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Constitutional Analysis of Section 144, Code of Criminal Procedure, 1973

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Section 144 of the Code of Criminal Procedure 1973 confers wide powers on executive authority to issue an order barring "assembly of more than five people" at a given area.[1] The "District Magistrate, Sub-divisional Magistrate or any other Executive Magistrate"[2] have the power to pass any order "directing any person to abstain from a certain act or to take certain order when there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable."[3] The constitutionality of Section 144 has been consistently upheld by the Supreme Court of India. However, no principles have been laid down to manage its exercise. In a series of judgments, the urgency of the situation has been laid down as the essence of this section, without providing any explanation or illustrations for the same. Although High Court has the power to review such orders, most of the time it turns out to be a cumbersome process and thus, ineffective. To prevent Section 144 from violating the fundamental right of freedom of assembly of citizens under Article 19 (1) (b) of the Constitution of India, specific restrictions must be laid down on this absolute power of the Magistrate.

Keywords: *section 144, crpc, magistrate.*

1 Sudipto Sarkar & V R Manohar, *Code of Criminal Procedure* (Sarkar, Wadhwa and Company, Nagpur 2007)
2 Code of Criminal Procedure 1973, s 144(1)
3 *Ibid*

SCOPE OF THE RIGHT TO FREEDOM OF ASSEMBLY

All citizens of our country have the right "*to assemble peaceably and without arms*"[4] under Article 19 (1) (b), Constitution of India. It follows that the freedom of citizens to meet and interact with others in any number is guaranteed, subject to two conditions:

- The assembly should be peaceful.
- It should be unarmed.[5]

The right to carry out processions would also be covered within the ambit of this provision.[6] However, this fundamental right of citizens is not an absolute one. Before the Constitution came into force, the law had absolute power to abridge this right of the citizens.[7] Now the position has been changed and the State can regulate this right to a limited extent[8] and only "*in the interest of the people*"[9]. Under the Constitution, the State has the power to lay down reasonable restrictions "*in the interests of the sovereignty or integrity of India or public order*".[10] The intent of the Constituent Assembly in inserting the term "*reasonable*"[11] before restrictions was to ensure that there is a check on the unfettered power of the State and that the Courts can look into if the imposed restrictions were "*reasonable, proper, and necessary in the circumstances of the case*".[12]

The same was observed in *Chintaman Rao v the State of M.P.*[13] that "*determination by the Legislature is not final or conclusive and is subject to supervision by the court*".[14] There is "*no abstract standard of reasonableness*[15]" to be followed and each case should be judged based on "*the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and the*

[4] Constitution of India, art 19(1)(b)
[5] Justice Y V Chandrachud & Ors, *DD Basu: Commentary on The Constitution of India* (8th edn, 2 vol, Wadhwa and Company 2007)
[6] Mahendra P Singh, *VN Shukla's Constitution of India* (11th edn, Eastern Book Company)
[7] Dr Subhash Kashyap, *The Framing of India's Constitution, A Study* (2nd edn, Universal Law Publishing 2007)
[8] Arvind P Datar, *Commentary on The Constitution of India* (2nd edn, Wadhwa and Company, Nagpur 2007)
[9] Constituent Assembly Debates, Vol VII, 2 December 1948
[10] Constitution of India, art 19(3)
[11] *Ibid*
[12] Constituent Assembly Debates, Vol VII, 1 December 1948
[13] *Chintaman Rao v the State of MP* [1951] AIR 118 (SC)
[14] *Ibid*
[15] *Harakchand v Union of India* [1970] AIR 1453 (SC) [15]

urgency of the evil sought to be remedied thereby, the disproportion of the imposition and the prevailing conditions at the time"[16]. The reasonableness of the restrictions has to be "*determined objectively from the standpoint of the general public and not of those affected*"[17]. The reasonability of the "*procedural part of the law*" is also required to be considered.[18] The burden of proof to exhibit that the restrictions are within the legitimate limits lies on the State.[19]

Even though the State cannot put a bar on the right to assemble on "*every public street or public place*"[20], it should not be interpreted to mean that citizens have the right to hold meetings at all places according to their wishes as was laid down in *Himat Lal K. Shah v Commissioner of Police, Ahmedabad & Anr.* In this case, arbitrary powers bestowed on the police requiring prior permission for holding a public meeting[21] were invalidated by a Constitution Bench. Even though this right could be regulated, the said Rule was struck down as no guidelines were provided as to when such permission can be denied.[22] Another instance to this observation was laid down in *Railway Board v Niranjan Singh*[23], which provided that there was "*no fundamental right for citizens to hold meetings on Government premises*".

The expression "*public order*" has been laid down to be "*synonymous with public peace, safety, and tranquillity*"[24]. The Supreme Court has interpreted the meaning of the term "*public order*" as "*that state of tranquillity, which prevails amongst the members of a political society as a result of the internal regulations, enforced by the Government.*"[25] It was also observed that "*public order*" should not be interpreted to be the same as "*security of the State*". A restriction could be imposed "*in the interest*

[16] *Ibid*
[17] *Krishnan Kakkanth v Government of Kerala* [1997] AIR 128 (SC)
[18] *Dr NB Khare v State of Delhi* [1950] AIR 211 (SC)
[19] *Saghir Ahmed v State of UP* [1954] AIR 728 (SC)
[20] *Himmat Lal Shah v Commissioner of Police, Ahmedabad &Anr* [1973] AIR 87 (SC) [33]
[21] Bombay Police Act 1951, s 33(1)(o); Rules for Processions and Public Meetings framed by the Commissioner of Police, rule 7
[22] *Harakchand v Union of India* [1970] AIR 1453 (SC) [40]
[23] *Railway Board v Niranjan Singh* [1969] AIR 966 (SC)
[24] *Supdt, Central Prison v Ram Manohar Lohia* [1960] AIR 633 (SC)
[25] *Ramesh Thapar v State of Madras* [1950] AIR 124 (SC) [5]

of public order"[26] only when there exists "*a direct and proximate connection between the restriction and the public order*"[27].

CONSTITUTIONAL VALIDITY OF SECTION 144, CODE OF CRIMINAL PROCEDURE 1973

The Code of Criminal Procedure 1973 contains provisions for reasonable restrictions on the fundamental right "*to assemble peaceably and without arms*"[28]. There are two ways in which this right can be restricted under the Code. The first set of provisions can be used before the gathering of an assembly and the second set are to be exercised for the dispersal of a gathered assembly.[29] Section 144, falling in the former category, confers wide powers on executive authority to issue an order barring "*assembly of more than five people*" at a given area.[30] The "*District Magistrate, Sub-divisional Magistrate or any other Executive Magistrate*"[31] has the powers to pass any order "*directing any person to abstain from a certain act or to take certain order when there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable*."[32]

Before Independence, a similar provision of the second category was enacted for the first time under the British regime as part of The Code of Criminal Procedure 1861. Section 111 empowered a Magistrate or Officer in charge of a Police Station to order any unlawful assembly to be dispersed.[33] It didn't specify on what grounds an assembly can be declared to be unlawful. The Police Act of 1861 bestowed powers on the police to "*direct the conduct of assemblies and processions*"[34].

[26] Constitution of India, art 19(3)
[27] *Rex v Basudev* [1950] AIR 67 (SC)
[28] Constitution of India, article 19(1)(b)
[29] Justice Y V Chandrachud & V R Manohar, *The Code of Criminal Procedure* (Ratanlal and Dhirajlal, Wadhwa and Company, Nagpur 2007)
[30] Sudipto Sarkar (n 1)
[31] Code of Criminal Procedure 1973, s 144(1)
[32] *Ibid*
[33] Code of Criminal Procedure 1861
[34] Police Act 1861, s 30(1)

Section 127 of The Code of Criminal Procedure 1898 provided powers to "*any Magistrate or Officer in charge of a Police Station*"[35] to disperse "*any unlawful assembly or any assembly of five or more persons*"[36] which might cause "*disturbance to public peace*".[37] Extensive powers were provided to the "*Magistrate of the highest rank*"[38] under this Act to get any assembly "*dispersed by military force*"[39] if "*such assembly can't be otherwise dispersed*".[40] The same provision has been enacted under the present Code of Criminal Procedure as Section 129.[41]

Section 144 of the Code of Criminal Procedure 1898 had empowered the magistrate to pass anticipatory orders in this regard in "*urgent cases of nuisance or apprehended danger*"[42]. Under the present Code of Criminal Procedure, sub-section 1 omits the words "*risk or obstruction*[43]". Under sub-section 3 of the present Act, "*persons residing in a particular place or area*[44]" are also brought within the ambit of this section. This seeks to extend the scope of this section under the present Act. Earlier no maximum duration was provided for which the Government could extend the order under sub-section 6 of the Act of 1898, but now it cannot be extended for more than six months under sub-section 4 of the present Act. Now, a bar has been put on the absolute powers of the State Government. Under sub-section 6, the State Government has now been empowered "*to rescind or alter any order made by it*[45]". The provisions of this section have now been made applicable to Metropolitan areas by omitting sub-section 7 of the Act of 1898.

This section is generally used in emergencies.[46] As it is anticipatory, the Magistrate cannot issue an order unless a "*speedy remedy*"[47] is required or there is an apprehension of "*danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, of an affray*."[48] In the case of

[35] Code of Criminal Procedure 1898, s 127
[36] *Ibid*
[37] *Ibid*
[38] Code of Criminal Procedure 1898, s 129
[39] *Ibid*
[40] *Ibid*
[41] Code of Criminal Procedure 1973
[42] Code of Criminal Procedure 1898, s 144(1)
[43] *Ibid*
[44] Code of Criminal Procedure 1973, s 144(3)
[45] Code of Criminal Procedure 1973, s 144(6)
[46] Justice Y V Chandrachud (n 31)
[47] Code of Criminal Procedure 1973, s 144(1)
[48] *Ibid*

Radhe Das vJairam Mahto & Ors.[49], it was laid down that jurisdiction to act under this section can be granted when the following three requirements are fulfilled: -

a) A sufficient ground can be made out in the said case to proceed under this section
b) "*Immediate prevention or speedy remedy*"[50] is desired
c) An order is "*likely to prevent or tends to prevent a disturbance of the public tranquillity or a riot or an affray*"[51]

Still, Section 144 constitutes a restriction on the fundamental right of citizens to assemble freely. The passing of the Citizenship Amendment Act, 2019 by the Parliament on 11th December 2019 led to widespread protests all over the country and the imposition of Section 144 in various States. While such imposition could be justified in some instances, in a few others, it could be called unreasonable. One such instance came up before the Bombay High Court in *Iftekhar Zakir Sheikh v State of Maharashtra & Ors.*[52], which observed that the impugned orders were passed arbitrarily and did not have any valid grounds.

The constitutional validity of this section has been challenged in a catena of cases. This issue first arose before the Supreme Court in *Babulal Parate v State of Maharashtra & Ors.*[53], where an order by the District Magistrate under Section 144 against the union of mill workers carrying out processions was challenged as violative of their right to assemble. Using the same terminology as the section as constituting conditions on the powers of the Magistrate, the Court upheld the constitutionality of this section on the assumption that the Magistrate would exercise these anticipatory powers "*legitimately and honestly*" only in emergencies in the discharge of the executive's "*duty of maintenance of law and order*".

The constitutionality of this section was again upheld in *Madhu Limaye v Sub-Divisional Magistrate, & Ors.*[54], where it was held that "*urgency of the situation*" is the *sine qua non* for acting

[49] *Radhe Das v Jairam Mahto & Ors* [1929] AIR 714 (Pat)
[50] *Ibid*
[51] *Ibid*
[52] Criminal Writ Petition No 223 of 2020
[53] *Iftekhar Zakir Sheikh v State of Maharashtra & Ors* [1961] AIR 884 (SC)
[54] *Madhu Limaye v Sub-Divisional Magistrate & Ors* [1971] AIR 2486 (SC)

under this section. The requirement of "*sudden emergency and grave consequences*" follows from such absolute powers wherein orders may be passed even *ex parte* "*to prevent harmful occurrences*". It was laid down in *Gulam Abbas and Ors. v State of Uttar Pradesh and Ors.*[55] that while proceeding under this section, the Magistrate must regard the established rights of the public "*subject to the paramount consideration of maintenance of public peace and tranquility.*"

The principles established in *Babulal Parate v State of Maharashtra & Ors.*[56] still hold value and are followed by the courts as is evident from the *Ramlila Maidan Incident v Home Secretary, Union of India (UOI), and Ors.* [57]case. In this case, Section 144 was imposed after agitations were led by Baba Ramdev at the Ramlila Maidan in Delhi. The Supreme Court observed: "*It must be borne in mind that the provisions of section 144 CrPC are attracted only in emergent situations... in case of a mere apprehension, without any material facts to indicate that the apprehension is imminent and genuine, it may not be proper for the authorities to place such a restriction upon the rights of the citizen*."[58]

CONCLUSION

Although the Code of Criminal Procedure seeks to curb the arbitrary exercise of power by the Magistrate under Section 144, it cannot be said that the same has been successful in protecting the fundamental right of citizens under Article 19 (1) (b) of the Constitution of India. The Magistrate is empowered to pass an order for a maximum period of two months according to sub-section 4 of the Code. This fetter on his power gets defeated as the same order could be extended for another six months by the State Government. Such an order could also be renewed or revived by the Magistrate. It was observed in *Acharya Jagdishwaranand Avadhut & Ors. vPolice Commissioner, Calcutta & Anr.*[59] that such orders by the Magistrate could not be "*of a permanent or semi-permanent nature*", as it would result in an abuse of power.[60] *Madhu Limaye*[61]case criticized

[55] *Gulam Abbas & Ors v State of Uttar Pradesh & Ors* [1981] AIR 2198 (SC)
[56] *Babulal Parate v State of Maharashtra & Ors* [1961] AIR 884 (SC)
[57] *Acharya Jagdishwaranand Avadhut & Ors v Police Commissioner, Calcutta & Anr* [2012] SCC 5 (SC) [1]
[58] *Ibid*
[59] *Acharya Jagdishwaranand Avadhut & Ors v Police Commissioner, Calcutta & Anr* [1984] AIR 51 (SC)
[60] *Ibid*
[61] *Madhu Limaye v Sub-Divisional Magistrate & Ors* [1971] AIR 2486 (SC) [27]

the passing of *ex parte* orders in the case of emergencies by the Magistrate under sub-section 2 of the Code.

Another question that arises is whether Section 144 would pass the 'constitutional test of vagueness', which was laid down in *Kartar Singh vthe State of Punjab*[62]. The court observed that "*laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly*". Any law could not be rendered void solely on the ground of vagueness[63]. However, a section conferring discretionary powers to the Magistrate should contain clear, certain and definite terms. Such issues with this section were a cause of concern for the drafters of the Indian Constitution as well. While acknowledging the need to impose restrictions on the fundamental right to assemble freely, Shri Syamanandan Sahaya was certain that they should only be in place for a limited time.[64]

The constitutionality of Section 144 has been consistently upheld by the Supreme Court of India. However, no principles have been laid down to manage its exercise. In a series of judgments, the urgency of the situation has been laid down as the essence of this section, without providing any explanation or illustrations for the same. Although High Court has the power to review such orders, most of the time it turns out to be a cumbersome process and thus, ineffective. To prevent Section 144 from violating the fundamental right of freedom of assembly of citizens under Article 19 (1) (b) of the Constitution of India, specific restrictions must be laid down on this absolute power of the Magistrate.

[62] *Kartar Singh v the State of Punjab* [1994] SCC 569 (SC)
[63] *K A Abbas v Union of India & Anr* [1971] AIR 481 (SC)
[64] Constituent Assembly Debates, Vol VII, 1 December 1948