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Preventive Powers of Police in India: A German Lawyer's Perspective[1]

Introduction

Discussions on the police in India usually focus on the lack of accountability and professionalization of the institution. Writing a book on this topic is most popular with former high-ranking police officers. To the contrary, analyzing the law of the land almost seven decades after Independence and looking into police powers from a legal perspective, is much less popular in academic writing and in the legal profession in India. 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 moment, it is objected that granting the police a set of clearly stated but also delimited statutory powers would automatically lead to even more powers of the police, a result to the detriment of Indian citizens. Of course, it has to be conceded that any revision and modernization of statutory powers, e.g. in the Indian Police Act or in the Code of Criminal Procedure (CrPC 1973) implies the peril of an increment 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.

Yet, a discussion on police powers in India is absolutely necessary from my point of view. 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 these days 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 status of the law of the land, granting the police vast and not at all clearly delimited powers to encroach upon fundamental and human rights.

To make things more clear for the German reader: The very notion of police powers in this paper refers to means of policing (*Eingriffsbefugnisse*) like, e.g., arrest, search, but also interdictions to stay in a certain area or police

1 Earlier versions of this paper have been published in VRÜ 2016, 53ff. and in KIIT Journal of Law and Society 2016, Vol. 6 No. 1, 7ff.

powers to act against assemblies, like dispersal of an assembly. Interestingly, in India such powers are settled in both, Police Law and in the Code of Criminal Procedure. The CrPC is most relevant in vesting the police with preventive powers even in the case of a mere prevention of dangers while only a few preventive powers in the context of criminal justice can be described as powers to prevent the commission of (cognizable) offences (*Verhütung von Straftaten*) (cf. CrPC, section 149, 151). However, this cannot be said of other major provisions in the CrPC which are directed at the maintenance of public peace or law and order (*Gefahrenabwehr*), which clearly have to be distinguished from criminal procedure (*Strafverfolgung*).

Preventive Powers of Police in India

This piece 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 differentiation. The underlying assumption of this research 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 law and 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 (But see Chandra et al. 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").

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 fundamental 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. However, at least sometimes the Courts and especially the German Constitutional Court (*Bundesverfassungsgericht*) will 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.

My somewhat "legalistic", German approach might seem a little "narrow" to a political scientist like Hans-Gerd Jaschke. And yet, while a lot has been written on the shortcomings of policing in India (Alexander 2006; Sen 2010; Aston 2011; CHRI 2011), enriched and enhanced by many official Commissions and Committees on the Union as well as on the State level plus some SC decisions, it seems that statutory law on police powers as such does not generate much attention in scholarly writing in India (exemplary exceptions are Devi 2012; Kumar 2009). 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 guaranteed by its constitution. Besides the very typical objection in any discussion is that Indian police law is determined by common law standards and as such not to be understood by a continental European lawyer, which is true at one point but also seems to be an easy option to "opt out" of further discussions. Thus to conclude the well-known Indian lawyer Fali S Nariman should 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* of administering justice, a method which lawyers not reared in the system find difficult to comprehend!" (Nariman 2006, pp. 26-27, italics and quotation marks in original). Nariman certainly is right and yet, even in the "motherland" of Indian law, Great Britain, today statutory law is prevalent if not exclusive when it comes to police powers (Newburn/Neyroud 2008; on early deviations from common law powers in the UK in the 18th century see, e.g., Dixon 1997, pp. 54 et seq.).

The British Police Act of 1861 in the 21st century

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 to date and its substitution by "modern" police laws is governed by Entry 2 of List II Seventh Schedule Indian Constitution. In consequence, some Indian States have implemented comprehensive modern Police Acts while others still resist even though the SC for many years

now is asking them to do so. 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" (National Police Commission, 2nd Report at 14.24 and 14.28). As the Commission further pointed out, 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" (National Police Commission, 2nd Report at 14.26). There is not much evidence that this has changed significantly to date.

The BPA of 1861 was amended several times without implementing major changes in the Indian police system and law. Bayley, in his seminal book on 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" (Bayley 1969, p. 45). According to him, the system at the end of the 1960s had been handed down virtually intact since 1861 (Ibid. pp. 49-50). 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?" (Ibid. p. 57). Perhaps, as some suggest, the perpetuation of the British system was (and is) in the best interest of the new rulers after Independence as well (cf. Subramanian 2007, p. 63-64, 75).

Policing India and the Law

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 19th 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 the legislative powers, neither during the *British Raj* nor in modern India. Bayley in 1969 con-

cludes that "contemporary police philosophy in India is an ironic combination of British liberal tradition and British colonial practice" (Bayley 1969, p. 422). Have 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 chapter.

Police reform is a much-discussed topic in India with many books by active and former police officers and scholars. Interestingly, however, the legal means and statutory police powers are hardly ever mentioned in any of such books. 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.

1. The Indian Police under Critical Scrutiny

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 (see, e.g., Joshi 2013; Tadsad/Ramaswami 2012; Sen 2010). 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 concerned the police (see Sen 2002, pp. 294-296). 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." (NHRC 2013). In 2011 the SC, with reference to D.K. Basu v. State of West Bengal (1997 1 SCC 416) 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." (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 …" p. 47).

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 (see, e.g. Sen 2002, pp. 333-379). On the other hand, because of the wide-spread perception of a malfunctioning criminal justice system, probably quite a significant share of the public do not mind when the police resort to illegal means as far as fake encounters, i.e. extrajudicial killings (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." More recently in Rotash Kumar v. Haryana (AIR 2014 SC (Supp.) 182), a compensation of 2 Mio. Rs. was granted.). 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." (Sen 2002 p. 352).

2. Illegal Means and "Third Degree Methods"

As a result, discussion of the use of illegal means by police is a "standard" in Indian books on policing. The use of illegal means to produce evidence and to obtain confessions is commonly referred to as "third degree" methodology 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 standards of evidence required by the courts (see, e.g., Dhillon 2005, p. 154). 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." (Inder Singh v State 1978, 4 SCC 161 at 162-63).

Especially when it comes to so called "*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 (see NPC 8th Report, at 61.38; Vadackumchery 2001, p. 11-31; Sen 2002, p. 352). It seems to be widely belie-

ved 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 (Dhillon 2005, pp. 174-176 and 193, giving examples of official "approval" of such methods). Some police officers are downright known as "encounter specialists". The National Human Rights Commission (NHRC) documented 555 cases of alleged fake encounters across India from October 2009 till February 2013 alone 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 (for some most recent cases see, e.g., Mehboob Batcha v. State 2011, 7 SCC 45; Prakash Kadam v. Ramprasad Vishwnath Gupta 2011, 6 SCC 189 to a significant amount (Sirohi 2012, p. 164-167).

The regular and indiscriminate use of handcuffing also was an issue under the scrutiny of the SC (Criminal Law Journal 2005, pp. 98-104; NPC 3rd Report, 22.31; 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), stating in more than one case that mandatory handcuffing during arrest violates Articles 14, 19 and 21 Constitution. The Court also required alternative means to be taken into consideration (Prem Shankar Shukla v. Delhi Administration 1980, 3 SCC 526 at 538). However, the guidelines of the SC in Prem Shankar Shukla presumably did not bring an end to frequent resort of the police to handcuffing as a more or less "normal" procedure (Tivari 2005, p. 102, with reference to case law).

3. 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" (NPC 3rd Report, 22.22). According to the Commission's findings, legal provisions granting discretionary power of arrest to the police, might be unavoidable in general but often lead to corruption and malpractices (Ibid., 22.20-21, 22.28). 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" (NPC 4th Report, 27.24). The NPC summarizes that public "fear of police essentially stems from the fear of an arrest by the police in some connection or other." (NPC 3rd Report, 22.24). 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 (See NPC 3rd Report, 22.23). "Apart from a legal perception of the necessity to make arrests in co-

gnizable 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." (NPC 3rd Report, 22.27). As a consequence, however, the NPC only demands guidelines for making arrests (NPC 3rd Report, 22.28) 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 (see, e.g., National Human Rights Commission o.J.; see also Lokaneeta (2014). Cruel treatment and even death of persons in custody or arrest give reason for many rulings in individual or Public Interest Litigation (PIL) (on the constitutional base of PIL see S. P. Gupta v. President Of India, AIR 1982, SC 149, 188 et seq.) 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 (…)" (State of U.P. v. Ram Sagar Yadav, AIR 1985, SC 416, 421). In D.K. Basu v. West Bengal the SC raised the point again: "Custodial violence, including torture and death in the lock ups, strikes a blow at 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. (…)." (D.K. Basu v. West Bengal 1997, 1 SCC 416, 424).

From my point of view, the very law of the land and its statutory foundations are in urgent need of close examination, 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 (a very common problem; see, e.g. Lalita Kumari v. Govt. of U.P., 2014 AIR SC 187), 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 (National Human Rights Commission o.J.). Some of these suggestions have been implemented in a few States; many are still waiting to become law of the land and reality in the future.

Since the Judiciary in cases of police misbehavior and infringements of fundamental and human rights often cannot provide for redress in due time (cf. Sebastian Hongray v. Union of India 1984, 1 SCC 339), the SC since the 1980s is putting an emphasis on financial compensation for police abuse of powers al-

so as a means of preventing illegal action and enforcing due compliance with human and fundamental rights by the police in the future (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). 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 (Basu 2007, pp. 3215-3216). However, such compensation may not have any deterrence effect unless police officers are personally made liable (Devi 2012, p. 74; see also Arvinder Singh Bagga v. State of U.P 1995, AIR SC 117, 119: "(…) it will be open to the State to recover personally the amount of compensation from the police officers concerned").

4. 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 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 "colonial hangover" (Dhillon 2005, p. 52, using this notion in a slightly different context) was accepted by government and legislators for a long time after independence. 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." (NPC 1st Report, Preface). The NPC produced no less than eight extensive reports between 1979 and 1981, making wide-reaching recommendations on police reform. 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 (for a critical evaluation see Verma 2005, pp. 206-28).

Fifteen years later, two former senior police officers filed a PIL in the SC requesting the Court to direct the governments of India to implement the re-

commendations of the NPC 1979-81 (Prakash Singh & Ors. v. Union of India & Ors, Writ petition (civil) No. 310 of 1996), which had not yet been implemented by the Union or by State governments. In response to some 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. 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 on-line to maintain transparency in the Committee's deliberations. The Police Act Drafting Committee delivered a comprehensive draft for a new Police Act. 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 of the Rule of Law". In the following year 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 statutory preventive powers major changes obviously did not take place.

5. 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 British Police Act 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" (Prakash Singh & Ors. v. Union of India & Ors). 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 (Prakash Singh & Ors. v. Union of India & Ors. 2008) 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 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" (Ibid. para 29).

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 executive powers and functions alone (The Times of India 2013). 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 (The Hindu 01.11.2013).

Fundamental Rights under the Indian Constitution

Fundamental rights and "freedoms" are protected in part III of the Constitution, which includes reference to generally accepted Human Rights as well (Railway Board v. Chandrima Das 2000, 2 SCC 465 at 481). Most important for this study are the rights to freedom as protected by Articles 19, 21 and 22 Indian Constitution. Restrictions of the rights to freedom while martial law is in force (Art. 34) shall not be dealt with here because of their inherent discrepancy from the very idea of fundamental freedoms and also because this is outside of the scope of this paper.

1. 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" (State of West Bengal v. Subodh Gopal Bose, AIR 1954, SC 92 at 95) by the SC. Freedoms are not without limitations or restrictions though, as clauses (2) to (6) demonstrate (Jain 2013, p. 1421). "Reasonable restrictions" 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. Emergency or terrorism law, lying outside "standard" powers of police will not be covered by this piece (on this topic, e.g., Singh 2015, p. 27; Rajan/Kumar 2015, p. 35). Any restriction on a fundamental right thus has to withstand the test of reasonableness however, subject to supervision by the courts (Shukla 2012, p. 11; Jain 2013, p. 1422-1427 for a more detailed discussion). According to the SC a "reasonable restriction" 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." (Bishamber Dayal Chandra Mohan v. State of Uttar Pradesh, AIR 1982, SC 33 at 46).

Art. 19(1)(b) protects the right to assemble peaceably and without arms, which excludes any riotous assembly. Art. 19(3) gives the State the right to impose "reasonable" restrictions on the freedom of assembly in the interest of public order. Yet, 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 (Himat Lal K. Shah v. Commissioner of Police, Ahmedabad, AIR 1973, SC 87 at 95). 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." (Ibid.). 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) (Babulal Parate v. State of Maharashtra, AIR 1961, SC 884 at 891). 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 (Basu 2007, p. 2730; see also Express Newspapers v. Union of India 1986, 1 SCC 133 at 195).

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 be-

tween the States as well as within a single state without any restriction whatsoever. Nevertheless, removal or externment from a given place, e.g., a district or city, is one of the most relevant police powers given its obviously widespread use (Jain 2013, p. 1487; Basu 2007, pp. 2796-2814, with many references to case law). 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 (see, e.g., Prem Chand v. Union of India, AIR 1981, SC 613). 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 externment orders in general, the Court has put limitations on such orders with respect to Art. 19(5) in various cases (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). An "order of externment must always be restricted to the area of illegal activities of the externee" (Lt. Governor, NCT Delhi v. Ved Prakash 2006, 5 SCC 228 at 237), 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 externment of up to two years (Gurbachan v. State of Bombay 1952, SCR 737; State of Maharashtra v. Salem Hasan Khan 1989, SCR (1) 970). Even externment 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 (State of U.P. v. Kaushaliya 1964, SCR (4) 1002).

2. 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 today that Art. 21 must be read together with Art. 19 and 14 (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). According to Art. 21 no person[2] shall be deprived of life or personal liberty except according to a "procedure established by law" which requires a valid parliamentary law (Basu 2007, pp. 3152, 3154). Besides, such law has to be constitutionally valid under all (other) fundamental rights, too (Ibid. p. 3159). The notion of "personal liberty" over the decades was construed in a progressively broad sense by the SC (Shukla

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

2012, p. 196), which can perhaps be attributed to the experiences of the proclamation of emergency from 1975-77 (Jain 2013, p. 1571) and the attempt of the SC to resurrect its credibility. Today it is settled that Articles 19(1) and 21 are not mutually exclusive (Maneka Gandhi v. Union of India 1978, SCR (2) 621 at 670). 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 (Zhia 2013, p. 43; see also Ganguly, J., in: Rameshbhai Chandubhai Rathod v. Gujarat, (2009) 5 SCC 740 at 784).

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

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 (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). 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 (Govind v. Madhya Pradesh 1975, SCR (3) 946). 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)" (Malak Singh v. Punjab & Haryana 1981, SCR 311 at 317; 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. After some controversy in an early case (Kharak Singh v. State of U.P., 1964 SCR (1) 332) 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" (Rajagopal v. State of Tamil Nadu 1995 AIR SC 264 at 276; referring however to the relationship of a private person versus the media). 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 (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. In effect after Maneka Ghandi the notion of "life" in Art. 21 has been given a very broad meaning as it is the case for "personal liberty" making this Article a "source of many substantive rights and procedural safeguards" (Jain 2013, p. 1575-1586) in Indian law.

3. Arrest and Preventive Detention

In addition to the fundamental rights guaranteed by Art. 21 on the one hand, while 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 (Shukla 2012, pp. 218-219) 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. 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 (Jain 2013, p. 1664, with reference to State of Punjab v. Ajaib Singh, 1953 SCR 254). In Joginder Kumar v. State of Uttar Pradesh (AIR 1994 SC 1349 at 1353-54) 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 of-

ficer 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 (but see Devi 2012).

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.

1. Duties of Police Officers and Police Powers

According to Sec. 23 BPA 1861 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 Section., 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 (see, e.g., Behari 1961, p. 18). 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 (most sophisticated Singh 2008; see also Raichurmatham Prabhakar v. Rawatmal Dugar, AIR 2004 SC 3625 (3630)). 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 (Oxford Dictionary of English 2010). 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 *in toto* (Singh 2008, p. 338). 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 (see also Bhanage 1974, p. 142, who, however, interfuses duties and powers). 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 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 (Kantilal Damodardas v. Gujarat, 1970 Crim.L.J. 1359) "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 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 widespread 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. 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.

2. Public Assemblies and Processions

Sec. 30 BPA 1861 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 (Beotra 1970, p. 123, 126; Behari 1961, p. 29). Even though it is agreed upon that the power to "control" does not include the power to prohibit an assembly or procession (Beotra 1970, p. 119-21; Behari 1961, p. 27), 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 (Basu, 2007, pp. 2732-2735), the SC so far has not declared the unconstitutionality of this Section. According to Sec. 30A BPA 1861, 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 afore mentioned sections shall be deemed to be an unlawful assembly, making participation liable to prosecution (see Sec. 141 CrPC). 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 BPA 1861 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.

On the other hand Sec. 32 BPA 1861 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 (Beotra 1970, p. 150). 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 (Ibid. p. 149). This at least puts some limitations on such penalties and the reasonableness test could be the legal barrier to unconstitutional limitations.

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 there 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 does not seem to be in the focus of legal discussion in India.

1. 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 under its own discretion (Ranchhoddas & Thakore 2011, p. 219).

Sec. 129 CrPC deals with the powers of specified police officers 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. Obviously the dispersal of an assembly in effect infringes on the fundamental right under Art. 19(1)(b) of the Indian Constitution (see Himat Lal K. Shah v. Commissioner of Police, Ahmedabad AIR 1973 SC 87). 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 (Ratanlal & Dhirajlal 2011, p. 219; Sarkar 2014, p. 448). 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 (Basu 2010, p. 676 with reference to case law). 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) (Sohoni 2003, p. 1153). 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 (Ibid. p. 1155). 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 nor disperse or (ii) without being so commanded, it conducts itself in such a manner as to show a determination not to disperse (see also Sections 145, 151 IPC). 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. 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 (cf. Chauhan, J. (concurring), Ramlila Maidan Incident v. Home Secretary, Union of India 2012, 5 SCC 1 at 122). Hence the dispersal of an assembly without prior explicit command to disperse conflicts with the constitutional safeguards for the fundamental right of freedom of assembly under Art. 19(1)(b).

According to Sec. 144(1) CrPC 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.[3] However, from a constitutional point of view only exceptional circumstances can legitimize an encroachment upon fundamental rights under this provision (Sarkar 2014, pp. 487, 489, with reference to case law). Thus Sec. 144 needs to be limited to extra-ordinary situations of "emergency" (Ibid. pp. 487-90; see also Ramlila Maidan Incident v. Home Secretary, Union of India 2012, 5 SCC 1 at 67) or "urgent cases of nuisance or apprehended danger" (Gulam Abbas v. State of Uttar Pradesh, 1982 SCR (1) 1077 at 1083). The latter one seems to be a 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 (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, 2007, 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 (see, e.g., Babulal Parate v. State of Maharashtra, AIR 1961 SC 884 at 889). The SC therefore set certain standards to be followed. With reference to reasonable limitations to protect "public order" as mentioned in Art. 19(2), the SC in

3 *Manupatra*, a legal database, has about 1.600 counts on this provision (as of 16.2.2016).

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

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" (In Re Ramlila Maidan Incident v. Home Secretary, Union of India, (2012) 5 SCC 1 at 45). 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" (Ibid. at 46). However, even an incorrect order is not necessarily a colorable and/or *mala fide* exercise of power on bad faith, according to the SC (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)).

2. Preventive Powers of the Police under the CrPC

Police powers under Chapter XI are considered to be very broad and extensive while the police are authorized to act on their own initiative and knowledge (Ratanlal/Dhirajlal 2011, p. 269). 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, which in terms of transparency and constitutional limitations under the rule of law does not seem to be a good solution.

According to Sec. 149 CrPC "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 commen-

tator states that Sec. 149 "enables a police officer to prevent the commission of a cognizable offence" (Ibid.) while others are more permissive in terms of legitimizing encroachment of fundamental rights (Sohoni 2003, p. 1641: Sec. 149 and 151 result in "curtailment of valuable fundamental rights in the interest of public order"), 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" (Sarkar 2014, p. 593). 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" (Misra 2011, p. 202). A third 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 (Basu 2007, p. 794, referring to Sec. 151 for arrest), 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 CrPC 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 do, 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 (Princep 2008, p. 593, seems to support this point of view, when referring in effect only to "duties of police" with regards to Section 149) but no powers (rather confusing Thakker Takwani 2011, pp. 363-64: "Sec. 149 enables police officer to prevent (…) it imposes on him a duty") seems to 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 deduct from the written law whether the police are vested with such powers; also, the extent of such powers must be specified clearly and exclusively by the 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.

Sec. 151 CrPC grants the police a "very vast power" (Law Commission 177th Report on "Law Relating to Arrest", p. 21) and discretion (Sohoni 2003, p. 1617) 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) (cf. Sarkar 2014, p. 595; Sohoni 2003, p. 1618; see also Basu 2007, p. 798, with a less than clear notional differentiation between arrest and detention). 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 (Ahmed Noormohmed Bhatii v. Gujarat, AIR 2005 SC 2115). 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 (Sohoni 2003, p. 1617, with reference to case law). Comparing Sec. 149 and Sec. 151 (as well as Sec. 152) from my point of view (to the opposite Sarkar 2014, p. 593) 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.

Conclusions

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 almost hostile response, which perhaps was paradigmatic for the Indian discussion. One reason certainly was the above mentioned common law approach which does not seem to be update any longer from my point of view however. Another objection 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 19th century modernization of police in the UK (cf. Dixon 1997, pp. 56 et seq.). Without doubt 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 (cf. Sanders/Young 2008, p. 282, on "due process" vs. "crime control" values). Rule of law in this context obviously refers to a substantive (cf. D.K. Basu v. West Bengal, (1997) 1 SCC 416 at 424; see also Jain 2013, p. 1575), not only formal, concept.

Yet, 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 today 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. From my point of view this would add another important feature to the discussion on police reform in India. If policing in India is ever to 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 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 up fundamental and human rights needs to be scrutinized, too. This has yet to be done in India.

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