscript{535} See for example Basil Fernando, Sri Lanka: The Politics of \textit{Habeas Corpus} and the Marginal Role of the Sri Lankan Courts under the 1978 Constitution, \textit{LST Review}, Volume 21 Issue 275 & 276, September & October 2010, at 25. He comments: ‘The judicial failure to protect the remedy of \textit{habeas corpus} in Sri Lanka is the result of the structural contradictions in the 1978 Constitution…the protection of rights has been confined to a minor area with enormous limitations and the judiciary can operate only within that limited area for the protection of rights…the judiciary has only a marginal role in the protection of individual liberties. The Executive President is at liberty to pursue whatever objectives and policies he thinks fit….’}
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• H.C.A. No. 184/94 decided on 20.10.1994
• H.C.A. No. 248/92 decided on 20.10.1994
• H.C.A. No. 262/94 decided on 20.10.1994
• H.C.A. No. 288/94 decided on 20.10.1994
• H.C.A. No. 301/94 decided on 20.10.1994
• H.C.A. No. 192/94 decided on 20.10.1994
• H.C.A. No. 314/94 decided on 20.10.1994
• H.C.A. No. 317/94 decided on 20.10.1994
• H.C.A. No. 344/94 decided on 25.10.1994
• H.C.A. No. 341/94 decided on 25.10.1994
• H.C.A. No. 222/94 decided on 31.10.1994
• H.C.A. No. 218/94 decided on 31.10.1994
• H.C.A. No. 224/94 decided on 31.10.1994
• H.C.A. No. 279/94 decided on 31.10.1994
• H.C.A. No. 225/94 decided on 31.10.1994
• H.C.A. No. 280/94 decided on 31.10.1994
• H.C.A. No. 228/94 decided on 31.10.1994
• H.C.A. No. 333/94 decided on 01.11.1994
• H.C.A. No. 209/94 decided on 03.11.1994
• H.C.A. No. 250/94 decided on 03.11.1994
• H.C.A. No. 448/92 decided on 08.11.1994
• H.C.A. No. 328/94 decided on 16.11.1994
• H.C.A. No. 339/94 decided on 16.11.1994
• H.C.A. No. 326/94 decided on 16.11.1994
• H.C.A. No. 324/94 decided on 16.11.1994
• H.C.A. No. 316/94 decided on 16.11.1994
• H.C.A. No. 323/94 decided on 16.11.1994
• H.C.A. No. 276/94 decided on 16.11.1994
• H.C.A. No. 128/94 decided on 21.11.1994
• H.C.A. No. 129/94 decided on 21.11.1994
• H.C.A. No. 134/94 decided on 21.11.1994
• H.C.A. No. 425/93 decided on 21.11.1994
• H.C.A. No. 368/94 decided on 23.11.1994
• H.C.A. No. 320/94 decided on 24.11.1994
• H.C.A. No. 336/94 decided on 01.12.1994
• H.C.A. No. 335/94 decided on 01.12.1994
• H.C.A. No. 337/94 decided on 01.12.1994
• H.C.A. No. 334/94 decided on 01.12.1994
• H.C.A. No. 164/89, 171/89, 166/89, 164/89, 171/89, 166/89 decided on 02.12.1994
• H.C.A. No. 275/94 decided on 06.12.1994
• H.C.A. No. 223/94 decided on 12.12.1994
• H.C.A. No. 353/94 decided on 13.12.1994
• H.C.A. No. 312/94 decided on 14.12.1994
• H.C.A. No. 239/94 decided on 14.12.1994
• H.C.A. No. 343/94 decided on 14.12.1994
• H.C.A. No. 133/94 decided on 14.12.1994
• H.C.A. No. 374/94 decided on 28.12.1994

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• H.C.A. No, 330/94 decided on 10.01.1995
• H.C.A. No. 338/94 decided on 10.01.1995
• H.C.A. No. 362/94 decided on 10.01.1995
• H.C.A. No. 318/94 decided on 10.01.1995
• H.C.A. No. 313/94 decided on 11.01.1995
• H.C.A. No. 317/88 decided on 13.01.1995
• H.C.A. No. 162/89 decided on 13.01.1995
• H.C.A. No. 67/92 decided on 13.01.1995
• H.C.A. No. 442/89 decided on 13.01.1995
• H.C.A. No. 30/92 decided on 13.01.1995
• H.C.A. No. 255/89 decided on 13.01.1995
• H.C.A. No. 15/92 decided on 13.01.1995
• H.C.A. No. 349/94 decided on 17.01.1995
• H.C.A. No. 376/94 decided on 27.01.1995
• H.C.A. No. 375/94 decided on 27.01.1995
• H.C.A. No. 1/95 decided on 02.02.1995
• H.C.A. No. 131/93 decided on 08.02.1995
• H.C.A. No. 363/92 decided on 08.02.1995
• H.C.A. No. 32/94 decided on 08.02.1995
• H.C.A. No. 30/94 decided on 08.02.1995
• H.C.A. No. 235/92 decided on 08.02.1995
• H.C.A. No. 443/92 decided on 08.02.1995
• H.C.A. No. 352/92 decided on 08.02.1995
• H.C.A. No. 236/92 decided on 08.02.1995
• H.C.A. No. 25/93 decided on 08.02.1995
• H.C.A. No. 26/93 decided on 08.02.1995
• H.C.A. No. 389/93 decided on 08.02.1995
• H.C.A. No. 29/94 decided on 08.02.1995
• H.C.A. No. 537/93 decided on 08.02.1995
• H.C.A. No. 31/94 decided on 08.02.1995
• H.C.A. No. 346/94 decided on 09.02.1995
• H.C.A. No. 293/93 decided on 13.02.1995
• H.C.A. No. 07/95 decided on 23.02.1995
• H.C.A. No. 08/95 decided on 28.02.1995
• H.C.A. No. 297/94 decided on 28.02.1995
• H.C.A. No. 97/94 decided on 01.03.1995
• H.C.A. No. 94/94 decided on 01.03.1995
• H.C.A. No. 135/94 decided on 01.03.1995
• H.C.A. No. 149/94 decided on 01.03.1995
• H.C.A. No. 148/94 decided on 01.03.1995
• H.C.A. No. 35/94 decided on 01.03.1995
• H.C.A. No. 41/94 decided on 01.03.1995
• H.C.A. No. 42/94 decided on 01.03.1995
• H.C.A. No. 45/94 decided on 01.03.1995
• H.C.A. No. 46/94 decided on 01.03.1995

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• H.C.A. No. 47/94 decided on 01.03.1995
• H.C.A. No. 55/94 decided on 01.03.1995
• H.C.A. No. 52/94 decided on 01.03.1995
• H.C.A. No. 53/94 decided on 01.03.1995
• H.C.A. No. 116/94 decided on 01.03.1995
• H.C.A. No. 100/94 decided on 01.03.1995
• H.C.A. No. 127/94 decided on 01.03.1995
• H.C.A. No. 147/94 decided on 01.03.1995
• H.C.A. No. 130/94 decided on 01.03.1995
• H.C.A. No. 45/91 decided on 02.03.1995
• H.C.A. No. 10/95 decided on 08.03.1995
• H.C.A. No. 188/94 decided on 21.03.1995
• H.C.A. No. 168/94 decided on 21.03.1995
• H.C.A. No. 298/94 decided on 21.03.1995
• H.C.A. No. 237/94 decided on 21.03.1995
• H.C.A. No. 241/94 decided on 21.03.1995
• H.C.A. No. 268/94 decided on 21.03.1995
• H.C.A. No. 282/94 decided on 21.03.1995
• H.C.A. No. 240/94 decided on 21.03.1995
• H.C.A. No. 273/94 decided on 21.03.1995
• H.C.A. No. 277/94 decided on 21.03.1995
• H.C.A. No. 281/94 decided on 21.03.1995
• H.C.A. No. 258/94 decided on 21.03.1995
• H.C.A. No. 236/94 decided on 21.03.1995
• H.C.A. No. 173/94 decided on 21.03.1995
• H.C.A. No. 242/94 decided on 21.03.1995
• H.C.A. No. 243/94 decided on 21.03.1995
• H.C.A. No. 197/94 decided on 21.03.1995
• H.C.A. No. 436/92 decided on 21.03.1995
• H.C.A. No. 311/94 decided on 21.03.1995
• H.C.A. No. 265/94 decided on 21.03.1995
• H.C.A. No. 238/94 decided on 21.03.1995
• H.C.A. No. 235/94 decided on 21.03.1995
• H.C.A. No. 203/94 decided on 21.03.1995
• H.C.A. No. 153/94 decided on 21.03.1995
• H.C.A. No. 154/94 decided on 21.03.1995
• H.C.A. No. 310/94 decided on 21.03.1995
• H.C.A. No. 309/94 decided on 21.03.1995
• H.C.A. No. 294/94 decided on 21.03.1995
• H.C.A. No. 266/94 decided on 21.03.1995
• H.C.A. No. 367/94 decided on 22.03.1995
• H.C.A. No. 79/94 decided on 28.03.1995
• H.C.A. No. 146/88 decided on 30.03.1995
• H.C.A. No. 38/95 decided on 19.04.1995
• H.C.A. No. 189/93 decided on 03.05.1995
• H.C.A. No. 354/94 decided on 03.05.1995
• H.C.A. No. 22/95 decided on 12.05.1995
• H.C.A. No. 42/95 decided on 12.05.1995
• H.C.A. No. 24/95 decided on 12.05.1995
• H.C.A. No. 23/95 decided on 12.05.1995
• H.C.A. No. 411/92 decided on 17.05.1995
• H.C.A. No. 372/94 decided on 17.05.1995
• H.C.A. No. 371/94 decided on 17.05.1995
• H.C.A. No. 18/95 decided on 24.05.1995
• H.C.A. No. 53/92 decided on 20.06.1995
• H.C.A. No. 38/90 decided on 21.06.1995
• H.C.A. No. 42/90 decided on 21.06.1995
• H.C.A. No. 34/95 decided on 03.07.1995
• H.C.A. No. 33/95 decided on 03.07.1995
• H.C.A. No. 32/95 decided on 03.07.1995
• H.C.A. No. 31/95 decided on 03.07.1995
• H.C.A. No. 40/95 decided on 03.07.1995
• H.C.A. No. 17/95 decided on 05.07.1995
• H.C.A. No. 190/89 decided on 24.07.1995
• H.C.A. No. 56/95 decided on 25.07.1995
• H.C.A. No. 88/92 decided on 27.07.1995

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• H.C.A. No. 2/95 decided on 28.07.1995
• H.C.A. No. 37/95 decided on 30.08.1995
• H.C.A. No. 60/95 decided on 04.09.1995
• H.C.A. No. 59/95 decided on 04.09.1995
• H.C.A. No. 13/91 decided on 15.09.1995
• H.C.A. No. 103/91 decided on 15.09.1995
• H.C.A. No. 523/93 decided on 18.09.1995
• H.C.A. No. 525/93 decided on 18.09.1995
• H.C.A. No. 522/93 decided on 18.09.1995
• H.C.A. No. 51/94 decided on 27.09.1995
• H.C.A. No. 36/92 decided on 29.09.1995
• H.C.A. No. 100/95 decided on 03.10.1995
• H.C.A. No. 54/90 decided on 03.10.1995
• H.C.A. No. 107/95 decided on 04.10.1995
• H.C.A. No. 15/95 decided on 04.10.1995
• H.C.A. No. 90/91 decided on 04.10.1995
• H.C.A. No. 120/95 decided on 30.10.1995

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• H.C.A. No. 441/92 decided on 06.03.1996
• H.C.A. No. 437/92 decided on 06.03.1996
• H.C.A. No. 391/92 decided on 06.03.1996
• H.C.A. No. 247/92 decided on 06.03.1996
• H.C.A. No. 218/92 decided on 06.03.1996
• H.C.A. No. 192/93 decided on 06.03.1996
• H.C.A. No. 184/93 decided on 06.03.1996
• H.C.A. No. 130/95, decided on 07.03.1996
• H.C.A. No. 99/95 decided on 20.03.1996
• H.C.A. No. 97/95 decided on 20.03.1996
• H.C.A. No. 351/94 decided on 27.03.1996
• H.C.A. No. 340/94 decided on 27.03.1996
• H.C.A. No. 64/95 decided on 27.03.1996
• H.C.A. No. 360/94 decided on 29.03.1996
• H.C.A. No. 21/96 decided on 22.04.1996
• H.C.A. No. 16/96 decided on 22.04.1996
• H.C.A. No. 119/95 decided on 28.03.1996
• H.C.A. No. 63/95 decided on 15.05.1996
• H.C.A. No. 474/93 decided on 23.05.1996
• H.C.A. No. 272/94 decided on 24.05.1996
• H.C.A. No. 529/93 decided on 24.05.1996
• H.C.A. No. 292/94 decided on 24.05.1996
• H.C.A. No. 285/94 decided on 24.05.1996
• H.C.A. No. 511/93 decided on 24.05.1996
• H.C.A. No. 185/93 decided on 24.05.1996
• H.C.A. No. 45/93 decided on 24.05.1996
• H.C.A. No. 265/92 decided on 24.05.1996
• H.C.A. No. 338/93 decided on 05.06.1996
• H.C.A. No. 77/95 decided on 05.06.1996
• H.C.A. No. 30/96 decided on 05.06.1996
• H.C.A. No. 220/94 decided on 05.06.1996
• H.C.A. No. 295/94 decided on 05.06.1996
• H.C.A. No. 512/93 decided on 05.06.1996
• H.C.A. No. 300/94 decided on 05.06.1996
• H.C.A. No. 171/89 decided on 05.06.1996
• H.C.A. No. 164/89 decided on 05.06.1996
• H.C.A. No. 166/89 decided on 05.06.1996
• H.C.A. No. 296/94 decided on 12.06.1996
• H.C.A. No. 93/95 decided on 12.06.1996
• H.C.A. No. 24/90 decided on 19.06.1996
• H.C.A. No. 106/95 decided on 26.06.1996
• H.C.A. No. 55/91 decided on 10.07.1996
• H.C.A. No. 19/96 decided on 10.07.1996
• H.C.A. No. 104/92 decided on 24.07.1996
• H.C.A. No. 88/95 decided on 24.07.1996
• H.C.A. No. 47/95 decided on 24.07.1996
• H.C.A. No. 91/95 decided on 31.07.1996
• H.C.A. No. 12/96 decided on 31.07.1996
• H.C.A. No. 245/93 decided on 31.07.1996
• H.C.A. No. 19/95 decided on 31.07.1996
• H.C.A. No. 109/95 decided on 31.07.1996
• H.C.A. No. 473/93 decided on 31.07.1996
• H.C.A. No. 115/95 decided on 21.08.1996
• H.C.A. No. 46/95 decided on 21.08.1996
• H.C.A. No. 86/95 decided on 21.08.1996
• H.C.A. No. 70/96 decided on 30.08.1996
• H.C.A. No. 71/96 decided on 04.09.1996
• H.C.A. No. 27/96 decided on 04.09.1996
• H.C.A. No. 483/93 decided on 04.09.1996
• H.C.A. No. 246/92 decided on 04.09.1996
• H.C.A. No. 347/93 decided on 04.09.1996
• H.C.A. No. 327/94 decided on 04.09.1996
• H.C.A. No. 319/94 decided on 04.09.1996
• H.C.A. No. 286/94 decided on 04.09.1996
• H.C.A. No. 321/94 decided on 04.09.1996
• H.C.A. No. 129/95 decided on 04.09.1996
• H.C.A. No. 124/95 decided on 04.09.1996
• H.C.A. No. 128/95 decided on 04.09.1996
• H.C.A. No. 44/94 decided on 04.09.1996
• H.C.A. No. 48/96 decided on 11.09.1996
• H.C.A. No. 35/96 decided on 11.09.1996
• H.C.A. No. 89/96 decided on 18.09.1996
• H.C.A. No. 85/95 decided on 18.09.1996
• H.C.A. No. 85/96 decided on 18.09.1996
• H.C.A. No. 125/95 decided on 18.09.1996
• H.C.A. No. 79/95 decided on 25.09.1996
• H.C.A. No. 62/95 decided on 25.09.1996
• H.C.A. No. 390/93 decided on 25.09.1996
• H.C.A. No. 358/94 decided on 25.09.1996
• H.C.A. No. 66/94 decided on 25.09.1996
• H.C.A. No. 259/94 decided on 25.09.1996
• H.C.A. No. 29/95 decided on 04.12.1996
• H.C.A. No. 18/96 decided on 04.12.1996
• H.C.A. No. 13/96 decided on 04.12.1996
• H.C.A. No. 118/96 decided on 04.12.1996
• H.C.A. No. 40/96 decided on 04.12.1996
• H.C.A. No. 8/96 decided on 04.12.1996
• H.C.A. No. 52/96 decided on 04.12.1996
• H.C.A. No. 69/96 decided on 04.12.1996
• H.C.A. No. 116/95 decided on 04.12.1996
• H.C.A. No. 103/95 decided on 04.12.1996
• H.C.A. No. 5/96 decided on 04.12.1996
• H.C.A. No. 63/94 decided on 11.12.1996
• H.C.A. No. 65/94 decided on 11.12.1996
• H.C.A. No. 322/94 decided on 11.12.1996
• H.C.A. No. 9/95 decided on 11.12.1996
• H.C.A. No. 95/95 decided on 18.12.1996
• H.C.A. No. 24/96 decided on 18.12.1996
• H.C.A. No. 23/96 decided on 18.12.1996
• H.C.A. No. 71/95 decided on 18.12.1996
• H.C.A. No. 37/96 decided on 18.12.1996
• H.C.A. No. 302/94 decided on 18.12.1996
• H.C.A. No. 112/95 decided on 02.10.1996
• H.C.A. No. 113/95 decided on 02.10.1996
• H.C.A. No. 122/95 decided on 02.10.1996
• H.C.A. No. 84/95 decided on 02.10.1996
• H.C.A. No. 83/95 decided on 02.10.1996
• H.C.A. No. 72/96 decided on 09.10.1996
• H.C.A. No. 11/96 decided on 09.10.1996
• H.C.A. No. 50/96 decided on 09.10.1996
• H.C.A. No. 94/95 decided on 09.10.1996
• H.C.A. No. 96/96 decided on 16.10.1996
• H.C.A. No. 45/96 decided on 23.10.1996
• H.C.A. No. 44/96 decided on 23.10.1996
• H.C.A. No. 44/95 decided on 23.10.1996
• H.C.A. No. 3/96 decided on 30.10.1996
• H.C.A. No. 100/96 decided on 30.10.1996
• H.C.A. No. 34/96 decided on 30.10.1996
• H.C.A. No. 89/96 decided on 30.10.1996
• H.C.A. No. 82/95 decided on 30.10.1996
• H.C.A. No. 91/96 decided on 30.10.1996
• H.C.A. No. 106/96 decided on 06.11.1996
• H.C.A. No. 109/96 decided on 06.11.1996
• H.C.A. No. 117/95 decided on 06.11.1996
• H.C.A. No. 114/95 decided on 06.11.1996
• H.C.A. No. 108/94 decided on 13.11.1996
• H.C.A. No. 110/96 decided on 13.11.1996
• H.C.A. No. 347/94 decided on 13.11.1996
• H.C.A. No. 66/95 decided on 13.11.1996
• H.C.A. No. 293/94 decided on 13.11.1996
• H.C.A. No. 111/96 decided on 13.11.1996
• H.C.A. No. 26/96 decided on 20.11.1996
• H.C.A. No. 118/95 decided on 20.11.1996
• H.C.A. No. 127/95 decided on 20.11.1996
• H.C.A. No. 105/95 decided on 20.11.1996
• H.C.A. No. 73/95 decided on 20.11.1996
• H.C.A. No. 7/96 decided on 20.11.1996
• H.C.A. No. 65/95 decided on 27.11.1996
• H.C.A. No. 126/95 decided on 27.11.1996
• H.C.A. No. 12/95 decided on 27.11.1996
• H.C.A. No. 16/95 decided on 27.11.1996
• H.C.A. No. 61/95 decided on 27.11.1996
• H.C.A. No. 56/96 decided on 27.11.1996
• H.C.A. No. 46/93 decided on 16.02.1996

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e. 1997

- H. C.A No. 104/95 decided on 15.01.1997
- H. C.A No. 72/95 decided on 15.01.1997
- H. C.A No. 2/97 decided on 15.01.1997
- H. C.A No. 9/96 decided on 26.03.1997
- H. C.A No. 15/96 decided on 28.05.1997
- H. C.A No. 28/96 decided on 30.04.1997
- H. C.A No. 32/96 decided on 15.01.1997
- H. C.A No. 36/96 decided on 14.05.1997
- H. C.A No. 39/96 decided on 18.06.1997
- H. C.A No. 41/96 decided on 10.09.1997
- H. C.A No. 45/96 decided on 19.03.1997
- H. C.A No. 46/96 decided on 29.01.1997
- H. C.A No. 47/96 decided on 28.05.1997
- H. C.A No. 53/96 decided on 26.02.1997
- H. C.A No. 57/96 decided on 26.03.1997
- H. C.A No. 58/96 decided on 26.03.1997
- H. C.A No. 60/96 decided on 26.03.1997
- H. C.A No. 63/96 decided on 26.03.1997
- H. C.A No. 65/96 decided on 26.03.1997
- H. C.A No. 66/96 decided on 26.03.1997
- H. C.A No. 67/96 decided on 26.03.1997
- H. C.A No. 68/96 decided on 05.02.1997
- H. C.A No. 77/96 decided on 26.03.1997
- H. C.A No. 74/96 decided on 15.01.1997
- H. C.A No. 78/96 decided on 12.02.1997
- H. C.A No. 79/96 decided on 12.02.1997
- H. C.A No. 80/96 decided on 12.02.1997
- H. C.A No. 81/96 decided on 12.02.1997
- H.C.A. No. 82/96 decided on 07.05.1997
- H. C.A No. 83/96 decided on 26.02.1997
• H.C.A No. 84/96 decided on 26.02.1997
• H.C.A No. 86/96 decided on 26.03.1997
• H.C.A No. 90/96 decided on 12.03.1997
• H.C.A No. 92/96 decided on 26.03.1997
• H.C.A No. 93/96 decided on 30.07.1997
• H.C.A. No. 94/96 decided on 07.05.1997
• H.C.A No. 95/96 decided on 12.02.1997
• H.C.A. No. 99/96 decided on 28.05.1997
• H.C.A No. 101/96 decided on 28.05.1997
• H.C.A No. 103/96 decided on 19.02.1997
• H.C.A No. 104/96 decided on 14.05.1997
• H.C.A No. 107/96 decided on 15.01.1997
• H.C.A No. 108/96 decided on 19.03.1997
• H.C.A No. 112/96 decided on 26.02.1997
• H.C.A No. 113/96 decided on 19.03.1997
• H.C.A No. 116/96 decided on 12.02.1997
• H.C.A No. 117/96 decided on 29.01.1997
• H.C.A No. 119/96 decided on 19.02.1997
• H.C.A No. 120/96 decided on 26.03.1997
• H.C.A No. 122/96 decided on 30.04.1996
• H.C.A No. 123/96 decided on 07.05.1997
• H.C.A No. 125/96 decided on 02.07.1997
• H.C.A No. 126/96 decided on 11.06.1997
• H.C.A No. 128/96 decided on 30.04.1997
• H.C.A No. 129/96 decided on 26.03.1997
• H.C.A. No. 130/96 decided on 30.04.1997
• H.C.A No. 131/96 decided on 30.04.1997
• H.C.A No. 132/96 decided on 26.02.1997
• H.C.A No. 133/96 decided on 02.04.1997
• H.C.A No. 134/96 decided on 14.05.1997
• H.C.A No. 136/96 decided on 05.02.1997
• H.C.A No. 141/96 decided on 21.01.1997
• H.C.A No. 142/96 decided on 02.07.1997
• H. C.A No. 145/96 decided on 30.07.1997
• H. C.A No. 146/6 decided on 19.03.1997
• H. C.A No. 147/96 decided on 18.06.1997
• H. C.A No. 148/96 decided on 26.03.1997
• H. C.A No. 149/96 decided on 19.03.1997
• H. C.A No. 150/96 decided on 02.04.1997
• H. C.A No. 151/96 decided on 02.04.1997
• H. C.A No. 1/97 decided on 30.04.1997
• H. C.A No. 2/97 decided on 30.04.1997
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This is the first time that a comprehensive study has been undertaken regarding the working and effectiveness of the habeas corpus remedy in Sri Lanka. The analysis is undertaken with the broad objective of not only illustrating judicial attitudes to the freedoms of life and liberty but also highlighting paucities in the working of the legal and judicial systems with the specific aim of redressing such paucities.

The formulation of a body of recommendations and reforms is a key part of this effort. Thus the authors propose the enactment of a Habeas Corpus Act for Sri Lanka, which is particularly engineered towards making the remedy more efficacious and better equipped to serve the cause of justice for the poor and disadvantaged.

From the Introduction