

ASSESSING INDIA'S LEGAL FRAMEWORK ON THE RIGHT TO PEACEFUL ASSEMBLY

BY VRINDA GROVER

ICNL

PUBLISHED DECEMBER 2021





ASSESSING INDIA'S LEGAL FRAMEWORK ON THE RIGHT TO PEACEFUL ASSEMBLY

Resource paper for
the International Center for Not-for-Profit Law (ICNL)

TABLE OF CONTENTS

| | |
|---|----|
| EXECUTIVE SUMMARY | 2 |
| ACKNOWLEDGMENTS | 6 |
| I. INTRODUCTION | 7 |
| II. INDIA'S CONSTITUTIONAL PARADIGM ON ASSEMBLY RIGHTS | 10 |
| III. INDIA'S DOMESTIC LEGAL FRAMEWORK FOR ASSEMBLY AND REAL-LIFE APPLICATIONS | 21 |
| IV. INTERNATIONAL LAW STANDARDS AND BEST PRACTICES | 47 |
| V. RECOMMENDATIONS AND CONCLUSION | 71 |

EXECUTIVE SUMMARY

The right to freedom of peaceful assembly is central to democracy. This report maps the Indian legal framework governing the right to freedom of assembly and the right to protest, and analyses how various laws and orders erode the full enjoyment of this constitutionally protected right. It critically examines Indian constitutional law and relevant domestic laws, and undertakes a comparative analysis of the Indian experience against the backdrop of international standards and good regulatory practices on the freedom of assembly. Recommendations are proposed to bring the exercise of the right to freedom of assembly in conformity with the guarantee envisaged under the Indian constitution and international law.

The report notes some of the dichotomies of the Indian approach to regulating assembly, and recent concerning trends, as follows:

- Despite constitutional protections at the national level, the devolution of specific policing powers and law-making to the states has created a web of regulations that dilute protections for free assembly.
- A punitive, security-focused approach has been increasingly deployed in India, amidst a growing trend of demonising and criminalising public protests, including the vilification of assembly organisers.
- Criminal law is often misused to deem peaceful assemblies illegal and unlawful, either through using the absence of official ‘permission,’ or using stray incidents of violence to initiate criminal proceedings against the leaders and organisers.
- India increasingly requires prior permission for assembly, in conflict with international standards that only speak of prior notification systems.
- Local law enforcement agencies have often failed to protect protesters, or encouraged or stood by while agent provocateurs or majoritarian counter protesters have used violent means to attack peaceful protesters.
- Legitimate justifications for restricting assembly have been abused by Indian authorities, who have used public health or traffic considerations as excuses to shut down or prevent assemblies, rather than going to the lengths required under international law to accommodate protests and gatherings.
- Protesters have been penalized using the full range of criminal law, and saddled with prohibitory bail orders, movement limitations, and even bills and liability for alleged property destruction – all measures with a heavy chilling effect.

- Independent journalists reporting on public assemblies are being targeted through arrests and criminal prosecutions charging them with circulating fake news, sedition, and other grave offences; no recognition is accorded to observers or monitors of assemblies in India, further creating a void in accountability mechanisms against State excesses.
- As with many countries during the COVID-19 pandemic, and consistent with a global trend of democratic backsliding, the Indian state used the justification of public health to further curtail the freedom of assembly, expanding the use of prohibitory orders under the Criminal Procedure Code, as well as invoking provisions of the colonial Epidemic Diseases Act, 1897 and The Disaster Management Act, 2005, to prohibit public assemblies and punish violations.

In short, despite some protective laws and jurisprudence around assembly, there is a disturbing trend of growing intolerance towards democratic processes and social movements in India, where inconvenience to everyday life caused by peaceful public protests receives greater attention than the protection and promotion of rights, or the concerns of disadvantaged and marginalised groups.

Following a detailed analysis of the legal framework, standards, and realities around assembly in India, the report proposes the **following recommendations**, among others, for the Government, law enforcement agencies, and the National and State Human Rights Commissions, tailored to bring the substantive and practical framework governing the freedom of assembly in conformity with both international standards and the protections enshrined in the Indian Constitution:

For the Government of India and State Governments:

1. Carry out a comprehensive review of specific public order and Criminal Code provisions and amend the law to ensure that restrictions on the right to



Despite some protective laws and jurisprudence around assembly, there is a disturbing trend of growing intolerance towards democratic processes and social movements in India.

freedom of assembly are in compliance with the Constitution of India.

2. Further direct the Law Commission of India to review all relevant central and state laws, as well as Standing Orders issued by the police and administrative authorities, that restrict the right to freedom of assembly, and recommend legal reforms to the government.
3. Repeal or modify Rules and Administrative Orders to ensure that the existing 'permit regime' is replaced by a 'notification regime' for the holding of public meetings by assemblies.
4. Ensure that absence of 'prior permission' for an assembly does not result in penal sanctions for members of the public assembly.
5. Ensure that members of peaceful assemblies are not burdened with criminal prosecution, especially under anti-terror and sedition laws, merely for non-violent participation in assemblies.
6. Direct that, in the absence of a data protection law, standard operating procedures be prepared and implemented to ensure the right to privacy is protected when public assemblies are filmed or captured by police personnel and stored on State servers.
7. Provide institutional recognition to independent observers and monitors for public assemblies to ensure that rights are respected and there is no abuse of power.
8. Recognise that the right to freedom of assembly extends to digital platforms, and commit to ensuring that arbitrary internet shutdowns will not be ordered in areas where public assemblies have formed or protests are being carried out.
9. Recognise that the State has an added responsibility to protect, facilitate and enable assemblies organised by marginalised and oppressed groups, and take steps to protect assembly participants in case of majoritarian counter assemblies.
10. Ensure that public assemblies are not routinely dispersed under the guise of public convenience.
11. Ensure that designated spaces for protests are in prominent areas of cities where the protest is visible to its target audience.
12. Ensure that India's commitment to international treaties and conventions on freedom of assembly is rigorously implemented and reflected in its domestic laws and policy.

For Law Enforcement and Security Personnel:

1. Carry out training and orientation of police and security personnel on their role as facilitators of the right to freedom of assembly, sensitizing police on their duty to enable and protect non-violent public assemblies, as opposed to 'controlling' or 'managing' them.
2. Ensure that police tactics in dealing with public assemblies emphasise de-escalation based on communication.
3. Train police personnel on use of minimal force as a 'last resort,' not as the default response to assemblies.
4. Establish internal accountability mechanisms to check arbitrary, disproportionate and excessive use of force by police personnel while dispersing public assemblies.

For the National Human Rights Commission (NHRC) and State Human Rights Commissions (SHRC):

1. Nominate observers to monitor and document public assemblies if a request is made by the organiser of the said assembly or protest, especially when there is a threat of counter-assemblies disrupting the assembly.
2. Investigate and produce reports on cases where public assemblies are disrupted by agent provocateurs or State agents.
3. Lay down guidelines for police and administrative authorities to follow to ensure that the freedom of assembly is respected, protected and promoted.

ACKNOWLEDGMENTS

This report was authored by Vrinda Grover. Soutik Banerjee provided assistance in developing ideas, drafting and research. Research assistance was provided by Ratna Appender and Devika Tulsiani. This report was made possible with support from the International Center for Not-for-Profit Law (ICNL), who also helped to design the report. The research team would like to thank all those who were involved in the project.

I. INTRODUCTION

The idea and praxis of the freedom of assembly has been embedded in the popular imagination of people in India since the independence movement. It continues to be a cherished right of individuals as well as a form of collective political expression in India. This is manifest in the nationwide protests held against the Citizenship Amendment Act in 2019-2020,¹ and in the massive protests in 2020-2021 by farmers against three hastily introduced and passed farm laws,² described by some as the largest protest in history.

A country that carries the moniker of ‘the world’s largest democracy,’ home to a diverse and plural population, is bound to generate and fuel social, economic, cultural and political debate, disagreement and dissent. The hallmark of democracy lies in determining how open and attentive the State is towards divergent views voiced via various forms of association, expression and assembly. However, assembly rights have remained particularly contentious, with courts, the State and citizens evidencing different views and interpretations of Indian laws and international standards, with serious implications for the ongoing protection of free assembly in India.

For instance, in a June 2021 judgment, the Delhi High Court granted bail to three young student activists who played a lead role in organising protests against the Citizenship Amendment Act. Following communal violence in Delhi in February 2020, the students were arrested on multiple criminal charges, including for committing terrorist acts under the Unlawful Activities Prevention Act (UAPA). The Court held:

We are constrained to say ... that in its anxiety to suppress dissent and in the morbid fear that matters may get out of hand, the State has blurred the line between the constitutionally guaranteed ‘right to protest’ and ‘terrorist activity.’ If such blurring gains traction, democracy would be in peril.³

The State, however, disagreed with the High Court’s reading of the law and swiftly appealed against the judgment to the Supreme Court, which ordered that, pending consideration by the apex court, this judgment of the High Court was not to be cited as precedent.

Moreover, in February 2021 in the context of the anti-CAA protests, the Indian Supreme Court dismissed a Review Petition against its judgment propounding the ‘designated space’ doctrine, stating: “*The right to protest cannot be anytime and everywhere. There may be*

1 Aditi Malik, Shivajee Mukherjee, Ajay Verghese, “In India Thousands are protesting the new citizenship law. Here are four things to know”, The Washington Post, 31.12.2019. (Accessed on 12.04.2021) at: <https://www.washingtonpost.com/politics/2019/12/31/india-thousands-are-protesting-new-citizenship-law-here-are-things-know/>
Also see, Vasudha Venugopal, “Delhi lockdown: Anti-CAA protests removed from Shaheen Bagh and other places”, The Economic Times, 25.03.2020, Accessed on 12.04.2021, at: <https://m.economictimes.com/news/politics-and-nation/coronavirus-lockdown-delhi-police-vacate-protesters-at-shaheen-bagh/articleshow/74785253.cms>

2 “How farmer’s protest against the three new laws have unfolded over the months”, The Times of India, 03.02.2021, Accessed on: 12.04.2021 at: <https://timesofindia.indiatimes.com/india/how-farmers-protests-against-the-3-farm-laws-unfolded/articleshow/80648849.cms>. A remarkable feature of these protests has also been the significant presence of women in the public assemblies.

3 Devangana Kalita v. State of Delhi (NCT), 2021 SCC OnLine Del 3255, para 48

some spontaneous protests but in case of prolonged dissent or protest, there cannot be continued occupation of public place.” Similarly, as the farmers’ protest marked four months of public assemblies on the outskirts of Delhi, on 29th March 2021, the Indian Supreme Court directed the state authorities to keep the road clear so that vehicular traffic and commuters were not troubled.⁴ A shift in jurisprudence can thus be discerned where a more conservative and restricted reading of the freedom of assembly is being espoused.

These differing interpretations and the importance of protest in Indian historical and constitutional traditions begs a greater exploration of the permissible contours of the right to protest in India. This report attempts to accomplish that, focusing on both the domestic legal framework and the international standards around free assembly.

The right to freedom of assembly is enshrined as a fundamental human right in the Universal Declaration of Human Rights (UDHR) and in the International Covenant on Civil and Political Rights (ICCPR). The right to peaceful assembly is both an individual and a collective right, enabling “*individuals to express themselves collectively and to participate in shaping their societies.*”⁵

The right to peaceful assembly, along with other related rights, has been recognised as constituting “the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism,”⁶ and as a tool for the promotion and protection of other human rights, particularly for marginalised groups. The ICCPR affirms States’ obligation to uphold the right to freedom of assembly not only for citizens, but for all individuals within its borders,⁷ and not only for purposes that are non-controversial, but also for those that are contentious and disruptive.⁸

Under the Indian constitutional scheme, the right to freedom of

4 Radhika Roy, “We have said this before, public streets should not be blocked, Supreme Court on Noida resident’s plea that travel to Delhi takes 2 hours”, Live Law, 09.04.2021, Accessed on: 14.02.2021, at: <https://www.livelaw.in/top-stories/public-streets-should-not-be-blocked-supreme-court-noida-residents-plea-delhi-traffic-blockade-172356>

5 General Comment 37, Para 1, UN Digital Library, Accessed at 12.03.2021, at: <https://digitallibrary.un.org/record/3884725?ln=en#record-files-collapse-header>

6 Ibid.

7 Ibid, Para 5

8 Ibid, Para 7



The right to peaceful assembly, along with other related rights, has been recognised as constituting 'the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism.'

assembly holds a vital place, and, indeed, the tradition of peaceful assembly pre-dates nationhood itself. India has a distinct historical experience of non-violent, popular, participatory public gatherings, with marches and meetings playing a pivotal role in the anti-colonial independence struggle.

However, the evolution of the right to freedom of assembly in India follows a chequered trajectory, and despite the memorialisation of this right in the Constitution, significant encroachment and erosions have substantially diluted the exercise and enjoyment of this right from what is envisaged in the Indian Constitution and by the ICCPR.

The centrality and significance of the right to freedom of assembly today cannot be over-emphasised in India where, under the present ruling coalition, legislation impacting millions of lives is passed hurriedly, and consequently the forum for debate and discussion on laws, policies and state action shifts from the Parliament to public assemblies.

Even as the space for dissent and diversity of views is generally shrinking, India is experiencing a fresh contestation around the idea of freedom of assembly, as large-scale protests assert the right to access and occupy public spaces across the country. Ongoing protests could prove to be a pivotal moment in shaping the future jurisprudence in India on the right to freedom of assembly, and the constitutional enshrinement of the right must be paramount in any law and policy reform.

This report summarizes the constitutional paradigm around free assembly in India and relevant aspects of the domestic legal framework; it then reiterates certain key standards of the right to assembly under international law, providing analysis throughout on how India's laws interact with and could be improved with reference to international standards. The report concludes with some key recommendations on how to best protect rights and proceed in an era of evolving socio-political challenges and upheaval.

II. INDIA'S CONSTITUTIONAL PARADIGM

ON ASSEMBLY RIGHTS

‘Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life.’⁹ –Dr. B.R. Ambedkar

The Constitution of India embodies the core principles, rights and duties which guide and govern the interaction of the Indian State, its agents and authorities with the citizens of the country. The Preamble to the Constitution clarifies the source from which the Constitution gains its legitimacy as, ‘WE THE PEOPLE OF INDIA.’¹⁰ The Preamble is an important tool to interpret the scope of fundamental rights,¹¹ and is considered an integral part of the Constitution.¹²

The evocative language of the Preamble declares that, in India, the people are supreme, and not the elected representatives.¹³ The constitutional paradigm of the freedom of assembly in India must accordingly be located in the context of the supremacy of people over the executive, the rich history of public participation in India’s anti-colonial struggle for independence and social reform campaigns, as well as in the continued relevance of this freedom in shaping and sustaining parliamentary democracy in India.

The Democratic Imperative

The Preamble proclaims that India shall be constituted as a democratic republic. The edifice of democracy in India rests on a system of free and fair elections,¹⁴ exercised through universal adult franchise. The Preamble also sets out the ideals of ‘Liberty, Equality and Fraternity,’ which must be respected and complemented by social justice, economic empowerment and political justice for all citizens under the rule of law.¹⁵ The basic structure doctrine evolved by the Supreme Court enumerates democracy as an inalienable facet of the Indian polity.¹⁶

9 November 15, 1949, Speech delivered in the Constituent Assembly of India

10 SR Chaudhuri vs State of Punjab (2001) 7 SCC 126 (Para 39)

11 Kesavananda Bharati vs State of Kerala AIR 1973 SC 1461 (Para 302 and 509)

12 Kesavananda Bharati vs State of Kerala AIR 1973 SC 1461 (Para 292, 599, 682, 1164 and 1437)

13 Usha Bharti vs State of Uttar Pradesh (2014) 7 SCC 663

14 Kuldip Nayyar vs Union of India (2006) 7 SCC 1

15 SS Bola vs BD Sardana (1997) 8 SCC 522 (Para 82)

16 Kuldeep Nayar & Ors. Vs Union of India (2006) 7 SCC 1

The ideals of ‘Liberty, Equality and Fraternity’ can only be realised if citizens can exercise their free will to meet, discuss, deliberate, debate, assert, advocate, decide and influence issues that affect their lives. The Supreme Court underscored the foundational role of the freedom of assembly in shaping India’s society, economy and polity in the 1973 five-judge constitution bench judgment of *Himmat Lal K. Shah vs Commissioner of Police, Ahmedabad*,¹⁷ which held that:

Freedom of assembly is an essential element of any democratic system. At the root of this concept lies the citizens’ right to meet face to face with others for the discussion of their ideas and problems-religious, political, economic or social.... assemblies face to face perform a function of vital significance in our system, and are no less important at the present time for the education of the public and the formation of opinion than they have been in our past history.... Public streets are the ‘natural’ places for expression of opinion and dissemination of ideas. Indeed it may be argued that for some persons these places are the only possible arenas for the effective exercise of their freedom of speech and assembly.

The Court additionally noted that:

Public meeting in open spaces and public streets forms part of the tradition of our national life. In the pre-Independence days such meetings have been held in open spaces and public streets and the people have come to regard it as a part of their privileges and immunities.

Even the most rudimentary conceptualisation of democracy as a system of elections based on universal adult franchise is premised on the exercise of freedom of assembly. Ballots are cast pursuant to a public and often high-decibel exchange between competing political aspirants of their vision, ideologies, programmes and promises to the people. Public meetings and rallies by political parties and candidates are the pathways to canvass, engage and persuade the voters. An informed and engaged citizenry strengthens representative democracy. Thus, freedom of assembly constitutes the brick and mortar on which the edifice of Indian democracy rests.

Curtailment of the freedom of assembly would impinge on other guaranteed rights and freedoms, and denude rights such as the freedom of speech and expression, as the ability to discuss and debate is enhanced by the capacity to freely assemble. Recognising the relevance and value of the pre-Independence practice of formation of public assemblies for public discussions and debates, the drafters of the Constitution of India ensured that the right is guaranteed and protected as a Fundamental Right.

Fundamental Rights and the “Golden Triangle”

Part III of the Indian Constitution sets out the Fundamental Rights guaranteed to persons and citizens; these rights are interdependent and indivisible in their exercise and enjoyment. The Fundamental Rights ‘do not exist in silos, but as indivisible units’ which are

¹⁷ *Himmat Lal K. Shah vs Commissioner of Police, Ahmedabad and Another* (1973) 1 SCC 227, emphasis added.

rendered meaningless without association with one another.¹⁸ Article 14 of the Constitution provides a guarantee to all persons of 'equality before law and equal protection of the laws.'¹⁹ Articles 15²⁰ and 16²¹ extend the principle of the right to equality by providing a guarantee against discrimination and a right to equal opportunity in matters of public employment. Article 19 guarantees the enjoyment of certain fundamental freedoms - which are so integral that they are known as natural rights or common law rights, as opposed to rights created by statute - to all citizens.²² These freedoms include the freedom of speech and expression, the right to assemble peacefully and without arms and the right to form associations or unions.²³ The guarantee of the right to equality, the right to fundamental freedoms and the right to life form a "golden triangle" that '*breathes vitality in the concept of rule of law*.'²⁴ In *TR Kothandaraman vs TN Water Supply and Drainage Board*,²⁵ the Supreme Court of India stated with regard to Articles 14, 19 and 21 that, '*Incorporation of such a trinity in our paramount parchment is for the purpose of paving such a path for the people of India which may see them close to the trinity of liberty, equality and fraternity*'.

The interdependence and indivisibility of the fundamental rights elevates the freedom of assembly to an even higher pedestal than the right occupies independently, as an integral means to actualisation of many other rights and freedoms. Free assembly thus merits constitutional protection and robust safeguards against State arbitrariness and abuse.

The Constitutional Right to Freedom of Assembly and its Limitations

Recognising the right to freedom of assembly as a fundamental right for all citizens, Article 19(1)(b) of the Indian Constitution provides that '*All citizens shall have the right to assemble peacefully*

¹⁸ RC Cooper vs Union of India (1970) SCR 3 530

¹⁹ Article 14, Constitution of India, 1950.

²⁰ Article 15, Constitution of India, 1950.

²¹ Article 16, Constitution of India, 1950.

²² Jamuna Prasad Mukheria v. Lachhi Ram (1955) 1 SCR 608

²³ Article 19, Constitution of India, 1950.

²⁴ Bachan Singh vs State of Punjab (1982) 3 SCC 24

²⁵ T.R. Kothandaraman and others vs Tamil Nadu water supply & drainage BD and Others (1994) 6 SCC 282



The guarantee of the right to equality, the right to fundamental freedoms and the right to life, form a 'golden triangle' that 'breathes vitality in the concept of rule of law'.

*and without arms.*²⁶ The right to hold public meetings, or to have processions, flows from this right to freedom of assembly, as affirmed by judgments of the Supreme Court.²⁷

The conferment of the right to freedom of assembly as a fundamental right in the Indian Constitution gives citizens a right to seek constitutional remedies for enforcement of the said right,²⁸ placing a constitutional obligation upon the Indian State to facilitate the people's right to assembly.

The right to freedom of assembly is not absolute, and is subject to certain restrictions prescribed in the Constitution. Rationalising the need for restrictions on fundamental rights, the Supreme Court observed that the Constitution attempts a 'harmonious balancing' between individual liberty and social control.²⁹

Restrictions to the right to freedom of assembly are stipulated in Article 19(3) of the Constitution, which states that the right provided in Article 19(1)(b) shall not '*affect the operation of any existing law in so far as it imposes, or prevent[s] the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause.*' Thus, the right can only be curtailed by reasonable restrictions imposed in the interest of the following three factors: i) To protect the sovereignty of India; ii) To protect the integrity of India; iii) To preserve public order.

Any restriction imposed on the right to freedom of assembly must be in furtherance of one of these three permissible grounds and must also simultaneously pass the test of reasonableness, necessity and proportionality as reaffirmed by the Supreme Court in the *KS Puttaswamy* judgment, detailed later in this section.³⁰ The lived experience of political and social activism in India, as well as judicial pronouncements, suggest that most prohibitory orders against formation of assemblies are premised on the interest of preserving public order.

What is Public Order?

The term public order is among the most misconstrued legal phrases, and is often wrongly used in place of terms such as law and order or public tranquillity. It must be underscored that each of these terms signifies different thresholds, and, therefore,

26 The term 'Arms' is defined in Section 2(c) of The Arms Act, 1959: "Arms" means articles of any description designed or adapted as weapons for offences, or defence, and includes firearms, sharp-edged and other deadly weapons, and parts of, and machinery for manufacturing arms, but does not include articles designed solely for domestic or agricultural uses such as a lathi or an ordinary walking stick and weapons incapable of being used otherwise than as toys or of being converted into serviceable weapons

27 Kedar Nath Singh vs State of Bihar AIR 1962 SC 955; Babulal Parate vs State of Maharashtra AIR 1961 SC 884

28 Article 31, Constitution of India

29 KK Kochunni vs State of Madras AIR 1960 SC 1080

30 KS Puttaswamy vs Union of India (2017) 10 SCC 1

they cannot be used interchangeably. In the *Madhu Limaye vs Sub-Divisional Magistrate*³¹ judgment, the Supreme Court of India held:

We may here observe that the overlap of public order and public tranquillity is only partial. The terms are not always synonymous. The latter is a much wider expression and takes in many things which cannot be described as public disorder. The words public order and public tranquillity overlap to a certain extent but there are matters which disturb public tranquillity without being a disturbance of public order. A person playing loud music in his own house in the middle of the night may disturb public tranquillity, but he is not causing public disorder. Public order ... means what the French designate order published, defined as an absence of insurrection, riot, turbulence, or cry of violence. The expression 'public order' includes absence of all acts which are a danger to the security of the state and also acts which are comprehended by the expression 'order publique' explained above but not acts which disturb only the serenity of others.

Thus, mere inconvenience caused to commuters, motorists or local residents due to a peaceful protest being held nearby on a public road may not be deemed to amount to disturbing the public order, and the assembly cannot be dispersed on these grounds. As long as an assembly is non-violent, it is not relevant whether it inconveniences by virtue of a large number of members gathering. Protests or political gatherings and demonstrations, by their very nature, will result in a certain degree of inconvenience and disturbance to daily life. In fact, the right to freedom of assembly includes the right to protest in a manner that is visible to its target audience, otherwise the right would be rendered nugatory.³²

It is pertinent that many social gatherings, religious processions or public rallies by political parties also result in significant inconvenience to commuters and disrupt the lives of people residing in such areas; however, such inconvenience is never cited as a ground to prohibit or disperse the assembly. Thus, what emerges from the Indian experience is that inconvenience to others is only foregrounded as a pretext to regulate, control or defeat the right to protest where the non-violent assembly is voicing dissenting views, raising issues or seeking accountability. This will be analysed in greater detail in the chapters to follow.

Restrictions Must Be Reasonable

For a restriction to be permissible, it must first pass the test of reasonableness which envisages both substantive and procedural reasonableness of the law that prima facie infringes a fundamental right.³³ The expression “reasonable restriction” seeks to strike a balance between the freedoms guaranteed by Article 19(1) and the curtailment allowed under clauses (2) to (6) of Article 19.³⁴

31 *Madhu Limaye vs Sub-Divisional Magistrate, Monghyr and Others* (1970) 3 SCC 746. Also See: *The Superintendent, Central Prison, Fatehgarh vs Ram Manohar Lohia* (1960) AI

32 *Madhu Limaye vs Sub-Divisional Magistrate, Monghyr and Others* (1970) 3 SCC 746

33 *Maneka Gandhi vs Union of India*, 1978 AIR SC 597

34 'Durga Das Basu Shorter Constitution of India', Justice (Retd) AK Patnaik, 15th Edition, Vol. 1 Page 244

Substantive reasonableness requires that the restriction must have a rational connection with the object sought to be achieved by the law.³⁵ The procedural aspect of reasonableness concerns the method of imposing restrictions and the procedure provided for putting it into operation. A restriction, even if reasonable in its substance, would be unconstitutional if the method of its imposition is not reasonable.³⁶ Ordinarily, the procedural aspect of reasonableness relates to whether the principles of natural justice are followed while imposing a restriction on a fundamental right.³⁷ However, even in situations where there is no provision for a hearing, procedural safeguards may be found in other forms, such as vesting discretion in an objective superior authority³⁸ or the requirement of passing a speaking order, recording reasons for arriving at its conclusions instead of simply pronouncing the decision to allow or disallow the assembly.³⁹

The vesting of unfettered or unguided discretion upon an authority to grant or refuse permission to hold public meetings in a public space would render the said rule or provision void, as it amounts to an unreasonable restriction on the right to freedom of assembly.⁴⁰ Thus, if an order is passed imposing a blanket ban on public gatherings per se, without recording cogent reasons, it would be in breach of principles of natural justice and constitute an unreasonable restriction on the right to freedom of assembly.

Test of Proportionality

In a unanimous judgment by nine Judges in *Justice KS Puttaswamy v. Union of India (Puttaswamy I)*,⁴¹ the Supreme Court of India explained the test of proportionality as four-fold:

- (a) the action must be sanctioned by law;*
- (b) the proposed action must be necessary in a democratic society for a legitimate aim;*

35 Municipal Corporation vs Jan Mohammad Usmanbhai AIR 1986 SC 205 (Para 20)

36 State of Maharashtra vs Rao Himmatbhai Narbheram AIR 1970 SC 1157


37 Nawabkhan Abbaskhan vs. State of Gujarat (1974) 2 SCC 121

38 Kishan Chander vs State of MP (1964) 1 SCR 765

39 Babubhai & Co. vs. State of Gujarat (1985) 2 SCC 732

40 Himmat Lal K Shah vs Police Commissioner, Ahmedabad (1973) 1 SCC 227

41 K.S Puttaswamy and Another Vs Union of India and Others (2017) 10 SCC 1



The vesting of unfettered or unguided discretion upon an authority to grant or refuse permission to hold public meetings in a public space would render the said rule or provision void, as it amounts to an unreasonable restriction on the right to freedom of assembly.

(c) *the extent of such interference must be proportionate to the need for such interference;*

(d) *There must be procedural guarantees against abuse of such interference.*⁴²

The term ‘law’ denotes a valid law, made by a competent legislature, which does not contravene any provision of the Constitution placing limitations on the concerned legislature.⁴³ It also includes subordinate legislation, but not a mere departmental or executive instruction for the purposes of the test of proportionality.⁴⁴ Thus, restrictions, in order to be valid, must be imposed by or under the authority of law, and not by mere exercise of executive power without any law.⁴⁵ Only if the executive action has the backing of law are the subsequent limbs of the proportionality test activated.

The test of proportionality categorically requires that the purpose behind imposition of a restriction on a fundamental right must be such that the restriction would be necessary in a democratic society to achieve a legitimate aim. Further, the restriction imposed must be the least invasive means to achieve the state’s purpose.⁴⁶ This implies that if the state’s legitimate aim can be achieved through other means, then the restriction(s) would be unconstitutional. The restriction imposed on the fundamental right to freedom of assembly must therefore be used by the state as a last resort, based on grounds provided under Article 19(3) of the Constitution of India.

Norm vs Exception - Burden of Proof

Under the constitutional scheme of the freedoms guaranteed under Article 19, freedom is the rule and restrictions are the exception. Public actions of citizens in organising protests or carrying out marches or other forms of public engagement that involve formation of an assembly must be measured against this touchstone. If a law *prima facie* violates, infringes or restricts the fundamental right to assembly, the onus shifts to State authorities to prove that the legislation falls within the permissible limits imposed by any of the clauses (2) to (6) of Article 19.⁴⁷ Therefore, the onus is not on the citizens to prove that the exercise of their right is not barred by restrictions; it is for the State to establish that its action falls within the scope of one of the permissible restrictions. The presumption rests in favour of citizens.⁴⁸

⁴² Ibid.

⁴³ RC Cooper vs UOI (1970) SCR 3 530

⁴⁴ Bijoe Emmanuel vs State of Kerala, Para 16, (1986) 3 SCC 615

⁴⁵ NK Bajpai vs UOI, Para 16, (2012) 4 SCC 653

⁴⁶ In Re Ramlila Maidan Incident, Para 179, (2012) 5 SCC 1

⁴⁷ Dharam Dutt vs. UOI (2004), Para 49, 1 SCC 712 (Para 49). Also see: NK Bajpai vs UOI (2012), Para 20, 4 SCC 653

⁴⁸ Vrajilal Manilal and Co. vs. State of MP (1969) 2 SCC 248

Balancing Freedom of Assembly and Other Fundamental Rights

A question that repeatedly engages the court is how to balance the rights of citizens who are not members of the assembly with the right of the assembly. In *Railway Boards vs Niranjan Singh*,⁴⁹ the Supreme Court of India held:

It is true that the freedoms guaranteed under our Constitution are very valuable freedoms and this Court would resist abridging the ambit of those freedoms except to the extent permitted by the Constitution. The fact that the citizens of this country have freedom of speech, freedom to assemble peaceably and freedom to form associations or unions does not mean that they can exercise those freedoms in whatever place they please. The exercise of those freedoms will come to an end as soon as the right of someone else to hold his property intervenes.

The freedom of assembly may collide with the right to freedom of movement of commuters, or people seeking access to the public road where an assembly has camped. In 2020, the Supreme Court examined this issue in the context of the protest sit-in at the Shaheen Bagh area of New Delhi, where protesters occupied a public space for almost three months, seeking repeal of the CAA. The Supreme Court, in its judgment dated 7 October 2020, held that the protest was causing inconvenience and hardships to commuters. Commenting on the scope of the right to freedom of assembly, the Court stated:

*Democracy and dissent go hand in hand, but then the demonstrations expressing dissent have to be in designated places alone. The present case was not even one of protests taking place in an undesignated area, but was a blockage of a public way which caused grave inconvenience to commuters.*⁵⁰

While authorities have the power to allow / disallow protests at a particular place or time in the interest of the sovereignty or integrity of India or for preserving public order, the settled legal position is that there can be no blanket ban against protests or demonstrations in public spaces. The Supreme Court's judgment in *Himmat Lal K Shah vs Commissioner of Police, Ahmedabad*,⁵¹ decided by five judges sitting in a Constitution Bench to decide cases involving substantial questions of constitutional interpretation, is arguably the most authoritative pronouncement on the issue of freedom of assembly in India, and is at variance with the more recent October 2020 three-judge judgment above. In *Himmat Lal*, the Supreme Court stated:

The power of the appropriate authority to impose reasonable regulation in order to assure the safety and convenience of the people in the use of public highways has never

49 *Railway Board representing the Union of India vs Niranjan Singh*, AIR 1969 SC 966

50 *Amit Sahni vs Commissioner of Police & Ors.*, (2020) 11 SCC 334

51 *Himmat Lal K Shah vs Police Commissioner, Ahmedabad*, Para 71, (1973) 1 SCC 227

been regarded as inconsistent with the fundamental right of assembly. A system of licensing as regards the time and the manner of holding public meetings on public street has not been regarded as an abridgement of the fundamental right of public assembly or of free speech. But a system of licensing public meeting will be upheld by Courts only if definite standards are provided by the law for the guidance of the licensing authority. Vesting of unregulated discretionary power in a licensing authority has always been considered as bad.

A designated place for protests would qualify as a reasonable restriction only if it is a facilitating measure taken by the State to promote the safety and security of citizens exercising the right to assemble. To that end, designated spaces for protests may not necessarily be a restriction on the right to freedom of assembly, but a logistical means to facilitate assemblies.

However, to hold that protests can only be held in designated spaces and not elsewhere is to undermine the very essence of the right to freedom of assembly, which the Supreme Court in *Himmat Lal* (Supra) recognised as a right rooted “*in the continued de facto exercise of the right over a number of years*”⁵² on public streets and public parks. The decision of the Supreme Court in *Himmat Lal* recognizes a fundamental right to hold public meetings on public streets, and noted that the assignment of designated spaces would whittle down the same right. Therefore, there can be no implied ban on protests at non-designated spaces by virtue of demarcating designated spaces for protests. Each restriction on a protest or assembly at a non-designated space must be justified on the touchstone of reasonableness, necessity and proportionality in order to have the authority of law.

Restrictions, if imposed fairly, could act as catalysts for creating and enabling a conducive environment which enhances the exercise of rights for all. For example, structural and systemic disparities, such as socio-economic vulnerabilities, cultural marginalisation or political proximity may give a disproportionate advantage to some groups and result in the fundamental freedoms of individuals from those groups flourishing at the cost of the freedoms of others. Therefore, reasonable restrictions on the freedom of assembly could

⁵² Ibid.



A designated place for protests would qualify as a reasonable restriction only if it is a facilitating measure taken by the State to promote the safety and security of citizens exercising the right to assemble.

ensure that majoritarian groups or dominant communities do not occupy all available public spaces to espouse their cause. The constitutionally sanctioned approach to restrictions mandates restrictions be deployed in a manner that minimises disparities and creates an enabling environment for the exercise of freedom of assembly by all.

Unfortunately, the lived experiences in India suggest that the imposition of restrictions on the right to freedom of assembly has rarely been fair or balanced. Rather, the State has, under the guise of social control and administrative exigencies, frequently abridged the right, especially when challenged by protests from socio-political or peoples' movements and dissenting voices. Further, notions of public inconvenience, comfort and ease of living have often found their way into the discussions on restrictions against the right to assembly, lowering the permissible threshold for imposition of restrictions, and in effect prioritising certain classes of citizens and their rights over others. Such restrictions by their very nature differentially impact and disproportionately burden assemblies of socio-economically marginalised groups or political dissenters. With limited or no access to levers of power and privilege, these groups through their mass assemblies seek to impress and draw the attention of the State to their concerns. Their presence in large public assemblies is perceived as a source of inconvenience, unsettling particularly for the urban upper and middle class in India. Where convenience and orderliness become the governing theme, inevitably the scales tilt against the socially, economically and culturally marginalised.

The public convenience approach is at times reflected in judicial decisions where public protests are viewed as contributing to noise and pollution. As observed by the Supreme Court:

We feel that the pathetic conditions which were caused as a result of the processions, demonstrations and agitations etc. at the Jantar Mantar were primarily because ... authorities did not take necessary measures to regulate the same. Had adequate and sufficient steps [been] taken by the authorities to ensure that such dharnas and demonstrations are held within their bounds, it would have balanced the rights of protesters as well as the residents. For example, the dharnas and protests were allowed to be stretched almost on the entire Jantar Mantar road, on both sides, and even across the width of the road. Instead, a particular area could have been earmarked for this purpose, sufficiently away from the houses etc. so that there is no unnecessary blockage of roads and pathways. Likewise, the demonstrators were allowed to go on with non-stop slogans, even at odd hours, at night, and that too with the use of loudspeakers etc. The authorities could have ensured that such slogans are within the parameters of noise pollution norms and there are no shoutings or slogans at night hours or early morning hours.⁵³

Such observations reflect the notion of public convenience being paramount in the

53 *Mazdoor Kisan Shakti Sangathan vs. Union of India* (2018) 17 SCC 324, (emphasis added)

determination of rights in the context of public assemblies, and is often the underlying attitude behind designating the rights of marginalised groups to form assemblies as insignificant.

A vibrant democracy witnesses a continuous contestation of ideas and jostling of rights. The right to motorways, the civic needs of commuters, neighbourhoods and the commercial demands of markets often weigh so heavily on the mind of the administrative and adjudicating authority that they obliterate the right to assembly of marginalised communities and render the right nugatory. Discriminated and marginalised communities have no access to open spaces, parks or grounds to host their assemblies due to spatial inequities and skewed urban planning. The right to assembly holds a more compelling significance for marginalised or impoverished classes, who negotiate dimensions of their right to life through collective bargaining. The balancing approach, frequently adopted by Indian Courts while adjudicating a situation which *prima facie* presents a conflict of rights, therefore has inherent pitfalls.

In balancing the right to assembly of protesters against the right of other citizens to convenience in use of public spaces, the disproportionate access that different groups of citizens enjoy to infrastructure and cultural and socio-political capital is eclipsed and ignored. Such balancing leads to solutions that feed into systemic and structural inequalities and aggravate discrimination and marginalisation.

A STUDY IN CONTRASTS: THE KANWARIYA YATRA AND PROTESTS*

The Kanwariya yatra, is an annual religious pilgrimage of devotees of the Hindu God Shiva in which men collect water from the Ganges river and carry it to their local shrines, across northern India.

Large groups of men, visibly distinguishable due to their saffron attire, walk barefoot for miles carrying the holy water, as a practice of their faith. A Hindu pilgrimage, the Kanwariya yatra is facilitated by the State which demarcates and cordons off roads and provides resting stations, meals and refreshments to the pilgrims at State expense. As thousands walk through towns and cities, through busy thoroughfares, it often results in traffic disruptions and reportedly road accidents, skirmishes and altercations involving acts of violence and destruction of property.

Nevertheless, despite significant disruption to daily public life, the assembly of Kanwariyas is facilitated annually by the State. In sharp contrast, protesters are not allowed to hold assemblies if they cause traffic disruption and inconvenience. Thus, the balancing of the right of assembly vis-à-vis daily commuters is not content-neutral.

The leanings of the State play a determinative role in deciding which assemblies are facilitated and which ones are not, in the guise of balancing of rights.

* "Road Blockades in Delhi-NCR and Uttar Pradesh as Kanwaria destruction carries on", Hindustan Times, 10.09.2018, Accessed on: 09.04.2021, at: <https://www.hindustantimes.com/india-news/road-blockades-in-delhi-ncr-and-uttar-pradesh-as-kanwariya-destruction-rages-on/story-JIXEO3IUmes3m5jgBQuMaJ.html>

III. INDIA'S DOMESTIC LEGAL FRAMEWORK

FOR ASSEMBLY AND REAL-LIFE APPLICATIONS

The right to freedom of assembly in India is governed by a web of laws, rules and regulations which determine the true extent to which the right, as defined in the Constitution, is exercised by the people. These laws vary from one state to another, as 'police' and 'public order' are legislative subjects over which each state is competent to make its own laws.⁵⁴

More specifically, criminal law is a legislative subject enumerated in the Concurrent List (List III) of the Seventh Schedule in the Indian Constitution. States have the legislative authority to amend provisions of the Code of Criminal Procedure as applicable in their territorial jurisdiction. Each state thus has a Police Act modelled along the lines of the colonial Police Act of 1861,⁵⁵ which delineates the powers and duties of the police in addition to those provided in the Criminal Procedure Code. States in exercise of their executive powers have issued Police Manuals and from time to time also issue Standing Orders relevant to freedom of assemblies.⁵⁶ A striking feature of this panoply of laws, rules and orders constituting the domestic legal regime governing assemblies is that it overwhelmingly accords power to the executive and the police. This includes the power to either prevent or withhold permission for assemblies and to manage assemblies through dispersal or use of force, or through detaining and arresting the members of the assembly. In this chapter, various statutes, rules, regulations and orders are analysed under two broad themes: preventive laws and punitive laws in relation to the right to assembly.

A. Preventive Legal Regime

The Constitution guarantees the right to freely assemble without arms; however, there are various legal provisions, including overwhelmingly bureaucratic procedures, which regulate and in practice often deter the exercise of the right.

PRIOR RESTRAINT ON THE RIGHT TO ASSEMBLY

The right to assembly is subject to the control and curbs of the regime of intimation, permission and prohibition. The rationale for prior restraint, elucidated by the Supreme Court in 1961, is that, "*Public order has to be maintained in advance in order to ensure*

⁵⁴ Entry 1 and 2, List II, Seventh Schedule of Constitution of India

⁵⁵ The Police Act, 1861.

⁵⁶ Circular No. 12/2012: The Commissioner of Police, Delhi has issued directions in view of the judgment of Hon'ble Supreme Court of India in the matter of *Suo Motu Writ Petition (Criminal) No. 122 of 2011, Ram Lila Maidan incident dated 4/5-06-2011 Versus Home Secretary, Union of India & Others*, Circular no. 35/2011: The Commissioner of Police, Delhi has issued guidelines regarding the conduct of rallies, processions, demonstrations & protests in the light of the directions given by the Supreme Court of India and the Delhi High Court.

... it is competent to a legislature to pass law permitting an appropriate authority to take anticipatory action or place anticipatory restrictions upon particular kinds of acts in an emergency for the purpose of maintaining public order.”⁵⁷ In India, the threshold in relation to preventive action is ‘apprehension for breach of peace,’ rather than the ‘clear and present danger’ test under American law.⁵⁸

PRIOR PERMISSION FOR PUBLIC ASSEMBLIES

The Police Standing Orders of various States mandate that protests at the designated protest sites in each city/town can be held only after securing a Police Permit and a ‘No Objection Certificate’ (NOC) from the police. Prior permission is secured through an application for permission containing certain information and identity documents of the organiser, filed a few days (generally seven days) prior to the assembly. The police may grant or reject permission on consideration of ‘whether it would cause any obstruction to traffic or danger to human safety or disturbance to public tranquillity etc.’⁵⁹ Some States like Karnataka have issued Police Orders which specifically state that, ‘No processions or assemblies shall be allowed in Bangalore City without obtaining licence under this order.’⁶⁰

Information, including the date, time, duration of protest, number of persons expected and route that a procession or rally will take, as well the purpose or subject matter of the protest, is often required for submission to the police. Permission is often contingent on organizers providing information and prior undertakings regarding the nature of the protest or assembly, and a guarantee against breach of peace.⁶¹

INTIMATION VIS-À-VIS PERMISSION

The rationale for requiring submission of information of assemblies before they are held ought to be to enable peaceful assemblies; to prevent overlap of assemblies in the same public

57 Babulal Parate v. State of Maharashtra (AIR) 1961 SC 884 Para 28

58 Babulal Parate (Supra) para 14, 19-22, 24-30

59 Clause 3(iii) of Delhi Police Standing Order No.10/2018, "Guidelines for Organising Protests or Demonstrations at or near Central Vista, including Jantar Mantar and Boat Club" available at <http://delhipolice.nic.in/standing%20order/10.pdf>

60 Regulation of public processions and assemblies (Bangalore City) Order, page 840, Accessed on: 12.04.2021, at: 2009 available at [http://gazette.kar.nic.in/12-03-2009/Part-E.O.G.-\(Page-779-874\).pdf](http://gazette.kar.nic.in/12-03-2009/Part-E.O.G.-(Page-779-874).pdf)

61 Delhi Police Standing Order No. 35/2011, Accessed on 14.12.2020, at: <https://drive.google.com/file/d/1JSdTb8gjpPXrSfjhmqBPTUuiQJzVRBJr/view>. Also see, Delhi Police Circular 20/2012, Accessed on 14.12.2020, at: <https://drive.google.com/file/d/15eSaelDTzNnK-bAmr277xJj040s36UQ1/view>



Permission is often contingent on organizers providing information and prior undertakings regarding the nature of the protest or assembly, and a guarantee against breach of peace.

space at the same time; to arrange for logistical and other infrastructural support for assemblies including availability of first aid and similar objectives. However, in practise, the provision is implemented and understood not as prior intimation of assemblies but as securing prior permission from the police for assemblies. The requirement to disclose the purpose of the protest provides an occasion for selective or discriminatory exercise of police power to grant permission, and amounts to a prior restraint that is not content-neutral. For instance, in Mumbai in December 2019, a protest against the discriminatory impact of the CAA and planned implementation of the National Register of Citizens (NRC), organised by transgender rights groups and women's groups, had to be called off due to the last-minute denial of police permission on specious grounds.⁶²

It is important to underscore that the right to freedom of assembly is a constitutional right - as long as it is a peaceful and unarmed assembly, there should be no content-specific denial of the right. The need to preserve 'public order' by making necessary arrangements to facilitate and enable the right to assembly can be achieved by a regime of prior notification or intimation, and does not require seeking permission. The Organization for Security and Co-operation in Europe (OSCE) Guidelines on Freedom of Assembly emphasise that legal provisions concerning advance notification should require the organisers to submit a notice of the intent to hold an assembly, but not a request for permission.⁶³ A similar view is held by the European Court of Human Rights.⁶⁴

PROHIBITORY ORDERS UNDER SECTION 144 OF THE CRIMINAL PROCEDURE CODE.

The most frequently resorted to legal provision for prohibiting formation of assemblies in public spaces is the issuance of orders under Sec. 144 of the Code of Criminal Procedure, 1973 (Cr.P.C.),⁶⁵ by the District Magistrate, Sub-Divisional Magistrate or any Executive Magistrate. The power to issue such orders was held to be constitutional by the Supreme Court, on the ground that they are aimed at preservation of 'public order,' and thus constitute a reasonable restriction on the right to assembly.⁶⁶

Prohibitory orders may be directed at a particular individual or group of people, or impose a blanket prohibition against public assemblies in a particular area.⁶⁷ The most common exercise of the power under Sec. 144 of the Cr.P.C. in relation to public assemblies is when the District Magistrate issues orders prohibiting *any assembly* of four or more persons in a particular geographical area within the district.⁶⁸ Other prohibitory measures include restriction or prohibition of movement including

62 Ananya Baiswal, "Denied permission, anti-CAA rally called off", The Hindu, January 04, 2020, Accessed on January 23, 2021, at: <https://www.thehindu.com/news/cities/mumbai/denied-permission-anti-cao-rally-called-off/article30474057.ece>

63 The OSCE Guidelines on Freedom of Assembly Para 118

64 Balçık & Others vs Turkey, Judgment dt 29.02.2008, Para 49

65 Section 144, The Code of Criminal Procedure, 1973,

66 Madhu Limaye vs Sub Divisional Magistrate (Supra)

67 Section 144(3), Code of Criminal Procedure, 1973

68 Section 144, Code of Criminal Procedure, 1973

vehicular movement,⁶⁹ closure of all schools⁷⁰ and commercial establishments⁷¹ and, more recently, restriction or suspension of internet⁷² and telecom services.⁷³

The rationale for action under Sec. 144 Cr.P.C. is the urgency of the situation and the need to prevent harmful occurrences.⁷⁴ The State, through the District Magistrate, has the power to issue prohibitory orders *‘for immediate prevention.’*⁷⁵

Orders under Section 144 Cr.P.C lapse after two months from their date of promulgation, but may be extended up to a maximum period of six months if necessary for ‘preventing danger to human life, health, safety or for preventing a riot or any affray.’⁷⁶ Despite the temporal limitation, in practice, prohibitory orders under Sec. 144 Cr.P.C are often consecutively re-issued upon the expiry of the initial time frame, effectively resulting in indefinite prohibition of assemblies. In most cases, the consecutive orders are identically worded, passed mechanically and show no application of mind to the circumstances that may warrant such an order. Such arbitrary use of Sec 144 Cr.P.C was challenged in *Mazdoor Kisan Shakti Sangathan v. Union of India*⁷⁷ where the Supreme Court, examining the validity of repeated, continuous imposition of prohibition of assemblies through identically worded prohibitory orders in New Delhi, held that such a situation amounts to ‘banning’ public assemblies rather than ‘regulating’ them.⁷⁸ However, many prohibitory orders continue to be routinely promulgated, in violation of the law laid down by the Supreme Court of India, reiterated in 2020, that *“Repetitive orders under Section 144, Cr.P.C. would be an abuse of power.”*⁷⁹

Orders under Sec. 144 Cr.P.C. also often tend to be overbroad and lacking in context, with scant explanation or justification for the imposition of the order and a chilling effect on the *bona fide* right to free speech of an assembly. For instance, a prohibitory

69 PTI, “COVID-19: Police prohibit vehicular movements in city from 6 pm today” Pune Mirror, March 23, 2020, Accessed on January 23, 2021, at: <https://punemirror.indiatimes.com/pune/others/covid-19-police-prohibit-vehicular-movements-in-city-from-6-pm-today/articleshow/74778235.cms>. Also See: Tanya Thomas, “Maharashtra imposes lockdown till 31st; violators will be booked”, Live Mint, March 23, 2020, Accessed on January 23, 2021, at: <https://www.livemint.com/news/india/maharashtra-imposes-lockdown-till-31st-violators-will-be-booked-11584974889765.html>. Also See: PTI, “Pillion-riding prohibited during Republic Day”, The Economic Times, January 23, 2020, Accessed on January 23, 2021, at: <https://economictimes.indiatimes.com/news/politics-and-nation/pillion-riding-prohibited-during-republic-day/articleshow/45990028.cms>

70 144 CrPC order dated 7.03.2020 passed by District Magistrate, Samba, Accessed on: January 23, 2021, at: <https://cdn.s3waas.gov.in/s3a97da629b098b75c294dffdc3e463904/uploads/2020/05/2020053074.pdf>

71 144 CrPC order dated 21.03.2020 passed by District Magistrate, Samba, Accessed on: January 23, 2021, at: <https://cdn.s3waas.gov.in/s3a97da629b098b75c294dffdc3e463904/uploads/2020/05/2020053069.pdf>

72 Shikhar Goel, “Internet Shutdown: Strategy to Maintain Law and Order or Muzzle Dissent?”, Economic & Political Weekly, Vol. 53, Issue No.42, October 20, 2018, Accessed on January 23, 2021, at: <https://www.epw.in/engage/article/internet-shutdowns-strategy-maintain-law>. Also see: <https://internetshutdowns.in>

73 SruthisagarYamunan, “Internet Shutdown now reach India’s capital- but was the Delhi Police order legal?”, Scroll, December 19, 2019, Accessed on January 23, 2021, at: <https://scroll.in/article/947336/internet-shutdowns-now-reach-indias-capital-but-was-the-delhi-police-order-legal>

74 Madhu Limaye vs. Sub Divisional Magistrate (1970) 3 SCC 746

75 Acharya Jagdishwaranand Avadhuta vs. Commissioner of Police (1983) 4 SCC 522

76 Section 144(4) Code of Criminal Procedure, 1973

77 Mazdoor Kisan Shakti Sangathan vs. Union of India (2018) 17 SCC 324

78 Ibid.

79 Anuradha Bhasin vs Union of India (2020) 3 SCC 637

order under Section 144 in Delhi read as follows⁸⁰:

4. Now, therefore, in exercise of the powers conferred upon me by the virtue of Section 144 CrPC, 1973 (No. 2 of 1974) read with the Government of India, Ministry of Home Affairs, New Delhi's Notification No. U-11036/(i) UTL dated 9-9-2010, I, Ved Bhushan, Assistant Commissioner of Police, of Sub-Division Parliament Street of New Delhi District do hereby make this written order prohibiting:

- (i) The holding of any public meeting;*
- (ii) Assembly of five or more persons;*
- (iii) Carrying of firearms, banners, placards, lathis, spears, swords, sticks, brickbats, etc.*
- (iv) Shouting of slogans;*
- (v) Making of speeches, etc.*
- (vi) Processions and demonstrations;*
- (vii) Picketing or dharnas in any public place within the area specified in the Schedule and site plan appended to this order.*

The prohibition on sloganeering, making speeches and carrying banners, placards, etc. is a direct curb on the right to free speech of an assembly, including the right to protest. Such orders, ostensibly aimed at preserving peace and public tranquillity, have a debilitating impact on the right to assembly by rendering such an assembly voiceless. The Madras High Court, while reading down the scope of a prohibitory order passed by the Puducherry Administration on 04.04.2021, remarked on the illegality of superfluous 144 prohibitory orders, observing: “Thankfully, this country allows expansive freedom to its citizens, and as the Constitution provides, there cannot be any authoritarian regime possible in the country nor any regimentation of the citizens or their lives.”⁸¹

POLICE POWER TO IMPOSE PROHIBITORY ORDERS

The police too have the power to take prohibitory measures that impact the right to assembly. For example, Chapter V of the Delhi Police Act⁸² empowers the police to take ‘Special Measures for Maintenance of Public Order and Security of State,’⁸³ including prohibitory orders as a preventive measure. The Commissioner of Police or a city’s senior most police official has the authority to issue a notification to ‘*prohibit any assembly or procession whenever and for such time as he considers such prohibition to be necessary for the preservation of the public order.*’⁸⁴ Such notification shall ordinarily remain in force only for a period of 15 days, but may be extended for up to six months.

⁸⁰ Mazdoor Kisan Shakti Sangathan vs. Union of India, Para 11, (2018) 17 SCC 324

⁸¹ R. Rajangam v Union Territory of Puducherry [WP No. 8980 of 2021]

⁸² Delhi Police operates under the supervision of the Ministry of Home Affairs, Govt. Of India

⁸³ The Delhi Police Act, 1978

⁸⁴ Section 30 (3) of the Delhi Police Act, 1978; Section 33: Power to make rules or regulation of traffic and for presentation of order in public place, etc. of The Bombay Police Act, which is applicable to Maharashtra and Gujarat; Section 79 Regulation of Public Assemblies Kerala Police Act, 2011

Many of the restrictions and regulations on assemblies, including prior permission, are justified based on practicalities, particularly in the context of the infrastructural limitations of urban India. However, certain aspects of the regulation of freedom of assembly through State and police power nevertheless place unreasonable restrictions on freedom of speech, freedom of association and freedom of assembly. The Delhi Police Standing Orders prohibit certain activities that are essential to particular forms of assemblies, or particular expressions of political opinion. For example:

v. No burning of any documents, books and effigy, cooking, littering, throwing of placards, banners and plastic waste [to] be permitted as it will be in violation of the judgement of the Hon'ble NGT and the Hon'ble Apex Court.⁸⁵

The ban on burning of books and effigies is most often rationalised on grounds of preventing fire hazards. However, the symbolic burning of books like the Manu Smriti⁸⁶ by groups subjugated by the caste system, or the burning of political documents including copies of legislation⁸⁷ or effigies of political leaders, such as those of the Prime Minister⁸⁸ have been integral to protests in India. The pre-independence movements of 'Swadeshi' and 'boycott' pioneered by Mahatma Gandhi in the early twentieth century also involved public burning of foreign-made goods as a form of non-violent protest against the British colonial State.⁸⁹ There is thus a rich history and protest culture in India of burning items in public assemblies as a symbol of the people's sentiment. Yet police orders routinely curtail such key facets of the right to protest.

Another illustrative example of assembly restrictions is of designated protest sites charging a fee, presumably for maintenance and upkeep, to public assemblies that use their space. Delhi's Ramlila Maidan, which hosted the famous 2011 protests against corruption in India led by Anna Hazare and yoga proponent Baba Ramdev, used to charge INR 50,000 (~675 USD) to public assemblies using its space; this sum is prohibitively expensive, particularly for, say, a protest demanding payment of minimum wages. In 2018, the fee was abolished, but there remains a requirement of payment of INR 5000

85 Clause 10 of Delhi Police Standing Order No.10/2018

86 On December 15, 1927, Dr. BR Ambedkar burnt a copy of the Manusmriti as a symbol of revolt against the oppressive caste system. Till date, December 15 is celebrated as 'ManusmritiDahan Divas' by many socially oppressed and backward castes, including the Dalit community. See: Ashish Chauhan, "Dalit Activists set fire to Manusmriti", The Times of India, December 26, 2017, Accessed on January 23, 2021, at: <https://timesofindia.indiatimes.com/city/ahmedabad/dalit-activists-set-fire-to-manusmriti/articleshow/62245685.cms>

87 Manoj Kumar, Adnan Abidi, "Indian farmers burn legislation in show of defiance", Reuters, January 13, 2021 Accessed on January 23, 2021, at: <https://www.reuters.com/article/india-farms-protests/indian-farmers-burn-legislation-in-show-of-defiance-idUSKBN29IOMV>

88 Manish Swarup, "BJP youth wing burn an effigy of Prime Minister Manmohan Singh as they protest a scandal over the government's sale of coal fields without competitive bidding in New Delhi", Outlook, Accessed on January 23 2021, at: <https://www.outlookindia.com/photos/single/59981>

89 "Remembering the Quit India movement in 5 photos", The Economic Times, August 8, 2016, Accessed on January 23, 2021, at: <https://economictimes.indiatimes.com/nation-world/remembering-the-quit-india-movement-in-5-photos/burning-foreign-made-goods/slideshow/53598785.cms>

(~67.5 USD) as a refundable security deposit for organising a protest at this venue.⁹⁰

The implementation of these powers has imposed restrictions in a blanket or indefinite manner, thereby acting as prohibitions. They are additionally utilised in a selective and discriminatory manner.

DISPERSAL OF AN ASSEMBLY

Under the Cr.P.C., the police have the power to direct the members of an assembly to 'disperse' if the assembly is likely to cause a disturbance to public peace, and to further 'confine' or 'arrest' members to effectively disperse the assembly.⁹¹ The latter power can be exercised only after a person refuses or fails to comply with directions to disperse.⁹² The police may take such persons to the police station and detain them on the premises, or may confine them in certain notified public premises. The police have the power to detain without arrest, and to detain after arrest. The law stipulates that no person shall be detained or kept in police custody for longer than 24 hours without being produced before a Magistrate.⁹³ Even on arrest, the police can only keep a person in their custody after securing an order from the Magistrate specifying the number of days for which the police are permitted to keep the person in police custody.

CROWD CONTROL AND EXCESSIVE USE OF FORCE

Measures for crowd control and regulating the use of force are inherently connected. While the police, Central Armed Police forces (CAPF) and the armed forces are accorded statutory authority to use force, the use of such force is circumscribed by legal principles, regulations and restrictions, which have further evolved through guidelines and jurisprudence. Although there are no absolute restrictions on the use of force, the universally accepted dictum that force must be used as a 'last resort' is reflected in Indian policing rules and protocols.

90 "Payments done away with, but Delhi's Ramlila Maidan still fails to find any takers for protests", Financial Express, July 17, 2018, Accessed on May 2, 2021, at: <https://www.financialexpress.com/india-news/payments-done-away-with-but-delhis-ramlila-maidan-still-fails-to-find-any-takers-for-protests/1247654/>

91 Section 129, Code of Criminal Procedure, 1973

92 Section 129(2) Code of Criminal Procedure, 1973 and Section 65 of Delhi Police Act, 1978

93 Section 76 Code of Criminal Procedure, 1973

SELECTIVE APPLICATION OF PROHIBITORY ORDERS*

In June 2020, orders were promulgated under 144 Cr.P.C by the Assistant Commissioner of Police, Dwarka, to prohibit all forms of public gatherings in the Dwarka region of New Delhi. Despite such orders, political rallies and events continued to be held, and no one was prosecuted for the same. However, social activist Shabnam Hashmi was served with notices by the Delhi Police and an FIR was registered against her for participating in a public march holding banners calling for the release of political prisoners.

Given that election campaigns and religious festivals involving millions of people were permitted despite the pandemic, the registration of FIRs for small protest marches with 8-10 women participants reveals that while prohibitory orders are passed in rem, they are selectively applied to target and prosecute only certain dissenting members of civil society.

* FIR 222/2020, P.S. Dwarka South

The Code of Conduct⁹⁴ for the police states that:

*4. In securing the observance of law or in maintaining order, the police should as far as practicable, use the methods of persuasion, advice and warning. When the application of force becomes inevitable, only the irreducible minimum of force required in the circumstances should be used.*⁹⁵

For the purpose of public assemblies, including assemblies that may be violent, the Union Home Secretary of the Ministry of Home Affairs has recommended Standard Operating Procedures (SOPs) and non-lethal measures to deal with public agitations.⁹⁶ Permitted equipment and weapons for crowd and riot control by the police and the CAPF, as recommended by the Bureau of Police Research and Development, include water cannons, teargas shells, stinger and dye-marker grenades, tasers and lasers, net guns and stink bombs.⁹⁷

However, due to the absence of rigorous monitoring and accountability for the use of firearms, against the standards of necessity and proportionality, members of public assemblies continue to sustain gunshot wounds resulting from police firing carried out ostensibly to disperse them.⁹⁸ The impunity for the excessive use of firearms is facilitated by the mandatory statutory requirement under Section 197 Cr.P.C. of prior sanction for prosecution of the offending police officer.⁹⁹ This legal immunity shields all public servants, including police personnel, members of CAPF, and armed forces, from prosecution before a criminal court, if it is held that the offence of causing the injury or death was committed in the course of discharge of official duty, unless prior sanction is obtained from the relevant appointing authority in the government. There

94 Adopted at the Conference of the Inspector Generals of Police in 1960 revised by the first national Police Commission and issued by the Ministry of Home Affairs in 1985

95 Ministry of Home Affairs, Guidelines to the Indian Police, Code of Conduct for the Police in India, Accessed on 12.04.2021, available at <https://police.py.gov.in/MHA%20-%20Model%20Code%20of%20Conduct%20-%20Indian%20Police.pdf>

96 Vide order No.1-11011/33/2010-1S-IV, Govt. of India, Ministry of Home Affairs (IS-I Division), New Delhi dated 22nd September, 2010

97 "Precis on Crowd Control", Bureau of Police Research & Development, MHA, GOI, 2016, Accessed on May 2, 2021, at [https://bprd.nic.in/WriteReadData/CMS/Crowd%20Control-All%20chapters\(1-114\)English.pdf](https://bprd.nic.in/WriteReadData/CMS/Crowd%20Control-All%20chapters(1-114)English.pdf)

98 Staff Reporter, "After denials, police admit they did open fire on December 15 during anti-CAA protests, January 6, 2020, Accessed on January 23, 2021, at: <https://www.thehindu.com/news/cities/Delhi/after-denials-police-admit-they-did-open-fire-on-december-15/article30489076.ece>

99 Section 197, Code of Criminal Procedure

13 PROTESTERS KILLED IN TAMIL NADU*

13 protesters were killed in a police shooting in May 2018, outside a copper smelter factory run by UK-based Vedanta Resources in Tamil Nadu's port city of Thoothukudi.

The protests were sparked by the smelter's pollution of ground water, in which the Pollution Control Board allegedly allowed the company to operate its smelter with shorter chimney stacks than permitted, reducing the company's costs but damaging the environment.

12 of the 13 protesters killed when police opened fire were hit by bullets in the head or chest, and six of these were shot from behind, as per autopsy reports. Two others died after bullets pierced the sides of their heads, according to reports produced by forensic medicine experts from several government hospitals.

* "Autopsies reveal Indian police shot protesters demonstrating against Vedanta copper smelter in head, chest and from behind", Reuters, December 22, 2018, Accessed on 02.05.2021 at: <https://www.scmp.com/news/asia/south-asia/article/2179227/autopsies-reveal-indian-police-shot-protesters-demonstrating>. See also: "Why are people against Vedanta's Sterlite plant in Tuticorin? 6 things you should know", The Economic Times, 25 May, 2018, Accessed on 02.05.2021 at: <https://economictimes.indiatimes.com/news/politics-and-nation/whats-wrong-with-vedantas-sterlite-unit-in-tuticorin-6-things-you-should-know/articleshow/64273066.cms?from=mdr>

are many instances where members of assemblies suffer bullet injuries in their backs, indicating that they were fleeing the protest site when they were shot. This suggests an act of aggression or revenge by law enforcement, rather than an act of self-defence, as would be required to pass the test of proportionality.

The excessive use of force by law enforcement agencies against protesters is an issue of recurring concern, as it stands in direct breach of constitutional protections. Unfortunately, normalisation of hate and contempt for protesters in Indian mainstream media has emboldened the sense of impunity with which such brutality is inflicted. The Human Rights Handbook on Policing Assemblies states that “*the dispersal of an assembly by the police should always be a measure of last resort and should only be utilized in response to acts of violence or the imminent threat of violence.*” However, in India, peaceful assemblies have been dispersed even when there is no likelihood of violence, on the pretext of lack of permission¹⁰⁰ or risk to health and safety.¹⁰¹

ARMED FORCES SPECIAL POWERS ACT

The Armed Forces Special Powers Act 1958 (AFSPA), operational in parts of the North-East,¹⁰² and the AFSPA 1990,¹⁰³ applicable in Jammu and Kashmir, expressly allows the army and Central Armed Police Forces (CAPF) to use force against any assembly of more than five persons in a notified ‘disturbed area.’ Disregarding the distinction between peaceful and violent assemblies, such force can extend to inflicting fatalities, merely at the discretion of army personnel, for the purpose of maintaining ‘public order.’ AFSPA provides for use of force by an army personnel:

(a) 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

100 “CAA protest peaceful, 350 detained in Delhi”, Hindustan Times, 28.12.2019, Accessed on 02.05.2021, at: <https://www.hindustantimes.com/india-news/caa-protest-peaceful-350-detained-in-delhi/story-IF6lg8CbQmOKMtiRdAQjll.html>
Also see “CAA protest march denied permission in Delhi; UP, Karnataka Issue prohibitory orders”, The Wire, 19.12.2019, Accessed on 02.05.2021, at: <https://thewire.in/rights/caa-protest-permission-denied-prohibitory-orders>. “Anti-CAA protest in Nizamuddin, 200 agitators occupy footpaths”, Hindustan Times, 28.01.2020, Accessed on: 14.02.2021, at: <https://www.hindustantimes.com/delhi-news/anti-kaa-protest-springs-up-at-nizamuddin/story-JljE4rxSP6fD1NacleSAhL.html>. Also see, “CAA- NRC protest: 7 arrested for taking out candle march without permission in Lucknow”, India Today, 01.02.2020, Accessed on: 14.04.2021, at: <https://www.indiatoday.in/india/story/kaa-nrc-protest-7-arrested-for-taking-out-candle-march-without-permission-in-lucknow-1642151-2020-02-01>

101 “Shaheen Bagh protest site cleared by police as Delhi goes under coronavirus lockdown”, India Today, 24.03.2020, Accessed on: 12.04.2021, at: <https://www.indiatoday.in/india/story/delhi-lockdown-coronavirus-shaheen-bagh-protest-cleared-1658927-2020-03-24>. Also see, “Farmer’s protest: Delhi police fire tear gas shells to disperse farmers at Singhu border”, Business Insider, 27.11.2020, Accessed on: 12.04.2021, at: <https://www.businessinsider.in/india/news/farmers-protest-delhi-police-fire-tear-gas-shells-to-disperse-farmers-at-singhu-border/articleshow/79440720.cms>

102 Presently, AFSPA, 1958 is operational in entire States of Assam, Nagaland, Manipur (except Imphal Municipal area), three districts namely Tirap, Changlang and Longding of Arunachal Pradesh and the areas falling within the jurisdiction of the eight police stations in the districts of Arunachal Pradesh, bordering the State of Assam. The notification declaring Manipur and Assam as “Disturbed Areas’ have been issued by the State Governments.

103 The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 available at https://www.mha.gov.in/sites/default/files/The%20Armed%20Forces%20%28Jammu%20and%20Kashmir%29%20Special%20Powers%20Act%2C%201990_0.pdf

*being used as weapons or of fire-arms, ammunition or explosive substances.*¹⁰⁴

EXTERNMENT AND PREVENTIVE GOOD BEHAVIOUR BONDS

The power to extern and evict, or temporarily banish persons from a specific geographical area under the Goondas Act¹⁰⁵ or the Cr.P.C. has been invoked to prevent certain categories of people, such as leaders of the opposition political party, leaders of people's social movements or trade union leaders, from entering specific geographical areas. It has also been used to extern persons from an area, subsequent to their participation in a peaceful assembly. This power is also deployed as a punitive measure to keep political leaders, who play a key role in many protests against government policies, away from the assembly.

The Cr.P.C. enables preventive action against specific individuals.¹⁰⁶ An Executive Magistrate, on the basis of information that a person is *"likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity"* may, after issuing a Show Cause Notice (SCN) to the person, direct the person to execute a bond for 'keeping the peace' for a specified period, not exceeding one year.¹⁰⁷ The bond may be issued with or without requiring the person to deposit a monetary surety.¹⁰⁸ The Executive Magistrate may issue a similar bond based on information received of a *"person taking precautions to conceal his presence [where] there is reason to believe that he is doing so with a view to committing a cognizable offence."*¹⁰⁹

In the event the person fails to deposit the security amount, the Magistrate may direct the person to be *'committed to prison.'*¹¹⁰ Similarly, if a person executes the bond, deposits the surety and then goes on to breach the undertaking, the Magistrate can direct that the person be *'arrested and detained in prison,'* in

104 Section 4(a) AFSPA, 1990 and Section 4(a) of AFSPA, 1958

105 Different States have their own 'Goondas Act', it is not a central law. For instance, The UP Control of Goondas Act, 1970, may be found here: <http://www.bareactslive.com/ALL/UP082.HTM>

106 Chapter VIII, Code of Criminal Procedure, 1973, under the provisions enumerated in the chapter titled 'Security for Keeping the Peace and for Good Behaviour.'

107 Section 107, Code of Criminal Procedure, 1973

108 Section 107 Code of Criminal Procedure, 1973

109 Section 109 Code of Criminal Procedure, 1973

110 Section 122 (a) Code of Criminal Procedure, 1973

'NON-LETHAL' PELLET GUNS: HISTORY OF PAIN AND SUFFERING IN KASHMIR*

Violent protests in Kashmir are quelled using pellet guns, tear gas and chilli-filled shells (containing PAVA or pelargonic acid vanillyl amide, found in chillies). As per the MHA's official data and news reports, metal pellets killed 18, blinded 139, injured 2,942 and caused eye injuries to 1,459 between July 2016 and February 2019, including killing and injuring minors.

The Ministry of Home Affairs (MHA) describes pellet guns, which spray a volley of multi directional metal pellets and can cause multi-organ damage, as a 'non-lethal' crowd-control measure.

* "Pellet guns have killed 24, blinded 139 in Kashmir since 2010: Report", Business Standard, August 2, 2019 (accessed on January 23, 2021) https://www.business-standard.com/article/current-affairs/pellet-guns-have-killed-24-blinded-139-in-kashmir-since-2010-report-119080200151_1.html

addition to being punished for breach of the undertaking.¹¹¹

A person who is committed to prison or detained under this Chapter of the Cr.P.C. is not entitled to access provisions on bail, as held by the Supreme Court:

Further bail is only for the continued appearance of a person and not to prevent him from committing certain acts. To release a person being proceeded against under ss. 107/112 of the Code is to frustrate the very purpose of the proceedings unless his good behaviour is ensured by taking a bond in that behalf.¹¹²

These powers are to be exercised only after an inquiry by the Magistrate, and through the inquiry a determination of whether such immediate measures are necessary. The provision, however, gives wide discretionary powers to determine whether a person is 'hazardous to the community' based on evidence of his 'general repute or otherwise.'¹¹³ The various state enactments of The Goondas Act also provide similar discretionary powers to the District Magistrate.

In Mumbai, externment orders were passed against various protesters participating in the January 2020 anti-CAA protests, which also criticized the violence against student activists at Jawaharlal Nehru University. In addition to two separate First Information Reports (FIRs) filed at the Colaba Police Station and MRA Marg Police Station, the police also initiated chapter proceedings under Section 110(e) of the Code of Criminal Procedure (CrPC) against several prominent activists. While these externment proceedings have reportedly been dropped,¹¹⁴ 36 persons have been charge-sheeted by the police for several offences, including Section 143 (member of an unlawful assembly), Section 149 (every member of an unlawful assembly guilty of offence committed in prosecution of common object) of the Indian Penal Code; and Section 37 (3) of the Bombay Police Act, 1951, which allows the police to "prohibit any assembly or procession whenever and for so long as it considers such prohibition to be necessary for the preservation of the public order."¹¹⁵

The Gujarat High Court on 26.08.2021 quashed an order of externment for social activist Md. Kaleem Siddiqui for one year, passed by the Assistant Commissioner of Police, Ahmedabad under the Gujarat Police Act, 1951. The externment order was passed on the basis of two FIRs against Siddiqui; one for which he had already been acquitted, and the other filed in 2019, allegedly for Siddiqui being part of a crowd of unknown persons who were protesting against CAA-NRC. In quashing the externment order the High Court observed that, "*Citizen cannot be subjected to externment for raising his grievance*

111 Section 122(b) Code of Criminal Procedure, 1973

112 *Madhu Limaye v Sub-Divisional Magistrate* (Supra)

113 Section 116 Code of Criminal Procedure, 1973

114 Sukanya Shantha, "Mumbai police withdraws externment proceedings against activists and students", *The Wire*, 17.11.2020, Accessed on 02.05.2021, at: <https://thewire.in/rights/mumbai-police-withdraw-externment-proceedings-activists-students>

115 "Mumbai police Chargesheet 36 for Gateway of India Protest after JNU attack", *The Wire*, 29.12.2020, Accessed on: 02.05.2021, at: <https://thewire.in/law/mumbai-police-gateway-of-india-protest-chargesheet>

against the Government. On this count also, the externment order needs to be set aside.”¹¹⁶

PREVENTIVE DETENTION

The Criminal Procedure Code authorises preventive detention, and the same has been held by the Supreme Court to be a valid restriction on the fundamental right to liberty. A police officer may arrest without warrant or without orders any person who has “a design to commit any cognizable offence,” if it appears that “the commission of the offence cannot be otherwise prevented.”¹¹⁷ As noted earlier, criminal law is a legislative subject over which each state is competent to make its own laws. For example, Section 151 Cr.P.C. authorises a police officer to arrest (without warrant or orders from a Magistrate) and detain a person for up to 24 hours to prevent the commission of a cognisable offence.¹¹⁸ In Delhi the preventive detention can be extended by the Court for a maximum of seven days,¹¹⁹ while in Maharashtra, the duration of preventive detention can extend for up to 15 days at a time, but not exceeding 30 continuous days, if the circumstances are such that the person “being at large is likely to be prejudicial to the maintenance of public order.”¹²⁰ It is thus permissible in India for States to amend legal provisions of the Code of Criminal Procedure, thereby creating parallel systems of laws that vary by State. Thus, persons who may be desirous of joining an assembly that aims to raise controversial political issues may be subjected to preventive detention under these provisions to prevent them from joining the assembly. In Jammu and Kashmir, the Jammu and Kashmir Public Safety Act, 1978 is regularly used to prevent political gatherings and assemblies by placing political leaders and influential individuals under preventive detention,¹²¹ for which imprisonment can extend up to two years.¹²²

116 Order dt. 26/08/2021, Criminal Miscellaneous Application 1/2020, https://www.livelaw.in/pdf_upload/caa-nrc-gujarat-hc-399373.pdf

117 Section 151 Cr.P.C

118 Section 151(2), Cr.P.C.

119 Aldanish Rein vs. State of NCT of Delhi & Anr. 2018 SCC OnLine Del 12207

120 Maharashtra State Amendment of Section 151 CrPC

121 Gaurav Bhawani, “Rule of ‘lawless law’”, Economic and Political Weekly, Vol 53., Issue No. 20, 19.05.2018, Accessed on 05.02.2021, at: <https://www.epw.in/journal/2018/20/insight/rule-%E2%80%98lawless-law%E2%80%99.html>

122 Section 18, J&K Public Safety Act, 1978

SHARJEEL USMANI: STUDENT LEADER EXTERNED FROM ALIGARH FOR LEADING CAA PROTESTS*

An externment order under The Uttar Pradesh Control of Goondas Act, 1970, was issued by the Aligarh district administration against Sharjeel Usmani, a 23-year old student leader from Aligarh Muslim University (AMU), to remove himself from the district and not to return for a period of six months.

Sharjeel Usmani was a key organiser and leader of the CAA protests at Aligarh Muslim University in Uttar Pradesh, which emerged in response to police violence against students at New Delhi’s Jamia Milia Islamia University. These protests were met with disproportionate and excessive use of force amounting to police brutality, with the police using tear gas, rubber bullets and stun grenades against university students.

The malicious and overzealous externment order came on the heels of Usmani being granted bail by the District Court in another case related to the CAA protests, in which the Court released Usmani, citing his stellar academic record.

* Asad Rehman, “AMU Violence Sharjeel Usmani externed from Aligarh under Goondas Act”, The Indian Express, November 8, 2020, Accessed on January 23, 2021, at: <https://indianexpress.com/article/india/amu-violence-sharjeel-usmani-externed-from-aligarh-under-goondas-act-7004905/>. Also see, Shahira Naim, “December 15 night at AMU that haunts Aligarh”, The Tribune, December 22, 2019, Accessed on January 23, 2021, at: www.tribuneindia.com/news/features/dec-15-night-at-amu-that-haunts-aligarh-15294

B. Punitive Legal Regime

Participation in an assembly attracts punitive consequences, ordinarily in two circumstances: first, if certain offences are committed during the assembly by its members, or second, if a peaceful assembly is carried out in violation of prohibitory orders under the Cr.P.C. that are typically imposed on members of public assemblies. These may be broadly categorised as ‘offences against public tranquillity’;¹²³ ‘offences affecting the human body’;¹²⁴ ‘offences against the State’;¹²⁵ and ‘offences of contempt of lawful authority of public servants.’¹²⁶

DISOBEYING PROHIBITORY ORDERS

The prohibitory orders issued under the Police Orders or under Section 144 Cr.P.C. are orders that have been duly promulgated by public servants acting in their official capacity. Disobedience of such orders can result in monetary fines and imprisonment up to one month.¹²⁷

BROADENING THE SWEEP OF CRIMINAL LAWS

Serious offences that ordinarily appear unrelated to assemblies, such as criminal conspiracy,¹²⁸ sedition¹²⁹ and promoting enmity between communities,¹³⁰ have also been invoked against members of assemblies engaged in political protests. Many anti-CAA protesters have been arrested and slapped with sedition charges, in what many experts believe is an attempt to quell dissent.¹³¹ These offences, due to their very nature, broaden the net of criminality and make it difficult to immediately secure bail, as the *prima facie* allegation is of a grave offence. The use of such provisions to stifle dissent and disrupt assemblies has been an ever-present feature of the Indian State’s response to legitimate protests.¹³²

Extraordinary laws, such as the Unlawful Activities Prevention Act (UAPA), 1967, known as an ‘anti-terror law,’ criminalise membership in an ‘unlawful association.’¹³³ This allows political beliefs or political expression, including through participation in peaceful assemblies, to be criminalised by mere association. Provisions of the UAPA

123 Chapter VIII, Code of Criminal Procedure, 1973.

124 Chapter XVI, Code of Criminal Procedure, 1973.

125 Chapter VI, Code of Criminal Procedure, 1973.

126 Chapter X, Code of Criminal Procedure, 1973.

127 Section 188, Indian penal Code, 1860.

128 Section 120B, Indian penal Code, 1860.

129 Section 124A, Indian penal Code, 1860.

130 Section 153A, Indian penal Code, 1860.

131 Anumeha Yadav, “How India uses colonial-era sedition law against CAA protesters”, Aljazeera, January 21 2020, Accessed on January 22 2021, at: <https://www.aljazeera.com/news/2020/1/21/how-india-uses-colonial-era-sedition-law-against-caa-protesters>

132 “Dissent thy name is sedition?”, The Hindu, September 17 2012, Accessed on January 22 2021, at: <https://www.thehindu.com/news/national/tamil-nadu/dissent-thy-name-is-sedition/article3904645.ece>

133 Section 10, Unlawful Activities (Prevention) Act, 1967

also allow for prolonged detention prior to the filing of a chargesheet,¹³⁴ and invert the settled jurisprudence on bail being the rule and jail an exception by prohibiting bail in cases where the investigation shows a ‘*reasonable ground for believing that the accusations against such person are prima facie true.*’¹³⁵ Protesters who were part of assemblies involving anti-CAA speeches and slogans are now facing prosecution under the UAPA.¹³⁶

Similarly, provisions of The Prevention of Money Laundering Act, 2002, (PMLA) have been invoked against persons in an effort to connect peaceful assemblies to violent incidents allegedly supported by unaccounted funds, ultimately criminalising members of peaceful assemblies.

In a judgment granting bail to three student activists leading the anti-CAA protests in Delhi, the Delhi High Court examined:

*...when the constitutionally guaranteed right to protest flowing from the right under Article 19(1)(b) of the Constitution to “assemble peaceably and without arms,” turns into a cognizable offence under the ordinary penal law; and when the right to protest gets further vitiated and becomes a terrorist act, or a conspiracy or an act preparatory, to commission of a terrorist act under the UAPA.*¹³⁷

Perusing the allegations made against the activists, the Court held that:

*Allegations relating to inflammatory speeches, organising of chakka jaam, instigating women to protest and to stock-pile various articles and other similar allegations, in our view, at worst, are evidence that the appellant participated in organising protests, but we can discern no specific or particularised allegation, much less any material to bear- out the allegation, that the appellant incited violence, what to talk of committing a terrorist act or a conspiracy or act preparatory to the commission of a terrorist act as understood in the UAPA.*¹³⁸

Examining the purpose and object of the anti- terror UAPA law, the High Court held:

*“Having given our anxious consideration to this aspect of ‘likelihood’ of threat and terror, we are of the view that the foundations of our nation stand on surer footing than to be likely to be shaken by a protest, however vicious, organised by a tribe of college students or other persons, operating as a coordination committee from the confines of a University situate in the heart of Delhi.*¹³⁹

134 Section 43D(2), Unlawful Activities (Prevention) Act, 1967

135 Section 43D(5), Unlawful Activities (Prevention) Act, 1967

136 ‘Invocation of sedition laws, UAPA against CAA protesters illegal, say activists’, The Wire, April 24 2020, Accessed on January 22 2021, at: <https://thewire.in/rights/anti-caa-protesters-uapa-caa>

137 Natasha Narwal v. State of Delhi (NCT), 2021 SCC OnLine Del 3254, para 23

138 Ibid, para 34.

139 Asif Iqbal Tanha v State of Delhi (NCT), 2021 SCC OnLine Del 3253, Para 59(i)

Placing reliance upon the Supreme Court judgment in *Mazdoor Kisan Shakti Sangathan vs Union of India and Anr.* the High Court concluded:

*We are constrained to express, that it seems, that in its anxiety to suppress dissent, in the mind of the State, the line between the constitutionally guaranteed right to protest and terrorist activity seems to be getting somewhat blurred. If this mindset gains traction, it would be a sad day for democracy.*¹⁴⁰

The State, however, disagreed with the High Court's reading of the law and swiftly appealed against the judgment to the Supreme Court, which ordered that, "in the meantime, the impugned judgment shall not be treated as a precedent and may not be relied upon by any of the parties in any of the proceedings."¹⁴¹

IMPOSITION OF PROHIBITORY CONDITIONS IN BAIL ORDERS


There are numerous examples in which protesters are unceremoniously arrested for violating prohibitory orders or overbroad bail orders related to an initial protest arrest; such bail orders often limit an individual's ability to participate in subsequent legitimate protest actions, in violation of their right to assemble.

For example, Dalit political leader and Bhim Army Chief, Chandrashekar Azad, was arrested while protesting the CAA at Jama Masjid, New Delhi. After 25 days in custody, he was granted bail by a Delhi Sessions Court on 15 January 2021.¹⁴² While acknowledging that the reading of the Preamble of the Constitution does not constitute incitement, the court proceeded to pass an order requiring Azad to stay outside Delhi for a period of one month, in view of the upcoming State Legislature elections, as part of his bail conditions. He was ordered to mark his presence at the local police station in Saharanpur, Uttar Pradesh (his permanent place of residence) every Saturday for four weeks. The court declared that if Azad was required to come to Delhi for medical treatment, he should

140 *Natasha Narwal v. State of Delhi (NCT)*, 2021 SCC OnLine Del 3254, para 35

141 *State of NCT of Delhi v. Devangana Kalita*, Special Leave to Appeal (crl.) No.(s) 4289/2021

142 "Bhim Army Chandra Shekhar Azad released from Tihar Jail," *India Today*, 16.01.2020, Accessed on 04.04.2021, at: <https://www.indiatoday.in/india/story/bhim-army-chief-chandra-shekhar-azad-released-from-tihar-jail-1637563-2020-01-16>



There are numerous examples in which protesters are arrested for violating prohibitory orders or overbroad bail orders related to an initial protest arrest; such bail orders often limit an individual's ability to participate in subsequent legitimate protest actions, in violation of their right to assemble.

inform the police authorities in Saharanpur and New Delhi. During the period of such visit, he would be under police escort. The court further stated that Azad was free to visit Jama Masjid, Jor Bagh, and Guru Ravi Das temple to pay obeisance within 24 hours after his release, but would thereafter be escorted to his permanent address in UP.¹⁴³ As the bail conditions imposed were violative of Azad's fundamental rights, they were subsequently modified to allow Azad to visit Delhi.¹⁴⁴ The modified conditions still required him to mark his presence before the police and inform them of his itinerary.

OFFENCES AGAINST PUBLIC TRANQUILLITY

Chapter VIII of the Indian Penal Code (I.P.C) contains the punitive legal framework for offences against public tranquillity. While the term 'public tranquillity' remains undefined in the Code, the offences within this chapter largely penalise the formation and continuation of an unlawful assembly and commission of the act of rioting.

Section 141 of the I.P.C designates an assembly of five or more persons as an 'unlawful assembly' if the common object of the members falls within one of the five parameters outlined in the section. If the common object of the assembly is to 'overawe' the State, or any public servant by the use or show of criminal force, or to resist the execution of any law or legal process, the assembly will be designated as unlawful. Thus, any assembly can potentially be designated as 'unlawful' if an order for a blanket restriction of public assemblies under section 144 of the Cr.P.C. stands violated. Further, any peaceful assembly by mere non-compliance with the conditions set out in the permit or any dispersal order may also be deemed unlawful and therefore punishable. In *Ram Babu vs. Emperor*, it was held by the Patna High Court that "*resistance to the conditions set out in the order issued under the law is resistance to the execution of the law. Therefore, the case is clearly governed by Cl.2 to sec 141.*"¹⁴⁵

Membership in an unlawful assembly is ascribed to anyone who, "being aware of facts which render any assembly unlawful, intentionally joins the assembly, or continues in it."¹⁴⁶

In *Masalti v State of Uttar Pradesh*,¹⁴⁷ the Supreme Court opined that to extend liability to members of an assembly, it is not necessary for every member of an assembly to perform an illegal overt act or an illegal omission. Rather the Court noted that:

Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members

143 Nilashish Choudhary, "Chandra Shekhar Azad granted bail on condition to stay out of Delhi for a month", January 15 2020, Accessed on January 22 2021, at: <https://www.livelaw.in/top-stories/delhi-court-grants-bail-to-bhim-army-chief-chandra-shekhar-azad-151666>

144 Nilashish Choudhary, "Delhi court allows Chandra Shekhar Azad to visit Delhi: Modifies bail condition", January 21 2020, Accessed on January 22 2021, at: <https://www.livelaw.in/top-stories/delhi-court-allows-chandra-shekhar-azad-to-visit-delhi-modifies-bail-conditions-151860>

145 A.I.R 1946 Pat. 381 at P. 382.

146 Section 142, Indian Penal Code, 1860

147 *Masalti v State of Uttar Pradesh* (1964) 8 SCR 133

of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by s.149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.

While presence in an unlawful assembly and sharing a common unlawful object are the *sine qua non* of an unlawful assembly, the Delhi Police have initiated prosecution against the key organisers and members of the anti-CAA protests without any cogent proof of their role in the commission of an offence, other than organising public protests. Judicial orders granting bail for crimes under the Indian Penal Code to key organisers and young women leaders of the anti-CAA protests, Devangana Kalita and Natasha Narwal, noted that there was no evidence to show that they indulged in or incited violence.¹⁴⁸ In another bail order in favour of three Muslim men facing prosecution for participation in an unlawful assembly and rioting, the court observed that the investigation had been careless and perfunctory, and the filing of the charge sheet was done in a lackadaisical manner.¹⁴⁹ However, a Sessions Court, while denying bail to another woman leader, Safoora Zargar, held that the organising of a “*chakka-jam*” or a road block by an unlawful assembly would be enough to meet the elements of serious offences under India’s anti-terror law (the UAPA).¹⁵⁰

The penalty for being a member of an unlawful assembly can be imprisonment up to six months, a fine, or both.¹⁵¹ If an individual joins or continues membership in an unlawful assembly knowing that it has been commanded to disperse, the term of imprisonment increases up to two years.¹⁵² Further, if the assembly commanded to disperse has not been declared to be an unlawful assembly, yet the members know that it is likely to cause disturbance of public peace, the continued membership or joining of such an assembly may also be punished with imprisonment up to six months, a fine, or both.¹⁵³

Another facet of an unlawful assembly penalised under this chapter is the offence of rioting, defined by Section 146 I.P.C. as follows: “*Whenever force or violence is used by an unlawful assembly or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.*” The punishment for

148 Devangana Kalita vs State of NCT of Delhi, Bail App. 2038/2020, Order dt. 01.09.2020, Accessed on 02.05.2021, at: https://www.livelaw.in/pdf_upload/pdf_upload-380762.pdf. Also see: Bail Application no. 1394/2020, Order dt. 17.09.2020, Accessed on 02.05.2021, at: https://www.livelaw.in/pdf_upload/pdf_upload-381642.pdf

149 Nupur Tapilyal, “Investigation carried out in a lackadaisical manner’ Karkardooma Court granted bail to three accused in the Delhi Riots cases”, Live Law, 05.01.2021, Accessed on 02.05.2021, at: <https://www.livelaw.in/news-updates/delhi-riot-investigation-bail-to-accused-delhi-police-osama-gulfam-sonu-chikna-aatir-167980?infinitemscroll=1>

150 Pregnant student Safoora Zargar denied bail by Delhi High Court in UAPA case alleging Delhi riots conspiracy”, Live Law, 04.06.2020, Accessed on: 12.04.2021, at: <https://www.livelaw.in/top-stories/pregnant-student-sarfoora-zargar-denied-bail-by-delhi-court-157839>

151 Section 143 IPC

152 Section 145 IPC

153 Section 151 IPC

the offence of rioting can be imprisonment up to two years, a fine, or both.¹⁵⁴ In India, all members of an unlawful assembly may be prosecuted for the offence of rioting under the rule of vicarious liability. For instance, in September 2020, 15 persons in the state of Uttar Pradesh were booked by the police for rioting, for protesting growing unemployment by burning an effigy of the Prime Minister.¹⁵⁵ As noted, burning effigies has been an integral protest act in India for many decades; unless accompanied by acts of violence, such protest acts are squarely protected by the right to freedom of speech and expression under Article 19(1)(a) of the Constitution. Despite this, the offence of rioting is an oft-used legal provision by the police to crackdown on protesters and political dissidents.

It is pertinent to note that the law makes no distinction between acts of violence committed by members of an assembly vis-à-vis *‘agent provocateurs’*,¹⁵⁶ by counter-protesters who respond violently to public assemblies, or by State officials who play an overt or covert role in instigating the riots. Invariably, the organisers and participants of the public assembly are prosecuted for rioting, even though the riots may have been fuelled by those opposing the public assembly. Thus, chapter VIII of the I.P.C is instrumental in providing legal tools for the State to criminalise members of public assemblies through the legal doctrine of vicarious liability to quell and penalise public participation in assemblies.

RECOVERY OF DAMAGES FROM ASSEMBLIES

The Prevention of Damage to Public Property Act, 1984, penalises the damaging of public property, including during peaceful assemblies, and provides for recovery of damages from protesters or members of such assemblies. The Prevention of Damage to Public Property Act, 1984, punishes anyone “*who commits mischief by doing any act in respect of any public property*” with a jail term of up to five years, a fine, or both.¹⁵⁷ ‘Public

¹⁵⁴ Section 148 IPC

¹⁵⁵ “15 booked for rioting, burning PM Modi’s effigy on his birthday in Uttar Pradesh”, The new Indian Express, 19.09.2020, Accessed on: 12.04.2021, at: <https://www.newindianexpress.com/nation/2020/sep/19/15-booked-for-rioting-burning-pm-modis-effigy-on-his-birthday-in-uttar-pradesh-2199068.html>

¹⁵⁶ GC 37 recognizes that violence against peaceful assemblies may be committed by agent provocateurs acting on behalf of authorities, and such violence should not be attributed to the assembly. (Para 18)

¹⁵⁷ The Prevention of Damage to Public Property Act 1984, Section 3.



In India, all members of an unlawful assembly may be prosecuted for the offence of rioting under the rule of vicarious liability.

Property' includes any property, whether movable or immovable, which is under the control of the Central or State government, or any local/municipal corporation, or any institution or enterprise that is funded wholly or partially by the government.¹⁵⁸ In 2009, the Supreme Court prescribed principles of tortious liability in relation to properties damaged during assemblies for the purpose of "restitution" of properties.¹⁵⁹

The state government of Uttar Pradesh in 2020 erected huge public hoardings and banners at prominent locations in the capital city, displaying large photographs of the faces of people against whom proceedings for recovery of damages had been initiated for their role in organising and participating in the anti-CAA protests. The installation of banners was justified by the state as a measure to recover damages, although it posed serious concerns around privacy and fair trial rights. Indeed, the action of the state government was held unconstitutional by the Allahabad High Court in a *Suo motu* petition, where the Court stated:

*We are having no doubt that the action of the State which is subject matter of this public interest litigation is nothing but an unwarranted interference in privacy of people. The same hence, is in violation of Article 21 of the Constitution of India.*¹⁶⁰

However, before the hoardings could be dismantled, the State appealed against the said order and the same is pending consideration before the Supreme Court.

In a 2009 judgment, the Supreme Court instructed and permitted the police to film peaceful assemblies.¹⁶¹ Introduced as a solution to provide accountability in cases where public property is damaged by members of an assembly, the recording and storing of information relating to protest participation has deterred public participation and raised serious concerns around privacy rights, especially as India currently lacks a Data Protection law.¹⁶²

COVID-19 AND THE REINFORCEMENT OF CURTAILMENT OF FREEDOM OF ASSEMBLY

The onset of the pandemic in early 2020 was used by the State to implement a web of legal provisions, both preventive and punitive, penalising presence in public spaces and participation in public gatherings. While the pandemic signalled a grave health emergency, it also provided an occasion for the Indian State to resort to special laws and issue administrative orders and notifications, all of which augmented the power of the Executive and police, and drastically pared down individual and collective fundamental freedoms, leading to pervasive democratic backsliding.¹⁶³ Prohibitory orders under Section 144 Cr.P.C. were issued by District Magistrates or police chiefs in districts across

158 The Prevention of Damage to Public Property Act 1984, Section 2(b).

159 In *Re destruction of public and private properties v. State of A.P* (2009) 5 SCC 212

160 In-*Re Banners Placed On Road Side In The City Of Lucknow vs State of UP*, 2020 SCC OnLine All 244

161 Ibid.

162 A draft Data Protection Bill is under analysis by a Joint Parliamentary Committee.

163 Lydia Finzel, "Democratic Backsliding in India, The World's Largest Democracy", *Varieties of Democracy*, 24.02.2020, Accessed on 02.05.2021, at: <https://www.v-dem.net/en/news/democratic-backsliding-india-worlds-largest-democracy/>

the country, prohibiting gatherings of people.¹⁶⁴ The Central government invoked provisions of the Epidemic Diseases Act, 1897,¹⁶⁵ and the Disaster Management Act, 2005.¹⁶⁶ The Epidemic Diseases Act, 1897, a colonial law enacted to respond to the bubonic plague, penalises the disobedience of an Order passed by a public servant under the Act.¹⁶⁷ The Disaster Management Act supplements provisions in general law which penalise obstruction of public servants in the discharge of their functions and the refusal to comply with orders of the government.

Most orders during the pandemic prohibiting or restricting public gatherings were issued under The Disaster Management Act, 2005, which empowers State Governments to take necessary measures to 'prevent and mitigate' disasters.¹⁶⁸ The Act enables the State to impose a range of restrictive measures, including, to '*(b) control and restrict the entry of any person into, his movement within and departure from, a vulnerable or affected area.*'¹⁶⁹ Although the lockdown imposed on 24 March 2020 was relaxed after three months, the prohibitory orders became embedded in a state regime of social control and remained in force across Delhi through October 2020; they were subsequently resurrected in April 2021 during India's second COVID wave.¹⁷⁰

CRIMINALISING PEACEFUL ASSEMBLIES DURING THE PANDEMIC

Consequent to the sudden imposition of a strict lockdown by the central government at the end of May 2020 with all transport shut down, millions of migrant workers found themselves stranded, jobless, destitute and hungry. Desperate to return home, industrial cities like Surat and Mumbai saw hundreds of workers gather, demanding that the



164 "Amid Covid-19 surge, Section 144 imposed in various cities, read details", Hindustan Times, 21.09.2020, Accessed on 02.05.2021, at: <https://www.hindustantimes.com/india-news/amid-covid-19-surge-section-144-imposed-in-various-cities-read-details/story-veffZfMvCyApp3djAS3EIJ.html>. Also see: 144 Order imposed in Goa dt. 20.03.2020 & 21.03.2020, Accessed on 02.05.2021 at: <https://www.goa.gov.in/wp-content/uploads/2020/03/Order-Section-144-Collectorate-South.pdf>. Also see: "Covid-19: Kerala government imposes section 144 as cases spike", The Wire, 02.10.2020, Accessed on: 02.05.2021, at: <https://thewire.in/health/covid-19-kerala-government-imposes-section-144-to-curb-transmission>. Also see: Vivek Dubey, "Coronavirus crisis: section 144 imposed in New Delhi till March 31", Business Today, 22.03.2020, Accessed on 02.05.2021, at: <https://www.businesstoday.in/top-story/coronavirus-crisis-section-144-imposed-in-new-delhi-till-march-31/story/398902.html>

165 The Epidemic Diseases Act, 1897.

166 The Disaster Management Act, 2005.

167 Section 3, The Epidemic Diseases Act, 1897.

168 Section 6 and Section 14, The Disaster Management Act, 2005.

169 Section 24 (b), The Disaster Management Act, 2005.

170 "Covid-19 prohibitory orders issued in Mumbai under Section 144", The Economic Times, 14.04.2021, Accessed on 02.05.2021, at: <https://economictimes.indiatimes.com/news/india/covid-19-prohibitory-orders-issued-in-mumbai-under-section-144/articleshow/82066208.cms?from=mdr>. Also see: "Section 144 in Gurugram", The Hindu, 26.04.2021, Accessed on 02.05.2021, at: <https://www.thehindu.com/news/cities/Delhi/section-144-in-gurugram/article34409663.ece>. Also see: "Rajasthan government extends section 144 in whole state till 22 May", Mint, 20.04.2021, Accessed on: 02.05.2021, at: <https://www.livemint.com/news/india/rajasthan-govt-extends-sec144-in-the-whole-state-till-22-may-11618921755873.html>

government permit them to travel back to their homes, outside the state. The migrant workers who formed assemblies agitating for their right to return home were met with the iron hand of law. The police used severe, arbitrary and excessive force to disperse these assemblies of helpless and anxious workers. They subsequently filed First Information Reports (FIRs) against many workers for the criminal offences of rioting, unlawful assembly and obstructing and disobeying public servants in the discharge of their duty.¹⁷¹ Meanwhile, political rallies for state elections and certain religious gatherings continued in full swing, with active participation of the highest Executive, including the Prime Minister, the Union Home Minister, Chief Minister and members of Parliament, and the State facilitating the same.¹⁷²

DISCRIMINATORY CRIMINALISATION OF A RELIGIOUS ASSEMBLY: THE TABLIGHI JAMAAT EPISODE

In early March 2020, a Tablighi Jamaat congregation, attended by more than 9000 people, was underway at the Markaz Mosque, Nizamuddin, New Delhi. As COVID-19 restrictions were put in place and a nationwide lockdown imposed, the Markaz received a notice to effect closure of the building. The Union Ministry of Health released statistics listing the number of total cases linked in the country to the Markaz,¹⁷³ and various media outlets took their cue from the state to spread a false and vicious campaign of an organised nexus of Muslim Jamaat participants using the virus as a bioweapon to launch what was termed as “Corona-Jihad.”¹⁷⁴ Multiple

171 “Covid 19 Migrant workers protest across India, demand to be sent back home”, Business Standard, May 5 2020, Accessed on January 20 2021, at: https://www.business-standard.com/article/current-affairs/migrant-crisis-deepens-protests-erupt-demanding-to-be-sent-back-home-120050500158_1.html. Also see, “Migrants on Mumbai streets: Police register FIR against 1000, No arrests yet”, News 18 India, April 14 2020, Accessed on January 20 2021, at: <https://www.news18.com/news/india/migrants-on-mumbai-streets-police-register-fir-against-1000-no-arrests-yet-2577815.html>

172 “Bengal: Home Minister Amit Shah holds 3 rallies a day after state logs over 10,000 covid cases”, Outlook magazine, 22.04.2021, Accessed on: 02.05.2021, at: <https://www.outlookindia.com/website/story/india-news-bengal-home-minister-amit-shah-addresses-3-rallies-a-day-after-state-logs-over-10000-covid-cases/380982>. Also see: “No plan to end Kumbh mela despite rise in covid-19 cases”, Mint, 06.04.2021, Accessed on 02.05.2021, at: <https://www.livemint.com/news/india/no-plan-to-end-kumbh-mela-despite-rise-in-covid-19-cases-11617729377414.html>

173 “Corona Virus Nearly 4,300 cases were linked to Tablighi Jamaat event, says health Ministry”, The Hindu, April 18 2020, Accessed on January 20 2021, at: <https://www.the-hindu.com/news/national/coronavirus-nearly-4300-cases-were-linked-to-tablighi-jamaat-event-says-health-ministry/article31376202.ece>

174 Sukanya Shantha, “Covid, Communal reporting and Centre's attempt to use Independent media as alibi for inaction”, The Wire, November 18 2020, Accessed on January 20 2021, at: <https://thewire.in/communalism/tablighi-jamaat-communal-reporting-ib-ministry-coronavirus>



Migrant workers who formed assemblies agitating for their right to return home were met with the iron hand of law. ... Meanwhile, political rallies for state elections and certain religious gatherings continued in full swing.

state governments arrested Jamaat participants and initiated prosecutions against them under sections of the Indian Penal Code, The Disaster Management Act, The Epidemic Diseases Act and The Foreigners Act.¹⁷⁵

In December 2020, a Delhi Court acquitted 36 foreigners facing trial for allegedly flouting COVID guidelines while participating in a Tablighi Jamaat event, stating that it was ‘reasonably probable’ that none of them were present at Markaz during the relevant period and that they had been picked up from different places so as to maliciously prosecute them.¹⁷⁶ In August 2020, the Bombay High court quashed FIRs against 29 foreign nationals, stating: “*A political Government tries to find the scapegoat when there is pandemic or calamity and the circumstances show that there is probability that these foreigners were chosen to make them scapegoats.*”¹⁷⁷ Further, the Supreme Court directed the Government of India to facilitate the return of 36 foreigners who had participated in the event, and who have now been exonerated of all charges.¹⁷⁸ The Bombay High Court criticised media reportage of the event, stating “*the material of the present matter shows that the propaganda against the so called religious activity was unwarranted.*”¹⁷⁹ Similar orders were passed by courts across the country. In August 2020, the Supreme Court issued notice to the National Broadcasting Standards Authority and the Press Council in a plea seeking action against the media for the communalisation of the Tablighi Jamaat event at the Markaz mosque.¹⁸⁰

C. Lack of Accountability: Jeopardising the Right to Assembly

While the Supreme Court has often reiterated the centrality of the freedom of assembly, the exercise of the right is seriously impeded by the lack of proper accountability mechanisms.

175 “14 jamaat participants arrested after completion of their quarantine term in UP”, The New Indian Express, 17.04.2020, Accessed on 02.05.2021, at: <https://www.newindianexpress.com/nation/2020/apr/17/14-jamaat-meet-participants-arrested-after-completion-of-their-quarantine-term-in-up-2131504.html>. Also see: Gautma S. Mengle, “25 attendees of Tablighi Jamaat gathering arrested in Mumbra”, The Hindu, 24.04.2021, at: <https://www.thehindu.com/news/cities/mumbai/25-attendees-of-tablighi-jamaat-gathering-arrested-in-mumbra/article31419776.ece>

176 Sparsh Upadhaya, “Tablighi Jamaat: Possible that they were picked up from different places and maliciously prosecuted: Delhi court acquits 36 foreigners”, Live Law, December 16 2020, Accessed on January 20 2021, at: <https://www.livelaw.in/news-updates/tablighi-jamaat-delhi-court-acquits-36-foreigners-maliciously-prosecuted-nizamuddin-markaz-188-ipc-167310?infinitemscroll=1>

177 Nitish Kashyap, “Bombay High Court says Tablighi Jamaat foreigners were made scapegoats, quashes FIR against them ; criticizes media propaganda”, Live Law, August 22 2020, Accessed on January 20,2021, at: <https://www.livelaw.in/news-updates/bombay-hc-says-tablighi-jamaat-foreigners-were-made-scapegoats-quashes-firs-against-them-criticizes-media-propaganda-161793>

178 Sanya Talwar, “Tablighi Jamaat: Supreme Courts Asks Centre To Facilitate Return of 36 Foreigners Who Were Acquitted”, Live Law, December 22, 2020, Accessed on 02.05.2021, at: <https://www.livelaw.in/top-stories/tablighi-jamaat-supreme-courts-asks-centre-to-facilitate-return-of-36-foreigners-who-were-acquitted-167523>

179 “Media propaganda that Tablighi Jamaat attendees spread Covid-19 in India was unwarranted: Bombay HC”, Live law, August 22 2020, Accessed on January 20 2021, at: <https://www.livelaw.in/top-stories/media-propaganda-that-tablighi-jamaat-attendees-spread-covid-19-in-india-was-unwarranted-bombay-hc-161800>

180 Nilisha Choudhary, “SC issues notice to NBA and seeks report from press council in plea seeking action against media for communalisation of Nizamuddin market”, Live Law, August 22 2020, Accessed on January 20 2021, at: <https://www.livelaw.in/top-stories/tablighi-jamaat-sc-issues-notice-to-nba-and-seeks-report-from-press-council-in-plea-seeking-action-against-media-for-communalization-of-nizamuddin-markaz-meet-161127?infinitemscroll=1>

Since the exercise of powers vested in the District Magistrate or the Police Superintendent to permit assemblies or issue prohibitory orders against public gatherings is largely discretionary, these orders are subject only to a limited challenge on grounds of existence of material on the basis of which the order is passed and compliance with due process; the subjective satisfaction of the authority cannot be questioned in judicial review.¹⁸¹ Further, while police manuals lay down the steps to be followed for use of firearms in crowd dispersal, there is rarely any penal action initiated against a police officer for opening fire at a crowd in violation of the procedure specified in the police manual:¹⁸²

- A warning shot in the air or firing over the heads of the crowd is not permitted⁹
- An armed force should maintain a safe distance from a dangerous crowd to prevent being overwhelmed, or increasing the chances of inflicting heavy casualties
- **Aim should be kept low and directed at the most threatening part of the crowd**
- **Firing should cease the moment the crowd show signs of dispersing**
- **All help should be rendered to convey the wounded to the hospital**
- Police officers must not leave the scene of disturbance before satisfying themselves beyond reasonable doubt about the restoration of tranquility
- **An accurate diary of all incidents, orders and action** along with the time of occurrence should be maintained by the police. This will include an individual report by all officers involved in the firing.
- The number of fired cartridges and the balance of unfired cartridges should be verified to ensure ammunition is accounted for

India inherited a system of policing from the colonial state, and the police as an institution did not undergo any substantial changes in its training, attitude and approach to perform a different role of respecting, protecting and promoting the rights of citizens and persons. The constitutional transition of people from “subjects” to “citizens” led to the evolution and recognition of a new spectrum of rights, but did not see a parallel reorientation and sensitisation of the state machinery and its agents to the said rights. The police force is tasked with various functions, including law enforcement, crime investigation, crowd control, maintenance of public order, facilitation of public assemblies, and first responders in public emergency. Each of these duties requires separate and distinct training, as they involve carrying out specialised roles to fulfil varied responsibilities of the State. Despite the long-standing directive of the Supreme Court to segregate the police force for discharge of the functions of law and order and investigation, even this rudimentary step towards police reform has not been implemented.¹⁸³

¹⁸¹ Madhu Limaye v Sub Divisional magistrate (Supra); In Re: Ramlila Maidan (2012) 5 SCC 1

¹⁸² Directions for use of firearm in crowd dispersal, Kerala Police Manual, 1970

¹⁸³ Prakash Singh vs Union of India, (2006) 8 SCC 1. Also see: Prakash Singh and Others vs Union of India (2011) 14 SCC 33

The police's approach towards public assemblies is to "manage" and "control" the assembly, almost invariably presuming that an assembly is an unruly mob, a group of troublemakers likely to breach peace and violate the law. It is this embedded suspicion of people asserting their right which manifests in pre-emptive orders under Sec. 144 Cr.P.C. promulgated routinely by administrative authorities, or in the more recent phenomena of shutting down internet services around protest sites. Such approaches significantly diminish the freedom to form public assemblies and provide an environment conducive to the full and uninhibited realisation of the right to freedom of assembly. It is such circumstances that lead political commentators to describe India's current political scenario as 'democratic backsliding',¹⁸⁴ where the State employs law as an instrument to erode basic rights.

Furthermore, India does not accord recognition to journalists and human rights defenders as "observers" or "monitors" during protests or demonstrations. Thus, there is no visible marker that distinguishes such individuals from members of the assembly, leading to many such persons being detained and arrested by the police. In February 2021, a young journalist was arrested at a farmers' protest site at Singhu on the outskirts of Delhi, while he was recording abuse meted out by policemen to the protesting farmers.¹⁸⁵ Further, since media personnel are not treated as observers or monitors, independent reports of police action are rejected by the State as biased media reporting, and the same is countered through narratives published by media outlets that enjoy State patronage. This creates a contestation of facts where State-backed propaganda tends to dominate the public discourse.

Accountability against excessive use of force or arbitrary detention by state authorities, may not always be secured through institutional mechanisms; often it is ensured through the presence of journalists and human rights defenders who monitor or observe public assemblies. The UN Human Rights Committee's General Comment 37, 2020, recognises the significant role of journalists and human rights defenders as a source of accountability against police excesses when dealing with public assemblies.¹⁸⁶ The UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Clément Nyaletsossi Voule, states, "*The very presence of human rights monitors during demonstrations can deter human rights violations. It is therefore important to*

184 Lydia Finzel, "Democratic Backsliding in India, The World's Largest Democracy", *Varieties of Democracy*, 24.02.2020, Accessed on 02.05.2021, at: <https://www.v-dem.net/en/news/democratic-backsliding-india-worlds-largest-democracy/>

185 "They don't want the truth to come out: Journalist arrested at farmer's strike", NDTV, 05.02.2021, Accessed on: 05.02.2021, at: <https://www.ndtv.com/india-news/journalist-mandeep-punia-arrested-at-farmers-strike-says-was-thrashed-by-cops-camera-broken-2363910>

186 "They may not be prohibited from, or unduly limited in, exercising these functions, including with respect to monitoring the actions of law enforcement officials. They must not be met with reprisals or other harassment, and their equipment must not be confiscated or damaged. Even if an assembly is declared unlawful or is dispersed, that does not terminate the right to monitor. It is a good practice for independent national human rights institutions and non-governmental organizations to monitor assemblies."

allow human rights defenders to operate freely in the context of freedom of assembly.”¹⁸⁷ However, there is no recognition accorded to observers or monitors of assemblies in India, leading to a void in accountability mechanisms against State excesses.

The response of independent statutory watchdogs such as the National Human Rights Commission (NHRC) with regard to the excessive use of force against peaceful assemblies has been *ad hoc* and indecisive, further allowing law enforcement personnel to resort to use of force with impunity. In December 2019, the Delhi Police is alleged to have thrown tear gas shells inside Jamia Millia University during the protests against the Citizenship Amendment Act, 2019,¹⁸⁸ and images and videos circulating in the media depicted unarmed students being assaulted by policemen.¹⁸⁹ The NHRC’s report on the incident concluded that the situation was not “handled professionally” by the Delhi Police, as noted by the Delhi High Court.¹⁹⁰ No remedial steps were directed by the NHRC, nor was any accountability recommended against the police. There is an urgent need for a greater and more purposeful role to be played by such statutory human rights bodies to promote the right to assembly and check impunity.

The culture of impunity is also emboldened by the legal immunity provided by Section 197 Cr.P.C., which mandates prior sanction for prosecution of a public servant, including police personnel and security forces, if an offence is committed in the course of discharge of official duty.¹⁹¹ This provides a layer of statutory protection for violation of the directions

187 Written submission prepared by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule on the occasion of the half-day of general discussion in preparation for a General Comment on Article 21 (Right of Peaceful Assembly) of the International Covenant Civil and Political Rights, 20.03.2019, Accessed on 14.02.2021, at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj9vqlqvAhWXX30KHdk-KD6AQFjAAegQIBBAD&url=https%3A%2F%2Fwww.ohchr.org%2FDocuments%2FHR-Bodies%2FCCPR%2FGC37%2FSR_FreedomPeacefulAssemblyandassociation.docx&usg=AOvVaw2L47UF6nD6uaO5N-KcP_I5

188 Sruthisagar Yamuna, “Delhi Police were ‘uncontrollable’ as they unleashed violence at Jamia Millia Islamia, students say”, Scroll.in, 16.12.2019, Accessed on 12.04.2021, at: <https://scroll.in/article/946933/delhi-police-were-uncontrollable-as-they-unleashed-violence-at-jamia-millia-islamia-students-say>

189 Ibid.

190 Anand Mohan J, “NHRC indicated Jamia row handled unprofessionally: Delhi HC to police”, The Indian Express, 22.08.2020. Accessed on 12.04.2021, at: <https://indianexpress.com/article/cities/delhi/nhrc-indicated-jamia-row-handled-unprofessionally-delhi-hc-to-police-6564826/>

191 Section 197, Code of Criminal Procedure, 1973.



The response of independent statutory watchdogs such as the National Human Rights Commission (NHRC) with regard to the excessive use of force against peaceful assemblies has been *ad hoc* and indecisive, further allowing law enforcement personnel to resort to use of force with impunity.

stipulated in police manuals. Further, police reforms are long overdue in India. Despite the setting up of the Police Complaints Authority in some states in pursuance of the Model Police Act, 2006,¹⁹² there is an urgent need to orient and train police personnel to respect and promote the democratic rights of members of an assembly to gather, speak and protest in a non-violent manner, and on the police's duty to facilitate such assemblies with a content-neutral approach.

The Supreme Court of India's judgment in the case of *Mazdoor Kisan Shakti Sangathan vs Union of India*¹⁹³ should serve as a timely reminder to police personnel that the content or subject of a protest cannot be used as a factor to determine its legitimacy. The Court held that:

*Undoubtedly, holding peaceful demonstrations by the citizenry in order to air its grievances and to ensure that these grievances are heard in the relevant quarters, is its fundamental right. This right is specifically enshrined under Article 19(1)(a) and 19(1)(b) of the Constitution of India. Article 19(1)(a) confers a very valuable right on the citizens, namely, right of free speech. Likewise, Article 19(1)(b) gives right to assemble peacefully and without arms. Together, both these rights ensure that the people of this country have right to assemble peacefully and protest against any of the actions or the decisions taken by the Government or other governmental authorities which are not to the liking. Legitimate dissent is a distinguishable feature of any democracy. Question is not as to whether the issue raised by the protestors is right or wrong or it is justified or unjustified. The fundamental aspect is the right which is conferred upon the affected people in a democracy to voice their grievances. Dissenters may be in minority. They have a right to express their views. A particular cause which, in the first instance, may appear to be insignificant or irrelevant may gain momentum and acceptability when it is duly voiced and debated. That is the reason that this Court has always protected the valuable right of peaceful and orderly demonstrations and protests.*¹⁹⁴

In sum, while the constitutional and jurisdictional protections of the right to assembly under Indian law are clear, practical implementation and protection of such rights at the local and State level are often contravened by local police orders, regulations and general operational approaches that conflict with basic, assembly-protecting measures.

192 Draft Police Act, Ministry of Home Affairs, Accessed on January 20 2021, at: https://www.mha.gov.in/division_of_mha/policy-act-drafting-committee

193 *Mazdoor Kisan Shakti Sangathan vs. Union of India* (2018) 17 SCC 324, emphasis added.

194 *Mazdoor Kisan Shakti Sangathan vs. Union of India* (2018) 17 SCC 324, emphasis added.

IV. INTERNATIONAL LAW STANDARDS AND BEST PRACTICES

For a comprehensive assessment of the status of freedom of assembly in India, it is germane to evaluate Indian law and experiences with the standards set by international law and best practices followed in different jurisdictions. This chapter highlights the core principles of international law around the right to assembly, for a holistic analysis of the right to assembly in India.

Under international law, the right to freedom of assembly is codified and recognised in Article 21 of the ICCPR. Regional conventions too guarantee it as a fundamental freedom, including the Convention for the Protection of Human Rights and Fundamental Freedoms, popularly called the European Convention on Human Rights (Art. 11); the American Convention on Human Rights (Art. 15); the African Charter on Human and Peoples' Rights (Art. 11); and the Arab Charter on Human Rights (Art. 28).

This chapter primarily draws upon the jurisprudence developed by the UN Human Rights Committee in 2020 in General Comment No. 37 on the right of peaceful assembly,¹⁹⁵ which stipulates the relevant standards and best practices for the protection and enjoyment of this right.

The freedom of peaceful assembly is recognised as *universal and indivisible*¹⁹⁶ under international human rights law, and is specifically guaranteed under Article 21 of the ICCPR, to which India acceded in 1979. Article 21 of the ICCPR states:

*The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*¹⁹⁷

¹⁹⁵ General Comment no. 37 (2020), United Nations Digital Library, Accessed on: July, 8, 2021, <https://digitallibrary.un.org/record/3884725?ln=en#record-files-collapse-header>

¹⁹⁶ Report of the Special Rapporteur on the rights to peaceful assembly and association, United Nations, General Assembly, A/72/135, para. 14, Accessed on: January, 22, 2021, at: documents-dds-ny.un.org/doc/UNDOC/GEN/N17/214/75/PDF/N1721475.pdf?OpenElement.

¹⁹⁷ International Covenant on Civil and Political Rights, Accessed on: January, 22, 2021, at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

Scope of Article 21 ICCPR - What Is an Assembly?

An assembly under international human rights law is defined as “an intentional and temporary gathering in a private or public space for a specific purpose, whether mobile or static.”¹⁹⁸

International courts and mechanisms have held demonstrations, pickets, processions, rallies, sit-ins, roadblocks, gatherings in privately-owned places, occupations of buildings and the public reading of press statements to be legitimate and protected forms of assemblies.¹⁹⁹ The protection of international law, however, is only available to assemblies that are peaceful. It is more appropriate here to use the term non-violent assembly, instead of peaceful assembly, to appreciate the full scope of this right in terms of international law.

From these definitions, it is evident that the right guaranteed under Article 19(1)(b) of the Indian Constitution is generally similar in scope to the freedom guaranteed under international law, as are the restrictions imposed under Indian domestic law.

Peaceful Nature of the Assembly to Be Presumed by the State

International standards require States to presume the peaceful nature of an assembly, until and unless there is availability of cogent, verifiable and relevant proof to indicate that the intentions of the participants are violent or the assembly *prima facie* turns violent in nature.²⁰⁰ General Comment No. 37 on the freedom of peaceful assembly provides guidance on what constitutes violence for the purposes of Article 21, stating:

*“Violence” in the context of article 21 typically entails the use by participants of physical force against others that is likely to result in injury or death, or serious damage to property. Mere pushing and shoving or disruption of vehicular or pedestrian movement or daily activities do not amount to “violence.”*²⁰¹

The right of peaceful assembly thus *“protects the non-violent gathering by persons for specific purposes, principally expressive ones. It constitutes an individual right that is exercised collectively. Inherent to the right is thus an associative element.”*²⁰²

198 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, United Nations, General Assembly, A/ HRC/20/27, para. 24, Accessed on: January, 22, 2021, at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf.

199 FOAA Online, “The Right to Freedom of Peaceful Assembly: general Principles”, Accessed on: January, 22, 2021, at: <http://freeassembly.net/general-principles/>.

200 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, United Nations, General Assembly, A/ HRC/20/27, para. 24, Accessed on: January, 22, 2021, at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf. Also see: Guidelines on freedom of assembly, European Commission of Democracy Through law (Venice Commission), OSCE Office of Democratic Institutions and Human Rights, Second Edition, para 25, p.35.

201 General Comment No.37, Human Rights Committee, para 15, September 17 2020, CCPR/C/GC/37, Accessed on January 22, 2021, at: <https://documents-ddsny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

202 Ibid.


It is routinely seen in India that permission for protests is denied by authorities, under a presumption of violence which is not based on any independent assessment of the nature of the protest. For instance, in March 2020, permission was denied to customers of the Punjab and Maharashtra Cooperative (PMC) Bank, who were protesting the imposition of a withdrawal limit from bank savings accounts in view of a financial fraud which was under investigation.²⁰³ The police resorted to provisions of the Bombay Police Act to deny permission to the protesters, relying on apprehension of violence by stating that protests against the CAA law in New Delhi had turned violent. This belies logic, as the protests were in no way connected to each other, yet a presumption of violence was used to deny permission to protest to peaceful customers of the PMC Bank.

Pertinently, Article 21 of the ICCPR and subsequent resolutions of the Human Rights Council²⁰⁴ extend the right to peaceful assembly to everyone, including foreign nationals, immigrants (documented or undocumented), asylum seekers, refugees and stateless persons – not only to citizens.²⁰⁵ This is in sharp variance with the language of the right to freedom of assembly under Article 19(1)(b) of the Indian Constitution, which uses the term ‘citizen’ rather than ‘person.’ However, it is arguable that for asylum seekers and refugees, the right to freedom of assembly, or the right to protest, would form a constitutive feature of their right to life, which is guaranteed to all persons under Article 21 of the Indian Constitution. Past practice and experience suggest that India has a content-specific approach towards allowing foreigners and refugees a right to protest. Two contrasting state responses are illustrated in the table on the next page:

203 “PMC Bank depositors denied permission for protest in Mumbai, police cite CAA protests, Delhi Violence”, Deccan Herald, Accessed on: July, 8, 2021, at: <https://www.deccanherald.com/business/business-news/pmc-bank-depositors-denied-permission-for-protest-in-mumbai-police-cite-caa-protests-delhi-violence-809734.html>

204 Human Rights Council Resolution 15/21, The rights to freedom of peaceful and association, October 6 2020, A/HRC/RES/ 15/21. Also see: Human rights Council Resolution 24/5, The rights to freedom of peaceful and association, October 8 2013, A/HRC/RES/24/5. Also see: Human rights Council Resolution 21/16, The rights to freedom of peaceful and association, October 11 2012, A/HRC/RES/21/16.

205 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UN-DOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>



Article 21 of the ICCPR and subsequent resolutions of the Human Rights Council extend the right to peaceful assembly to everyone, including foreign nationals, immigrants (documented or undocumented), asylum seekers, refugees and stateless persons – not only to citizens.

| POLITICALLY SYMPATHETIC CAUSES PERMITTED | POLITICALLY SENSITIVE PROTESTS BARRED |
|--|---|
| <p>India has been a refuge for many Tibetans in exile over the years, providing political asylum to the Dalai Lama since 1959, and allowing a Tibetan government in exile to operate out of Dharamshala in the northern state of Himachal Pradesh in India.²⁰⁶</p> <p>Every year, various protests by Tibetans in exile are permitted and facilitated in India, although they are not Indian citizens. For instance, in March 2021, hundreds of Tibetans marched through the towns of Mussoorie and Dehradun to mark the 62nd anniversary of the uprising in Tibet against Chinese aggression.²⁰⁷</p> | <p>Rohingya refugees have not been provided political asylum in India, and the Indian State has arrested and prevented Rohingyas for protesting their deportation to Myanmar. On March 11, 2021, seventy-one Rohingya refugees were detained in New Delhi for protesting outside the office of the UN High Commissioner for Refugees against their planned deportation.²⁰⁸</p> <p>In a similar show of intolerance, two foreign nationals from Germany and Norway who participated in anti-CAA protests were deported in December 2019 for joining the protests.²⁰⁹</p> |

State Obligations to Enable and Protect Freedom of Assembly

Article 21 of the ICCPR places positive obligations on the State party to facilitate and enable the freedom of assembly. It is within the scope of this positive obligation that the State's power to make specific interventions, including to protect participants against possible abuses, exists.²¹⁰

In 2012, the UN Special Rapporteur on Freedom of Assembly, Maina Kiai, articulated the conceptual basis of a legal regime on freedom of assembly, stating *that the purpose of such a regime should be to assist the state authorities in fulfilling their role in promoting and protecting the conduct of assemblies along with public safety*.²¹¹ For the protection and promotion of the right to freedom of assembly, the obligation on the State also extends to not placing hurdles that will obstruct and impair the exercise of this right. International law thus casts a positive obligation on the State, “*not to prohibit, restrict, block, disperse or disrupt*

206 “Am a refugee but enjoy India's freedom: Dalai Lama”, Financial Express, Accessed on: July,08,2021, at: <https://www.financialexpress.com/india-news/am-a-refugee-but-i-enjoy-indias-freedom-dalai-lama/1735091/>

207 Anmol Jain and Mohammad Anab, “Tibetans protest against Chinese occupation, demand freedom for Tibet”, The Times of India, Accessed on: July 08, 2021, at: <https://timesofindia.indiatimes.com/city/dehradun/tibetans-protest-against-chinese-occupation-demand-freedom-of-tibet/articleshow/81436867.cms>

208 Ismat Ara, “After Jammu, 71 Rohingyas detained in Delhi for protesting at UNHCR office”, The Wire, Accessed on July,08,2021, at: <https://thewire.in/rights/rohingyas-detained-delhi-unhcr-protest>

209 “Silly crackdown on foreign protests”, The Economic Times, Accessed on: July,08,2021, at: <https://economictimes.india-times.com/blogs/et-editorials/silly-crackdown-on-foreign-protesters/>

210 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

211 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, United Nations, General Assembly, A/ HRC/20/27, para. 24, Accessed on: January, 22, 2021, at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf.

peaceful assemblies without compelling justification, nor to sanction participants or organizers without legitimate cause.”²¹²

States must also promote and protect other interconnected freedoms and rights, such as the freedom of speech and expression and freedom of association, without which the purpose for forming assemblies is rendered nugatory.²¹³ In that regard, as discussed in the preceding chapters, the increasingly restrictive prohibitory orders passed in India under Sec. 144 Cr.P.C. which disallow legitimate forms of protest, including burning of effigies and non-violent protest marches, as well as internet shutdowns, directly encroach on interconnected freedoms which breathe life into the exercise of the right to assembly.

No Arbitrary Restriction, Discrimination, or Threat of Violent Retaliation

Further, the State is obliged to ensure that access to the right to peacefully assemble is not arbitrarily restricted, and there is no discrimination in State action in facilitating certain kinds of assemblies over others. Underscoring the principle of non-discrimination and drawing on Articles 2 (1), 24 and 26 of the ICCPR, GC37 states: *“Central to the realization of the right is the requirement that any restrictions, in principle, be content neutral, and thus not be related to the message conveyed by the assembly.”*

The UN Human Rights Committee in 2013 interpreted the State’s obligation to include the duty to facilitate peaceful assemblies, even in the face of apprehension of retaliatory or counter-violence:

The Committee notes that freedom of assembly protects demonstrations promoting ideas that may be regarded as annoying or offensive by others and that, in such cases, States parties have a duty to protect the participants in such a demonstration in the exercise of their rights against violence by others. It also notes that an unspecified and general risk of a violent counter demonstration or the mere possibility that the authorities would be unable to prevent or neutralize such violence is not sufficient to ban a demonstration ... the obligation of the State party was to protect the author in the exercise of his rights under the Covenant and not to contribute to suppressing those rights.²¹⁴

This position is further reinforced in GC37 which states: *“The possibility that a peaceful assembly may provoke adverse or even violent reactions from some members of the public is not*

212 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

213 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

214 Alekseev v. Russian Federation, Communication No. 1873/2009, Human Rights Committee, para 9.6, October 25 2013, CCPR/C/109/D/1873/2009, Accessed on January 22 2021, at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhstcNDCvDan1pXU7dsZDBaDWw%2fGOTA2i8Rhyjl6SWgVCHBer15WGcTIB5fP4qyy-QfKuZRAAnwE01KYMe%2bgfz2YkwZf8ztw3g6Bj8Ch%2bSZJJsBfuQawLSRMxzyxDz5fOWAiat9jKqLJikEGU5sVvAvIVCA%3d>

*sufficient grounds to prohibit or restrict the assembly.*²¹⁵

Thus, international law makes it incumbent upon the state to take necessary measures to ensure that the exercise of the freedom of assembly is not obstructed or interrupted due to real or apprehended risk of a violent counter demonstration.

The communal riots in New Delhi in winter 2020, precipitated by a majoritarian retaliation to months of ongoing peaceful and public anti-CAA protests predominantly by Muslim minorities, illustrate the failure of the State to proactively enable and protect the assembly from counter violence. In one specific instance in January 2020, a young man fired a gun shot and injured a protester at an anti-CAA protest site near the Jamia Millia Islamia University in New Delhi, in the presence of a large contingent of police personnel who merely watched the imminent threat as bystanders, failing to protect the protesters from the armed shooter.²¹⁶

States Must Enable Access to Public Spaces

GC37 emphasises that the State has a responsibility to facilitate and protect assemblies,

*...wherever they take place: outdoors, indoors and online; in public and private spaces; or a combination thereof. Such assemblies may take many forms, including demonstrations, protests, meetings, processions, rallies, sit-ins, candlelit vigils and flash-mobs. They are protected under Article 21 whether they are stationary, such as pickets, or mobile, such as processions or marches.*²¹⁷

The use of public spaces for holding peaceful assemblies is as justified as their use for any other public purpose, including commercial activity or vehicular and pedestrian movement.²¹⁸

215 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

216 "Jamia firing: man shoots at students, cops defend inaction as political parties blame BJP", India Today, Accessed on: July 08, 2021, at: <https://www.indiatoday.in/india/story/jamia-firing-shooter-injured-student-police-inaction-amit-shah-kejriwal-1641789-2020-01-30>

217 Ibid.

218 Guidelines on freedom of assembly, European Commission of Democracy Through law (Venice Commission), OSCE Office of Democratic Institutions and Human Rights, Second Edition.

'RELOCATING' THE FARMERS' PROTESTS*

As farmers protested three new farm laws in November 2020 on roads bordering New Delhi, the Union government sought to relocate the farmer protests to a designated protest site.

As a precondition to initiating talks with the protesters, the government asked the protesters to shift their protest from the roads to a site in the Burari region on the outskirts of Delhi. This condition was rejected by the protesters, who termed the ground an 'open jail.' The government failed to negotiate with the farmers effectively, and the protests continued on the roads at the borders of Delhi.

In a case seeking that the roads be cleared for vehicular movements, the Supreme Court of India has directed the government to ensure unobstructed movement of vehicular traffic, but significantly has not ordered the protesters to be removed from the site and dispersed. Reiterating the same, the Supreme Court on August 23, 2021 ordered, "...that the solution lies in the hands of Union of India and the concerned State Governments and they must coordinate to ensure that if the protests are on, at least the Inter-State roads and National Highways are not blocked in any manner whatsoever so that to and fro on those roads does not cause great inconvenience to the other persons who use those roads."

* "Dilli Chalo protest | Burari is an open Jail, says farmers ejecting Centre's conditional invitation for talk", The Hindu, Accessed on: July, 08, 2021, at: <https://www.thehindu.com/news/national/dilli-chalo-protest-farmers-reject-centres-demand-that-they-move-to-burari-before-holding-talks/article33204627.ece>.
Monicca Agarwal vs. Union of India, W.P(c) 249/2021, at: https://main.sci.gov.in/supremecourt/2021/2616/2616_2021_36_36_29449_Order_23-Aug-2021.pdf

The international standard specifically includes within its ambit the right of the participants to organise and hold assemblies within the “*sight and sound of their target audience*.”²¹⁹ This is a very important facet of the right, which conflicts with emerging Indian jurisprudence restricting the right to protest to a designated space, and disallowing protests that may inconvenience traffic and regular public life.

Preserving the Right to Freedom of Peaceful Assembly of Marginalised Groups

The right to freedom of assembly acquires even greater significance in the context of oppressed and marginalised groups, as it is integral to the magnification of their collective opinions, contingent upon which is the realisation of their other rights. The Special Rapporteur on the Right to Freedom of Peaceful Assembly and Association points towards the conjoint history of discrimination faced by marginalised groups and restricted access to freedom of assembly.²²⁰ Recognising the discriminatory impact or implementation of otherwise neutral laws, the Human Rights Council mandates that domestic laws drafted to regulate the exercise of the right must not be explicitly discriminatory or disproportionately implemented against marginalised groups.²²¹

Moreover, permit and penal regulations that on their face appear neutral may in application disproportionately restrict the rights of marginalised groups.²²² The 2014 Annual Thematic Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and Association highlights that extremely bureaucratic procedures, hefty fines, discretionary clauses and extraordinary penal laws can all have detrimental and disabling effects on the exercise of the right by marginalised groups.²²³ Therefore, any evaluation of the enjoyment of the right to freedom of assembly by marginalised groups must include an assessment of the freedom and independence of human rights defenders, activists, journalists, election monitors, and representatives of national and international human rights organisations.²²⁴

In India, various marginalized groups and human rights defenders face criminal prosecutions for their role in people’s movements and in attending and organizing

219 Andrei Strizhak v. Belarus, Communication No. 2260/2013, Human rights committee, para 6.5, December 13 2018, CCPR/C/124/D/2260/2013, (Accessed on: January 22 2021), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/364/25/PDF/G1836425.pdf?OpenElement>. Also see: General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, (Accessed on: January 22 2021), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>. Also see: Guidelines on freedom of assembly, European Commission of Democracy Through law (Venice Commission), OSCE Office of Democratic Institutions and Human Rights, Second Edition.

220 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, United Nations, General Assembly, April 14 2014, A/HRC/26/29, (Accessed on: January 22 2021), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/134/75/PDF/G1413475.pdf?OpenElement>

221 Ibid.

222 Ibid.

223 Ibid.

224 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

public assemblies that criticise government policies and laws.²²⁵ The State must ensure that the right to freedom of assembly of marginalised groups is not curbed on the grounds that it might lead to adverse or violent response from disagreeing parties, therefore vesting in the State a responsibility to protect participants of an assembly from violence or threat of violence from state or non-state actors.²²⁶

Restrictions on the Right to Peaceably Assemble

Restrictions may curtail the freedom or right to assembly before, during and after an assembly.²²⁷ The European Court of Human Rights has on multiple occasions outlined the scope of the term ‘restrictions’ stating, *“the term ‘restrictions’ must be interpreted as including both measures taken before or during an act of assembly and those, such as punitive measures, taken afterwards.”*²²⁸ Article 21 of the ICCPR requires that restrictions placed on the right to freedom of assembly be:

(a) imposed in conformity with the law, and

*(b) necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*²²⁹

The aforesaid tests are similar to the tests of reasonableness, necessity and proportionality prescribed by the Supreme Court of India.²³⁰ It is pertinent that the ICCPR qualifies the test of necessity with a caveat that the restriction must be deemed necessary in a democratic society, thereby limiting the State’s power to a realm where political dissidents are not deprived of the right to peaceful assembly merely on grounds of administrative or political convenience. This is also emphasised in GC37, which states that *“restrictions must therefore be necessary and proportionate in the context of a society based on democracy, the rule of law, political pluralism and human rights, as opposed to being merely reasonable or expedient.”*

Further, restrictions must not be arbitrary and must be authorised by domestic law.²³¹ The OSCE-ODIHR²³² and Venice Commission Guidelines on Freedom of Peaceful Assembly, require that:

225 “Safeguard human rights defenders, rights of NGO’s in India, Bachelet urges”, UN News, Accessed on: July,08,2021, at: <https://news.un.org/en/story/2020/10/1075792>

226 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

227 Ibid.

228 Case of Ezdin v France, European court of Human rights, Application No. 11800/85, April 29 1991. Also see: Case of Baczowski and Others v Poland, European Court of Human Rights, Application No. 1543/06, May 3 2007.

229 International Covenant on Civil and Political Rights, Accessed on: January, 22, 2021, at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

230 See Chapter 1.

231 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

232 Office for Democratic Institutions and Human Rights

*The legitimate grounds for such restrictions are prescribed by the relevant international and regional human rights instruments, and these should neither be supplemented by additional grounds in domestic legislation nor loosely interpreted by the authorities.*²³³

Similar to Indian jurisprudence, international law too instructs that domestic law which imposes a restriction should be published, widely publicised, accessible to citizens and not be vague or over-broad, in order to allow people to fairly predict what constitutes a breach of that restriction.²³⁴ The Supreme Court of India in its judgment in *Anuradha Bhasin vs Union of India*²³⁵ underscores the principle behind this requirement by stating:

An order passed under Section 144, Cr.P.C. should state the material facts to enable judicial review of the same. The power should be exercised in a bona fide and reasonable manner, and the same should be passed by relying on the material facts, indicative of application of mind. This will enable judicial scrutiny of the aforesaid order.

Permissible Restrictions and Burden of Proof

International law reaffirms that the restrictions imposed by the State around the freedom of assembly cannot be such as to extinguish the right, or render it illusory, recognising that, “restrictions must not be discriminatory, impair the essence of the right, or be aimed at discouraging participation in assemblies or causing a chilling effect.”²³⁶

Akin to the constitutional scheme in India, international standards also require States to ensure that a restriction

233 Guidelines on freedom of assembly, European Commission of Democracy Through law (Venice Commission), OSCE Office of Democratic Institutions and Human Rights, Second Edition

234 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>. Also see: *Navalnyy v. Russia*, European Court of Human rights, Application no. 29580/12, November 15, 2018. Also see: *Gillan and Quinton v. the United Kingdom*, European Court of Human rights, Application No. 4158/08, January 12 2020.

235 2020(3) SCC 637

236 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>



International law too instructs that domestic law which imposes a restriction should be published, widely publicised, accessible to citizens and not be vague or over-broad, in order to allow people to fairly predict what constitutes a breach of that restriction.

must be the least intrusive measure.²³⁷ A complete prohibition of an assembly must only be used as a measure of last resort, after exhausting all other measures.²³⁸ In *Vladimir Sekerko v. Belarus*,²³⁹ the Human Rights Committee held that “if the State imposes a restriction, it is up to the State party to show that it is necessary for the aims set out in [Article 21 of the ICCPR].”²⁴⁰ Similarly the Human Rights Committee, in *Marina Statkevich v. Belarus*, held that the obligation to prove that a restriction is permissible, or that it is necessary and proportionate, rests on the State, and not on the party challenging the restriction.

Necessary and proportionate²⁴¹ restrictions are those that are based on relevant,²⁴² cogent, compelling and convincing²⁴³ proof of imminent threat. For instance, the OSCE/ODIHR Guidelines on Freedom of Assembly caution that imposition of blanket restrictions is insufficiently tailored to the emergent conditions of a particular assembly.²⁴⁴ This implies that restrictions on an assembly should be relevant to the distinct and specific characteristics of each assembly, and overbroad orders should not blindly be applied to all assemblies alike. Clearly, the blanket and overbroad prohibitory orders routinely passed in India under Section 144 Cr.P.C. contravene this standard.

Restrictions Can Only Be Imposed on Legitimate Grounds

Restrictions can only be imposed on legitimate grounds and must be specific and not overbroad, so as to avoid having a chilling effect on the right to free assembly. GC37 sets out what the legitimate grounds for restricting assembly are (these are largely similar to Article 19(3) of the Constitution of India):

(a) National security: “to preserve the State’s capacity to protect the existence of the nation, its territorial integrity or political independence against a credible threat or use of force.”²⁴⁵

237 Ibid.

238 Ibid.

239 *Vladimir Sekerko v. Belarus*, Human rights Committee, Communication No. 1851/2008, December 2 2013, CCPR/C/109/D/1851/2008.

240 *Marina Statkevich v. Belarus*, Human Rights Committee, Communication No. 2133/2012, December 16 2015, CCPR/C/115/D/2133/2012.

241 Guidelines on freedom of assembly, European Commission of Democracy Through law (Venice Commission), OSCE Office of Democratic Institutions and Human Rights, Second Edition

242 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>. Also see: ECHR judgements: *Coster v. the United Kingdom*, European Court of Human Rights, Application no. 24876/94, para 104, 18 January 2001. Also see: *Ashughyan v. Armenia*, European Court of Human Rights, Application no. 33268/03, para 89, 17 July 2008. Also see: *S. and Marper v. the United Kingdom*, European Court of Human rights, Application nos. 30562/04 and 30566/04.

243 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>. Also see: *Makhmudov v. Russia*, European Court of Human Rights, Application No. 35082/04, para.65, July 26 2007.

244 Guidelines on freedom of assembly, European Commission of Democracy Through law (Venice Commission), OSCE Office of Democratic Institutions and Human Rights, Second Edition.

245 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

(b) Public safety: where the assembly “creates a real and significant risk to the safety of persons (to life or security of person) or a similar risk of serious damage to property.”²⁴⁶

(c) Public order: in order to preserve “the sum of the rules that ensure the proper functioning of society, or the set of fundamental principles on which society is founded, which also entails respect for human rights, including the right of peaceful assembly.”²⁴⁷

(d) Protection of Public health: “For example where there is an outbreak of an infectious disease and gatherings are dangerous. This may in extreme cases also be applicable where the sanitary situation during an assembly presents a substantial health risk to the general public or to the participants themselves.”²⁴⁸

(e) Morals: “If used at all, this ground should not be used to protect understandings of morality deriving exclusively from a single social, philosophical or religious tradition, and any such restrictions must be understood in the light of the universality of human rights, pluralism and the principle of non-discrimination.”²⁴⁹

(f) Protection of the rights and freedoms of others.

With respect to some of these restrictions, a few considerations are of note. First, the Human Rights Committee observed in General Comment No. 22 that:

the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations...for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.²⁵⁰

Second, national, political or government interest is not synonymous with national security or public order.²⁵¹ Finally, similar to Indian jurisprudence, protection of the rights and freedoms of others recognises the need for a harmonious exercise and enjoyment of multiple rights. However, by adopting a misconceived balancing of rights approach, decisions of Indian courts and authorities often extinguish the right to assemble completely in favour of other considerations, without a due balancing exercise in line with international law.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

²⁴⁹ Ibid.

²⁵⁰ CCPR General Comment no. 22, Human Rights Committee, July 30 1993, CCPR/C/GC/22.

²⁵¹ Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, Human Rights Council, A/HRC/31/66, February 4 2016, para 49.

Curtailing the Right to Assembly by Restricting the Use of Public Spaces

“Peaceful assemblies may in principle be conducted in all spaces to which the public has access or should have access, such as public squares and streets.”²⁵²

Public spaces are not out of bounds for peaceful assemblies to exercise their right to assemble. In keeping with the requirement that restrictions must be proportional and based on a specialised assessment of the nature and characteristics of each assembly, blanket provisions disallowing the holding of assemblies in any public place apart from designated spaces are *prima facie* overbroad and disproportionate in nature.²⁵³ GC37 states that:

*The designation of the perimeters of places such as courts, parliament, sites of historical significance or other official buildings as areas where assemblies may not take place should generally be avoided, inter alia because these are public spaces. To the extent that assemblies in and around such places are restricted, this must be specifically justified and narrowly circumscribed.*²⁵⁴

Further, the demarcation of certain public areas or designation of certain public spaces as protest sites, in effect and by implication, restricts the right to peaceful assembly in all other public spaces. This is specifically prohibited as per GC37, which states:

*As a general rule, there can be no blanket ban on all assemblies in the capital city, in all public places except one specific location within a city or outside the city centre, or on all the streets in a city.*²⁵⁵

Recent judgments of the Indian Supreme Court have sought to spatially restrict the right to freedom of assembly by holding that the freedom of assembly is to be exercised in the space designated for the said purpose by the State. This ruling is at sharp variance with international best practices and standards. This also brings up the issue of conflicting rights of members of an assembly vis-à-vis those inconvenienced by it. The ECHR has repeatedly emphasized that:

*Although a demonstration in a public place may cause some disruption to ordinary life, including disruption of traffic, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of its substance.*²⁵⁶

252 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

253 Guidelines on freedom of assembly, European Commission of Democracy Through law (Venice Commission), OSCE Office of Democratic Institutions and Human Rights, Second Edition.

254 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

255 Ibid.

256 Guidelines on freedom of assembly, European Commission of Democracy Through law (Venice Commission), OSCE Office of Democratic Institutions and Human Rights, Second Edition.

The Inter-American Court of Human Rights (IACHR) has also held that, although an assembly including protests may naturally cause annoyance or even some damage, the right to assembly cannot be jeopardised.²⁵⁷

As discussed in earlier sections, the judicial approach of the Indian Supreme Court to limit the freedom of assembly to designated spaces on grounds of public inconvenience and administrative exigencies is not in consonance with international jurisprudence. The Indian approach needs to be recalibrated by giving centrality to the effective exercise of fundamental rights and adopting an equitable harmonization of the rights, in the context of democracy underlying the basic structure of the Indian Constitution.

Prior Restrictions on Assemblies: Permit / Notification Regime

While the requirement of obtaining prior permission from the State for assemblies has been declared as antithetical to and undermining of the right to freedom of assembly,²⁵⁸ both the UN Human Rights Committee and the ECHR allow an exception for prior permissions that allow the state to further facilitate and make necessary arrangements for the assembly.²⁵⁹

No adverse consequence can flow, however, from the failure to secure prior permission. GC37 states:

*A failure to notify the authorities of an upcoming assembly, where required, does not render the act of participation in the assembly unlawful, and must not in itself be used as a basis for dispersing the assembly or arresting the participants or organisers, or the imposition of undue sanctions, such as charging them with criminal offences.*²⁶⁰

Moreover, the procedure of securing permission should also be transparent, not excessively bureaucratic and provided free of cost.²⁶¹ Any procedure for the procurement of permits must necessarily be accompanied by a mechanism to appeal the denial of such permission in a court of law.²⁶² The shift in India from a notification to a permit regime, as discussed in detail in the previous chapter, makes seeking prior permission to hold public assemblies mandatory. This has opened the door for the arbitrary exercise of discretionary power and contributed to democratic backsliding in India.

257 Ibid.

258 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

259 Kivenmaa v. Finland, Human Rights Committee, Communication No. 412/1990, CCPR/C/50/D/412/1990, June 9 1994.

260 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

261 Ibid.

262 Ibid.

Restrictions During an Assembly

RESTRICTIONS ON ACCESS TO THE ASSEMBLY

International human rights standards on the right to freedom of assembly acknowledge that a refusal to allow people to travel to participate in assemblies, or detention of people on the way to or before the start of assemblies, amounts to an interference with the right to freedom of assembly.²⁶³ GC 37 states:

*The obligations of States parties thus extend to actions such as participants' or organizers' mobilization of resources; planning; dissemination of information about an upcoming event; preparation for and travelling to the event; communication between participants leading up to and during the assembly; broadcasting of or from the assembly; and leaving the assembly afterwards.*²⁶⁴

These obligations are routinely violated in India, where the government exploits its power and authority to obstruct the movement of people to form or join assemblies, including digging up roads, shutting down public transport such as metro services, suspending internet to impede communications and using coercive force, including water cannons and tear gas shells, to disperse potential assemblers. For instance, on 11 February 2021, more than 100 protesters were left injured in Kolkata, West Bengal, as the police resorted to indiscriminate 'lathi charges,' i.e. when a large number of police charged peaceful student protesters demanding jobs, and attacked them with wooden or metallic batons. 'Lathi-charges' are a commonly used Indian police tactic to disperse assemblies and crowds that thwarts the right to assembly, in gross violation of international standards and practices.

MANAGEMENT AND DISPERSAL OF ASSEMBLIES

International human rights law mandates that the management and dispersal of assemblies is carried out with a view to respect, protect and facilitate assemblies.²⁶⁵ A Joint Report

263 Ibid. Also see: *Djavit An v. Turkey*, European Court of Human rights, Application no. 20652/92, Para 61-62, February 20 2003.

264 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

265 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>



On 11 February 2021, more than 100 protesters were left injured in Kolkata, West Bengal, as the police resorted to indiscriminate 'lathi charges,' i.e. when a large number of police charged peaceful student protesters demanding jobs, and attacked them with wooden or metallic batons.

on recommendations for management of assemblies by the Special Rapporteur on Freedom of Assembly and Association and the Special Rapporteur on Arbitrary Arrest and Detention underlines that domestic law must not give unrestricted, arbitrary or wanton powers to law enforcement agencies for management of assemblies.²⁶⁶

GC37 states that dispersal should be resorted to only in exceptional situations, and only after all other measures, including targeted arrests, have been exhausted: *“An assembly that remains peaceful while nevertheless causing a high level of disruption, such as the extended blocking of traffic, may be dispersed, as a rule, only if the disruption is ‘serious and sustained.’”*²⁶⁷

USE OF FORCE

The right to life²⁶⁸ and the right to be free from torture or cruel, inhuman or degrading treatment or punishment²⁶⁹ should be the overarching principles governing the policing of public assemblies.²⁷⁰ The only circumstances warranting the use of firearms, including during demonstrations, is the imminent threat of death or serious injury.²⁷¹ The UN Refugee Agency (UNHCR) Guidance on Less-Lethal Weapons in Law Enforcement, as well as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, mandate that officials are obligated to first exhaust all non-violent means and only then use the minimum force necessary to lawfully manage and disperse a peaceful assembly.²⁷² If the use of force becomes unavoidable, then a warning and reasonable time should be given to participants for dispersal of the assembly.²⁷³

Disproportionate or indiscriminate use of force would amount to inhuman and degrading treatment under Article 3 of the Convention Against Torture,²⁷⁴ to which India is a signatory. Moreover, any use of force against the participants of an assembly should be based on an individualised assessment of the conduct of participants.²⁷⁵

266 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

267 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

268 Article 3 of the UDHR and Article 6 of the ICCPR

269 Article 5 of the UDHR and Article 7 of the ICCPR

270 “The Right to Freedom of Peaceful Assembly: Best practices Fact sheet”, FOAA Online, (Accessed on: January, 22, 2021) <https://www.statewatch.org/media/documents/news/2014/nov/un-freedom-of-assembly-best-practices-factsheet.pdf>

271 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Human Rights Council, A/HRC/17/28, May 23 2011, para 60.

272 Guidance on the use of less lethal weapons in law enforcement, United Nations Human rights, 2020. Also see: Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, (Accessed on: January 22 2021), <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx>

273 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>. Also see: Police and Human Rights: A Manual for Teachers, Resource Persons and Participants in Human Rights Programmes, Ralph Crawshaw, (2nd Edition), p.237.

274 Çelebi and Others v. Turkey (no. 2), European Court of Human Rights, Application no. 22729/08, November 8 2020, para 111.

275 Human Rights and Law Enforcement: A Manual on Human Rights Training for Law Enforcement Officials, OSCE Office for Democratic Institutions and Human Rights, 2016, chap. 9.

GC37 underlines that the assessment must be based on whether an assembly is largely peaceful, with sporadic elements of violence, or whether the assembly on the whole is violent in nature.²⁷⁶ In sharp contrast to this, the ubiquitous image in India is of the police using wooden batons to disperse peaceful assemblies, whether by teachers demanding salaries; students protesting against university authorities; workers making demands from management; political party members opposing government decisions; indigenous communities protesting against police excesses or citizens questioning the government's economic policy. From the colonial period to post-independence, the lathi, or wooden stick, of the police personnel continues to be a central method deployed to discipline and punish peaceful, dissenting protesters.

On 28th August 2021, unarmed anti-farm law protesters, including elderly farmers, were heading towards a meeting of the ruling BJP party in the state of Haryana to draw attention to their 10 month-long ongoing protest.²⁷⁷ Numerous protesters were severely beaten with *lathis* (batons) by the police who employed a disproportionate amount of force.²⁷⁸ Multiple protesters sustained grave head and bodily injuries, leading to the death of one protester.²⁷⁹ A few hours after the incident, a video was released of a Sub-Divisional Magistrate (a senior administrative officer) from Haryana instructing the police to ensure that no one be allowed to cross the police cordon created at the inter-state highway; in the event of protesters trying to breach the cordon, the police should break their heads with lathis.²⁸⁰ A few hours after these instructions were given, the police cracked down on the protesters. In his reply to the viral video, the SDM stated that the video had been doctored, that no violence took place where he was stationed and that all the directions given by him were in consonance with the law.²⁸¹

The recent landmark judgement of the Supreme Court of Colombia²⁸² on the right to protest and the protection of human rights during protests highlights the importance of restructuring national guidelines on use of force and bringing them in compliance with international standards. The judgement also underlines the central role played

276 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

277 "Haryana: farmers injured as police lathi charge to disperse Anti-Farm law gathering", The Wire, 28.08.2021, Accessed on 28.08.2021, at: <https://thewire.in/rights/haryana-more-than-10-farmers-injured-in-police-lathicharge-at-protest-venue>

278 "Farm laws: Haryana police baton-charge farmers heading to BJP meeting, 10 injured", Scroll.in 28.08.2021, Accessed on 30.08.2021, at: <https://scroll.in/latest/1003992/farm-laws-haryana-police-baton-charge-farmers-heading-to-bjp-meeting-10-injured>

279 Sohini Goswami, "Karnal SP denies reports of farmer's death due to lathi charge at protest", Hindustan Times, 29.08.2021, Accessed on 30.08.2021, at: <https://www.hindustantimes.com/india-news/karnal-sp-denies-reports-of-farmer-s-death-due-to-lathicharge-at-protest-101630246865644.html>

280 Satender Chauhan, "Break heads of protestors, Karnal SDM tells cops deployed to tackle protesting farmers | watch video", India Today, 28.08.2021, Accessed on 28.08.2021, at: <https://www.indiatoday.in/india/story/haryana-karnal-sdm-cops-lathi-charge-protesting-farmers-viral-video-1846580-2021-08-28>

281 Varinder Bhatia, "If someone breaches cordon, make sure has broken head: IAS Officer", Indian Express, 29.08.2021, Accessed on 29.08.2021, at: <https://indianexpress.com/article/india/haryana-karnal-sub-divisional-magistrate-ayush-sinha-farmers-protest-7475906/>

282 "Colombian Supreme Court clarifies rules around protection of human rights during social protests", Media Defenders, 23.09.2020, Accessed on 12.04.2021, at: <https://www.mediadefence.org/news/colombian-supreme-court-clarifies-rules-around-protection-of-human-rights-during-social-protests/>

by accountability mechanisms to curb the *‘disproportionate aggression of the police force against peaceful protesters.’* These observations are pertinent to India, and there is an urgent need for proper accountability against excessive use of force by State agencies against public assemblies, as witnessed in the case of the police shooting an anti-CAA protester in the eye in Uttar Pradesh in December 2020.²⁸³

USE OF LESS LETHAL WEAPONS

The UNHCR Guidance on Less-Lethal Weapons in Law Enforcement establishes that the use of firearms to disperse an assembly is always illegal; if circumstances require the use of force, only the use of less lethal weapons is permissible.²⁸⁴ That too is permissible only as a last resort for the dispersal of assemblies, when targeted intervention for isolation and removal of violent individuals proves ineffective.²⁸⁵ The use of non-lethal weapons, including chemical irritants such as tear gas, should not be used indiscriminately,²⁸⁶ putting innocent bystanders²⁸⁷ or peaceful members²⁸⁸ of an assembly at risk. If law enforcement agencies resort to any use of violent means to police or disperse an assembly, such use must be promptly and transparently recorded to enable an ex post facto review of the proportionality, necessity and impact of the usage.²⁸⁹

283 “UP: Post mortem shows anti-CAA protester killed in police firing was shot in eye”, The Week, January 07, 2020, Accessed on 02.05.2021 at: <https://www.theweek.in/news/india/2020/01/07/up-postmortem-shows-anti-cao-protester-killed-in-police-firing-was-shot-in-eye.html>

284 Guidance on the use of less lethal weapons in law enforcement, United Nations Human rights, 2020, Accessed on July, 08,2021, at: https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf. Also see: Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, (Accessed on: January 22 2021), at: <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx>


285 Ibid.

286 Guide on Article 11 of the European Court of Human Rights, European Court of Human Rights, May 31 2020, para. 82.

287 Guidance on the use of less lethal weapons in law enforcement, United Nations Human rights, 2020, Accessed on July, 08,2021, at: https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf. Also see: Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, (Accessed on: January 22 2021), at: <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx>. Also see: General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

288 Ibid.

289 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>



There is an urgent need for proper accountability against excessive use of force by State agencies against public assemblies, as witnessed in the case of the police shooting a protester in the eye in Uttar Pradesh in December 2020.

These standards are at sharp variance with Indian practice, where chemical irritants like tear gas and wooden batons are routinely used against peaceful protesters, and almost never questioned.²⁹⁰

DETENTION

According to GC37, detention or containment (kettling) of people should be relied on as a measure of last resort, only when all other less intrusive measures are bound to be inadequate.²⁹¹ This is especially the case when detention is likely to last for at least a few hours. The practice of indiscriminate mass detention or arrest prior to, during or following an assembly, as is often the case in India, is treated as arbitrary and thus unlawful under international law.²⁹² For instance, women activists and lawyers were detained by the Delhi police in May 2019 as they were beginning a protest march to the Supreme Court of India against the exoneration of the then Chief Justice of India from sexual harassment charges.²⁹³

Punitive Sanctions against Assemblies - Deterrence to Exercise of Right

Penal sanctions against participation in assemblies deter the exercise of the right to freedom of association and assembly, and have a chilling effect on the exercise of the right. Elaborating on the scope of sanctions that can be imposed, GC37 states:

*when criminal or administrative sanctions are imposed upon organisers of or participants in a peaceful assembly for their unlawful conduct, such sanctions must be proportionate, non-discriminatory in nature and must not be based upon ambiguous or over broadly-defined offences, or suppress conduct protected by the Covenant.*²⁹⁴

In Gafgaz Mammadov v. Azerbaijan, the European Court of Human Rights addressed the issue of penal sanctions on members of assemblies, stating:

108. The Court reiterates its finding above that the measure to which the applicant was subjected (namely arrest and custody followed by five days' imprisonment) pursued aims unrelated to the formal ground relied on to justify the deprivation of liberty, and implied an element of bad faith on the part of the police officers. While he was formally charged with failure to comply with a lawful order of a police officer, the applicant was

290 "Police lathi-charge, use tear gas to disperse farmers protesting against Haryana CM Khattar", India Today, Accessed on: July,08,2021, at: <https://www.indiatoday.in/india/story/police-uses-lathi-charge-tear-gas-to-disperse-farmers-protesting-against-cm-khattar-in-haryana-1803149-2021-05-16>

291 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

292 Ibid.

293 "Women activists detained while protesting against CJI Ranjan Gogoi", The New Indian Express, Accessed on: July, 08,2021, at: <https://www.newindianexpress.com/cities/delhi/2019/may/10/women-activists-detained-while-protesting-against-cji-ranjan-gogoi-1975179.html>

294 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

*in fact detained for his participation in an unauthorised peaceful demonstration.*²⁹⁵

Penal sanctions against participating in or organising assemblies have a chilling effect, which remains even after acquittal or dropping of charges. Prosecution in itself deters future participation in peaceful assemblies.²⁹⁶ Persecution of dissenting voices through the legal mechanism interferes with the legitimate exercise of the right.²⁹⁷

Surveillance too may function punitively, and has been cautioned against in GC37 as violating Article 17 of the ICCPR, as follows:

*The right to privacy may be infringed, for example, by facial recognition and other technologies that can identify individual participants in a crowd. The same applies to the monitoring of social media to glean information about participation in peaceful assemblies. Independent and transparent scrutiny and oversight must be exercised over the decision to collect the personal information and data of those engaged in peaceful assemblies and over its sharing or retention, with a view to ensuring the compatibility of such actions with the Covenant.*²⁹⁸

Requiring an undertaking “from individuals not to organize or participate in future assemblies”²⁹⁹ constitutes an impermissible punitive consequence that interferes with the exercise of freedom of assembly. Signing a “bond of peace”³⁰⁰ is a common practice in India, which involves requiring individuals to promise not to play a part in any breach of peace, or by virtue of the bond be subjected to a hefty fine or even imprisonment. Such practice not only has a chilling effect on assembly, but is a direct infringement on the exercise of assembly rights.

295 *Gafgaz Mammadov v. Azerbaijan*, European Court of Human Rights, Application No. 60259/11, October 15 2015, Para 108.

296 *Nurettin Aldemir and Others v. Turkey*, European Court of Human Rights, Application nos. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02, 32138/02, December 18 2007, para 34.

297 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

298 *Ibid.*

299 *Ibid.*

300 Section 107, Cr.P.C.

TARGETING STUDENT ACTIVISM*

In March 2021, a fourth-year PhD Scholar at the Indian Institute of Technology in Guwahati, was made to sign a six-point undertaking, including an assurance that he would not participate in “any form of agitation/protest/dharna,” in order to resume his research programme on campus.

In 2020, the student had been suspended from campus for ‘defamatory tweets,’ in which he had written about corrupt practices prevalent in the University as well as the ill treatment of faculty members by the administration.

The undertaking is another example of constitutionally impermissible limits being placed on the right to freedom of speech and the right to freedom of association.

* Hemant Kumar Nath, “IIT Guwahati PhD scholar made to sign ‘no protest, dharna’ undertaking to continue research programme”, India Today, Accessed on: July 09, 2021, at: <https://www.indiatoday.in/education-today/news/story/iit-guwahati-phd-scholar-made-to-sign-no-protest-dharna-undertaking-to-continue-research-programme-1825007-2021-07-07>

Managing Counter-Strikes

The right to freedom of assembly includes:

*the protection of participants of peaceful assemblies from individuals or groups of individuals, including agents provocateurs and counter-demonstrators, who aim at disrupting or dispersing such assemblies. Such individuals include those belonging to the State apparatus or working on its behalf.*³⁰¹

Freedom of assembly does not exclude the right of opposing groups to hold assemblies, provided that they are not violent. The OSCE/ODIHR Guidelines recognise that counter-assemblies, including those that are spontaneous in nature, may be held within 'sight and sound' of their target audience, and that no unreasonable encumbrances should be placed on them.³⁰² However, there is a positive obligation on the State to ensure that violence or the threat of violence from counter assemblies does not defeat the right of the assembly formed earlier. As discussed, especially when it comes to assemblies formed by religious minorities, the Indian State has allowed for conditions that abridge or throttle the right to freedom of assembly.

In one such example, on January 30, 2020, a teenager opened fire on anti-CAA protesters near Jamia Millia Islamia University on January 30, 2020, brandishing the gun at protesters and shouting nationalist and pro-police slogans.³⁰³ One student was injured in the incident, while the Delhi Police merely watched without intervening, allowing the armed attacker to threaten and assault Muslim protesters.³⁰⁴

Rather than face penalties, the said offender has since participated in a right wing mass meeting (a 'Mahapanchayat') in the State of Uttar Pradesh, and delivered an anti-Muslim hate speech inciting violence.³⁰⁵ Various persons facing allegations of hate crime and violence have been speakers at such mass meetings, where they are cheered on by large crowds.³⁰⁶ The police have repeatedly facilitated and allowed such assemblies to be held. No punitive action in the form of criminal cases is generally initiated against the organizers or participants of such meetings, revealing the partisan nature of policing assemblies in India.

301 Guidelines on freedom of assembly, European Commission of Democracy Through law (Venice Commission), OSCE Office of Democratic Institutions and Human Rights, Second Edition.

302 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

303 "After Jamia shooting, youth congress president files complaint against Anurag Thakur for direct link", The Indian Express, Accessed on: July, 08, 2021, at: <https://indianexpress.com/article/cities/delhi/youth-congress-jamia-shooting-anurag-thakur-delhi-police-6243896/>

304 "Jamia firing: police watched silently as man fired at protesters, says eyewitnesses", The New Indian Express, Accessed on: July, 08, 2021, at: <https://www.newindianexpress.com/cities/delhi/2020/jan/30/jamia-firing-police-watched-silently-as-man-fired-at-protesters-say-eyewitness-2096757.html>

305 "Jamia shooter encourages attack on Muslims, abduction of women at Pataudi mahapanchayat", The New Indian Express, Accessed on: July, 08, 2021, at: <https://indianexpress.com/article/cities/delhi/jamia-shooter-encourages-attack-on-muslims-abduction-of-women-7390155/>

306 Brinda Karat, "Opinion: to counter Haryana farmer anger, hate politics at Mahasabha", NDTV, Accessed on July, 08, 2021, at: <https://www.ndtv.com/opinion/opinion-karni-senas-chief-hate-incite-gets-bjp-promotion-2464180>

Redressal Mechanisms for Violations of the Right to Freedom of Peaceful Assembly

In the absence of an effective remedy for violations, the right to freedom of peaceful assembly would be rendered meaningless. The Human Rights Council held that a corresponding right to redress would include *“taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”*³⁰⁷

Redressal mechanisms must also include compensation for wrongful denial or abridgement of the right to peaceful assembly. According to the UNHCR Guidance on Less-Lethal Weapons in Law Enforcement, victims of arbitrary and excessive use of force by law enforcement agencies must also be provided prompt and efficient redressal mechanisms that include compensation and guarantees of non-repetition.³⁰⁸ Moreover, States must also ensure that prompt steps are taken to remedy assembly violations by law enforcement agencies, not only against the general public, but also against marginalised groups.³⁰⁹

The Human Rights Committee obligates States to ensure that the right to seek redressal is not only enforceable against the state but also against non-state actors.³¹⁰ Therefore, inaction of State authorities to redress assembly violations by private parties also amounts to a violation of the ICCPR.³¹¹ However, under the Indian constitutional scheme, writ jurisdiction cannot be invoked against private actors. This legal shortcoming has a direct bearing on the enjoyment of the freedom of assembly.

Preserving the Right to Peaceful Assembly in the Digital Age

Resolutions of the Human Rights Council from 2007 onwards have recognised that freedom of assembly extends to the exercise of the right online as well.³¹² In July 2016, the United Nations Human Rights Council passed a resolution condemning network disruptions and measures resorted by states to curb online access and/or dissemination of information, affirming that rights in the online sphere must

307 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association, Human Rights Council, A/HRC/41/41, May 17 2019. Also see, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association, Human Rights Council, A/HRC/ 17/31, March 21 2011.

308 Guidance on the use of less lethal weapons in law enforcement, United Nations Human rights, 2020, Accessed on July, 08, 2021, at: https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf

309 Ibid.

310 Resolution adopted by the General Assembly on 16 December 2005, A/RES/60/147, Accessed on: July 8, 2021, at: <https://www.ohchr.org/en/professionalinterest/pages/remedyandrepairation.aspx>

311 Report of the Special Rapporteur on the rights of freedom of assembly and association, Human Rights Council, A/HRC/32/36, August 10, 2016.

312 Resolution 5/1 adopted by the Human Rights Council on Institution building of the UNHRC. Also see, Resolution 5/2 adopted by the Human Rights Council on Code of conduct for special procedures mandate holders of the Human Rights Council. Also see, Human Rights Council Resolution 24/5 on The Rights of peaceful assembly and association, October 8, 2013.

enjoy the same protections as are available offline.³¹³ In 2019, the Special Rapporteur on the right to freedom of peaceful assembly and association recognised the avenue provided by technology not only for the organisation and mobilisation of people, but also as a virtual space for holding peaceful assemblies. The Special Rapporteur notes that in a modern, hyper-connected world, the Internet presents itself as an easily accessible, affordable and safe platform for individuals, especially minorities, to form and disseminate collective opinion.³¹⁴ The report also explores the digital manifestation of the right to assembly, and the challenges faced both due to the pervasive state surveillance and near absolute control of the Indian State to suspend and control internet access. This report notes how the arbitrary suspension of internet curtails conversations, engagement and activism in the digital space. Further, with internet as the primary channel of communication, arbitrary internet shutdowns by the State are yet another instrument to disrupt the planning, formation and advocacy of physical assemblies.

GC37 highlights that internet shutdowns in anticipation of, during or after, peaceful protests are violative of the participants' rights to assemble peacefully.³¹⁵ Moreover, the blocking of websites that criticise official policies and actions, and the use of penal laws to criminalise online content have a chilling effect on the formulation and proliferation of collective opinions and on peaceful protest. In a resolution adopted in 2018, the Human Rights Council called upon States to *"refrain from and cease measures, when in violation of international human rights law, seeking to block Internet users from gaining access to or disseminating information online."*³¹⁶ State-sponsored trolling and other forms of cyberattacks are also antithetical to the right to protest freely without fear of reprisal.³¹⁷

In India, recent experience has revealed that there is a certain degree of State-sanctioned surveillance over internet messengers, leading to the criminalisation of the formation of virtual groups as well as the use of interpersonal communications, in breach of the right to privacy. Internet shutdowns have been justified to disallow the formation of virtual assemblies and to restrict political speech and ideas from being in circulation.³¹⁸

313 The promotion, protection and enjoyment of human rights on the internet, Human Rights Council, A/HRC/32/L.20, Accessed on: July 08, 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/131/89/PDF/G1613189.pdf?OpenElement>

314 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/74/349, Accessed on July 08, 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/276/22/PDF/N1927622.pdf?OpenElement>

315 General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37, Accessed on: January 22 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/232/15/PDF/G2023215.pdf?OpenElement>

316 Resolution 38/11 adopted by the Human Rights Council, A/HRC/ RES/38/11

317 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, Accessed on: July 08, 2021, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/141/02/PDF/G1914102.pdf?OpenElement>

318 A systematic criminalisation of digital activism was seen in the persecution of youth activists who created an online 'tool-kit' to digitally support and amplify the farmer's protest. Also see: "Explained: Why is Delhi Police probing a farmer's protest toolkit tweeted by Greta Thunberg", The Indian Express, Accessed on: July 08, 2021, at: <https://indianexpress.com/article/explained/greta-thunberg-toolkit-farmers-protest-fir-delhi-police-7176187/> Somashree Sarkar, "Now that the toolkit is out of the bag here's the role it plays in peaceful protests", The Wire, Accessed on: July 08, 2021, at: <https://thewire.in/rights/farmers-protest-greta-thunberg-toolkit-twitter-storm>

This trend is perhaps best exemplified by the arrest of youth climate activist, Disha Ravi, in February 2021, for sharing the link to a social media toolkit which was subsequently posted on Twitter by climate activist Greta Thunberg, and meant to amplify support for the farmers' protest in India on social media, including Twitter and Instagram. Following this, the Central government lodged a criminal case against Ravi, and the Delhi Police Cyber Cell initiated criminal investigations, including arrests and interrogation of various youth activists who used the Internet to amplify discourse opposing the government's position on the agricultural laws.³¹⁹ Public personalities, like singer Rihanna, who tweeted about the farmers' protest met with hostility and severe retaliation from Indian central government functionaries and senior ruling party politicians, who vehemently opposed global discussion on the issues surrounding the farmers' protest. Such responses fed into an already intensifying culture of silence and intimidation affecting assembly rights and public discourse.

The Indian central government also resorted to internet shutdowns to stifle the flow of information and communication from the sites of the farmers' protest in New Delhi.³²⁰ Internet shutdowns in India are governed by the Temporary Suspension of Telecom Rules, 2017, under the Information Technology Act. In the case of *Anuradha Bhasin vs Union of India*,³²¹ it was brought to the notice of the Supreme Court of India by the petitioner that the Temporary Suspension of Telecom Rules, 2017, quite contrary to the meaning of the term temporary, did not provide for any time period within which an order for suspension of internet would mandatorily expire. Thus, an arbitrary and ready power lay with the competent authority to shut down internet services through the aforementioned Rules. However, after the verdict in the *Anuradha* case, the government amended the said Rules in 2020 and inserted a clause which provides that an order for suspension of services would lapse upon the expiry of fifteen days.

Facial recognition technology has also been deployed to identify

³¹⁹ Ibid

³²⁰ Reha Binoy, "Internet shutdowns plague and paralyse parts of India", The Leaflet, Accessed on: July 08, 2021, at: <https://www.theleaflet.in/internet-shutdowns-plague-and-paralyse-parts-of-india/>

³²¹ (2020) 3 SCC 637



Public personalities, like singer Rihanna, who tweeted about the farmers' protest met with hostility and severe retaliation from Indian central government functionaries and senior ruling party politicians, who vehemently opposed global discussion on the issues surrounding the farmers' protest.

and criminalise those who participate in protests in India.³²² Following a Delhi High Court order in a case related to missing children, the Delhi Police acquired Automated Facial Recognition System (AFRS) software in March 2018 as a tool to identify lost children through photo matching. However, the said technology is now routinely used to film protest meetings and screen “rabble rousers and miscreants.”³²³

There is a grave need for legal as well as political discussion in India regarding the State’s excessive and arbitrary control and monitoring of the virtual space, which has in effect nullified the right to freedom of assembly in the digital era.

Covid-19 and the Right to Assemble Peaceably

Public health, generally read to mean risk of infectious disease, is specifically recognised as a ground for restriction of the right to freedom of assembly under the ICCPR.³²⁴ In April 2020, recognising that a pandemic poses unique challenges to freedom of assembly, and cautioning against an instrumental use of the pandemic by States to restrict the freedom of assembly, the UN Special Rapporteur on the right to freedom of peaceful assembly and association sought the facilitation of freedom of assembly on the Internet by ensuring affordable access, freedom from censorship and a sunset clause on the suspension of the right to physically assemble.³²⁵

Civil society and rights groups have been advocating that States must be checked against using the pandemic to enlarge their scope of powers using special laws and administrative orders that result in narrowing and restricting the right to assembly in a manner that is inconsistent with a democratic society. Instead, governments need to be challenged to arrive at solutions that are effective in combating the pandemic, while simultaneously upholding the socio-political and cultural rights of people, of which the right to peacefully assemble is among the most cherished and necessary for democracies to function. The Indian experience of a nationwide lockdown in 2020, and the subsequent debilitating restrictions on political gatherings and social activity through severe limitations on the number of people allowed to gather for protest assemblies; the closing of public parks and clearing of protest sites (including protest art) and the initiation of criminal proceedings against people who had attempted peaceful protest marches pose extremely strong and relevant questions about the Indian State’s ability to protect the right to assembly during and beyond the Covid-19 pandemic.

322 “Delhi Police is now using facial recognition software to screen ‘habitual protesters’”, The Wire, Accessed on: July 08, 2021, at: <https://thewire.in/government/delhi-police-is-now-using-facial-recognition-software-to-screen-habitual-protesters>

323 Jay Mazoomdar, “Delhi police films protesters, runs its images through facial recognition software to screen crowd”, The Indian Express, Accessed on: July 08, 2021, at: <https://indianexpress.com/article/india/police-film-protests-run-its-images-through-face-recognition-software-to-screen-crowd-6188246/>

324 International Covenant on Civil and Political Rights, Accessed on: January, 22, 2021, at www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.

325 “States responses to Covid 19 threat should not halt freedoms of assembly and association”, UN expert on the rights to freedoms of peaceful assembly and of association, Mr. Clément Voule, April 14 2020, Accessed at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25788&LangID=E>

V. RECOMMENDATIONS AND CONCLUSION

It is clear, both from the overview of Indian domestic laws on assembly and enforcement, and from this analysis of international standards on free assembly as applied to the Indian context, that there are major shortfalls and inconsistencies with respect to the protection of the fundamental right of assembly in India. Much of the problem can be located in implementation, as well as conflicting state and local-level laws and law enforcement practices with respect to regulating assemblies. An increasingly authoritarian approach to basic civic freedoms and democratic practices, such as assemblies critical of majoritarian policies, or of the State's public health response, is also of great concern to the future safeguarding of the freedom to peacefully assemble in India.

The following are recommendations to help bring Indian law and state practice in conformity with India's international law obligations, and to strengthen the exercise of freedom of assembly as guaranteed under the Indian Constitution.

Recommendations

The following steps are recommended for different state, law enforcement and institutional actors to undertake in order to help bring Indian law into compliance with international best practices and to better secure the right to peaceful assembly.

FOR THE GOVERNMENT OF INDIA AND STATE GOVERNMENTS:

1. Carry out a comprehensive review of Chapter VIII "Security for Keeping the Peace and Good Behaviour" Sections 106 to 124 and Chapter X, "Maintenance of Public Order and Tranquillity" Sections 129 to 148, of the Code of Criminal Procedure, 1973, and amend the law to ensure that restrictions on the right to freedom of assembly are in compliance with the grounds enumerated in Article 19(3) of the Constitution of India.
2. Direct the Law Commission of India to undertake a comprehensive and urgent review of all relevant central and state laws, as well as Standing Orders issued by police and administrative authorities, that restrict the right to freedom of assembly, and recommend legal reforms to the government to ensure that all such laws and orders adhere to the constitutional scheme of Article 19 of the Indian Constitution.
3. Repeal and modify Rules and Administrative Orders to ensure that the existing 'permit regime' is replaced by a 'notification regime' for the holding of public meetings by assemblies, in accordance with the scope of Article 19 of the Indian Constitution.

4. Ensure that absence of 'prior permission' for an assembly does not attract penal sanctions for members of the public assembly.
5. Ensure that members of peaceful assemblies are not burdened with criminal prosecution, especially under anti-terror and sedition laws, merely for non-violent participation in assemblies.
6. Direct that in the absence of a data protection law, standard operating procedures be prepared and implemented to ensure the right to privacy is protected when public assemblies are filmed or captured by police personnel and stored on State servers.
7. Provide institutional recognition to independent observers and monitors for public assemblies, to ensure that rights are respected and there is no abuse of power.
8. Recognise that the right to freedom of assembly extends to digital platforms, and commit to ensuring that arbitrary internet shutdowns will not be ordered in areas where public assemblies have formed or protests are being carried out.
9. Recognise that the State has an added responsibility to protect, facilitate and enable assemblies organised by marginalised and oppressed groups, and take steps to negate the impact of majoritarian counter assemblies.
10. Ensure that public assemblies are not routinely dispersed under the guise of public convenience, as a harmonious construction of rights requires that freedom of assembly is respected, protected and promoted.
11. Ensure that designated spaces for protests are in prominent areas of cities where the protest is visible to its target audience.
12. Ensure that India's commitment to international treaties and conventions on freedom of assembly is rigorously implemented and reflected in its domestic laws and policy.

WITH RESPECT TO LAW ENFORCEMENT AND SECURITY PERSONNEL:

1. Carry out training and orientation of police and security personnel on their role as facilitators of the right to freedom of assembly and the right to protest, sensitizing police on their duty to enable non-violent public assemblies, as opposed to 'controlling' or 'managing' them.
2. Ensure that police tactics in dealing with public assemblies emphasise de-escalation based on communication.
3. Train police personnel on use of minimal force as a 'last resort,' and not as the default response to assemblies.

4. Establish internal accountability mechanisms to check and seek accountability for arbitrary, disproportionate and excessive use of force by police personnel while dispersing members of public assemblies.

FOR THE NATIONAL HUMAN RIGHTS COMMISSION (NHRC) AND STATE HUMAN RIGHTS COMMISSIONS (SHRC):

1. Nominate observers to monitor and document public assemblies if a request is made by the organiser of the said assembly or protest, especially when there is a threat of counter-assemblies disrupting the assembly.
2. Investigate *suo-motu* public assemblies disrupted by agent provocateurs or State agents. The NHRC and/or SHRCs should subsequently prepare a report with the purpose of taking action on such disruptions or other violations of the right to assembly, in accordance with the law.
3. Lay down guidelines for police and administrative authorities to follow to ensure that the freedom of assembly is respected, protected, and promoted.

Adopting some or all of these recommendations would assist substantially with improving India's compliance with its international obligations to protect the right to free assembly, as would successful implementation of the same. The right to peaceful assembly remains a cornerstone of Indian democracy, as well as a longstanding tradition with a proud history of civic debate and social protest integral to India's development. Expanding legal and practical protections for protesters will serve to reinforce India's commitment to democratic norms, and ensure its vibrant civic space for decades to come.

ICNL