HANDCUFFING THROUGH THE FORCE OF NEW CRIMINAL LAW: A CONCERN FOR HUMAN DIGNITY

Abstract

The Constitution of India upholds human dignity at its soul and that is why in the hierarchy of constitutional rights under article 14, 19 and 21, the right to life with dignity stands at its pinnacle. The question is why the discourse on human dignity should hold so much importance today? Quite clearly to see whether the State and the institution it commands advances the dignitarian goals of the Indian Constitution in reference to section 43(3) of the new *Bhartiya Nagarik Suraksha Sanhita*, 2023 which has replacedthe existing Code of Criminal Procedure, 1973 and has introduced the law of handcuffing at the time of arrest. The human rights activist courts have vehemently stood for the progressive evolution or advancement of civilization and human dignity. In this context the paper seeks to explore important avenues of enquiry as to whether the new criminal law (BNSS) which is being viewed as a landmark piece of legislation comes out of the colonial image when it deals with the manner in which the person is arrested? Isn't the usage of handcuffs contrary to the Supreme Court's advancement of human dignity? Is it designed to protect the human rights of the arrestee by prescribing sufficient procedural safeguards during handcuffing? There is no gainsaying that to prevent the escape of an arrested person is in public interest but it is clear that the combination of stigma or shame associated with handcuffing and loss of liberty on account of arrest is perhaps the heaviest deprivation that the State can inflict on an individual. The paper argues that the interest of human dignity is irreconcilable with the security of the State.

I Introduction

THE RIGHT to human dignity is an indefeasible or a non-negotiable right of an individual. An individual has this right not because it has been give nor derived by law but because it is the very natural basis of an individual's existence. The Constitution of India upholds human dignity at its soul hence this very right finds its place in the Preamble, which marks the beginning of the essence of the Indian Constitution. According to Professor Upendra Baxi , "the expression human right presupposes a level at which biological entities are bestowed with the dignity of being called human. The bearers of human rights must have an implicit right to be and remain human."[1] Thus, it can be said that human dignity is integral to our humanity something which differentiates us from the other living beings.

In the light of this background the question today is why the discourse on human dignity is so important? Quite clearly because of the overhauling of the existing criminal justice system of India which can have far reaching effect on the right to human dignity. To see whether the State and the institutions it commands advances the dignitarian goals of the Indian Constitution in reference to section 43(3) of the

1 Upendra Baxi, "From Human Right to the Right to be Human: Some Heresies" 13(3/4) *Indian International Centre Quarterly* 187 (1986).

new *Bhartiya Nagarik Suraksha Sanhita*, 2023 (BNSS hereafter) which has replaced the existing Code of Criminal Procedure, 1973 (CRPC hereafter). The right to be human is the most sacred aspect of right to life under article 21 of the Indian Constitution[2] which presupposes right to live with dignity and honour, further article 5 of Universal Declaration of Human Rights, 1948 stands against any kind of torture, inhuman and degrading treatment or punishment.[3] However, can this right be trampled upon by the slated- sanction of new criminal law which has allowed the usage of handcuffs on the arrested persons from July 1, 2024. Most of us are fortunate enough not to be the subject of police powers of arrest but for many unfortunate ones it is indeed a stressful, troubling and a traumatic experience. For some persons, arrest and detention may even be a regular phenomenon simply because they live a life of dissent and selflessly stand against anything which they believe is unjust and unfair. The famous judgment of *Arnesh Kumar* v. *State of Bihar*[4] reminds us of how:[4(a)]

> Arrest brings humiliation, curtails freedoms and casts scar for forever. Lawmakers know it so also the police. There is a battle between the lawmakers and the police and it seems that the police have not learnt the lesson: the lesson implicit and embodied in CRPC. It has not come out of its colonial image despite six decades of independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public….it has become a handy tool to the police officers who lack sensitivity or act with oblique motive.

On being arrested the arrestee is taken to police custody or produced before the courts it is during these movements that many rights of the arrestee are at stake, as it is at this point that the criminal justice system opens up and the coercive investigating powers of the police is actually felt. The treatment of arrestee which offends human dignity, imposes torture and reduces him to the level of beast is certainly arbitrary and impossible as a code of human conduct. So, the question is-does the new criminal law (BNSS) which is being viewed as a landmark piece of legislation comes out of the colonial image when it deals with the manner in which the person is arrested? Isn't the usage of handcuffs contrary to the modern concept of treatment of offenders and to the Supreme Court's advancement of human dignity? Does it circumscribe police discretion? Is it designed to protect the human rights of the arrestee against police cruelty or torture? These questions are important avenue of enquiry which the paper seeks to explore.

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2 The Constitution of India, art. 21.

3 *Available at*: https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%205,or%20degrading%20treatment%20or%20punishment. (last visited on, May 5, 2024).

4 (2014) 8 SCC 273.

4(a) *Id.*, para 7.

II Spirit of Section 43(3) of BNSS and its critical analysis

Arrest has nowhere been defined in the criminal law statutes, the legal dictionaries and the Halsbury's Laws of England and even the *Corpus Juris Secundum* describe arrest when used in its natural or ordinary sense as "apprehension or restraint or deprivation of one's personal liberty."[5] The law on arrest under section 43(1) of BNSS which was same for the CRPC under sec 46(1)talks about three modes through which the police officer or other person making the arrest can arrest the person, *firstly* by touching the body of the person, *secondly* by confining the body of such person and *thirdly* is by submission to the custody by word or action in which case actual physical contact of restraining the person becomes unnecessary.[6] Therefore it is not necessary to touch or confine the body of the person arrested because the arrest is complete the moment there is a submission to custody either by words or by action.Even though one does not go into the question of technicality of what amounts to an arrest the realisation or the knowledge alone that the arrested person will be deprived of his personal liberties to go where he pleases is agonizing enough. To add to this physical agony the new provision under section 43(3) of BNSS brings further mental agony when the arrestee will be handcuffed. One can only imagine the kind of social humiliation and mental trauma the arrestee would experience and without an iota of doubt it will erode the concept of human dignity.

According to the State the essential feature of a fair trial is to secure the presence of the accused in the trial. To ensure such a presence the law allows the police officers to use all means necessary to arrest the person. The State further contends the police officer cannot resort to methods which strips down the dignity of the arrestee. The act of deprivation of liberty cannot be inhuman and cruel or degrading and it must be in sync with the fundamental rights enshrined in the Constitution. The State admits that though the Supreme Court of India has declared the use of handcuffs unconstitutional under Article 21 of the Constitution however, the Supreme Court did leave a small window open for the usage of handcuffs in certain circumstances. Bureau of Police Research and Development (BPRD hereafter) after observing the guidelines framed by the Supreme Court gives guidelines and directions regarding the limited use of handcuffs in prison manuals. An undertrial prisoners should not be normally be handcuffed. However, when an accused is arrested without a warrant, the police officer may use handcuffs if satisfied that, the accused is prone to violence, disorderly behaviour or the accused is so dangerous and desperate that there is no

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5 *Roshan Beevi* v. *The Joint Secretary to the Govt. of Tamil Nadu* 1984 Cr.L.J 134. Where in the full bench of High Court of Madras had the occasion to consider the meaning of expression of arrest.

6 The Bharatiya Nagarik Suraksha Sanhita, 2023 (46 of 2023), s. 43(1).

other practical way to prevent him from escaping custody or the accused has a tendency to escape from police custody or has previously escaped.[7]

The State submits that a complete ban on the usage of handcuffs is not advisable because of various unforeseeable and compelling circumstances. There may be situations which leave the police officer with no other option but using handcuffs to prevent the escape of accused from custody. There have been many instances where the accused have escaped from the custody, such situations can be avoided if the handcuffing is allowed in limited circumstances.[8] The Prison Statistics India released in the year 2022 stated, "a total of 257 prisoners escaped in the year 2022. Out of which 98 escapees (38%) had escaped from police custody and 159 escaped from judicial custody. A total of 113 escapees were rearrested during 2022".[9] The reason given by the State for bringing and favouring the handcuffing laws is to prevent such escape. In this background the BNSS has incorporated the use of handcuffs under section 43(3), which reads:[10]

> The police officer may, keeping in view the nature and gravity of the offence, use handcuff while making the arrest of a person or while producing such person before the court who is habitual or repeat offender, or who has escaped from custody, or who has committed offence of organised crime, terrorist act, drug related crime, or illegal possession of arms and ammunition, murder, rape, acid attack, counterfeiting of coins and currency- notes, human trafficking, sexual offence against children, or offence against the State.

The spirit of new criminal Acts as mentioned in the preface of BNSS states that section 43(3) is a specific provision for the use of handcuff while effecting the arrest and production before the court of an arrested person who has either escaped from custody earlier or is a habitual or repeat offender in heinous offences like, "organized crime, terrorist act, drug related crime, illegal possession of arms and ammunition, murder, rape, sexual offences against children, acid attack, counterfeiting of coins and currency notes, human trafficking, offences against the state."[11]

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7 Government of India, "Model Prison Manuel for the Superintendence and Management of Prison in India" Prepared by Bureau of Police Research and Development 253 (Ministry of Home Affairs, 2003).

8 *Available at*: https://bprd.nic.in/uploads/pdf/20240129040242039993 2Handcuffs.pdf. (Last visited on May 5, 2024).

9 Government of India, "Prison Statistics India 2022" National Crime Bureau, xix (Ministry of Home Affairs, 2022.

10 *Supra note* 6 at s. 43(3).

11 Spirit of New Criminal Acts, at iii of Universal's Bare Act on The Bharatiya Nagarik Suraksha Sanhita, 2023.

Though the spirit behind the incorporation of handcuffing under section 43(3) is stated to confine itself only to a person who has either escaped from custody earlier or is a habitual or repeat offender in *heinous offences*, but the way section 43(3) has been drafted does not give the impression that it is confined to the said circumstances only. Rather it makes it appear that handcuffing can also be used primarily on the nature and gravity of the offence alone. Now which offence amounts to be grave in nature might be ambiguously decided by the police officers. An arrested person can be handcuffed who is a habitual offender or has escaped custody in any offence whatsoever like cruelty, hurt, grievous hurt or hurting the religious sentiments of the people and such person need not necessarily be alleged to have committed the categories of heinous offences mentioned therein. Further a person who has committed the heinous offence for the first time but does not show any tendency to escape would also come within the ambit of section 43(3). It also has the power to bring within its clutches persons who are not violent and dangerous. Further it is also not clear whether the handcuffing provision exclude certain categories on the basis of sex and age. This makes the provision uncertain, vague and broad.

If at all the section is intended to use handcuffs only when person arrested is a habitual or previous convict of the heinous offence mentioned therein then it should have been drafted in the following words: The police officer may for heinous offences of "organised crime, terrorist act, drug related crime, or illegal possession of arms and ammunition, murder, rape, acid attack, counterfeiting of coins and currency-notes, human trafficking, sexual offence against children, or offence against the State", use handcuff while making the arrest of a person or while producing such person before the court if such person has either previously escaped from custody earlier or has been previously convicted in one or more occasions for such offences.

The CRPC already had stringent, provisions regarding securing the presence of the accused in custody at the time of making an arrest. Section 43(2) of BNSS and the old corresponding section 46(2) of CRPC allows the police officer or any other person making an arrest to use "all means necessary" to effect arrest if such person forcibly resists the endeavour to arrest.[12] It is clear that arrest need not be accompanied by handcuffing a person, but could be complete even by spoken words, if a person submits to the custody in terms of section 43(2). To limit the use of forcible arrest under section 43(2), section 46 of the BNSS and the corresponding old section 49 of the code provides that no unnecessary restraint shall be used on the person arrested *i.e.,* the arrestee cannot be subjected to more restraint than is necessary.[13] Further section 43(4) of the BNSS and the corresponding old section 46(3) of the code gives

12 *Supra* note 6 at s. 43(2).

13 *Id.* at 46.

the right to "cause the death" of a person who is accused of an offence punishable with death or imprisonment for life, if such persons resist arrest or escape from the custody of law.[14] When already strict provisions existed to effectuate the custody of the arrestee the BNSS introduced the practice of handcuffing through the force of new criminal law, which can have far reaching effect towards the advancement of human dignity of the arrestee. This is because this provision is not only coercive and restrictive but at the same time it is demeaning. According to the scheme of criminal procedure the stage of arrest comes at a pre-trial stage. This calls for due protection of arrestee from oppressive and capricious use of law which allows the usage of handcuffs in such a preliminary stage of criminal justice system in the largest democracy of the world.

The possibility of giving a strict implementation of section 43(3) to align with practical consideration

One might say that the provision of handcuffing is not mandatory but only directory in nature because of the usage of word "may". However, one cannot be very happy with this fact as it is well known that there are many procedures in CRPC where even though the section uses the word "may" it could be understood as "shall". And when the provision uses "shall" it is read down to understand "may." Such a liberal interpretation or presumption is not alien to the CRPC. For example, in the very chapter of arrest itself section 43(5) of BNSS and the corresponding old section 46(4) of the code emphasizes on the mandatory nature of arrest laws of a woman as the legislatures adopted the restrictive approach in the construction of section 46(4) to prevent possibilities of abuse in case of police discretion. The section 43(5) of BNSS and old section 46(4) of the code reads:[15]

> Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, *the woman police officer shall*, by making a written report, *obtain the prior permission of the Judicial Magistrate of the first class* within whose local jurisdiction the offence is committed or the arrest is to be made.

The section specifically bars the arrest of a woman at night except under special circumstances. Even in special circumstances the section requires the arrest to be made by a lady police officer and also requires a written report stating the need to make such an arrest and to seek a prior permission of the judicial magistrate within whose jurisdiction offence is committed or the arrest is made.

Prior to the insertion of section 46(4)[16] in the CRPC, time and again the procedure for arrest of a woman came up for judicial review. In the case of arrest and molestation

14 *Id.* at 43(4).

15 *Id.* at 43(5). (Emphasis supplied)

16 The Code of Criminal Procedure, 1973(Act 25 of 2005), s. 46(4) with effect from 23.0.2006.

of a woman in police custody the Nagpur Bench of the High Court of Bombay issued strict direction to the state government in unequivocal and unambiguous terms that "no woman should be arrested without the presence of a lady constable and in no case after sunset and before sunrise."[17] This had become an unwritten law in different states. In the year 2004 the Supreme Court reviewed the direction of the Bombay High court in *State of Maharashtra* v. *Christian Community Welfare Council of India the Supreme Court*[18] (C.C.W Council of India Case). This case is worth citing for to explain how the Supreme Court "read down" the strict direction which was given by the Nagpur Bench of the High Court of Bombay to strike a balance between the necessity of protecting the woman sought to be arrested from police misdeeds, and the practical difficulty of procuring the presence of a female constable when the necessity for such arises. Though the Supreme Court agreed with the spirit and object behind giving such a strict direction regarding the arrest of a female, the court took note of ground reality and felt that the strict interpretation of the direction could not be followed. Hence reduced it down to align with practical considerations and urgent situations. The balance tipping in favour of the investigating authorities. The court observed:[19]

> while arresting a female person, all efforts should be made to keep a lady constable present, but in circumstances where the Arresting Officer is reasonably satisfied that such presence of a lady constable is not available or possible and/or delay in arresting caused by securing the presence of a lady constable would impede the course of investigation. Such arresting officer for reasons to be recorded either before the arrest or immediately after arrest be permitted to arrest a female person for lawful reasons at any time of the day or night depending on the circumstances of the case even without the presence of a lady constable.

While the Supreme Court took into account the procedural difficulties for arranging the presence of a lady constable and did not agree to issue blanket order that no women could be arrested between sunset and a sunrise without a lady constable. The legislators by enacting section 46(4) in the code took a restrictive approach by making it a mandatory provision. The presence of a lady police officer is not a must for arrest of a woman in case the arrest is made after sunrise but before sunset. On exceptional circumstances woman can be arrested even between sunset and sunrise after taking permission of the judicial magistrate. But in that case, the arresting officer must be a lady police officer.

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17 *Christian Community Welfare Council of India* v. *Government of Maharashtra* (1995 Cr.L.J. 4223).

18 2004 CrLJ 14 (SC).

19 *Ibid.*

Recently in the year 2023 in the cases *Salma* v. *State of Tamil Nadu*[20](Salma's case) a woman challenged the legality of her arrest on account of procedural infraction and sought compensation from the High Court of Madras. The woman was arrested by the police officers at 10 pm at night without the prior permission of the judicial magistrate, it was contended by the State that seeking a written report to obtain prior permission from the judicial magistrate can be a done after the arrest, as strict interpretation of section 46(4) would practically delay the arrest whereby the accused can disturb the law and order.[21] The High Court of Madras denying compensation to the aggrieved woman observed that though it is incumbent on the authorities to have a written report submitted to the judicial magistrate concerned and obtain the prior sanction, however the court also agreed that there was nothing perverse in the decision of the authorities to arrest her as there were exceptional circumstances warranting arrest. The court observed, "this court will be guided by not just the explicit language of section 46(4), but the spirit, object, purpose as well as practical consideration for implementing the same."[22]

In *Salma's* case the mandatory provision of section 46(4) of the code became a discretionary or subjective provision on account of practical difficulties not only by the executive but also by the judiciary. One can make an assumption/ hypothesis that section 43(3) of BNSS which is a directory provision can be made a mandatory provision on account of spirit, objective, purpose as well as practical consideration of implementing the new section. Thus, possibility of its strict implementation is not unfounded or speculative in nature.

Absence of procedural safeguard to record reasons and permission of judicial officer

The Supreme Court has made substantial pronouncements whereby it has decried and severely condemned the conduct of the police in handcuffing without any justification. The Supreme Court has repeatedly stressed on the need of obtaining special orders from the magistrate before handcuffing the arrested person in exceptional circumstances. In *Citizen for Democracy through its President* v. *State of Assam*[23] the Supreme Court had an occasion to deal with the matter regarding use of handcuffs. It clearly declared that, "In all the cases where a person is arrested by the police, is produced before the magistrate and remand, the person concerned shall not be handcuffed unless special orders in that respect are obtained from the magistrate at the time of remand."[24]

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20 2023 LiveLaw (Mad) 105.

21 *Ibid.*

22 *Ibid.*

23 1995 (3) SCC 743.

24 *Ibid.*

The court further emphasized:[25]

> When the police arrest a person in execution of warrant of arrest obtained from the magistrate, the person so arrested shall not be handcuffed unless the police has also obtained orders from the magistrate for the handcuffing of the person to be so arrested. When a person is arrested by the police without warrant, the police officer if satisfied that it is necessary to handcuff such a person because of exceptional circumstances, he may do so till the time he is taken to the police station and thereafter his production before the magistrate. Further use of fetter can only be done under the orders of the magistrate.

It is often argued by the police that the Supreme Court is oblivious to the practical difficulties faced by the police and that in practice handcuffing may still be necessary in certain cases in spite of what law is and in extreme cases, extreme measures are therefore justified. Referring to such cases, the Supreme Court in *Prem Shankar Shukla* v. *Delhi Administration* (hereafter Prem Shukla's case) observed:[26]

> Even in cases where, in extreme circumstances, handcuffs have to be put on the prisoner, the escorting authority *must record contemporaneously the reasons for doing so.* Otherwise under article 21 the procedure will be unfair and bad in law. Nor will mere recording the reasons do, as that can be mechanical process mindlessly made. The escorting officer, whenever he handcuffs a prisoner produced in the court, *must show the reasons so recorded to the presiding judge and get his approval.* Otherwise, there is no control in applying handcuffs and fetters…. *And once the court directs that handcuffs shall be off no escorting authority can over-rule judicial discretion. This is implicit in article 21 which insists upon fairness, reasonableness and justice in the very procedure which authorises stringent deprivation of life and liberty.*

In spite of it, it is very unfortunate that the legislators in BNSS have dispensed with the need to obtain orders from the judicial magistrate and to record reasons for using handcuffs. Is practical consideration the reason that the legislators didn't feel the need to put the permission of judicial officers before allowing use of handcuff under section 43(3) of BNSS? So that the authorities would not be then pressed hard to do the needful quickly to prevent any untoward incident. A noticeable feature of the CRPC was that the judicial magistrate was kept in the picture at all stages of police investigation, though not authorised to interfere with the actual investigation or to direct the police how an investigation should be conducted. The presence of

25 *Ibid.*

26 AIR 1980 SC 1535. (Emphasis Supplied)

magistrate in the picture acts as a check against police excesses. If no judicial magistrate is there to put a check, there will be unguided discretion with the arresting authorities to use handcuffs, leading to arbitrary usage of handcuffs guided by the whims and fancies of individual arresting officers. Practical difficulty cannot be a sufficient reason to depart from the Supreme Court's guidelines or to depart from the scheme of the CRPC. Some suitable guidelines will have to be evolved to ensure compliance with the Supreme Court's directions to obtain permission of the Judicial Magistrate in exceptional, urgent and emergent situation, when practical enforcement of law gets difficult. As Anita Sumanth J., observed in *Salma's* case of the need to come up with guidelines to bridge the gap between the practical difficulty of obtaining the judicial magistrate's permission, the Judge observed, "Afterall in today's time of advanced technology, permission/sanction can well be obtained electronically /digitally in an instantaneous manner, ensuring that proper electronic trail and record of such sanction, is obtained and preserved."[27]

Moreover, absence of procedural safeguards to require the police officer to record reasons for handcuffing goes against the requirement of due process of law which according to article 21of the Constitution the procedure is unfair and bad in law. Otherwise, there will be no mechanism to control over possible arbitrariness in applying hand cuffs and fetters.There will be a scope for wide discretion among the arresting officers which will lead to inevitable misuse of handcuffing provision. After all discretion is not a chancellor's foot. Recording of reasons will also ensure accountability on the part of the State.

III A contempt of the Supreme Court's advancement of constitutional goal of human dignity

India has witnessed the commitment by the judiciary towards the human rights; there have been important developments in Indian Jurisprudence through the judicial adjudication like the right to life guaranteed under article 21 has been evolved to include within it right to live with human dignity which encompasses the right not to be tortured or assaulted by the State and its functionaries.[28] The Supreme Court in *M. Nagraj* v. *Union of India*[29] observed that in the hierarchy of constitutional rights under article 14, 19 and 21, the right to life with dignity stands at its pinnacle *i.e.,* the supreme of all the rights to which all other rights must conform. The court emphasized that human dignity inheres in us as a consequence of our individual existence. It observed:[30]

> It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition

27 *Supra* note 20.

28 *D.K. Basu* v. *State of West Bengal* (1997) 1 SCC 416.

29 2006 (8) SCC 212, para 21.

30 *Ibid.*

> of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give. It simply is. Every human being has dignity by virtue of his existence.

When one traces the progressive evolution of right to human dignity the first thought goes way back in the year 1980to the celebrated judgment of Krishna Iyer J., in *Prem Shankar Shukla's* case[31]where the human rights conscious court emphasized that handcuffs should not be resorted to as a matter of routine but only in the "rarest of rare cases" and when the person was "desperate", "rowdy" or involved in "non-bailable offence". Justice Krishna Iyer rightly observed:[32]

> The guarantee of human dignity, which forms part of our constitutional culture, and the positive provisions of article 14, 19 and 21 spring into action when we realise that to manacle man is more than to mortify him; it is to dehumanize him and, therefore, to violate his very personhood, too often using the mask of 'dangerousness' and 'security'….

He further observed:[33]

> Handcuffing is prima facie inhuman and, therefore, unreasonable, is overharsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring, to inflict 'irons' is to resort to zoological strategies repugnant to Article 21…To prevent the escape of an under-trial is in public interest, reasonable, just and cannot, by itself, be castigated. But to bind a man hand and foot, fetter his limbs with hoops of steel, shuffle him along in the streets and stand him for hours in the courts is *to torture him, defile his dignity, vulgarise society and foul the soul of our constitutional culture*.

Keeping in view the human rights and recognizing human dignity, the Supreme Court has immensely contributed towards the progressive evolution of right to human dignity. Through its weighty pronouncements the court has decried and severely condemned the conduct of escort police in handcuffing the prisoners/ undertrials without any justification.[34] In *Sunil Batra (I)* v. *Delhi Administration*[35] the Supreme Court held that imprisonment does not bid farewell to the fundamental rights enshrined in the Constitution. Part III of the Constitution does not part company with the

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31 *Supra note* 26.

32 *Ibid.*

33 *Ibid* (Emphasis Supplied).

34 *Khedat Mazdoor Chetna Sangath* v. *State of M.P* (1994) 6 SCC 260, *State of Maharashtra and others* v. *Ravikant S. Patel*, (1991) 2 SCC 373, *Sunil Kumar Gupta* v. *State of M.P* (1990) 3 SCC 119.

35 AIR 1980 SC 1579.

prisoners at the gates, and judicial oversight provides protection to the prisoner's shrunken fundamental rights, if flouted by the prison authorities.[36] The court had expressed concerns against the police atrocities over putting fetters in the following words, "to fetter prisoners in irons is an inhumanity unjustified save where safe custody is otherwise impossible. The routine resort to handcuffs and irons be speaks a barbarity hostile to our goal of human dignity and social justice."[37]

Despite the eye-opening judgments of the Supreme Court against handcuffing, the police has and still is resorting to indiscriminate use of handcuffs in subsequent recent incidents.[38] Some of the incidents are worth mentioning, in 2021 the High Court of Kerala in the case of *Rajeev* v. *State of Kerela*[39] expressed an incident of indiscriminate usage of handcuffing as "horrendously shocking" and came down heavily upon two police officers for inhuman treatment of a person who belonged to the vulnerable section of the society (*Dalit*). The only crime that the person committed was to ask from these officers a receipt of the complaint he had made earlier. All because a person belonging to a vulnerable section of the society could dare to ask for a receipt the officers handcuffed and chained the man to a handrail and also several criminal cases were registered against him one being to interfere with the functioning of the police. Devan Ramachandran J., lamented that how unfortunate it is that still many police officers do not understand their constitutional obligation while dealing with the citizenry.[40] He observed "This wasn't done even in British times to Indian. How can an Indian do this to another Indian? It pains me. We are taking a lot of efforts to make these people understand what civilisation is, what civilised behaviour is."[41] With the intervention of the court the case was registered against the erring police officers.[42]

In April 2024, the High Court of Telangana took a *suo moto* action based on a letter filed by a senior advocate complaining about the series of human rights violations of the rights of accused is being violated by handcuffing the accused in district court premises wherein frequently the accused are brought handcuffed in the court and

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36 *Ibid.*

37 *Ibid.*

38 *Suprit Ishwar Divate* v. *State of Kerela*, 2022 Livelaw (Kar) 233, *Satija* v. *Balwinder Singh Touri*, 2023 LiveLaw (PH) 70.

39 WP (C) NO. 20952 OF 2021 (G).

40 WP (C) NO. 13461 OF 2021 (G)

41 *Available at* : https://www.livelaw.in/news-updates/kerala-high-court-comes-down-heavily-on-the-police-for-inhuman-treatment-of-citizen-183069#:~:text=to%20unimaginable%20brutality.-,Justice%20Devan%20Ramachandran%20was%20outraged%20at%20the%20actions%20of%20two,complaint%20he%20had%20filed%20earlier. (last visited on May 5, 2024).

42 WP (C) NO. 20952 OF 2021 (G).

handcuffs are removed at the door of the court hall before presenting the accused before the presiding judge, to make it seems as though the guidelines laid down in *Prem Shukla's* judgment are being followed. On this the high court directed the Police officers of state of Telangana to ensure that no human rights violation takes place and strict adherence to Supreme Court's Decision in *Prem Shukla's* case be followed and to ensure balance of law and order in one hand and human rights of the accused in one hand.[43] In all these cases the judiciary has vehemently stood for the progressive evolution or advancement of civilization and human dignity. It has made it clear that any form of inhuman or degrading treatment meted to the accused during arrest, investigation or interrogation would fall within the ambit of article 21 of the Indian Constitution. No civilized nation can afford to have such a procedure of criminal law in garb of reasonable restrictions on one's fundamental rights.

The State has in a way disregarded the Supreme Court's judgments and have brought section 43(3) of BNSS which enlarges the powers of the police at the time of making arrest. The presence of this law confirms the subconscious belief of the State and the police officers that without the visible sign of restriction on the arrested person an arrest is not complete. Perhaps this belief is no different from the one prevalent in police State. Professor B. B. Pande has stated:[44]

> Arrest of persons has been treated as a *sine qua non* of State power, right from the colonial era down to the present- day criminal justice administration. That is the reason why the old as well as the new codes of Criminal Procedure provided extensive powers of arrest till the latest amendment in 2009-2010.

The position now is no different from that of the colonial era even after the rehauling of the Criminal Procedure Code. The BNSS has expanded the police powers for dealing with serious crimes in fact it now makes the laws of arrest more stringent by introducing handcuffing which was never mentioned in the CRPC.

Section 43(3) of BNSS is based on strict crime control model

The State through section 43(3) is bringing a stricter crime control model which aims to provide its citizen an efficient criminal justice system which is strong enough to deal with violators of law. According to Herbert Packer, "the value system that underlies the crime control model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the

43 TUWP (PIL) 4/2024, *also see* https://www.livelaw.in/high-court/telangana-high-court/telangana-high-court-hearing-pil-human-rights-violation-allegations-kukatpally-district-court-255956.

44 B B Pande, *Criminal Law and Criminal Justice* 208 (EBC, Lucknow, 2022).

criminal process."[45] The failure of law enforcement to bring criminal under tight control is considered to be the breakdown of public order and threat to human freedom. Packer further says, "If the laws go unenforced- which is to say, if it is perceived that there is a high percentage of failure to apprehend and convict in the criminal process- a general disregard for legal control tends to develop."[46] In such a scenario the individual becomes a victim of all sorts of unjustifiable invasions of his interest, and then his security of body and property is diminished.[47] The ultimate claim of criminal law is that it is a guarantor of social freedom and so to achieve this high purpose, the crime control model requires that primary consideration is paid to the efficiency with which the criminal justice system screen suspect, determine guilt and secure appropriate conviction. Crime control model suggests the use of criminal law sanction to cover an increasingly wide spectrum of anti-social behavior.

The danger associated with a strict crime control model is that the State's functionaries start to belief that power to use force on an individual is same as the need to use force. More so because of the stringent views on arrest and the usage of handcuffs advocated in the Malimath Committee Report which aimed at revamping the criminal justice system in Indiaby ensuring the maximum detection of the reported crime, having high conviction rate and by reducing the standard of burden of proof. The committee suggested that the increasing level of criminality in the society is violating article 21 of the Constitution and the State by its failure to provide an efficient crime control system is also violating that right.The committee viewed the power of arrest as a weapon in criminal justice system something which seems to have finally seeped into the new BNSS. The committee noted that how in other countries handcuffing is permitted as a rule whereas in India due to restrictions imposed on handcuffing a lot of practical difficulties occur. It expressed the desire of lifting the restrictions on handcuffing as the accused are increasingly becoming more daring and are even ready to risk their lives in order to escape from the custody. It is not always easy to prevent the accused from escaping and so with regard to the rights of the accused person the committee recommended that, "specific provision in the code be made which prescribes reasonable conditions to regulate handcuffing including provision for taking action for misuse of power by the police officers."[48]

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45 Herbert L. Packer, *The Limits of the Criminal Sanction* 158(Stanford University Press, California, 1968).

46 *Ibid.*

47 *Ibid.*

48 Government of India, "Report of the Committee on Reforms of Criminal Justice System" 269 (Ministry of Home Affairs, 2003).

Professor Upendra Baxi referred the committee's recommendations as "Shoddy Research" and "Ramshackle Reasoning."[49] With regard to expanding police powers in relation to investigation and arrest he made following remark:[50]

> ironically even human rights activists will agree that some move ahead is necessary. After all, who can argue against stricter crime control model against 'organized crime' and 'crimes of terrorism'…*what matters beyond these evocative labels is how a crime control model may still respect a due process paradigm of investigation*

Section 43(3) of BNSS is a classic example of strict system of crime control model which is totally repressive. It represses the right to human dignity in the most raw and naked form. It strips the arrestee from the essential procedural safeguards in terms of taking prior permission from the judicial magistrate and allows the arresting police officer to use handcuffs in which their discretion is given a full sway. This is anti-thesis to the due process model. The new BNSS does provide for handcuffing provision but no punishment is prescribed in the new *Bharatiya Nyaya Sanhita* (BNS), 2023 which has replaced The Indian Penal Code, 1860 if the power to handcuff is misused by the police officer. Chapter XII of BNS which deals with offences by public servants is in fact the shortest of all the number of offences mentioned in its other chapters. While the State has broadened its power over the crime committed by a common man. There has been and still is a great resistance to consider the fact that a great amount of crime is committed by the instruments or agents of the Sate, particularly the police. In the preface of PSA Pilla's book on Criminal Law, it has been pointed out that, "while the offence is defined by law, the corresponding offender is invariably defined by the State."[51] Thus, even though very often it is the functionaries of the State that abuse the law, they quickly escape prosecution because they are not considered in the eye of those who create laws, as offenders.

The need to restrain the excessive use of criminal law seems to be recognized by those who are affected by such criminal laws not by those who make it. It can be always argued by the State that the usage of handcuffing for serious crime during arrest is not a problem but a solution for a better criminal system and the human rights cost which comes due to it is because of the very "nature or structure" of criminal law. As Professor Wechsler said about criminal law that, "…. its promise as an instrument of safety is only matched by its power to destroy."[52] Criminal law

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49 Upendra Baxi, *The (Malimath) Committee on Reforms of Criminal Justice System: Premises, Politics and Implications for Human Rights*13 (Amnesty International India, 2003).

50 *Id* at 31. (Emphasis supplied).

51 KI Vibhute (ed.), PSA Pillai's Criminal Law xv (Lexis Nexis Butterworths Wadhwa, Nagpur, 10th edn.2008).

52 Herbert Wechsler, "The Challenge of a Model Penal Code" 65(7) *HLR* 1098(1952).

curtails the freedom of the individual who comes within its clutches. It creates suffering in different ways, *firstly* for the guilty, by the punishment actually inflicted; *secondly* for the guilty person's family and friends; *thirdly*, for the guilty again for regaining his place in social life after punishment because of the stigma or shame associated with criminality. Even if the accused is not prosecuted, the experience of arrest is embarrassing, and inconvenient. The misery arising due to the existence of enormous police powers is nothing but a collateral damage of criminal law and thus it becomes a challenge to the criminal justice system.

IV Conclusion

The spectrum of human rights is expanding as there is advancement in civilization but at the same time, the crime rate is also increasing. How are we to strike a balance between the two high interests which are competing and conflicting in nature? Can there ever be a balance between the interest of protecting the arrestee's right to human dignity and interest of the State to secure the evidence to enable justice to be done or to prevent the accused from fleeing justice.? The dilemma of maintaining peaceful coexistence of custodial conditions and basic human dignity of an arrested person is expressed by Krishna Iyer J., through the following words, "When does disciplinary measure end and draconian torture begin? What are the constitutional parameters, viable guidelines and practical strategies?"[53] The only viable method that one can think of is that the onus should be on the police officers to ensure that there is no escape of the arrestee. The escort that the police do of the arrestee must be sufficiently strong to prevent escape or causing any kind of undue trouble. While securing the presence of the arrestee the police officers should always be alert. If there is negligence or recklessness on their part no amount or method of trying or handcuffing will prevent an escape.

To prevent the escape of an arrested person no doubt is in public interest. But to handcuff the arrestee and escort him along in the streets and make him stand for hours in the court is like eroding his human dignity, vulgarizing society and diminishing the dignitarian spirit of our constitutional morality. It is therefore argued that the interest of human dignity is irreconcilable with the security of the State. One might say that the protection or safeguards of the arrestee should primarily be protection of those who are innocent and not intended for protection of the guilty or who are accused of having committed hard core heinous offences. If one goes by this line of argument then he/she assumes the character of a judge, he assumes the fate of the arrested person even before the hour of judgment. Therefore, the interest of the State cannot be magnified to the point of causing all safeguards to vanish from a statute. In the interest of security of the State it is apprehended that if the arrestee

53 *Supra* note 26 at para 1538.

escapes, he can show dangerous behaviour which will disrupt the peace and order in the society and hence it is better to nip something in the bud. The apprehension of the State can be responded by the following observation of the Supreme Court, "assuming a few likely to escape, would you shoot a hundred prisoners or whip every one every day or fetter all suspects to prevent one jumping jail? These wild apprehensions have no value in our human order, if article 14, 19 and 21 are the prime actors in the constitutional play."[54] Thus, the action of the State must be "right, just and fair". Using handcuff on the arrestee despite any tendency of escaping or showing any violent and disorderly behaviour would neither be right nor just or fair. Though, the State contends that police officer cannot resort to deprivation of dignity but at the same time it brings laws of handcuffing which is nothing but a contradiction. A society which covertly tolerates deprivation of human dignity during arrest is hypocritical; but one that approves its legality is on the way to becoming a totalitarian in nature.[55]

After July 1, 2024, we as a society must be prepared to pay a price for a regime that claims to offer an efficient criminal justice system strong enough to deal with violators of law. With the sanction of new criminal law now handcuffing will be used as a matter of routine contrary to the guidelines of the Supreme Court. There is also a probability that cases of seeking anticipatory bail might also increase in coming future. This forces one to question that can a procedure of handcuffing automatically becomes legitimate? Legitimacy of a power is seen in the way it is used and history has shown us how the police often indulge in indiscriminate use of handcuffs to humiliate and intimidate the arrestee. Once this procedure is in force it will affect the human rights and dignity in a substantial manner as it has the propensity to be directed towards a wide range of arrested persons. The combination of stigma or shame associated with handcuffing and loss of liberty on account of arrest is perhaps the heaviest deprivation that the State can inflict on an individual. Though the Constitution of India emphasizes on compassion and reverence of life, it is only unfortunate that these sentiments remain unfulfilled even after 74 years of the Indian Constitution. Albert Schweitzer once pronounced with conviction and humility on the Glory of life, "the reverence for life offers me my fundamental principle on morality."[56] The aforesaid expression reflects the respect that life commands and that the reverence for life is inseparable with human dignity. Any sensitive soul who has respect for the spirit of the Indian Constitution and pledges commitment or obedience to the constitutional vision of equality, dignity and justice should keep sustenance of human dignity at his/her highest concern. But for those who are still oblivious of the fact that human dignity forms

54 *Supra note* 35.

55 *Supra note*52 at 179.

56 *Mehmood Nayyar Azam* v. *State of Chhattisgarh* (2012)8 SCC 1.

part of our constitutional morality, one can only wait for them to cultivate within themselves the sentiment of compassion and reverence for life which the Indian Constitution strongly upholds through its Preamble, Fundamental Rights and the Directive Principle of State Policy.

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