

EXECUTIVE MAGISTRACY UNDER THE CODE OF CRIMINAL PROCEDURE, 1973 AND A REVIEW OF THE PREVENTIVE POWERS OF EXECUTIVE MAGISTRATES

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ABSTRACT

Executive Magistracy in India under the Code of Criminal Procedure, 1973 (CrPC) retains elements of the British system of Magistracy where non-experts of law are appointed and empowered by government to bind over persons suspected of indulging in breach of public peace to be of good behaviour. While in India, the Code of Criminal Procedure, 1973 has distinguished the functions of Executive and Judicial Magistrates. The nature of proceedings before Executive Magistrates is quasi-judicial. The power to bind over a person to be of good behaviour extends to getting him to execute a bond which the Executive Magistrate can also require to be secured by persons who can stand surety to the person undertaking to be of good behaviour. The standard of proof required to satisfy an Executive Magistrate about the likely breach of peace is not one beyond reasonable doubt but proceeds upon preponderance of probabilities. This article traces the origins of Executive Magistracy through the different Codes of Criminal Procedure as were applicable to India and reviews the system as it exists under the present Code of Criminal Procedure, 1973 and studies the relevance and impact of such powers and proceeds to propose certain legislative changes in the present system.

I. The Beginnings of Executive Magistracy and Vestiges of the Raj

Executive Magistracy can be safely stated to be a vestige of the British Rule in India. The definition of 'Magistrate' under the Code of Criminal Procedure, 1861 is an apt pointer of the inception of 'executive' magistracy in India:

'14. The words "Magistrate of the District" shall mean the Chief Officer charged with the executive administration of a District in criminal matters by whatever designation such Officer is called

15. The word "Magistrate" shall include all persons exercising all or any of the powers of a Magistrate.

16. The words "the powers of a Magistrate" shall imply the full powers of a Magistrate.

17. The words "any of the powers of a Magistrate" shall denote powers less than the full powers of a Magistrate.¹

The power to '**bind over persons to keep the peace**' can be traced back to the Justices of the Peace Act, 1361² in England and Wales which is in vogue to this date and an order of a Magistrate binding a person over to keep the peace can be appealed against³. The need to appoint '**good lawful men**'⁴ to perform this function was necessitated by King Edward's long absence from his domains while he was busy with the crusade⁵. The Justices of the Peace Act, 1361 defines the role of 'Magistrates' as follows - '*I Who shall be Justices of the Peace. Their Jurisdiction over Offenders; Rioters; Barrators; They may take Surety for good Behaviour.*

¹ Code of Criminal Procedure, 1861, <http://bombayhighcourt.nic.in/libweb/oldlegislation/crice1861/Code%20of%20Criminal%20Procedure,%201861.html>, Accessed on 4th September 2017

² http://www.cps.gov.uk/legal/a_to_c/binding_over_orders/#a02, Accessed on 4th September 2017

³ <http://www.legislation.gov.uk/ukpga/Eliz2/4-5/44>, Accessed on 4th September 2017

⁴ Kiralfy, A.K.R., '*Potter's Historical Introduction to English Law*', 4th Edition, New Delhi, Universal Law Publishing Co., 2010, Part 2, Chapter 9, p. 228

⁵ Kiralfy, A.K.R., '*Potter's Historical Introduction to English Law*', 4th Edition, New Delhi, Universal Law Publishing Co., 2010, Part 3, Chapter 4, p. 351

*First, That in every County of England shall be assigned for the keeping of the Peace, one Lord, and with him three or four of the most worthy in the County, with some learned in the Law, and they shall have Power to restrain the Offenders, Rioters, and all other Barators, and to pursue, arrest, take, and chastise them according their Trespass or Offence; and to cause them to be imprisoned and duly punished according to the Law and Customs of the Realm, and according to that which to them shall seem best to do by their Discretions and good Advisement; . . .; and to take and arrest all those that they may find by Indictment, or by Suspicion, and to put them in Prison; and to take of all them that be [not] of good Fame, where they shall be found, sufficient Surety and Mainprise of their good Behaviour towards the King and his People, and the other duly to punish; to the Intent that the People be not by such Rioters or Rebels troubled nor endamaged, nor the Peace blemished, nor Merchants nor other passing by the Highways of the Realm disturbed, nor [put in the Peril which may happen] of such Offenders: . . .*⁶ (emphasis supplied here) The power of Magistrates or Justices of Peace to 'bind over' persons to keep the peace is continued by s. 115 of the Magistrates' Courts Act, 1980⁷ as applicable to England and Wales⁸.

The institution of Justices of Peace with power to try and punish petty offences and bind over persons suspected to be capable of causing a breach of the public peace by Commission of the Crown combined the exercise of both judicial and executive functions⁹ and does so to this day¹⁰. The same fusion of functions was in evidence under the Code of Criminal

⁶ <http://www.legislation.gov.uk/aep/Edw3/34/1/section/I>, Accessed on 4th September 2017

⁷ https://www.legislation.gov.uk/ukpga/1980/43/pdfs/ukpga_19800043_en.pdf, Accessed on 4th September 2017

⁸ <https://www.legislation.gov.uk/ukpga/1980/43?view=extent>, Accessed on 4th September 2017

⁹ Kiralfy, A.K.R., *Potter's Historical Introduction to English Law*, 4th Edition, New Delhi, Universal Law Publishing Co., 2010, Part 2, Chapter 9, pp. 227, 230

¹⁰ <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/magistrates/>, Accessed on 5th September 2017

Procedure, 1861¹¹, the Code of Criminal Procedure, 1872 (Act No. X of 1872)¹² and the Code of Criminal Procedure, 1898 (Act No. V of 1898)¹³.

'Magistrates' in England and Wales remain, to this day, a class of adjudicators who are not necessarily experts in law¹⁴. Perhaps this origin of a lay magistracy has led to the retention of separate references to 'Judges and Magistrates.'¹⁵

Under the Code of Criminal Procedure, 1861, a Magistrate who was *not* a Justice of Peace under the Code, could not conduct trial but only hear complaints, issue warrants of arrest and hold arrested persons to bail. Only a Justice of Peace could try and punish under certain statutes summarily and without a jury, investigate charges so as to commit or discharge the accused person and prevent breaches of peace¹⁶.

II. Post-Independence Separation of Executive and Judicial Magistracy

The Statement of Objects and Reasons of the Code of Criminal Procedure, 1973 (Act 2 of 1974) (hereinafter 'CrPC') at paragraph no. 4 refers to the Fourteenth Report of the First Law Commission which deals with the recommendation on separation of judicial and executive functions. Section 3(4) of the CrPC also specifically provides for construction of terms wherein the functions exercisable by Magistrates inasmuch as they involve appreciation of evidence, punishment, penalty, custody pending investigation, inquiry or trial, committal of cases for trial

¹¹<http://bombayhighcourt.nic.in/libweb/oldlegislation/crpic1861/Code%20of%20Criminal%20Procedure,%201861.html>, Accessed on 5th September 2017

¹² <http://bombayhighcourt.nic.in/libweb/oldlegislation/crpic1872/Chapter%201%20to%2018.pdf>, Accessed on 5th September 2017

¹³ <http://bombayhighcourt.nic.in/libweb/oldlegislation/CRIPC1898/Chapter%201%20to%2010.pdf>, Accessed on 5th September 2017

¹⁴ <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/magistrates/>, Accessed on 5th September 2017

¹⁵ section 197(1) of the Code of Criminal Procedure, 1973 (Act 4 of 1974)

¹⁶ Bannerjee, Dr. Tapas Kumar, '*Herbert Cowell's History and Constitution of the Courts and Legislative Authorities in India*', R. Cambray & Co. Pvt. Ltd., Kolkata, 7th Edition 2008, Chapter VII 'Later History: The Presidency Town System [1781 - 1872]', p. 181

are to be construed to be exercisable by Judicial Magistrates¹⁷ and inasmuch as they concern administrative or executive matters such as the granting of licence, suspension or cancellation of licence, sanctioning a prosecution or withdrawing from a prosecution, are to be construed to be exercisable by Executive Magistrates¹⁸. The functionality of Executive Magistrates, thus has specific sanction under the CrPC.

Section 478 of CrPC as originally enacted in 1974 read as under -

'478. If the State Legislature by a resolution so requires, the State Government may, after consultation with the High Court, by notification, direct that—

(a) references in sections 108, 109 and 110 to a Judicial Magistrate of the first class shall be construed as references to an Executive Magistrate;

*(b) references in sections 145 and 147 to an Executive Magistrate shall be construed as references to a Judicial Magistrate of the first class.'*¹⁹

Under the 1974 Code, it was provided that proceedings under sections 108, 109 and 110 of the CrPC would be conducted before Judicial Magistrates of the first class while those under sections 145 and 147 of the CrPC would be conducted before Executive Magistrates²⁰. This position was altered by the Code of Criminal Procedure (Amendment) Act, 1980 (63 of 1980) wherein the provisions were altered and proceedings under sections 108, 109 and 110 of the CrPC were to be conducted by default before Executive Magistrates. This amendment provided that the State Government could, upon a resolution passed by the State Legislature, in consultation with the High Court, amend the references to Executive Magistrates in sections 108, 109, 110, 145 and 147 of the CrPC to mean references to Judicial Magistrates. The State of Maharashtra had before this, vide Maharashtra Act 1 of 1978 sections 2 and 5, provided that

¹⁷ s. 3(4)(a) of the Code of Criminal Procedure, 1973 (2 of 1974)

¹⁸ s. 3(4)(b) of the Code of Criminal Procedure, 1973 (2 of 1974)

¹⁹ <http://egazette.nic.in/WriteReadData/1974/E-1272-1974-0004-56219.pdf>, Accessed on 7th September 2017

²⁰ *Ibid*, pp. 47, 48

proceedings under sections 145 and 147 in the area of Greater Mumbai can be conducted before a Metropolitan Magistrate.

Section 478 of CrPC as amended by the Code of Criminal Procedure (Amendment Act 63 of 1980) provides that the State Government may, if the Legislative Assembly of the State so permits by resolution, after consultation with the High Court, by notification, direct the powers exercisable by an Executive Magistrate under sections 108, 109, 110, 145 and 147 of CrPC to be exercised by a Judicial Magistrate. Accordingly, the State of Maharashtra has passed Maharashtra Act 1 of 1978 vide which powers under sections 145 and 147 of CrPC are to be exercised by Metropolitan Magistrates in the Metropolitan area of Mumbai and by Executive Magistrates in other areas.

The anomaly in the view that although proceedings under sections 108, 109 and 110 of CrPC may be conducted before Judicial Magistrates but those under section 107 ought to be conducted before Executive Magistrates is criticised severely by the Delhi High Court in the case of *Sunil Batra v/s. Commissioner of Police, Delhi*²¹ where the conferring of powers of Executive Magistrates especially upon senior Police officers was deprecated in the following words –

'(6) UNFORTUNATELY, however, the responsibility for vesting the powers under Section 107 exclusively in the Executive magistrate is to be laid at the doors of the Law Commission which in its 41st Report published in 1969 recommended that the functions in this section should be assigned to the Executive Magistrate and that it is not necessary to invest the Judicial Magistrates with the concurrent powers. How one little gate-way which destroys the concept of separation of executive and judiciary can result in wider power being snatched by the executive is clear from the history of legislation of Sections 108 to 110 of the Criminal

²¹ 1984 (3) Crimes 771

Procedure Code. In that very report (41st) the Law Commission had noted that as power under sections 108 to 110 affects the liberty of the person against whom the proceedings are instituted, it is desirable to vest those powers exclusively in judicial magistrates. The Law Commission also did not think that the powers under these sections need be vested concurrently in both the judicial and executive magistrates although this was the position in some States at present. According to the Law Commission under a statutory scheme of separation, such a system is likely to create confusion and even otherwise has nothing to commend it. The law Commission, however, did not realise that having provided an opening that the proceedings under Section 107 which also deal with liberty of citizens, may vest in the Executive Magistrates, this argument had lost its punch. Though in the un-amended Code of Criminal Procedure 1973 Sections 108 to 110 require proceedings to be taken before a judicial magistrate of the first class the said part was amended by Act No. 63/80 by substituting the word "executive Magistrate" for a "judicial Magistrate". It is indeed ironical that though the legislature may seek to justify the provision of a "executive Magistrate" in Section 107 by seeking aid from the report of the law Commission, yet at the same time it should have overturned it when amending the Code in 1980 and thus acting against the specific recommendation of the Law Commission with regard to Sections 108 to 110 Criminal Procedure Code. The position in Delhi, however, is even worse. In the other States where the office of Police Commissioner does not exist, the exercise of power under Section 107 is at least exercised by the Executive magistrate who belong to administrative service and is not concerned with day to day maintenance of law and order, and may therefore, make an attempt to bring an objective approach to the problem. But in Delhi we are governed by the Delhi police Act, 1978 which is in force since 1-7-78. Section 70 of the said Act authorises the Central Government to empower the Commissioner or any other subordinate to the Commissioner of Police not below the rank of an Assistant Commissioner of Police to

exercise and perform in relation to Such area in Delhi as may be specified in the notification, the powers and duties of an Executive Magistrate under such of the provisions of the said code as may be specified in notification No. SO 422 published in the gazette of India, Extraordinary Part II, dated 20-11-1978 empowering every Additional Commissioner of Police, Deputy Commissioner of Police, Additional Deputy Commissioner of Police and Assistant Commissioner of Police to exercise and perform in relation to all area in the Union Territory of Delhi the powers and duties of an 'executive magistrate under Sections 107, 111, 113, 115, 116, 117, 118 and 121. Thus in Delhi the capital of republic of India proceedings which have serious repercussions concerning the liberties of the citizens of India are to be controlled by police officers exercising the powers of executive magistrates. A more serious in-road on the concept of separation of powers between instrumentalities States, namely the judiciary and executive is hard to imagine though unfortunately the ancestry for then situation may be traced back to peculiar recommendation of law commission report. But whatever the source, the seriousness of the situation is not lessened. Need one be surprised at the consequences which must inevitably flow from such a retrogressive step.²² (emphasis supplied here)

The conferring of powers under section 107 of CrPC upon senior Police officers by constituting them Special Executive Magistrates was challenged before the Bombay High Court in the case of Mohammed Salim Khan which ruled that being Special Executive Magistrates, they cannot be conferred powers under section 107. However, this view was reversed by the Supreme Court in *State of Maharashtra v/s. Mohammed Salim Khan and Ors.*²³

²² *Ibid*

²³ (1991) 1 SCC 550

and consequently, senior Police officers can be appointed as Special Executive Magistrates to exercise powers of Executive Magistrates *inter alia* under section 107 of CrPC²⁴.

The Bombay High Court has also deprecated the appointment of senior Police officers as Executive Magistrates for the purpose of conducting preventive proceedings under section 107 of CrPC in the case of *Surendra s/o Ramchandra Taori v/s. State of Maharashtra and Ors.*²⁵ in the following words: '*...we should record that vesting of powers of Special Executive Magistrate in Police Officers of whatever rank they may, has resulted in blatant misuse of such powers to the detriment of fundamental right of a citizen as enshrined in Article 21 of the Constitution of India. Very few cases reach the High Court relating to the proceedings before Special Executive Magistrate concerned with Chapter VIII of Criminal Procedure Code. This Court has no hesitation to take a judicial notice of the fact that if there is a survey conducted in the jails in the State of Maharashtra of the under trial prisoners languishing in jail, most of them are those who are arrested in petty offences and surprisingly a reasonable number of such persons are those against whom proceedings under Chapter VIII have been initiated. At least we have not come across any case in which when such proceedings are challenged either by way of revision before the Sessions Court or by invoking the writ jurisdiction of this Court, a detention of a person against whom proceedings under Chapter VIII is pending, was found to be justifiable. Therefore, in our humble opinion, it is high time that the State, which is duty bound to protect the fundamental right of its citizen and particularly relating to their liberty, should resort to section 478 of the Code of Criminal Procedure which vests in the State powers to order functions allocated to Executive Magistrate and such powers vested in favour of Police Officers as Special Executive Magistrate particularly in reference to Chapter VIII proceedings as they are commonly known and relate to sections 108 to 110 as well as sections 145 and 147*

²⁴ Circular No. EXM-0788/2783/SPL-2 dated 8th August 1991

²⁵ 2002 BCR 128 (Cri.)

of the Criminal Procedure Code to be made over to Judicial Magistrate of the First Class or Metropolitan Magistrate as the case may be.' Thus, the Bombay High Court has recommended that the State Government may exercise its powers under section 478 of CrPC to transfer the powers exercisable under sections 108, 109, 110 and 145 and 147 to Judicial Magistrates of the first class. However, this would still leave out a lacuna as described in the case of *Sunil Batra* (supra) whereby powers under section 107 of CrPC would still remain to be exercised by Executive Magistrates who could be senior Police officers in areas where Police Commissionerates are constituted.

III. **The rationale, relevance and desirability of Magistracy outside the regular judicial setup to 'keep the peace'**

Any form of 'Magistracy' as seen *supra* has for its functionality, the fusing of judicial and executive functions in order to perform the classical 'peace keeping' functions. In fact, a separate cadre of 'Judicial Magistrates' as it exists under the present CrPC, is a deviation from the classical function and purpose of Magistracy which was ground-level summary justice and peace-keeping. In the original sense, 'Judicial Magistracy' is oxymoronic, as the very idea of 'Magistrate' is meant to signify an officer vested with some judicial powers but one who is not an expert 'lawyer judge' as seen *supra*. However, now that we adhere to the principle of separation of judicial and executive powers, it is apposite to review the vestiges of the colonial systems and adopt a fairer procedural methodology for exercising the powers of preventive justice.

It would have made sense to a colonial power occupying a vast sub-continent to have a completely fused executive-judicial setup as seen in the form of the Codes of 1861, 1872 and 1898. In independent India, the principle of separation of judicial and executive powers and functions which is envisioned by Article 50 of the Constitution of India as a directive principle

of state policy, ought to be implemented in its true and full sense. In this regard, the ambiguity surrounding the exercise of what are technically, quasi-judicial powers by officers who may also be Police officers in areas which have Police Commissionerates, using sections which do not objectively specify the cases in which they may use their vast powers to prevent but not punish, but which carry with them all the effects and curbs on the fundamental right to freedom *in pari materia* with punitive actions, seems out of sync with India's Constitutional values and regressive instead of progressive.

The researcher submits that the non-Magisterial preventive powers of the Police like the ones under sections 149 and 151 of the CrPC outside the area of '*proceedings conducted as summons cases*' are sufficient to take care of immediate threats to public peace. As for perceived and apprehended threats to the public peace, the same can be dealt with by judicial officers who may be assigned to hear only such cases if such apprehension be grave and immediate. But to hold on to a colonial legacy by citing the urgency of such threats to public peace would be to imply that the executive cannot ordinarily establish and ensure peace and harmony in society, which would be plainly absurd.

IV. Absence of Objective Statutory Provisions as to apprehensions of breach of peace and lack of first appellate forum

It may be seen from the bare provisions of sections 107 to 109 of CrPC that there are indeed a very few objective criteria and that the satisfaction of the executive magistrate is subjective one, which must be based on objective facts. Section 110 of CrPC provides for objective criteria for the exercise of preventive powers. In fact, once such objective facts exist, the Executive Magistrate can be directed by mandamus or by specific relief to exercise his powers²⁶. The researcher submits that extraordinary and discretionary remedies cannot take the

²⁶ *Commissioner of Police, Bombay v. Gordhandas Bhanji*, AIR 1952 SC 16

place of an objective standard and are too indirect for situations where objective standards ought to exist, which leaves room for capricious application by the executive.

It is also submitted that an aggrieved applicant has no appellate/revisonal remedy under the CrPC to challenge the non-exercise of discretion by an Executive Magistrate. The forms provided under Schedule II vide section 476 of the CrPC however, provide for an application that may be moved by a private party before an Executive Magistrate. An Executive Magistrate is not constrained to receive information about possible breach of public peace from the police alone²⁷ and is empowered to receive such information from private persons as well. The reason is that a private person can be as interested in the maintenance of peace as the State itself. The model form under Schedule II of the CrPC also contemplates this. Therefore, it is essential that there must be a first appellate/revisonal forum before the District and Sessions Court for challenging the non-exercise of this discretion by the Executive Magistrate, as much as there is an appeal against the orders directing sureties etc.

The Hon'ble Bombay High Court has made the following observations and passed the following directions in the case of *Pravin Vijaykumar Taware v. Special Executive Magistrate, Baramati and Anr.* (Criminal Writ Petition No. 2682 of 2008)²⁸ :

*'When a person is appointed or posted as an Assistant Commissioner of Police, he is almost mechanically appointed as an Executive Magistrate and is given authority to execute powers under Chapter VIII of the Criminal Procedure Code. **Since the Government is not interested in taking away these powers from the Police Officers and handover the powers to judiciary or to revenue officials,** we are inclined to give the following directions :*

²⁷ *Madhu Limaye and Anr. v. SDM, Monghyr and Ors.*, AIR 1971 SC 2486

²⁸ 2009 ALL MR (CRI) 2093 : 2009 (3) MAH.L.J (Cri) 155

(1) That the State Government shall immediately take steps to train its all Executive Magistrates so that they understand as to how the provisions of Chapter VIII of the Criminal Procedure Code have to be applied.

(2) We understand that there is a police academy in the State. All the Executive Magistrate should undergo a crash course. Preferably the Sessions Judges should be invited to teach these Magistrate about the nuances of law, so that the powers are not abused or misused by the Executive Magistrate.

(3) Whenever, an order is passed by a Magistrate at interim stage or at final stage requiring a person to give a bond, he shall be given sufficient time to furnish the bond and the surety.

(4) At the stage of inquiry, the Magistrate shall not ask for an interim bond pending inquiry unless the Magistrate has satisfied himself about the truth of the information sufficient to make out a case for seeking a bond.

(5) Whenever, an Executive Magistrate passes an order under subsection (3) of Section 116 of Chapter VIII of the Criminal Procedure Code directing a person to be sent to jail, a copy of the order shall be sent to the learned Principal Sessions Judge immediately.

(6) On receiving copy of the order, the learned Principal Sessions Judge shall go through the order and if he finds a case of revision, he may intervene under Section 397 of the Criminal Procedure Code.

(7) A copy of the order directing a person to be sent to jail under Chapter VIII of the Criminal Procedure Code shall also be sent to the immediate superior of the Magistrate in his Department.’ (emphasis supplied here)

Thus, it is seen that the Bombay High Court has directed that all orders passed u/s 116 of the CrPC directing a person to be sent to jail during the pendency of preventive proceedings before

an Executive Magistrate must be necessarily subjected to judicial oversight of the Principal Sessions Judge. The directions seem to proceed upon the inability of the Government to hand over the preventive functions of Executive Magistrates to Judicial Magistrates. Therefore, these directions should be scrupulously followed in order to ensure that the special powers that are enjoyed by an Executive Magistrate are used only when it is absolutely necessary and that there is judicial oversight in all such cases.

V. Conclusion

The researcher submits that the regime of Executive Magistracy deserves to be reviewed and the powers of prevention which are currently exercised by Executive Magistrates especially under Chapters VIII and X of the CrPC ought to be handed over to Judicial Magistrates who are specially designated for that purpose.

The researcher also recommends that the law with regard to exercise of preventive powers under these two chapters must be amended to provide for a first appeal and/or revision before the District and Sessions Court and a second appeal before the High Court, as in an appeal the grounds of discussion are not as severely limited as in a proceeding like a Writ Petition where the exercise of powers is discretionary.

Executive officers exercising quasi-judicial powers that range from binding over a person to execute a bond to keep the peace and confining such a person to custody during the pendency of such proceedings to externing a person from certain areas in apprehension of mischief, ought not to be left to the subjective satisfaction of the Executive alone, and call for Judicial oversight and confirmation in all such matters, as is rightly directed by the Hon'ble Bombay High Court in Criminal Writ Petition No. 2682 of 2008 (*supra*).

It is submitted that the executive powers of the Police under sections 149 and 151 are sufficient to deal with immediate threats to peace. Judicial Magistrates' Courts specially

designated for the purpose of dealing with applications of apprehended breaches of peace and with objectively defined criteria for the exercise of such powers would be a fairer means of dealing with such nuisance than relying upon a vestige of the British Raj in the form of officers of the executive branch of government exercising functions which are quasi-judicial and discretionary in nature with no trappings of objective standards in the exercise of such discretion. It would also enable private individuals to approach such Courts where an apprehended breach of peace has the likelihood of affecting a private person's life and property. Providing for first and second appeals would ensure that preventive jurisprudence receives the Judicial attention that it requires.

