

# Police Reform and Preventive Powers of Police in India – Observations on an Unnoticed Problem

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**Abstract:** *The debate about policing in India usually focuses on the lack of accountability and professionalization of the organization. Writing a book on this topic is most popular with former high-ranking police officers. Analyzing the law of the land almost 70 years after Independence and looking into police powers themselves is, by contrast, much less popular in academic writing and the legal profession. A popular and widespread opinion is that it does not make any sense to analyze shortcomings in statutory law because India is a common law country and the Indian police do not obey the law anyway. At the same time, it is objected that granting the police a set of clearly stated but also delimited statutory powers would automatically lead to even more powers for the police. Obviously, it has to be conceded that any revision and modernization of statutory powers, e.g. in Police Acts and the Code of Criminal Procedure, implies the risk of an expansion of police powers detrimental to fundamental rights. While stressing rule of law values might lead to prioritizing fundamental rights, police powers rather point in the opposite direction. However, since much of the existing Indian law stipulating police powers is still based on a pre-constitutional model of police, it does not seem to be premature in 2016 to discuss a fundamental rights based concept of police powers in India. Besides, the inevitable need to modernize the Indian police and to enhance accountability mutually requires scrutinizing the current law of the land, which grants the police vast and not at all clearly delimited powers to encroach upon fundamental and human rights.*

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## A. Preventive Powers of Police in India: A View from the “Outside”

This essay deals with “preventive” powers of police in contrast to police powers in criminal procedure once a crime might have been committed; i.e. criminal justice. This distinction is rather uncommon in the Indian legal discussion, even though the notion of “law and order policing” somewhat reflects the idea, which however is not the base of a strict statutory dif-

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ferentiation.<sup>1</sup> The underlying assumption of this paper is that it would be in the interest of a better protection of constitutionally protected freedoms to “bundle” police powers in the field of preventive policing in one Act, precisely, narrowly, and exclusively describing which powers the police have to counter public order problems. For this reason, the approach of this paper is to examine preventive police powers, i.e. the right of the police to interfere with one’s constitutional and human rights, which are warranted not only in the Indian Constitution but also by countless Supreme Court (SC) decisions on the realities of policing in India. More than a few of these decisions have almost systematically been ignored by both the legislature, which is supposed to set the rules of the game, as well as by the police, even though being supposed to obey the rule of law.<sup>2</sup> My somewhat “legalistic”, German approach might seem a little narrow to a political or social scientist as well as to a human rights activist. And yet, while a lot has been written on the shortcomings of policing in India,<sup>3</sup> enriched and enhanced by many official Commissions and Committees on the Union as well as on the State level, it seems that statutory law on preventive police powers as such does not generate much attention in scholarly writing in India.<sup>4</sup> For a foreign observer the academic silence on the legal framework itself is surprising. For some reason, India appears “stuck” in a legal system that in many aspects does not at all reflect the aspirations as well as the needs of a modern society which promises its citizens liberty of thought, expression, belief, faith and worship, equality of status and of opportunity, and other fundamental freedoms in its constitution.

Another point might be the obviously widespread opinion that it does not make any sense to analyze possible shortcomings in statutory law itself because India (a) is a common law country and (b) the Indian police do not obey to the law anyway. At this point, only the well-known Indian lawyer *Fali S Nariman* can be cited: “The stark fact is that whenever there was a choice between common law and the Roman law (which is the basis of modern continental codes), the decision has always been in favor of Roman law. The main reason was that the Roman law is in the form of a code, and is far more convenient to understand than the common law, the latter being a strange amalgam of case law and statute law. In fact, the ‘common law’ is not so much ‘law’ as it is a unique *method* [italics and quotation

1 Cf. *Arshinder Singh Chawla*, Separation of Law & Order and Investigation, Presentation at the 39th All India Police Sciences Congress; at <http://www.bprd.nic.in/writereaddata/linkimages/0378278658-separation-a-field-model.pdf> (last access for this and all other Internet sources: 18/02/2016); see also SC in *Prakash Singh & Ors. v. Union of India & Ors.*

2 But see *Bipan Chandra/Mukherjee/Mukherjee*, India since Independence, New Delhi 2008, p. 21, referring to the “paradoxical” acceptance of the general concept of rule of law even by the colonial state, which was “basically authoritarian and autocratic”.

3 For lack of space only a very small selection: *K. Alexander*, Police Reforms in India, New Delhi 2006; *Sankar Sen*, Enforcing Police Accountability through Civilian Oversight, New Delhi 2010; *Joshua Aston*, Restructuring the Indian Police System: Need for Accountability and Efficiency, 2011; *CHRI*, Police Reform Debates in India, 2011.

4 Exemplary exceptions are *Uma B. Devi*, Arrest, detention and criminal justice system, Oxford 2012, and *N. Krishna Kumar*, Human Rights Violations in Police Custody, New Delhi (2009).

marks in original] of administering justice, a method which lawyers not reared in the system find difficult to comprehend!”<sup>5</sup> Nothing much needs to be added to this, though I will try. Besides, in contradiction to the common law demur, even in the “motherland” of Indian law, Great Britain, today statutory law is prevalent if not exclusive when it comes to police powers.<sup>6</sup>

## B. Police Powers as a Concept

The notion of preventive police powers in this paper refers to means like, e.g., arrest, search, but also interdictions to stay in a certain area or measures against assemblies, like dispersals (e.g. Sec. 129 CrPC). Interestingly, in India such powers are settled in both Police Law and in the Code of Criminal Procedure (CrPC 1973)<sup>7</sup>, like the power to issue an order in urgent cases of nuisance of apprehended danger (e.g. Sec. 144 CrPC). Thus the CrPC is most relevant in vesting the police with preventive powers even in the case of a mere prevention of dangers. While some preventive powers in the context of criminal justice can be described as powers to prevent the commission of (cognizable) offences,<sup>8</sup> this cannot be said of major provisions in the CrPC which are directed at the maintenance of public peace and order, which have to be distinguished clearly from criminal procedure. “Preventive detention” under special laws however will not be in the focus of this research, because such power is out of the range of “ordinary” police powers.

Not being an Indian lawyer, my understanding of Indian law will never be completely “detached” from my own legal background. While police powers in Germany today go far beyond what seems to be desirable from a perspective of constitutional freedoms and human rights, at least German law does have a clear-cut idea and system of how to delimit police powers in the written law even though this approach is not very popular with lawmakers today. And yet, at least sometimes the Courts stop excessive restrictions on personal freedoms and lawmakers publicly have to justify any introduction of even more powers for the police, which has an effect of somewhat deterring the introduction of “too many” limitations on constitutional freedoms. Discussion on such topics in Germany goes far beyond the legal profession while in India lawyers as well as human rights activists rather seem to be opposed to the idea of a clear-cut system of police powers, arguing that this would open the door to even more powers of the police.

5 Fali S. Nariman, *Indian Legal System: Can it be saved?*, New Delhi 2006, pp. 26-27.

6 See “Police Powers” in: *Dictionary of Policing*, Tim Newburn/Peter Neyroud (ed.), Cullompton 2008. On early deviations from common law powers in the UK in the 18<sup>th</sup> century see, e.g., *David Dixon*, *Law in Policing*, Oxford 1997, pp. 54 et seq.

7 In this paper I will only refer to the CrPC but not to State amendments to this Code.

8 Cf. section 149, 151 CrPC.

### C. The British Police Act (BPA) of 1861 and its Aftermath

The British Police Act (BPA) of 1861 was the outcome of the recommendations and a Bill drafted by the Police Commission 1860. The applicability of the Police Act of 1861 in the Indian States and its substitution by “modern” police laws is governed by Entry 2 of List II Seventh Schedule. However, which Indian States have enacted “new” police Acts to substitute colonial law to date and to what extent such acts substantially deviate from the 1861 “role model” has never been researched thoroughly by academic writing. When coming into force, the Act only applied to British India except for Bombay and Madras, which already had police acts comparable to the Act of 1861 (still in force today). According to the National Police Commission in 1979, the BPA of 1861 was “designed to make the police totally subordinate to the executive government in the discharge of its duties. No reference was made at all to the role of police as a servant of the law as such”.<sup>9</sup> With special reference to Sec. 23 the Commission pointed out that an “average policeman would deem an order to be a lawful order provided it comes to him from someone above in the hierarchy. He would not pause to check whether there is any enabling provision in any law for such an order to be issued”, continuing with the rather depressing statement that this still “is the present position”.<sup>10</sup> There is not much evidence that this has changed significantly nowadays.

The BPA of 1861 was amended<sup>11</sup> several times without implementing major changes in the Indian police system and law. *Bayley*, in his seminal book on the Indian Police in 1969, comes to the conclusion that the BPA already in 1861 was neither revolutionary nor particularly novel. According to his judgment, the significance rather lay in the fact that the Act provided authoritative answers to the two questions implicit in the experiments with policing British India, namely “what should be the relations between imperial and rural police and how imperial police administration should be coordinated with other functions of imperial authority”.<sup>12</sup> According to him, the system at the end of the 1960s had been handed down virtually intact since 1861.<sup>13</sup> He goes on stating that “[w]hat is particularly striking about contemporary police structure is its permanence. Its fundamental principles of organization have remained fixed for over a century. (...) is the system still compatible with a democratic political state as it was with a colonial one?”<sup>14</sup> Almost another 50 years later India, Bangladesh, and until 2002 Pakistan, regardless of some modernization in State law, still follow the basic principles laid by the BPA of 1861, despite profound “regime

9 National Police Commission, 2<sup>nd</sup> Report at 14.24 and 14.28.

10 National Police Commission, 2<sup>nd</sup> Report at 14.26.

11 See, e.g., Police Act 1888; Jammu and Kashmir (Extension of Laws) Act 1956; Police (Incitement to Disaffection) Act 1922; Police Act 1949; State Armed Police Forces (Extension of Laws) Act 1952; Police-Forces (Restriction of Rights) Act 1966.

12 *David H. Bayley*, Police and Political Development in India, Princeton 1969, p. 45.

13 *Ibid.* pp. 49-50.

14 *Ibid.* p. 57.

changes" by Independence in the middle of the last century and even despite very distinctive constitutional provisions for the protection of fundamental rights, as it certainly is the case in India. Perhaps, as some suggest, the perpetuation of the British system was (and is) in the best interest of the new rulers as well.<sup>15</sup>

#### D. Critical Accounts on Policing

From a German lawyer's perspective it is astonishing how much has been published on policing and the police in India – and how little seems to be published on statutory law governing the legal means of policing, i.e., police powers. On the other hand, already in the 19<sup>th</sup> century and up to date many official committees and commissions have analyzed the state of policing in India, most of the time without "tangible" results in real life and on police powers, neither during the *British Raj* nor in modern India. *Bayley* in 1969 concludes that "contemporary police philosophy in India is an ironic combination of British liberal tradition and British colonial practice".<sup>16</sup> Has policing in general and the respect of constitutional and fundamental rights by the police changed for the better since then? More recent publications and an evaluation of the extensive jurisprudence by the SC certainly do not depict a better picture than in 1969, rather to the contrary, as I will show in more detail later in this paper. Interestingly, however, the legal means and police powers are hardly ever discussed in academic writing or the public debate. Some authors mention the basic idea of the rule of law. Nevertheless, this hardly ever transcends a passing mention of the law without going into much detail. When discussing limitations of police powers, reference is made rather to human rights than to fundamental freedoms under the Indian Constitution, which is astonishing from my point of view. It seems that a well-grounded legal analysis of police powers and their necessary limitations under the rule of law still is on the waiting list in legal academia in India.

##### I. The Public Perception and the Supreme Court

Talking about the police to the *aam aadmi* (common man) in India will hardly ever result in a positive statement about the institution. Not different in academic writing. In short, unlawfulness, behavior and distrust in the police seem to be major problems of the Indian police.<sup>17</sup> Numberless examples of complaints about misbehavior, *mala fide* practices and unlawful action can be found in the media, in scholarly writing, and in Jurisprudence. The National Human Rights Commission (NHRC), which was constituted under the Human Rights Act of 1993, in 1999 alone received a total of almost 55,000 complaints, of which many

15 Cf. *K.S. Subramanian*, Political Violence and the Police in India, New Delhi 2007, pp. 63-64, 75.

16 *Bayley*, note 12, p. 422.

17 See, e.g., *G.P. Joshi*, Policing In India – Some Unpleasant Essays, New Delhi, 2013; *Kamalaxi G. Tadsad/Harish Ramaswami*, Human rights and police administration, New Delhi 2012; *Sankar Sen*, Enforcing Police Accountability through Civilian Oversight, New Delhi 2010.

concerned the police.<sup>18</sup> Obviously not satisfied with the police dealing with complaints before this body, the Commission in a drastic step in November 2013 asked the Government of Maharashtra to arrest and bring the Commissioner of Police, Pune before the Commission on a set date, because of his “casual and mechanical approach (...) in a matter relating to the human rights violation of a person of Scheduled Caste.”<sup>19</sup> In 2011 the SC, with reference to *D.K. Basu v. State of West Bengal*<sup>20</sup> summarized with most obvious discontent: “Policemen must learn how to behave as public servants in a democratic country, and not as oppressors of the people.”<sup>21</sup> When studying the plethora of SC rulings on police misbehavior and use of illegal means, there remains little doubt that in many, perhaps most of the cases the victims belong to the poor and marginalized sections of society. Even though changes may have taken place in the police of at least some States, in general the Indian police are still facing a major problem when it comes to adherence to human and fundamental rights as well as to the rule of law.<sup>22</sup> On the other hand, because of the wide-spread perception of a malfunctioning criminal justice system, probably quite a significant share of the public does not mind when the police resort to illegal means as far as fake encounters, i.e. extrajudicial killings<sup>23</sup>. As *Sen* puts it, the “police are encouraged to do the dirty work of society because the criminal justice system is not functioning and overhauling of the entire administration of justice is too big a task.”<sup>24</sup>

## II. Illegal Means and Third Degree Methods

As a result, discussion of the use of illegal means by police is “standard” in books on policing.<sup>25</sup> The use of illegal means to produce evidence and to obtain confessions is commonly referred to as “third degree” methods of investigation. In addition, evidence in more than just a few cases is said to be a product of padding and concoction, due to (too) high stan-

18 See *Sankar Sen*, *Tryst with Law Enforcement and Human Rights*, New Delhi 2002, pp. 294-96.

19 NHRC press release, 25.11.2013, at <http://nhrc.nic.in/DispArchive.asp?fno=13021> (last accessed on 16 March 2016).

20 (1997) 1 SCC 416.

21 *Mehboob Batcha v. State*, (2011) 7 SCC 45 (53), introducing the case against police officers with the remarks: “If ever there was a case which cried out for death penalty it is this one ...” (ibid. p. 47).

22 See, e.g. *Sen*, note 18, pp. 333-379; see also NHRC reports on some individual cases at <http://nhrc.nic.in/PoliceCases.htm>.

23 See, e.g., the case in *People’s Union for Civil Liberties v. Union of India*, 1997 SCR (1) 923 at 929, where the police seized “two persons along with some others (...) from a hut, taken to a long distance away in a truck and shot there. This type of activity cannot certainly be countenanced by the courts even in the case of disturbed areas.” Most actual *Rotash Kumar v. Haryana*, AIR 2014 SC (Supp) 182, were compensation of 2 Mio. Rs. was granted.

24 *Sen*, note 18, p. 352.

25 See also NPC, 4<sup>th</sup> Report, at 27.26.

dards of evidence required by the Courts.<sup>26</sup> This at least seems to be a broad perception on the side of police officers even though already in 1978 the SC pointed out that the “[c]redibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect (...) Why fake up? (...) We are satisfied that the broad features of the case, the general trend of the testimony and the convincing array of facts which are indisputable, converge to the only conclusion that may be reasonably drawn, namely, that the accused are guilty.”<sup>27</sup>

Especially when it comes to “gang dacoity” or “terrorism”, fake encounters as well as true encounters often seem to be the easiest device to earn rewards and recognition for a police officer.<sup>28</sup> It seems to be widely believed inside the police that the only effective strategy to deal with criminal and extremist violence is to “overcome” inadequacies and loopholes in the laws and procedures that govern criminal trials.<sup>29</sup> Some police officers are downright known as “encounter specialists”. The National Human Rights Commission (NHRC) recently documented 555 cases of alleged fake encounters across India from October 2009 till February 2013 alone,<sup>30</sup> while the number of cases registered with the NHRC amounts to almost 3000 for the period from October 1993 to April 2010. How many of these cases really involved illegal killings by the police is highly controversial, however there is no doubt that such cases do exist<sup>31</sup> to a significant amount.<sup>32</sup>

The regular and indiscriminate use of handcuffing also was an issue under the scrutiny of the SC,<sup>33</sup> stating in more than one case that mandatory handcuffing during arrest violates Articles 14, 19 and 21 Constitution. However, the guidelines of the SC in *Prem Shankar Shukla*<sup>34</sup> presumably did not bring an end to frequent resort of the police to handcuffing as a more or less “normal” procedure.<sup>35</sup>

26 See, e.g., *Kirpal Dhillon*, Police and Politics in India, New Delhi 2005, p. 154.

27 *Inder Singh v State*, (1978) 4 SCC 161 at 162-63.

28 See NPC 8<sup>th</sup> Report, at 61.38; *James Vadackumchery*, Wounded Justice and the Story of the Indian Police, New Delhi 2001, p. 11-31; *Sen*, note 18, p. 352.

29 *Dhillon*, note 26, pp. 174-176 and 193, giving examples of official “approval” of such methods.

30 India Today 4.7.2013 at <http://indiatoday.intoday.in/story/fake-encounters-congress-ruled-states-narendra-modi-gujarat/1/286891.html>.

31 For some most recent cases see, e.g., *Mehboob Batcha v. State*, (2011) 7 SCC 45 and *Prakash Kadam v. Ramprasad Vishwanath Gupta*, (2011) 6 SCC 189.

32 Cf. *Sanjeev Sirohi*, Fake Encounters Must be Punished with Death, *Criminal Law Journal* 118 (2012), p. 164-67.

33 See *Anu Tivari*, Handcuffing of Detainees: A “Cuff” on Our Legal Thought and Process, *Criminal Law Journal* 111(2005), pp. 98-104; NPC 3<sup>rd</sup> Report at 22.31; see also *State of Maharashtra v. Ravikant S. Patil*, (1991) 2 SCC 373; *Sunil Gupta v. M P*, (1990) 3 SCC 119; *Aeltemesh Rein v. Union India* (1988) 4 SCC 54.

34 *Prem Shankar Shukla v. Delhi Administration*, (1980) 3 SCC 526 at 538.

35 *Tivari*, note 33, p. 102, with reference to case law.

### III. Arrest and Custodial Death

A person being taken into arrest by the police finds her- or himself in a very vulnerable position, which the National Police Commission (NPC) appropriately betokens as the “trauma of arrest”.<sup>36</sup> According to the Commission’s findings, legal provisions granting discretionary power of arrest to the police, which might be unavoidable in general, lead to corruption and malpractices.<sup>37</sup> Therefore the arrest of a person according to the NPC can only be governed by public interest and the actual requirements of an investigation and not by a “mere desire of the police to show off their power”.<sup>38</sup> The NPC summarizes that public “fear of police essentially stems from the fear of an arrest by the police in some connection or other.”<sup>39</sup> However, the NPC also points to the fact that it is not only the police who may be responsible for a high number of arrests that at the end turn out to be unnecessary.<sup>40</sup> “Apart from a legal perception of the necessity to make arrests in cognizable cases, the police are also frequently pressed by the force and expectations of public opinion in certain situations to make arrests, merely to create an impression of effectiveness. (...) The announcement that no arrest has been made in a particular case is thus commonly “held against the police.”<sup>41</sup> As a consequence, however, the NPC only demands guidelines for making arrests<sup>42</sup> instead of examining in more detail the perhaps not sufficient safeguards in the CrPC.

The National Human Rights Commission right after its constitution in 1993 ordered that all cases of deaths in police custody have to be reported to the Commission within 24 hours for further inquiry.<sup>43</sup> Cruel treatment and even death of persons in custody or arrest give reason for many rulings in individual or Public Interest Litigation (PIL<sup>44</sup>) cases and the SC, e.g. in 1985, urged “to amend the law appropriately so that policemen who commit atrocities on persons who are in their custody are not allowed to escape by reason of paucity or absence of evidence. (...) Bound by ties of a kind of brotherhood, they often prefer to remain silent in such situations and when they choose to speak, they put their own gloss upon facts and pervert the truth (...).”<sup>45</sup> Again in *D.K. Basu v. West Bengal* the SC raised the point: “Custodial violence, including torture and death in the lock ups, strikes a blow at

36 NPC 3<sup>rd</sup> Report, at 22.22.

37 Ibid at 22.20-21 and 22.28.

38 NPC 4<sup>th</sup> Report, at 27.24.

39 NPC 3<sup>rd</sup> Report, at 22.24.

40 See NPC 3<sup>rd</sup> Report, at 22.23.

41 NPC 3<sup>rd</sup> Report, at 22.27.

42 NPC 3<sup>rd</sup> Report, at 22.28.

43 See, e.g., <http://nhrc.nic.in/cdcases.htm> (last accessed on 16 March 2016); see also Defining an Absence: Torture ‘Debate’ in India; Economic & Political Weekly 28/06/2014, p. 69.

44 On the constitutional base of PIL see *S.P. Gupta v. President Of India*, AIR 1982 SC 149, at 188 et seq.

45 *State of U.P. v. Ram Sagar Yadav*, AIR 1985 SC 416 at 421.

the Rule of Law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. (...).<sup>46</sup>

Not much has changed in policing since these two SC decisions. Still, the very law of the land and its statutory foundations are in urgent need of close examination,<sup>47</sup> not only possible excesses of the police in enforcing that law. To counter illegal methods and shortfalls the Model Police Act of 2006 proposed to introduce criminal penalties for common defaults committed by the police, such as non-registration of a First Information Report (FIR) under Sec. 154 CrPC<sup>48</sup>, unlawful arrest, detention, search and seizure, to bring into sharp focus for the police personnel that some of their practices are not only illegal, but also criminal offences under the law of the land.<sup>49</sup>

Since the Judiciary in cases of police misbehavior and infringements of fundamental and human rights often cannot provide for redress in due time,<sup>50</sup> the SC since the 1980s is putting an emphasis on financial compensation for police abuse of powers also as a means of preventing illegal action and enforcing due compliance with human and fundamental rights by the police in the future.<sup>51</sup> Thus financial compensation to some extent has become a remedy under public law which not only has the function to “civilize public power” but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved.<sup>52</sup> However, such compensation may not have any deterrent effect unless police officers are personally made liable.<sup>53</sup>

## **E. Police Commissions and Committees**

Several official and high-ranking commissions and committees on police reform have been set up in India on the Union level<sup>54</sup> in the last decades. The fact that the first one ever was inaugurated only 30 years after independence is striking enough, underlining that at a

46 D.K. Basu v. West Bengal, (1997) 1 SCC 416 at 424.

47 One noteworthy exception is *Devi*, note , which remarkably has been published in the UK.

48 A very common problem; see, e.g. Lalita Kumari v. Govt. of U.P., 2014 AIR SC 187.

49 [http://www.mha.nic.in/sites/upload\\_files/mha/files/pdf/Press\\_Brief\\_Oct\\_30.pdf](http://www.mha.nic.in/sites/upload_files/mha/files/pdf/Press_Brief_Oct_30.pdf) (last accessed on 16 March 2016).

50 Cf. Sebastian Hongray v. Union of India, (1984) 1 SCC 339.

51 See Rudul Sah v. State of Bihar, (1983) 4 SCC 141, commonly referred as the first case; see also Sebastian Hongray v. Union of India, (1984) 1 SCC 339; Bhim Singh v. State of Jammu & Kashmir, (1985) SCC 677; D.K. Basu v. West Bengal, (1997) 1 SCC 416; Rotash Kumar v. Haryana AIR 2014 SC (Supp) 182, were compensation of 2 Mio. Rs. for illegal killing by police was granted.

52 *Durga Das Basu*, Commentary on the Constitution of India, Agra 2007, pp. 3215-16.

53 *Devi*, note 4, p. 74; see also Arvinder Singh Bagga v. State of U.P., 1995 AIR SC 117 at 119: “... it will be open to the State to recover personally the amount of compensation from the police officers concerned”.

54 Many states set up State Police Commissions since Independence, which cannot be dealt with here.

“colonial hangover”<sup>55</sup> was accepted by government and legislators for a long time. The first such Commission, the National Police Commission (NPC) 1977-81 was installed by the Union government in 1977. It was given a very broad mandate, stating that “[f]ar-reaching changes have taken place in the country after the enactment of the Indian Police Act, 1861 and the setting up of the second Police Commission of 1902, particularly during the last thirty years of Independence.”<sup>56</sup> The NPC produced no less than eight extensive reports between 1979 and 1981, making wide-reaching recommendations on police reform.<sup>57</sup> 120 years after the enactment of the BPA of 1861, the NPC in 1981 also submitted the first comprehensive bill for a complete replacement of said Act. Chapter IV deals with duties, powers and responsibilities of the police without clearly separating duties and powers of the police. The draft grants – *inter alia* – vast powers to the police to limit the exercise of fundamental rights, e.g., freedom of assembly or freedom of speech, by mere police regulation. The ambitious project of the first NPC however never attracted much interest.<sup>58</sup>

Fifteen years later, two former senior police officers filed a PIL in the SC requesting the Court to direct Union and State governments to implement the recommendations of the NPC 1979-81,<sup>59</sup> which had not yet been implemented by any government. In response to the directions of the SC in May 1998, the Union government set up the so-called *Ribeiro* Committee. The Committee released two reports which both focused on police organization and accountability, but not on the powers of the police. However, the Committee was closing ranks with the NPC in its call for a new Police Act. Shortly after the release of the two reports, the Union government installed yet another committee to look again into police reform. The *Padmanabhaiah* Committee was vested with a broad agenda to be finished within a few months. The committee released its only report in August 2000.<sup>60</sup> Yet another Committee, the Police Act Drafting Committee (PADC), also known as the *Soli Sorabjee* Committee, was set up by the Ministry of Home Affairs and concluded its works in October 2006. The draft prepared by the PADC was also published online to maintain transparency in the Committee’s deliberations. The Police Act Drafting Committee delivered a comprehensive draft for a new Police Act.<sup>61</sup> The Preamble already outlines a rather new approach, *inter alia* stating “respect for and promotion of the human rights of the people, and protection of their civil, political, social, economic and cultural rights” to be “the primary concern

55 *Dhillon*, note 26, p. 52, using this notion in a slightly different context.

56 NPC 1<sup>st</sup> Report, Preface.

57 Short summary at CHRI, Police Reform Debates in India, p. 3-19 at [www.humanrightsinitiative.org/publications/police/PRDebatesInIndia.pdf](http://www.humanrightsinitiative.org/publications/police/PRDebatesInIndia.pdf) (last accessed on 16 March 2016); full reports at <http://bprd.nic.in/searchdetail.asp?lid=407> (last accessed on 16 March 2016).

58 For a critical evaluation see *Arvind Verma*, The Indian Police: A Critical Evaluation, New Delhi 2005, pp. 206-28.

59 Prakash Singh & Ors. v. Union of India & Ors, Writ petition (civil) No. 310 of 1996.

60 As for the *Ribeiro* Committee no official documentation of this commission can be found.

61 [http://www.mha.nic.in/sites/upload\\_files/mha/files/pdf/ModelAct06\\_30\\_Oct.pdf](http://www.mha.nic.in/sites/upload_files/mha/files/pdf/ModelAct06_30_Oct.pdf) (last accessed on 16 March 2016).

of the Rule of Law". In the following years some States adjusted their Police Acts to a broader or smaller extent (but see next chapter) to this Model Police Act, which cannot be analyzed here in detail. However, with regards to preventive powers major changes obviously did not take place.

## F. The Supreme Court on Police Reform

In 1996, two former police officers joined by an NGO filed a PIL writ with the SC urging police reforms to bring the police in line with the needs of a democratic system bound by the rule of law, thus finally leaving behind the legacy of the colonial BPA of 1861. With a delay of 10 years, the SC in 2006 in the landmark decision *Prakash Singh v. Union of India* took a stand on the lack of modernization of the police in India giving very clear directions to the legislative and executive in charge. The Court, *inter alia*, states that "[b]esides the Home Minister, all the Commissions and Committees ... have broadly come to the same conclusion on the issue of urgent need for police reforms. There is convergence of views on the need to have (a) State Security Commission at State level; (b) transparent procedure for the appointment of Police Chief and the desirability of giving him a minimum fixed tenure; (c) separation of investigation work from law and order; and (d) a new Police Act which should reflect the democratic aspirations of the people".<sup>62</sup> The Court mandated the Central Government, State Governments or Union Territories to comply with its directions by the end of 2006 and to file affidavits of compliance by January 2007. As a consequence of the obvious delay the SC extended the period for compliance for a couple of weeks. Apparently the granted extension time did not solve the problem. On May 16, 2008<sup>63</sup> the SC set up a Monitoring Committee to evaluate compliance, giving this commission a time limit of 2 years suggesting that extension might be granted if necessary. Summarizing its findings, the Committee<sup>64</sup> in 2010 stated that practically no State had fully complied with the SC's directive. Some States chose to not even respond to several requests of the Committee. The Committee concluded that "it would like to express its dismay over the total indifference to the issues of reforms in the functioning of Police being exhibited by the States".<sup>65</sup> However, it seems that neither the SC's directives nor the Committee's findings could cut the Gordian knot. Therefore, in October 2012 the SC ordered all State governments and Union territories to file affidavits stating to what extent the September 2006 judgment had been complied with. In August 2013 three major States in an attempt to block the SC's interventions - years after the first decision was handed down - raised constitutional objections against any interference on the part of the SC claiming that the whole matter was within

<sup>62</sup> *Prakash Singh & Ors. v. Union of India & Ors.*

<sup>63</sup> *Prakash Singh & Ors. v. Union of India & Ors.*, 16.05.2008.

<sup>64</sup> <https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnxwcmFrYXNoMXBhZ2V8Z3g6NmYxOGM3NzJlZTExNjdkYw&pli=0> (last accessed on 16 March 2016).

<sup>65</sup> *Ibid.* para 29.

executive powers and functions alone.<sup>66</sup> At the end of 2013 many if not most of the States still had not complied with many directions of the Court for police reform.<sup>67</sup>

## G. Fundamental Rights under the Indian Constitution

Fundamental rights or “freedoms” are protected under part III of the Constitution, which includes reference to generally accepted Human Rights as well.<sup>68</sup> Most important for this study are Articles 19, 21 and 22 Indian Constitution. Restrictions under martial law (Art. 34) however, shall not be dealt with here because of their inherent discrepancy from the very idea of fundamental rights and also because this is outside of the scope of this paper.

### I. Art. 19: Freedom of Speech, Assembly, Movement and Other Rights

According to Art. 19, all citizens shall have the right (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; and (g) to practice any profession, or to carry on any occupation, trade or business. These fundamental freedoms protected by Art. 19(1) are considered to be “great and basic rights which are recognized and guaranteed as the natural rights inherent in the status of a citizen of a free country”<sup>69</sup> by the SC. Freedoms are not without limitations or restrictions though, as clauses (2) to (6) demonstrate. While Art. 19 does not grant absolute freedom, the Constitution provides for limitations on the power of the legislature to restrict such freedoms.<sup>70</sup> “Reasonable restrictions” on said freedoms can be implemented by the State to protect, *inter alia*, public order, decency or morality, which are the most important justifications for limitations on freedoms protected under Art. 19 by the police.<sup>71</sup> Any restriction on a fundamental right thus has to withstand the test of reasonableness, subject to supervision by the Courts.<sup>72</sup> According to the SC, “reasonable restriction” signifies that the

66 See The Times of India, 16.8.2013, at [http://articles.timesofindia.indiatimes.com/2013-08-16/india/41416778\\_1\\_police-reforms-maharashtra-government-police-establishment-board](http://articles.timesofindia.indiatimes.com/2013-08-16/india/41416778_1_police-reforms-maharashtra-government-police-establishment-board) (last accessed on 16 March 2016).

67 See The Hindu 1.11.2013, at [www.thehindu.com/news/national/fiat-on-police-reforms-still-remains-on-paper/article5302489.ece](http://www.thehindu.com/news/national/fiat-on-police-reforms-still-remains-on-paper/article5302489.ece) (last accessed on 16 March 2016).

68 Railway Board v. Chandrima Das, (2000) 2 SCC 465 at 481.

69 State of West Bengal v. Subodh Gopal Bose, AIR 1954 SC 92 at 95.

70 M.P. Jain, Indian Constitutional Law, Gurgaon, 2013, p. 1421.

71 Emergency or terrorism law, lying outside “standard” powers of police will not be covered by this piece; on this, e.g., *Jatinder Singh*, Democracy and Anti-terrorism Laws, Economic & Political Weekly 15/07/2015, p. 27; *Alok Prasanna Kumar*, Unconstitutionality of Anti-Terror Laws, *ibid.* 11/07/2015, p. 35.

72 *V.N. Shukla*, Constitution of India, Lucknow, 11th Ed 2012 (reprint), p. 11; *Jain*, note 70, p. 1422-1427, for a more detailed discussion.

limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. Any restriction which arbitrarily or excessively invades a fundamental right “cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedoms guaranteed in Art 19(1) (g) and the social control permitted by clause (6) of Art. 19, it must be held to be wanting in that quality.”<sup>73</sup>

Art. 19(1)(b) protects the right to assemble peaceably and without arms, which excludes any riotous assembly. Comparable to restrictions on Art. 19(1)(a), Art. 19(3) gives the State the right to put “reasonable” restrictions on the freedom of assembly in the interest of public order, thus referring to the same concept as in Sec. (2). The SC has pointed out that, unlike under Common Law in England, the right to assemble peacefully cannot be abridged except by imposing reasonable restrictions.<sup>74</sup> This is also an interesting counterpoint to the common law argument in discussing the necessity of a critical analysis of statutory law. Requiring prior permission to be obtained before holding a public meeting a public street is within constitutional limits. But the “State can only make regulations in aid of the right of assembly of each citizen and can only impose reasonable restrictions in the interest of public order.”<sup>75</sup> According to the SC, anticipatory action under Sec. 144 CrPC against assemblies is constitutional under the public order clause in Art. 19 (2) and (3).<sup>76</sup> It is, however, uncontested that reasonable regulation or restrictions of an assembly from a constitutional perspective can never amount to a complete extinction of the fundamental freedom.<sup>77</sup>

The right of free movement under Art. 19(1)(d) and residence in the territory of India under Art. 19(1)(e) gives every citizen the right to move freely between the States as well as within a single state without any restriction whatsoever. Nevertheless, removal or exterrnent from a given place, e.g., a district or city, is one of the most relevant police powers given its obviously widespread use.<sup>78</sup> This preventive means clearly has to be distinguished from punishment, even though the *male fide* practice of the police seems to be different in more than a few cases.<sup>79</sup> Limitations are only permissible in accordance with Art. 19(5) as far as reasonable in the “interest of the general public”. While the SC does not negate the constitutionality of exterrnent orders in general, the Court has put limitations on such orders with respect to Art. 19(5) in various cases.<sup>80</sup> An “order of exterrnent must always be

73 Bishamber Dayal Chandra Mohan v. State of Uttar Pradesh, AIR 1982 SC 33 at 46.

74 Himat Lal K. Shah v. Commissioner of Police, Ahmedabad, AIR 1973 SC 87 at 95.

75 Ibid.

76 Babulal Parate v. State of Maharashtra, AIR 1961 SC 884 at 891.

77 Basu, note 52, p. 2730; see also Express Newspapers v. Union of India, (1986) 1 SCC 133 at 195.

78 Jain, note 70, p. 1487; Basu, note 52, pp. 2796-2814, with many references to case law.

79 See, e.g., Prem Chand v. Union of India, AIR 1981 SC 613.

80 See, e.g., State of Madhya Pradesh v. Thakur Bharat Singh, 1967 SCR (2) 454 at 458; Madhya Pradesh v. Baldeo Prasad, 1961 SCR 970 at 978 and 980; more restrictive in Prem Chand v. Union of India, AIR 1981 SC 613 at 616-17.

restricted to the area of illegal activities of the externee”<sup>81</sup> which may cover the territory of an entire State but may not specify any place outside that State where the externee must remain. The duration of such orders must also be reasonable, but the SC has not hesitated to uphold Acts that provided for an exterrnent of up to two years.<sup>82</sup> Even exterrment orders for an indefinite period of time were held not to be unreasonable by the SC if the law provided for the possibility of the aggrieved person to apply for review of such order.<sup>83</sup>

## *II. Art. 21: Protection of Human Life and Personal Liberty*

Constitutional protection against illegal or unconstitutional use of police powers is codified, *inter alia*, in Art. 21, warranting the protection of human life and personal liberty. It is settled that Art. 21 has to be read together with Art. 19 and 14.<sup>84</sup> According to Art. 21, no person<sup>85</sup> shall be deprived of life or personal liberty except according to a “procedure established by law” which requires a valid parliamentary law.<sup>86</sup> Besides, such law has to be constitutionally valid under all (other) fundamental rights, too.<sup>87</sup> The notion of “personal liberty” over the decades was construed in a progressively broad sense by the SC,<sup>88</sup> which can perhaps be attributed to the experiences of the proclamation of emergency from 1975-77<sup>89</sup> and the attempt of the SC to resurrect its credibility. Today it is settled that Articles 19(1) and 21 are not mutually exclusive.<sup>90</sup> The “procedure established by law” has to be valid under constitutional auspices and cannot be read “narrowly” to give the State every right to delimit life and liberty almost at zero as long as the procedure is established by law. However, the SC only in 1978 adopted an approach that any “law” under Art. 21 has to satisfy the test of fair, just and reasonable law itself, not very different from the American due process concept.<sup>91</sup> With reference to *Maneka Gandhi* and later decisions, the majority of the SC in *Mithu v. State of Punjab* summarized that these “decisions have expanded the scope of Art. 21 in a significant way and it is now too late in the day to contend that it is for the

81 Lt. Governor, NCT Delhi v. Ved Prakash, (2006) 5 SCC 228 at 237.

82 Gurbachan v. State of Bombay, 1952 SCR 737; State of Maharashtra v. Salem Hasan Khan, 1989 SCR (1) 970.

83 State of U.P. v. Kaushaliya, 1964 SCR (4) 1002.

84 R.C. Cooper v. Union of India 1970 SCR (3) 530 *passim*; see also *Maneka Gandhi v. Union of India* 1978 SCR (2) 621; A. K. Roy v. Union of India 1982 SCR (2) 272 at 327-28.

85 While Art. 19 refers to citizens, Art. 21 encompasses any person.

86 *Basu*, note 52, pp. 3152, 3154.

87 *Ibid.* p. 3155.

88 *Shukla*, note 72, p. 196.

89 *Jain*, note 70, p. 1571.

90 *Maneka Gandhi v. Union of India* 1978 SCR (2) 621 at 670.

91 *Zhia Mody*, 10 Judgements that Changed India, New Delhi 2013, p. 43; see also Ganguly, J., in: Rameshbhai Chandubhai Rathod v. Gujarat, (2009) 5 SCC 740 at 784.

Legislature to prescribe the procedure and for the Court to follow it ...”, adding that “the last word on the question of justice and fairness does not rest with the legislature.”<sup>92</sup>

Another widespread means is (secret) police surveillance of one’s home and movements, watching and keeping a record of visitors, or domiciliary visits at night, periodical enquiries of officers into habits, income etc., and others means, aimed at the prevention of the commission of crimes by the aggrieved person. The SC in an early finding refused to consider such measures of surveillance to be an encroachment upon Art. 19(1)(d) or any other fundamental right while the domiciliary visits were judged to be unconstitutional under Art. 21 because the relevant “police regulation” did not constitute a “law” under the constitutional notion.<sup>93</sup> With the advent of “a right to privacy” in the SC jurisprudence, this understanding could no longer be perpetuated and regulations under police law of Madhya Pradesh were therefore held to be interpreted narrowly, subject to reasonable restrictions on the basis of compelling public interest.<sup>94</sup> A few years later the Court, while dismissing the case, emphasized that “[p]revention of crime is one of the prime purposes of the constitution of a police force. ... But surveillance may be intrusive and it may so seriously encroach on the privacy of a citizen as to infringe his fundamental right to personal liberty guaranteed by Art. 21 of the Constitution and the freedom of movement guaranteed by Art. 19(1) (d)”<sup>95</sup> (see also next paragraph). Thus, while a right to privacy is not explicitly laid down in the Indian Constitution, the SC has construed such a fundamental right by interpretation of Art. 19(1)(a) and, more importantly, Art. 21.<sup>96</sup> After some controversy in an early case,<sup>97</sup> with a majority rejecting a fundamental right to privacy being enshrined in the Indian Constitution, a bench of two Justices more than a decade later declared that the “right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Art. 21. It is a “right to be let alone”<sup>98</sup> Consequently the lack of an explicit fundamental right to the secrecy of letters, post, and telecommunications did not preclude the SC from construing the protection of telecommunications under Art. 21, stating that the right to privacy also grants protection against telephone tapping unless legitimately restricted by a procedure established by law.<sup>99</sup> To summarize, it seems to be appropriate to state that after *Maneka Ghandi* the notion of “life” in Art. 21 has been given a very broad meaning as it is

92 1983 SCR (2) 690 at 698-99.

93 Kharak Singh v. State of Uttar Pradesh, 1964 SCR (1) 332, but see also the dissenting opinion which held Art. 19(1) (a) and (d) to be infringed.

94 Govind v. Madhya Pradesh, 1975 SCR (3) 946.

95 Malak Singh v. Punjab & Haryana, 1981 SCR 311 at 317.

96 See “Architecture of Surveillance” in: Economic & Political Weekly 04.01.2014, p 10-12.

97 Kharak Singh v. State of U.P., 1964 SCR (1) 332.

98 Rajagopal v. State of Tamil Nadu 1995 AIR SC 264 at 276; referring however to the relationship of a private person versus the media.

99 People’s Union for Civil Liberties v. Union of India AIR 1997 SC 568 at 574; see also State of Maharashtra v. Bharat Shanti Lal Shah (2008).

the case for “personal liberty” making this Article a “source of many substantive rights and procedural safeguards”<sup>100</sup> in Indian law.

### *III. Art. 22: Arrest and Preventive Detention*

In addition to the fundamental rights guaranteed by Art. 21 on the one hand, Art. 22 on the other hand specifies the procedural rights of a person under “arrest” or “detention” to substantially protect his right to life and personal liberty. According to Clause (1) no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. As an exemption to Clause (2), Clauses (3) to (7) lay down special provisions for persons who are “alien enemies” or under “preventive detention”. “Preventive detention”, according to its wording and legal history in England and in British India<sup>101</sup> however refers to a precautionary measure under special laws to be distinguished from police law and criminal procedure law in general, which I will not investigate here for lack of space. Arrest refers to any arrest on the allegation that a person has committed, or is likely to commit, an act of criminal or *quasi-criminal* nature, or some activity prejudicial to the public interest.<sup>102</sup> In *Joginder Kumar v. State of Uttar Pradesh*<sup>103</sup> the SC pointed out that because “[a]rrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person”, no “arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so.” For lack of space I am not able to deal with arrest in this piece, unfortunately.<sup>104</sup>

### **H. Preventive Powers of Police under the British Police Act of 1861**

Even though to date, many Indian States have enacted new Police Acts, the BPA of 1861 to some extent still is a “role model” with regards to police powers and thus will be dealt with here, also because a detailed analysis of police law in the States would exceed the limitations of this paper. Thus the following remarks can only refer to a few selected topics which seem to be important with reference to constitutional freedoms.

100 *Jain*, note 70, p. 1575-86.

101 See *Shukla*, note 72, pp. 218-19.

102 *Jain*, note 70, p. 1664 with reference to *State of Punjab v. Ajaib Singh*, 1953 SCR 254.

103 AIR 1994 SC 1349 at 1353-54.

104 But see *Devi*, note 4.

### I. Section 23: Duties of Police Officers are Different from Powers

According to Sec. 23 it “shall be the duty of every police-officer promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority, to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offences to justice and to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists: and it shall be lawful for every police-officer, for any of the purposes mentioned in this Sec., without a warrant, to enter and inspect any drinking shop, gaming house or other place of resort of loose and disorderly characters.”

Notwithstanding its heading, Sec. 23 commonly is understood not only to implement “duties” but also to grant “powers” to the police.<sup>105</sup> The underlying assumption seems to be that any duty transferred to the police automatically includes the necessary powers. This, however, is in conflict with the idea of the rule of law. With regards to the discrepancy of heading and full text obviously the rule requires interpretation and needs to be construed according to the general rules for the interpretation of legal rules.<sup>106</sup> While most of Sec. 23 clearly refers to duties of police officers, yet wording and grammar clearly indicate a shift in perspective when stating that “it shall be lawful for every police-officer …” to enter and inspect certain areas. The literal meaning of “duty” refers to a legal obligation or responsibility.<sup>107</sup> However, the meaning of words and expressions used in an Act must also consider the context in which they appear and statutes must be read as a whole.<sup>108</sup> Reference to the historical intentions of the lawmaker may also be helpful, in this case however, a reference to the pre-constitutional setting under the British rule does not appear to be justified in the context of a modern constitutional state. From a grammatical point of view Sec. 23 determines that it “shall be the duty to” carry out certain onuses, comprising the collection of intelligence, the prevention of offences as well as the detection of such offences. Under Sec. 23 police officers also have “the duty to … apprehend” while subsequently it is clearly stated that he may only apprehend “whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists”.

From my point of view, a critical analysis leaves no doubt that Sec. 23 itself does not grant any “power” (or authority) to apprehend a person but only makes clear that a police officer has a “duty” to apprehend those persons mentioned under the legal provisions for such an apprehension.<sup>109</sup> Only the very last part of Sec. 23 really grants a “power” to act against citizens when it is stated that “it shall be lawful for every police-officer, for any of

105 See, e.g., *Chandra Behari*, Police Act 1861, Allahabad 1961, p. 18.

106 Most sophisticated *G.P. Singh*, Principles of Statutory Interpretation, Agra 2008; see also *Raichurmatham Prabhakar v. Rawatmal Dugar*, AIR 2004 SC 3625 (3630).

107 Oxford Dictionary of English (2010).

108 *Singh*, note 106, p. 338.

109 See also *P.P. Bhanage*, The Bombay Police Act, 1951, Bombay 1974, p. 142, who, however, interfuses duties and powers.

the purposes mentioned in this Sec., without a warrant, to enter and inspect any drinking shop, gaming house or other place of resort of loose and disorderly characters.” From the wording it is unambiguous however that such powers are granted only in very limited circumstances, i.e. when the place the officers enters itself is special kind of place either explicitly mentioned in the Act (drinking shop or gaming house) or described by the Act (place of resort of certain characters). A comparative look into the Bombay Police Act of 1951 supports that there is a clear, distinct difference between “duties” and “executive powers” of the police as laid down in Chapter VI of this Act. Much in accordance with Sec. 23 BPA of 1861, Sec. 64 of the Bombay Police Act refers to duties of police officers, while the “power” to enter places is stipulated in Sec. 65(1), which under Sub Sec. (2) also empowers police officers to search suspected persons on the street. According to a decision of the Gujarat High Court<sup>110</sup> “it is very clear that Sec. 64 does not refer to any authority or power given to a police officer to obtain or record statement of person in respect of (...) cognizable offences”. Sec. 18 BPA of 1861 also confirms a clear-cut distinction between powers and duties of police officers. According to this rule, every special police officer under Sec. 17 “shall have same powers, privileges and protection, and shall be liable to perform the same duties … as the ordinary officers of police”.

In conclusion it must be emphasized that the equalization of “powers” and “duties”, which is still a widespread concept in India, does not correctly reflect the legal setting but rather seems to reflect a lack of differentiation also present in the interpretation of Sec. 149 CrPC (see below). To impose certain duties on a police officer does not *per se* vest the officer with powers or authority to execute such duties because it is the legislator that has to decide under the rule of law which powers are granted and what should be the legal prerequisites and thresholds for such powers to protect the fundamental rights of citizens.

## *II. Sections 30 - 32: Public Assemblies and Processions*

Sec. 30 provides for the regulation of public assemblies and processions by the police but also vests the Magistrate with some powers. According to Sub Sec. (1) the “District Superintendent or Assistant District Superintendent of Police may, as occasion requires, direct the conduct of all assemblies and processions on the public roads or in the public streets or thoroughfares, and prescribe the routes by which, and the times at which, such processions may pass. Sub Sec. (2) makes it obligatory to apply for a “license” if required by the police to do so by general or special notice in case that an assembly or procession, in the judgment of the Magistrate, “if uncontrolled, be likely to cause a breach of the peace”. From the wording, it is clear that the Magistrate may ask for such permission only in reaction to a particular meeting or occasion but not in general for a specified or even unlimited period of time.<sup>111</sup> Even though it is agreed upon that the power to “control” does not include the pow-

110 Kantilal Damodardas v. Gujarat, 1970 Crim.L.J. 1359.

111 B.R. Beotra, *The police acts*, Allahabad 1970, p. 123, 126; Behari, note 105, p. 29.

er to prohibit an assembly or procession,<sup>112</sup> Sec. 30 grants the police almost unguided power and discretion to refuse a license for an assembly altogether. Even though this raises severe legal questions,<sup>113</sup> the SC so far has not declared the unconstitutionality of this Section. According to Sec. 30A, any assembly or procession which violates the conditions of a license granted under Sec. 30, may be stopped or ordered to disperse by any Magistrate or any of the police officers enumerated in Sub Sec. (1). According to Sub Sec. (2), any procession or assembly which neglects or refuses to obey any order given under aforementioned sections shall be deemed to be an unlawful assembly, making participation liable to prosecution.<sup>114</sup> Interestingly, the procedure of dispersal is not regulated in the Police Act itself but under Sec. 129 to 132 CrPC, which gives a first hint to the preventive powers under the CrPC.

According to Sec. 31 it “shall be the duty of the police to keep order on public roads and in the public streets, thoroughfares, *ghats* and landing places, and at all other places of public resort, and to prevent obstruction on the occasions of assemblies and processions on the public roads and in the public streets, or in the neighborhood of places of worship, during the time of public worship, and in any case when any road, street, thoroughfare, *ghat* or landing-place may be thronged or may be liable to be obstructed.”

In terms of a very general approach and comparable to Sec. 23, this Section too imposes certain duties on the police. There is nothing in this rule that literally makes reference to any “power” vested in the police to fulfil such “duty”, a difference that again is not at all noticed in legal writing.

Interestingly, Sec. 32 provides for penalties for disobeying orders issued under the aforementioned three sections. Thus the Act itself implies the power to “order” a person to do or not to do something while in a procession or assembly. Such orders can be very broad as long as they can reasonably be considered necessary for keeping “order” within the meaning of the BPA.<sup>115</sup> However, different from, e.g., Sec. 68 Bombay Police Act of 1951, the BPA of 1861 does not provide that “[a]ll persons shall be bound to conform to the reasonable’ directions of a Police officer given in fulfilment of any of his duties under this Act”. While the latter one tacitly implies an obligation to follow police orders, the Bombay Act makes it a duty to obey orders only if such order is reasonable.<sup>116</sup> This at least puts some limitations on such penalties and the reasonableness test could be the legal barrier to unconstitutional limitations.

112 *Beotra*, note 111, p. 119-21; *Behari*, note 105, p. 27.

113 *Basu*, note 52, pp. 2732-35.

114 See Sec. 141 CrPC.

115 *Beotra*, note 111, p. 150.

116 *Ibid.* p. 149.

## I. Preventive Powers of Police under the Criminal Procedure Code of 1973

From a German lawyer's perspective it seems to be rather disturbing to find most of the preventive powers of police dedicated to public order in the CrPC, essentially a statute that deals with criminal justice, not with public order policing. In effect thereof exists a parallel statutory "anchorage" of police powers, both under police law as well as under criminal procedure law. Besides, other preventive powers are provided for under special law, e.g., on preventive detection or arms control, which cannot be analyzed here. Thus, the CrPC is not only adjective law of criminal justice, providing the rules for prosecution and punishment of offenders under the Indian Penal Code (IPC), but also comprises powers that constitute substantive law for the prevention of dangers, nuisance, or offences. From a systematic point of view this might call for a more articulate delimitation between preventive powers under Police Law on the one hand and Criminal Procedure Law on the other hand, both providing for significant powers of the police to encroach upon fundamental rights. Alternatively it might also be in the interest of the protection of constitutional freedoms to unify all preventive powers in one Act (preferably police law) to enhance the clear-cut separation of duties and powers of the police. However, such delimitation, for whatever reason, does not seem to be in the focus of legal writing in India.<sup>117</sup>

### I. Powers for Maintenance of Public Order and Tranquility

Chapter X of the CrPC stipulates for a broad range of powers of police for the maintenance of public order and tranquility, using again some very vague legal notions that have to be scrutinized here as far as the police itself is empowered to take action guided only by its own discretion.<sup>118</sup>

#### 1. Section 129: Dispersal of assemblies

Sec. 129 deals with the powers of specified police officers (as well as the Executive Magistrate) to disperse any unlawful assembly or assembly of five or more persons likely to cause a disturbance of the public peace. It does not seem to be very clear, how this power can be delimited from the power to disperse under Sec. 30-A BPA of 1861.

117 Cf. *R.V. Kelkar*, Criminal Procedure, Lucknow 2011, p. 743, stating: "it was felt expedient and necessary to include in the Code certain pre-emptive measures for the prevention of crime and certain other precautionary measures for the safety and protection of society"; without bothering to mention who felt such need in which context? See also *Gulam Abbas v. State of Uttar Pradesh*, 1982 SCR (1) 1077 at 1083: "The power conferred under section 144 Criminal Procedure Code 1973 is comparable to the power conferred on the Bombay Police under section 37 of the Bombay Police Act, 1951 - both the provisions having been put on the statute book to achieve the objective of preservation of public peace and tranquility and prevention of disorder ...".

118 *Ratanlal Ranchhoddas & Dhirajlal Keshavlal Thakore*, Code of Criminal Procedure, Gurgaon 2011, p. 219.

Obviously the dispersal of an assembly in effect infringes on the fundamental right under Art. 19(1)(b) of the Indian Constitution.<sup>119</sup> However, the Constitution itself provides for restrictions on the fundamental right in Art. 19(3). Whether the dispersal amounts to an encroachment upon the constitutionally protected freedom of assembly therefore depends on (i) what the Constitution protects, (ii) whether statutory restrictions exist, and (iii) whether these restrictions are reasonable means to protect the sovereignty and integrity of India or public order. “Unlawful assembly” under Sec. 129(1) refers to an assembly unlawful under Sec. 141 IPC.<sup>120</sup> Only if the elements of an offence under said provision are fulfilled, an assembly can be considered to be unlawful. This requires a common object of the participants to commit any of the acts falling under Sec. 141 IPC.<sup>121</sup> Failure of an assembly to disperse does not make it unlawful but might entitle the police to disperse such assembly according to Sec. 129(2).<sup>122</sup> The question whether an assembly is unlawful under Sec. 141 IPC does not open discretionary power to the police but is a strictly legal question.

Much more troublesome from a constitutional point of view is the second alternative of Sec. 129(1) which allows for the dispersal of any assembly of five or more persons “likely to cause a disturbance of the public peace”. Obviously the notion of “public peace” needs to be construed in accordance with the constitutional guarantees, including the question which amount of probability is necessary to make a disturbance “likely”. The very concept and notion of “public peace” seems to be far from clear. Construing this narrowly under the auspices of the Constitution, an assembly is likely to cause disturbance to public peace only if there is evidence to establish that this assembly would, in the immediate future, develop into an unlawful one.<sup>123</sup> Sec. 129(2) provides for the power of police or the Executive Magistrate to disperse an assembly by force if (i) upon being so commanded, the assembly does not disperse or (ii) without being so commanded, it conducts itself in such a manner as to show a determination not to disperse.<sup>124</sup> While alternative (i) at least requires an explicit order of the police (or Magistrate) that stipulates clearly and precisely for the participants that they are supposed to leave and gives them a chance to comply, this is not the case with alternative (ii). Here it would be necessary for the participants, who at least might presume to be protected under Art. 19(1)(b) to anticipate the legal assessment of the police or Magistrate to escape the use of force, i.e., an encroachment upon their fundamental right protected by Art. 21.

119 See *Himat Lal K. Shah v. Commissioner of Police, Ahmedabad* AIR 1973 SC 87.

120 *Ratanlal & Dhirajlal*, note 118, p. 219; *S.C. Sarkar, The Code of Criminal Procedure*, Gurgaon 2014, p. 448.

121 *Durga Das Basu, Criminal Procedure Code*, 1973, Gurgaon 2010, p. 676 with reference to case law.

122 *R.C. Sohoni, The Code of Criminal Procedure*, 1973, Allahabad 2003, p. 1153.

123 *Ibid.* p. 1155.

124 See also Sections 145, 151 IPC.

This does not seem not to be acceptable from a constitutional point of view because the police could always first resort to an explicit order under the first alternative, i.e. command the dispersal of an assembly, before force is to be used against participants.<sup>125</sup> Hence the dispersal of an assembly without prior explicit command to disperse is in conflict with the constitutional safeguards for the fundamental right of freedom of assembly under Art. 19(1) (b).

## 2. Section 144: Power to issue order in urgent cases of nuisance or apprehended danger

Especially with regard to freedom of speech and assembly<sup>126</sup> protected by Art. 19(1)(a) and (b), Sec. 144 must be scrutinized here, although it does not explicitly vest the police with any powers. Given the possibility of appointing the Commissioner of Police as a special Executive Magistrate according to Sections 21 and 20(5), powers under Sec. 144 are being conferred to the Police at least in metropolitan areas (Sec. 8 CrPC) where the State law provides for such measure. This is the case - at least - in Mumbai, Kolkata, Chennai, and Delhi.<sup>127</sup>

According to Sec. 144(1), it is possible to “direct any person to abstain from a certain act ...”. Even though Sec. 144 provides for very wide powers with a significant impact on fundamental rights, the wording is very vague and in reality the police seem to make broad use of the provision.<sup>128</sup> However, from a constitutional point of view only exceptional circumstances can legitimize an encroachment upon fundamental rights under this provision.<sup>129</sup> Thus Sec. 144 needs to be limited to extra-ordinary situations of “emergency”<sup>130</sup> or “urgent cases of nuisance or apprehended danger”.<sup>131</sup> “Danger” here seems to be the more appropriate notion to make it clearly distinguishable from “emergency law”. An imminent danger to values like human life and safety certainly may legitimize such measure. Nevertheless, it seems that Sec. 144 also in cases of disturbances of the public tranquility seems to be a “door-opener” for abuse, its powers broadly being used within the realm of freedom of assembly, e.g., to prohibit an assembly or a meeting, the uttering of “provocative slogans” or the use of loudspeakers.<sup>132</sup>

125 Cf. Chauhan, J. (concurring), *Ramlila Maidan Incident v. Home Secretary, Union of India*, (2012) 5 SCC 1 at 122.

126 See *Ramlila Maidan Incident v. Home Secretary, Union of India*, (2012) 5 SCC 1 at 44.

127 See *Sarkar*, note 120, pp. 65 and 492.

128 *Manupatra* gives 1600 counts on this provision (as of 16/02/2016).

129 *Sarkar*, note 120, pp. 487, 489 with reference to case law.

130 Ibid. pp. 487-90; see also *Ramlila Maidan Incident v. Home Secretary, Union of India*, (2012) 5 SCC 1 at 67.

131 *Gulam Abbas v. State of Uttar Pradesh*, 1982 SCR (1) 1077 at 1083.

132 See, e.g., *In Re Ramlila Maidan Incident v. Home Secretary, Union of India*, (2012) 5 SCC 1; see also reference to cases in *Basu*, note 121, p. 717.

Sec. 144 also seems to be broadly used against persons held to be “criminals” or “anti-social elements” by the police. Given the possibility of severe restrictions on fundamental rights, the question of constitutionality of this Section and orders under this provision has to be raised. The SC never repudiated the powers under this Section *in toto* but requested the restrictions to be reasonable.<sup>133</sup> The SC therefore sets certain standards to be followed. With reference to reasonable limitations to protect “public order” as mentioned in Art. 19(2), the SC in *Madhu Limaye* required “urgency of the situation and its efficacy in the likelihood of being able to prevent some harmful consequences. (...) As it is possible to act under the Section absolutely and even ex-parte it is obvious that the emergency must be sudden, and the consequences sufficiently grave”<sup>134</sup> The Court also held it to be admissible to pass an order not directed against a specific person but general orders “when the number of persons is so large that the distinction between them and the general public cannot be made (...). (...) “[t]hat Sec. 144 is not unconstitutional if properly applied and the fact that it may be abused is no ground for striking it down. The remedy then is to question the exercise of power as being outside the grant of the law”<sup>135</sup>

With regards to restrictions on public assemblies the SC summarized the legal requirements under Sec. 144 “being an order which has a direct consequence of placing a restriction on the right to freedom of speech and expression and right to assemble peaceably, should be an order in writing and based upon material facts of the case (...) such an order is revisable and is subject to judicial review”.<sup>136</sup> Furthermore it was emphasized that “the perception of the officer recording the desired/contemplated satisfaction has to be reasonable, least invasive and bona fide. The restraint has to be reasonable and further must be minimal. (...) the perception of threat to public peace and tranquility should be real and not quandary, imaginary or a mere likely possibility”<sup>137</sup> However, even an incorrect order is not necessarily a colorable and/or *mala fide* exercise of power on bad faith, according to the SC.<sup>138</sup>

## II. Preventive Action of the Police under the CrPC

Police powers under Chapter XI are considered to be very wide and extensive and the police are authorized to act on their own initiative and knowledge.<sup>139</sup> Coming back to the idea of strictly delimiting preventive powers from criminal justice, it is not clear how preventive provisions under the CrPC can be delimitated against “comparable” powers in police law,

133 See, e.g., *Babulal Parate v. State of Maharashtra*, AIR 1961 SC 884 at 889.

134 *Madhu Limaye v. Sub-Divisional Magistrate*, (1970) 3 SCC 746 at 757.

135 *Ibid.*

136 *In Re Ramlila Maidan Incident v. Home Secretary, Union of India*, (2012) 5 SCC 1 at 45.

137 *Ibid.* at 46.

138 *Ibid* at 54, where order under Sec. 144 was held to be against the law not being justified by the facts and circumstances of the case (*passim*).

139 *Ratanlal & Dhirajlal*, note 118, p. 269.

which in terms of transparency and constitutional limitations under the rule of law does not seem to be a good solution.

### 1. Section 149: Prevention of cognizable offences by the police

According to Sec. 149 “every police officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence.” The exact content and the powers of police stipulated here are far from clear and most scholarly writing does not bother to get into detail. An SC decision on this question could not be found. One commentator states that Sec. 149 “enables a police officer to prevent the commission of a cognizable offence”<sup>140</sup> while others are more permissive in terms of legitimizing encroachment of fundamental rights<sup>141</sup>, stating that “a police officer may do many things, e.g., arrest preventive action [sic!], dispersion of unlawful assembly and so forth” continuing that he “may do those things while investigating or even without investigation”.<sup>142</sup> Another author at least points to the necessity of certain limitations, stating that “interpose” in Sec. 149 does not “cover all sweeping orders that would be unreasonable with the liberty of the citizens”.<sup>143</sup> Yet another opinion points to the fact that this Section does not specify which acts can be carried out by a Police Officer for this purpose, excepting arrest without warrant<sup>144</sup>, which seems to presume that Sec. 149 does not grant any power at all. Understanding these contrarieties requires a bit of bushwhacking because power to arrest without warrant is already settled in Sec. 41 and power to disperse an unlawful assembly in Sec. 129. More importantly, Sec. 151 also vests the police with the power to arrest in order to prevent the commission of cognizable offences. So exactly what powers, to what aims, are transferred under Sec. 149?

Starting from a perusal, Sec. 149 either grants a police officer whatever means and powers he “needs” to whatever he thinks to prevent (only) a cognizable offence, or it describes a mere duty of police officers without transferring any power to interfere with citizens’ fundamental rights, which might be supported by the fact that, e.g., the power to arrest or the power to disperse an unlawful assembly are already explicitly stipulated by other Sections of the CrPC. That Sec. 149 provides for a mere duty<sup>145</sup> but no powers<sup>146</sup>, seems to

140 Ibid.

141 *Sohoni*, note 122, p. 1641: Sec. 149 and 151 result in “curtailment of valuable fundamental rights in the interest of public order”.

142 *Sarkar*, note 120, p. 593.

143 *Surya Narayan Misra*, The Code of Criminal Procedure, Allahabad 2011, p. 202.

144 *Basu*, note 121, p. 794, referring to Sec. 151 for arrest.

145 *Henry Thoby Princep*, The Code of Criminal Procedure, 1973, Delhi 2008, p. 593, seems to support this point of view, when referring in effect only to “duties of police” with regards to Section 149.

146 Rather confusing *C. K. Thakker Takwani* Criminal Procedure, Gurgaon 2011, pp. 363-64: “Sec. 149 enables police officer to prevent … it imposes on him a duty”.

be supported by the very idea of the rule of law, which certainly requires that any citizen – as well as the police – are able to understand and to know for sure if under the provision of a specific Act the police are vested with powers to interfere with fundamental rights or not. Even more, the rule of law not only requires that citizens and the police can deduce from the written law whether the police are vested with such powers; also, the extent of such powers should be specified clearly and exclusively by statutory law. This might be done in more generic terms like “public order”, if such notion is understandable and its boundaries and content are well settled by jurisprudence, but Sec. 149 does not even approximate to this basic requirement from my point of view.

## 2. Section 151: Arrest to prevent the commission of cognizable offences

Sec. 151 grants the police a “very vast power”<sup>147</sup> and discretion<sup>148</sup> to arrest in order to prevent any cognizable offence. Sec. 151 however does not grant any power to detain a person, which is uncontested with reference to Sub Sec. (2).<sup>149</sup> Regardless of these broad powers, Sec. 151 gets rather little attention in commentaries on the CrPC and the SC considered said provisions to be constitutional, pointing however to the procedural safeguards applicable under this Section.<sup>150</sup> There are two prerequisites for an arrest under this Section: The police officer (i) must “know” and not only “apprehend” that a person has a design to commit a cognizable offence, and (ii) the commission of such offence cannot be otherwise prevented, which is a matter of proportionality. The latter prerequisite requires urgency of an arrest; otherwise, the arrest is illegal.<sup>151</sup> Comparing Sec. 149 and Sec. 151 (as well as Sec. 152) from my point of view<sup>152</sup> demonstrates that Sec. 149 does not vest the police with any “power” to arrest or any other power to encroach upon citizen’s fundamental rights. On the other hand, Sec. 151 could also affirm the view that Sec. 149 grants a more than broad variety of permissible police actions without any explicit limitations at all, except for arrest and cases handled under Sec. 152. This interpretation however does not convince under the basic principles of the rule of law. Certainly Sec. 151 facilitates more than mere safeguards to the person arrested, because Sub Sec. (2) explicitly refers to the power to arrest under Sub Sec. (1), which hence cannot be included in Sec. 149.

147 Law Commission 177<sup>th</sup> Report on “Law Relating to Arrest”, p. 21.

148 *Sohoni*, note 122, p. 1617.

149 Cf. *Sarkar*, note 120, p. 595; *Sohoni*, note 122, p. 1618; see also *Basu*, note 121, p. 798, with a less than clear notional differentiation between arrest and detention.

150 Ahmed Noormohmed Bhati v. Gujarat, AIR 2005 SC 2115.

151 *Sohoni*, note 122, p. 1617, with reference to case law.

152 To the opposite *Sarkar*, note 120, p. 593.

### 3. Section 152: Prevention of injury to public property

Sec. 152 is aimed at the prevention of injury to public property. According to this provision a “police officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, movable or immovable, or the removal or injury of any public land mark or buoy or other mark used for navigation.” Unlike Sec. 151 this Section allows for police action regardless of whether the offence is cognizable or not.<sup>153</sup> So Sec. 152 has to be distinguished from Sec. 151 in case a cognizable offence against public property is concerned, which would permit an arrest under the latter one.<sup>154</sup> As outlined above under Sec. 151, this (again) confirms the opinion that Sec. 149 does not provide for all necessary means whatever this may be but emphasizes only a duty of police.

## J. Preventive Powers of Police – A Legal Void?

Discussions about the police in India are predominantly focused on accountability and professionalization of the police. When trying to discuss the idea of a modernization of statutory provision of police powers at a law school in India, the author experienced an very dismissive response, which was paradigmatic for the Indian discussion. The apprehension seems to be that granting the police a set of clearly stated but also delimited statutory powers would “automatically” lead to even more powers of the police, interestingly a controversial topic already in early 19<sup>th</sup> century modernization of police in the UK.<sup>155</sup> Any revision and modernization of statutory powers of the police, e.g. in Police Acts and the CrPC, implies the risk of an expansion of police powers detrimental to fundamental rights. While stressing rule of law values might lead to prioritizing fundamental rights, “police powers” rather point in the opposite direction.<sup>156</sup> Rule of law in this context obviously refers to a substantive,<sup>157</sup> not only formal, concept. Since most of the existing Indian law stipulating police powers is still based on a pre-constitutional model of police, it does not seem to be premature in 2016 to discuss a fundamental rights based concept of police powers in India, protecting such rights that were not in force when the law of the land was first stipulated.<sup>158</sup> From my point of view this would add another important feature to the discussion on police reform in India. If policing in India is to ever comply with essential standards of a democratic society under the rule of law, police training, professionalization, better working environment, adequate payments schemes, attitudinal changes in the police etc. certainly are

153 Law Commission 177<sup>th</sup> Report on “Law Relating to Arrest”, p. 68.

154 *Sarkar*, note 120, p. 596.

155 Cf. *Dixon*, note 6, pp. 56 et seq.

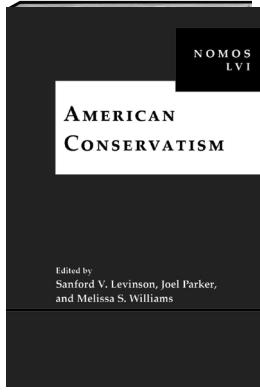
156 Cf. *Andrew Sanders/Richard Young*, Police Powers, in: *Handbook of Policing*, Newburn (ed.), Cullompton 2008, p. 282, on “due process” vs. “crime control” values.

157 Cf. *D.K. Basu v. West Bengal*, (1997) 1 SCC 416 at 424; see also *Jain*, note 70, p. 1575.

158 Ironically, a discussion on the (non-)applicability of the European Convention of Human Rights as a binding part of the law of the land has started in the UK recently.

indispensable prerequisites of change for a modern police in a democratic society based on fundamental rights of its citizens. But for all that, the current law of the land, granting the police vast and not at all clearly delimited powers to encroach upon fundamental and human rights needs to be scrutinized, too. This has yet to be done in India.

## Was bedeutet amerikanischer Konservatismus?



### American Conservatism

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Der Band untersucht den Begriff des „amerikanischen Konservatismus“: Existiert überhaupt ein spezifischer „amerikanischer“ Konservatismus? Und wenn ja: Was unterscheidet ihn von Konservatismen in anderen Ländern? Anhand dieser Fragen werden die unterschiedlichen, manchmal auch widersprüchlichen Meinungen konservativer Denker in den USA reflektiert.

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