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"MAGISTERIAL ROLE IN
LAW ENFORCEMENT"

BY

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Chapter 9

MAGISTERIAL ROLE IN LAW ENFORCEMENT

Law enforcement is the primary task of the criminal justice administration. As every society requires orderly performance of duties and protection of individual personal and property rights, law enforcement assumes greater importance. The criminal justice administration is broadly understood to include police, magistracy and the courts. Although the Code of Criminal Procedure 1973 provides for judicial magistrates also; the focus in this paper is on Executive magistrates also; who are led by the District Magistrate in a district and the Sub Divisional Magistrate in any sub division.

Section 6 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code) prescribes the classes of criminal courts that shall be there in every State besides the High Court. Following the principle of separation of judiciary from the executive, it places the judicial magistrates under the control of the High Court while the executive magistrates are the under the control of the State Government as their functions are mostly administrative in nature. Section 20 of the Code lays down that the State Government has to appoint as many executive magistrate in a district as it thinks fit. The State Government can also appoint an Additional District Magistrate with the powers of a District Magistrate. Section 21

of the Code makes a provision for the appointment of special executive magistrates for particular areas or for particular functions.

Although the Code lays down the law relating to criminal procedure, yet it gives specific powers to executive magistrates. In order to fully appreciate their role in law enforcement, it is desirable to briefly state their powers under the various provisions of the Code.

In terms of Section 44 (1) any executive magistrate may himself arrest or order any person to arrest an offender and commit him to custody if an offence is committed in his presence. Section 44 (2) empowers any executive magistrate to either himself arrest or direct the arrest in his presence of a person he is competent to issue warrants for his arrest at that time and in the given circumstances. This provision is intended to take care of an unforeseen situation in which an executive magistrate may find himself without any police manpower. Similarly, the District Magistrate and Sub-Divisional Magistrate have the powers to issue search warrants for wrongfully confined persons under Section 97 of the Code and can compel restoration of abducted females under Section 98 of the Code.

Chapter VIII and X give extensive powers to executive magistrates for keeping the peace and maintenance of public order and tranquillity. During the last two decades an increasing trend towards persistent defiance of law and erosion of rule of law is noticeable. The validity of many laws is being challenged on the ground that they have lost their relevance and the democratic inability to enforce socio-economic discipline is leading to a rather frequent disruption of public order. Chapter VIII provides for two kinds of securities to be taken, viz. (a) for keeping the peace and (b) for good behaviour. Sections 106 and 107 deal with the former while sections 108, 109 and 110 deal with security of good behaviour. Section 106 applies when a person is convicted of certain offences while section 107 applies when there is an apprehension that unless prevented, a person is likely to act to the detriment of public peace and tranquillity. Executive magistrates are empowered to act under Sections 107 to 110. These are preventive sections and the purpose is not punishment for offence already committed. The persons proceeded against can be asked to give a bond with or without sureties for a period not exceeding one to three years. Section 107 is intended to prevent local breach of peace between persons over property or other issues. Therefore, it becomes necessary to institute cross proceedings against both the groups. Section 108 makes a provision for seeking security for good behaviour from persons disseminating or abetting or attempting dissemination of seditious matters covered by Sections 124-A or 153-B or 153-A or 295-A of the Indian Penal Code. This section also provides for proceedings against those attempting criminal intimidation or defamation of judges or publicizing and circulating obscene matters covered by Section 292 of the Indian Penal Code. Considering that it is very difficult to gather and substantiate evidence regarding such offences, this section can be used to prevent undesirable and harmful activities. Section 109 is designed to frustrate the criminal activities of persons before they are carried out. Two ingredients are essential of attracting this section namely (a) an attempt to conceal presence and (b) such concealment should be with a view to committing a cognizable offence. Section 110 is intended to deal with those who cannot readily be booked under the ordinary law for serious offences. Clause (f) of the section is specially designed to cover those white collar offenders who habitually commit offences relating to adulteration of food or drug or foreign exchange or customs regulations or hoarding and profiteering or corruption or of offences

under the Protections of Civil Rights Act, 1955. In terms of this section, a person can be asked to furnish a bond for three years instead of one year in sections 108 and 109. It is interesting to note that in these three sections the powers were originally vested in the Judicial magistrate of the first class. But by the Amending Act No. 63 of 1980 jurisdiction has been conferred exclusively on the executive magistrates. This amendment came into effect from 29th September, 1980.

It may be noted here that an order under Section 111 is a condition precedent to further steps to be taken under Chapter VIII. In fact omission to issue this order renders all further proceedings void. This order must indicate the substance of information received by the executive magistrate, the amount of the bond, the term for which it is to be in force and the number, character, and class of sureties (if any) required to be furnished. This order is in reality a show cause notice. The person against whom the order is made is expected to file a reply to this notice and to participate in the inquiry as to the truth of information. In terms of Section 116 Sub Section 6, this inquiry should be completed within a period of six months from the date of its commencement, and if such inquiry is not so completed, the proceedings shall on the expiry of the period stand terminated and revived only after special reasons have been recorded in writing. If the non-applicant is arrested then, he has a right to bail and the available case law prescribes that needless impediments should not be placed in the way of his being admitted to bail (*Mir Hashmali V. Empror* 19 Cr. L.J., 329). Sub Section 3 provides that during the currency of the inquiry if immediate measures are required then the person can be required to execute a bond with or without sureties and the term should not be more onerous than those specified in the order under Section 111. In the event of his failure to do so, the person can be detained up to the conclusion of the inquiry or a period of six months, whichever is earlier. An order for interim bond is to be passed only in emergent cases and on the basis of some materials which can persuade the Executive magistrate to feel satisfied. The normal practice is that a statement of the station house officer is recorded for the purpose.

The provisions of Sections 107, 111 and 116 as also of Section 151 are used together in practice. Section 151 authorizes a Police officer to arrest without warrant and without orders from a magistrate in the commission of a cognizable offence cannot be otherwise prevented. It is the subjective satisfaction of the Police Officer that is relevant. However, nobody can be detained beyond twenty four hours. The usefulness of the provisions is enhanced by the fact an order for interim bond is not appealable and relief can be sought from the High Court only in terms of Section 482 Cr. P. C. Section 121 confers the power on an executive magistrate to reject the surety. It also provides for an inquiry by a subordinate magistrate if deemed necessary. The inquiry must be made by examining witnesses on oath. However, before finally rejecting a surety, the executive magistrate is expected to give him an opportunity to say something on his own behalf. Sub Section 3 of Section 122 specifies that the period of imprisonment for failure to give security cannot exceed three years. Such imprisonment for proceedings under sections 107 and 108 has to be simple and where the proceedings have been taken under section 109 or 110, it can be simple or rigorous as per the directions of the magistrate in each case. Section 123 (1) gives powers to District Magistrate to discharge conditionally or unconditionally, any person who has been imprisoned for failure to give security. The High Court or Court of Session and the District Magistrate may make an order, reducing the amount of security or the number of sureties or the time period for which the security has been demanded from the imprisoned person.

Section 131 gives very wide powers to District Magistrate, Sub-Divisional Magistrate or any other executive magistrate specially empowered by the State Government to make conditional order for removal of obstruction or nuisance from any public place or from any way, river or channel which can be lawfully used by the public. An order can also be made regarding regulation or prohibition of such trade or occupation or the storage of any goods that is injurious to the health or physical comforts of the community. This section also covers construction of buildings, disposal of any substance and fencing of tanks, wells, excavations, repair or destruction of dangerous structures or trees or animals. The person to whom such order is addressed has the option of either carrying out the order or of representing against it. Such orders cannot be called into question in any civil court. If so needed, the magistrate can order local inspection and examination of experts as witnesses. Section 142 empowers such magistrates to issue such injunction, pending enquiry, as may be necessary to obviate or prevent danger or injury. In case of default the magistrate can himself use or cause to be used such means as he thinks fit to obviate danger or to prevent injury. Sub-Section 3 provides for indemnity against civil suits for anything done in good faith.

An order may be issued to any person not to repeat or continue a public nuisance as defined in section 268 of the Indian Penal Code or in any special or local law. This provision can be used to give more teeth to local laws but it seems it is rarely if ever used in practice.

Section 145 of the Code enables executive magistrates to provide a speedy remedy for the prevention of breaches of peace arising out of disputes relating to immovable property. An executive magistrate can intervene and pass a temporary order in regard to the possession of such property. This order remains in operation until the title of one of the parties has been determined by a competent civil Court. This section does not apply to disputes between Government and private parties as it is meant to provide an additional weapon for maintaining peace. In term of sub section 8, the magistrate can make an order for the proper custody or sale of such property. Attachment of disputed property can be ordered under Section of 146 in cases of emergency or where the magistrate is unable to decide the question of possession or finds that none of the parties was in possession. A receiver can also be appointed and he is entitled to such remuneration as may be fixed by the magistrate in his discretion. The order of attachment can either be withdrawn when there is no likelihood of breach of peace or in the event of a decision by a competent court regarding the entitlement to possession.

Section 147 applies to disputes as to the right to use any land or water as distinct from disputes as to title or possession. Where a party claims the right to use the land either as a public road or as a pathway, it would seem that section 147 is a more appropriate section than section 145. The existence of a dispute over a right of user of any land or water, likely to cause a breach of the peace is the basis of the executive magistrate's jurisdiction. By "right" is meant legal right and the magistrate must record his satisfaction in the preliminary order. For example, the right to let off water by the natural course so as to prevent inundation of one's own land is a natural right to ensure proper enjoyment of one's own land. Where another party erects a bund to prevent the flow of such water, the executive magistrate has jurisdiction to direct the removal of the bund. Similarly, the right to fish in a pond and a dispute regarding right to use a ferry come within the scope of this section.

Section 144 is closely linked to the question of use of force to disperse unlawful assemblies.

Although, the section gives very wide powers to deal with urgent cases of nuisance or apprehended danger, yet, when read with sections 129, 130, 131 and 132 it provides for the scheme of use of civil force or armed forces for dispersal of unlawful assemblies. Section 129 states that the members of any unlawful assembly or any assembly of five or more persons likely to cause a disturbance of public peace shall disperse when commanded to do so by any executive magistrate or officer-in-charge of a police station or in his absence by a sub-inspector of police. If the assembly does not disperse, then, it can be dispersed by civil force by arresting the persons, if necessary. This section contemplates two kinds of assemblies - (a) an unlawful assembly within the meaning of section 141 of the Indian Penal Code and (b) an assembly of five or more persons likely to cause a disturbance of public peace. For disobeying the command to disperse the former kind of assembly is punishable under section 145 and the latter can be arrested under section 151 of the Indian Penal Code.

The degree of force that may be used for dispersing an assembly depends upon the nature of such assembly and the determination of its members in continuing with their activity. It has been observed by courts that the quantum of force to be used cannot be weighed with the sense of a detachment and objectivity which may be available when one has time to reflect. The use of force contemplated in this section is something akin to the use of force in the exercise of the right of private defence of person or property.

Section 130 empowers the executive magistrate of the highest rank present to requisition armed forces to disperse unlawful assemblies and to arrest and confine persons forming part of such assemblies if it is necessary to do so for purposes of public security. This section leaves it to the discretion of the officer in command as to how he will disperse the assembly or make arrests. Section 131 goes a step further and gives powers to any commissioned or gazetted officer of the armed forces to disperse a unlawful and to arrest and confine any person forming part of it if public security is manifestly endangered and no executive magistrate can be communicated with. However, as soon as it become practicable to communicate with an executive magistrate, the officer-in-charge of the armed force is under an obligation to communicate with him and to carry out his instructions. It may be mentioned here that there are three Acts passed by the Parliament to constitute the armed force of the union, viz. (1) The Central Reserve Police Force Act, 1949; (2) The Border Security Force Act, 1968; and (3) The National Security Guard Act, 1986. Section 132 provides comprehensive indemnity against prosecution to executive magistrates, police officers and members of the armed forces for actions undertaken in good faith.

However, action is rarely taken under these sections without first resorting to the provisions of Section 144. The omnibus power of this section has been used by the magistrates in a wide range of situations. The section is used only in an emergency. The power can be exercised for the purpose of preventing obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety or a disturbance of public tranquillity or a riot or an affray. An ex-parte order can be passed when there is no time to serve a notice and it can be directed against a particular individual or to persons residing in a particular place or area or to the public generally when frequenting or visiting a particular place or area. An order under this section can be passed by either a District Magistrate or a Sub Divisional Magistrate or an executive magistrate specially empowered by the State Government. The following orders can be lawfully passed :-

- (1) An order prohibiting burials in certain places on sanitary grounds.
- (2) An order prohibiting a procession on the ground that the magistrate would not be able to prevent a breach of the peace with the force at his disposal.
- (3) An order restraining other persons from reciting sankalpam on the bathing ghat of a holy tirtha.
- (4) An order prohibiting a meeting, if owing to the prevalence of ill-feeling between certain persons likely to attend the meeting, a breach of the peace is to be apprehended.
- (5) An order prohibiting slaughter of any cow or bullock within a specified boundary.
- (6) An order restraining a person from building a wall.

The list is illustrative and not exhaustive. The Supreme Court has also held in *Gulam Abbas Vs State of U.P.* (AIR 1981 SC 2198) that an order under this section is not a judicial order but an executive order. Therefore, it is not open to revision. Disobedience to an order is punishable under section 188 of the Indian Penal Code.

In addition to the Code of Criminal Procedure, District Magistrate, Additional District Magistrate and even Sub-Divisional Magistrate are empowered by the State Government to pass restriction orders under the laws enacted by the State legislatures. These local laws are known as "Goonda Act" in common parlance. For example, the Madhya Pradesh State Security and Public Order Act, 1980 provides for dispersal of anti-social elements and previous convicts and restricting of access to certain places and areas. Powers can also be exercised to control uniforms, camps, drills and use of pathways and roads. Section 36 of this Act authorizes the District Magistrates and specially empowered Additional District Magistrates to order preventive detention of any person with a view to preventing him from acting in any manner prejudicial to the security of State or the maintenance of public order.

There are two Central Acts also which empower the District Magistrates to order preventive detention. They are (a) The National Security Act, 1980 and (b) Prevention of Black marketing and Maintenance of supplies of Essential Commodities Act, 1980. The powers can be exercised with a view to preventing a person from acting in any manner prejudicial to the security of the State or maintenance of public order or maintenance of supplies and services essential to the community. The detention orders are amenable to the writ jurisdiction of the Supreme Court and the High Courts. However, the courts cannot question the subjective satisfaction of the detaining authority so long as it is not the result of malafide exercise of authority. Further, the grounds of detention must bear some nexus to the purpose of detention and the procedural requirements should be fully complied with. A perusal of the record should reveal bonafide application of mind by the detaining authority. These powers have been extensively used all over the country.

It became necessary to dwell at some length on the powers enjoyed by the executive magistrates because these are being increasingly forgotten. The ever increasing tendency is to administer through special laws. However, it would be relevant to broadly list the basic powers of revenue functionaries as all executive magistrates are primarily revenue officers. Land Revenue Acts passed by the State legislatures confer wide variety of powers relating of changes and correction in land records, survey of encroachments and their regularisation/removal, regulation of community rights, rights in trees and their fruits, diversion of agricultural land for non-agricultural purposes and appointment and termination of village officers as also recovery of government dues. In the

quality of armaments. Despite this superiority they find it difficult to operate without extraordinary laws. Firstly, the areas of their operation have to be declared "disturbed areas" and then "special powers" have to be conferred to enable them to operate on their own. The special powers must include the power to fire upon or otherwise use force even to the causing of death and to destroy camps and hideouts etc. Further, powers have to be delegated to the level of Havildar.

For example, section 4 of the Punjab Disturbed Areas Act, 1983 reads as follows :-

"Any Magistrate or Police Officer not below the rank of Sub Inspector or Havildar in case of Armed Branch of the Police may, if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning, as he may consider necessary, fire upon, or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area, prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances".

However, their superiority cannot last for more than twenty four hours as the arrested persons must be produced before a magistrate within that period, seized arms and property have to be made over to the nearest police station with the least possible delay for disposal as per the Code of Criminal Procedure. Further, their independent operations tend to alienate the civil police and the executive magistracy. Consequently, they lose the goodwill and the resourcefulness of the local administration as also its human touch. It may not be an exaggeration to say that the provisions of the Code, the local public order laws and the National Security Act should be sufficient to deal with any contingency or situation if there is close cooperation between the civil police and the executive magistracy. And it should not be difficult to achieve this objective because they have no competing interests.

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