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## EXAMINING THE INNER MORALITY OF THE LAWS OF ARREST: A PHILOSOPHICAL-LEGAL STUDY

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### ABSTRACT

We often read the procedures that are followed while a law is enforced, but not so often we think ‘why’ is that procedure implemented. Law is nothing without the society and the welfare of the society is the prime focus of law. So, when any law is carved out it finds the roots in the grundnorm<sup>2</sup>, which comes into existence by the moral code, principles and by the greater concept of what is right or what is wrong. The procedural laws of India have also found its root from the grundnorm of Indian Constitution which was inspired from past events across the world and from Constitution of 10 nations across the globe. Even the concept of Justice has various reasons arguments and debates of its own. This study focuses on what is the philosophical reason why certain strict methods are followed during the procedure of “arrest” under the Code of Criminal Procedure, 1973 and how those ‘concepts of philosophy’ came to existence i.e., rather than focusing on ‘*what* steps shall be taken’ during the ‘procedure of arrest’ in the Indian legal system, I have focused primarily, on ‘*why* such steps shall be taken’ during the procedure and have done a philosophical legal study pertaining to the laws of arrest.

**Keywords:** Grundnorm, Constitution of India, Code of Criminal Procedure, Arrest, Philosophical Legal Study

### THE CONCEPT OF JUSTICE

Charles Dickens in his book Great Expectation says, “In the little world in which children have their existence there is nothing so finely perceived and finely felt, as injustice”<sup>3</sup>. The following statement was further quoted by Nobel laureate and philosopher Amartya Sen in his book “The

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<sup>2</sup> Grundnorm is a concept from Kelsen’s ‘pure theory of law’ which means basic norm or from where the concept gets its source.

<sup>3</sup> CHARLES DICKENS, *GREAT EXPECTATIONS* 63, (Penguin Random House India Pvt. Ltd. 2003),

Idea of Justice”, whereby he states, this perception of injustice applies not only to children but also to adults, he says, “What moves us, reasonably enough, is not the realization that the world falls short of being completely just – which few of us expect – but that there are clearly remediable injustices around us which we want to eliminate.”<sup>4</sup> an age old theory that have existed in different ways or the other, modifies itself with the modification of the human civilisation. It has existed in one way or the other trying to make the society realise the concept of what is right over the concept of wrong. The word Justice is derived from the Latin word “Jus”, to look into more depths, the root of the same can be found in Greek philosophy. The etymology, jus, has taken directly from the Greek adjective carrying the meaning “right”. It is to be clearly stated that it is not merely something about what is legal or right or can be stated as just but with greater depth, something that is said to be a much more of a binding or a compulsive factor to be worked upon, i.e., “right, is something about what someone must do, rather than what someone may or should do”<sup>5</sup>. It can be taken as a very fundamental principle of life. Along the timeline the delivery of justice, is witnessed in a number of turns, from the ways as discussed by Plato and Aristotle, in the manner of harmonious relations stretching to the commands of the supreme or the divine spirit, Justice in Social Contract Theory to the modern distributive theory of Justice by Rawls and Amartya Sen. The concept of justice from the commands of gods have taken a turn towards the rights and dignity, which focus not only to the rights and dignity of the victim, but also towards the alleged accused who has allegedly committed a wrong.

### **THE CONCEPT OF DIGNITY AND LIBERTY**

“*All human beings are born free and equal in dignity and rights*”<sup>6</sup> is the very beginning of the Universal Declaration of Human Rights. From the very instance it can be inferred that the concept of human dignity is one of the precious elements in all spheres of a living soul and takes to be the prime basis of human right. As interpreted from the works of Immanuel Kant, human beings are something more, beyond than having a price, something that can’t be fulfilled with price, as no life can be replaced with another, or by a certain price or object that is to be compared. Dignity, specifically human dignity can be taken as a relatively new concept. It can be said that although the grundnorm or the meaning of dignity did exist, but the very usage as a

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<sup>4</sup>AMARTYA SEN, *THE IDEA OF JUSTICE* vii (The Belknap Press of Harvard University Press Cambridge, 2009).

<sup>5</sup> Jason Boatright, *The History, Meaning, and Use of the Words Justice and Judge*, 49 St. Mary's L.J. 727 (2018).

<sup>6</sup> UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 1

structure in human right and fundamental in human life can be said to be relatively new concept. The concept of dignity was one of the most instigated factors in the Latin American struggle against Spanish Colonialism and was later used in the Constitution of Country and primarily in the UN charter of Human Rights. As evident from the origin of the word, from the Latin term, “dignitas”, paralleled with the French term, “*dignité*” which is said about honour. Now the question that arises in this current discussion, how is dignity interpreted or is related with the fundamentals of life under the UN declaration, i.e., why in the UN charter it is mentioned that human beings have inalienable rights. As Glenn Hughes states in his paper to answer the same question that the UN charter is completely secular in nature thus answers pertaining to religion/ metaphysical cause had to be excluded, thus it cannot be said, “persons are endowed by a creator with certain unalienable rights”<sup>7</sup> nor can it be said that “inalienable right” is a concept derived from state or a social organ as “since anything socially conferred can, on principle, be socially rescinded”<sup>8</sup>. The dilemma was solved with when the drafters indicated to the fact that the rights conferred to the human beings are because of their intrinsic dignity. It can be noted that such interpretation was taken from the argument and explanation that Kant made about humans not having any price rather they value more than price, or what can precisely be said as ‘priceless’, as he writes, “*Whatever has a price can be replaced by something else as its equivalent; on the other hand, whatever is above all price, and therefore admits of no equivalent has a Würde*”<sup>9</sup> where Remy Debes, a professor from University of Memphis, in her article rightly points out that the concept of *Würde* was interpreted as dignity and thereby the interpretation playing a vital part in the modern day human right and dignity and played an instrumental role during the enactment of the UN declaration of Human Right. The intrinsic dignity is guaranteed to a person, irrespective of any discrimination on any ground, because “human beings to the quality they possess, have a special value or distinctive worth, that in each case and without exception, should be respected and nourished.”<sup>10</sup> Therefore the very initiation of the UN charter has guaranteed dignity, rather to state, an inherent exclusive human dignity, without any discrimination on any ground and moving a way further from what was dignity initially interpreted as dignified or dignitary, i.e., as William Shakespeare states long before the UN declaration of Human Right

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<sup>7</sup> Glenn Hughes, *The Concept of Dignity in the Universal Declaration of Human Rights*, Vol. 39 No.1, THE JOURNAL OF RELIGIOUS ETHICS 1, 3-4 (2011).

<sup>8</sup> *Id.* at 6.

<sup>9</sup> Remy Debes, A History of Human Dignity, FORUM FOR PHILOSOPHY (Feb. 5, 2018) <https://blogs.lse.ac.uk/theforum/a-history-of-human-dignity/>

<sup>10</sup> Glenn, *supra.* at 5.

took birth, “I think, the king is but a man as I am”<sup>11</sup>, he means, that all person, be it any person from any strata of the society have the same dignity, a dignity is not only for the dignified or the person holding the dignitaries, but for all person without holding any criteria or exception to this basic fundamentals. So, every individual irrespective of their position they hold in the eyes of society weighs the same as the other. The drafters of the UN declaration of Human Right has expressly laid focus on human dignity, Peng-Chun Chang suggested about the elevation of the concept of man’s dignity while Eleanor Roosevelt explained the significance of the terminology, as the right suggested under Article 1 of the charter is not a mere specific right rather an affirmation of equality and imbibed dignity that is to be seasoned by default irrespective of any discrimination with the same, thus the existence of the word dignity in the charter plays a pivotal role as all the rights guaranteed to an individual are a factor that is derived from the ‘constant’ of dignity. On the other hand, Charles Habib Malik affirmed in 1948 “inherent dignity” to be the initiating words of the Declaration’s Preamble ‘with the explicit intention of expressing the reason why we should recognize human rights’<sup>12</sup> and thus it is the duty of the state to explicitly guarantee every person with the human rights and dignity.

Now the fact, that we have discussed dignity to quite an extent, just moving to the next genre about the connection between dignity and justice or to some other facets of this study, without a brief about liberty, the objective of discussing justice and dignity ‘to the core’ remains unaccomplished. To quote, yet again, the Declaration on Human Right, “Everyone has the right to life, liberty and security of person”<sup>13</sup> it would be inferred that a dignity without the existence of liberty is like a country although bearing a Constitution without the Preamble. Dignity, Equality and Liberty are pearls tied to the same string, as Susanne Baer cites in her Lecture: Dignity Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism where “Dignity ensures respect for all individuals, equality serves to address systemic injustice and liberty safeguards freedom of choice under equal condition”<sup>14</sup>. The concept of Liberty was set a corner stone at spotlight in the modern world in the English Land. Moving down the line, in the early days of the 13<sup>th</sup> century, more precisely in the year of 1215, one of the most crooked King in the crown of England, King John, on violating a number of ancient laws and customs, he was made

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<sup>11</sup> WILLIAM SHAKESPEARE, WILLIAM SHAKESPEARE: THE COMPLETE WORKS 572, (Oxford and IBH Publishing Co. Pvt. Ltd., 1980)

<sup>12</sup> Glenn, *supra*. at 5.

<sup>13</sup> UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 3

<sup>14</sup> Susanne Baer, *Lecture: Dignity Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, Vol. 59 No.4, THE UNIVERSITY OF TORONTO LAW JOURNAL 417, 5 (2009).

to sign, the Magna Carta or what one may also term it as, ‘Great Charter’. It can be stated that although Magna Carta originated as a failed attempt to maintain peace but it set ‘liberty’ as a guiding light in the world. The charter had the prime objective was to restore the rights and to state that King is also within the purview of law and not beyond it. It provided the basic rights of a human existence required to live, or can be written as, freedom from unjustifiable rule, oppression or control of the government or ruling body, and also to act freely. The later would only be possible if the former is satisfied. Liberty, after getting its position in the frame, have been witnessed as a moto of several revolutionary struggles across the globe, found its place in charters of Human Rights and as one of the objectives in Constitutions of the Countries across the world. Thereby, it would be stated that a life, would not exist without these primary facets of dignity and liberty.

### **RELATIONSHIP BETWEEN HUMAN DIGNITY AND JUSTICE**

*“To no one will we sell, to no one deny or delay right or justice”*<sup>15</sup>, human dignity as it is often stated number of times is not something that can be sold or can be denied, not only at the choice of the other person but also even at the choice of the individual itself. Now the question lies in the fact why is the concept of dignity, is it at all connected with the theory of Justice? It has to be understood that ‘Justice’ in the widest of the ideals it is what someone deserves or ought to deserve, someone who if denied with the same, the wide ambit of ‘justice’ is not satisfied. A wide number of questions may arise with respect to the above-mentioned statement. The greatest question that I would like to answer of how to create a bridge that would basically connect Justice with Dignity. Dignity is the feeling that one individual will have which pertains to his worth, of the value he holds in the society to the greatest extent the mere basic ‘respect’ and ‘worth’ as a human being, something that is not a mere need but a part of life that is or shall be enshrined to an Individual under the four-alphabet phrase ‘life’. My demonstration may further get its colour while I mention here what was stated by Hon’ble Justice D.Y. Chandrachud in the landmark privacy case of Puttaswamy, “the life, under the right to live, is not a mere ‘life’, but a ‘life’ with dignity”<sup>16</sup>. So, this statement traces its roots to the Universal Declaration of Human Rights, the mere reason why dignity is a part of life, because the concept of dignity is

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<sup>15</sup> [Loulla-Mae Eleftheriou-Smith](https://www.independent.co.uk/news/uk/magna-carta-what-it-and-why-it-still-important-today-10017258.html), Magna Carta: What is it – and why is it still important today?, Independent (July. 01, 2021, 19:29 PM), <https://www.independent.co.uk/news/uk/magna-carta-what-it-and-why-it-still-important-today-10017258.html>

<sup>16</sup> JUSTICE K.S. PUTTASWAMY RETD. V UNION OF INDIA, (2017) 10 SCC 1

‘inalienable’ as it is something which can ‘neither be sold, nor can it be denied nor it can be delayed’, i.e., dignity is inherent to one individual from the birth and continue to till the death of the individual. The following heading - “Relationship between Human Dignity and Justice” can be discussed in number of manners. So, if any person claims that his dignity is violated by anything and the same act has no reasonable basis for violating the dignity of that person, as Micheal S Pritchard explains, the dignity of that person, irrespective of who the person is has to be protected in order to serve complete justice, thereby the two concepts, thus getting directly proportional to each other.<sup>17</sup>

This explanation and developed relationship among the concepts would hence help me illuminating on how the procedural laws in India, Code of Criminal Procedure, 1973(in this study, I would only deal with the procedures of arrest under the code) creates a balance between the procedure followed and the human right and dignity of an individual who goes through the same in order to serve complete justice.

## **ARREST AND THE PROCEDURE OF ARREST UNDER THE CODE OF CRIMINAL PROCEDURE, 1973**

### **i) Arrest**

The word ‘arrest’ as it becomes very significant to understand it from the very core, as stated in the case of Directorate of Enforcement V Deepak Mahajan<sup>18</sup>, is derived from the French word ‘arreter’ that basically means ‘to stop or stay’ an individual.

The word can although have a number of meaning based on circumstances in which it is used, but when meant generally, arrest, as defined under the Farlex Legal Dictionary, “A seizure or forcible restraint; an exercise of the power to deprive a person of his or her liberty; the taking or keeping of a person in custody by legal authority, especially, in response to a criminal charge.”<sup>19</sup>

A number of definition from a number of dictionary will show that the basic crux of the “arrest” when used, means to detain the liberty of a person lawfully or by lawful means. These definitions were kept while the provisions of arrest under the Code of Criminal Procedure was drafted by the Indian legislature. Section 41 to 60A of the Code of Criminal Procedure deals with the concept of arrest by various individuals, it’s procedure, rights of an arrested person.

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<sup>17</sup> Micheal S Pritchard, *Human Dignity and Justice*, Vol. 82 No.4, THE UNIVERSITY OF CHICAGO PRESS JOURNAL 299-313, 13(1972).

<sup>18</sup> DIRECTORATE OF ENFORCEMENT V DEEPAK MAHAJAN, 1994(3) SCC 440: 1994 CRI LJ 2269

<sup>19</sup> THE FREE DICTIONARY BY FARLEX, [http:// https://legal-dictionary.thefreedictionary.com/arrest](http://https://legal-dictionary.thefreedictionary.com/arrest) (last visited July. 1,2021).

## ii) Distinction between Arrest and Custody

The distinction between “arrest” and “custody” is a necessary ingredient, although the two words are often synonymously used, but the later has a wider scope and perspective over the former. “Arrest is a mode of formally taking person in police custody”<sup>20</sup>, so from the statement it would be stated that, for every arrest made by any authority there is always a custody, but for every custody it is not important for an arrest to take place. Custody, as explained in the case of State of Bihar V. Madanlal Agarwalla<sup>21</sup>, by relying on the case of State of Uttar Pradesh v. Deoman Upadhyaya<sup>22</sup>, that under Section 27 of the Indian Evidence Act, the term should be interpreted in wider manner rather than only interpreting as post arrest custody. One individual, with certain amount of information when goes to the Police officer or to the Magistrate, the person can be said to be “under the custody” of the respective police officer or under the Magistrate. Thus, “arrest”, as stated above, is the formal way of taking an alleged individual, in the “custody” of the law enforcement agency.

## iii) The balance of Liberty and Dignity of an individual and Arrest

The Universal Declaration of Human Rights states “*Everyone has the right to life, liberty and security of a person*”<sup>23</sup>. The same has often been the grundnorm in designing the Justice System across the world or in designing the procedural legislature. As stated above, while discussing about the relationship between dignity and justice, it was shown in this article that dignity catered with liberty are the fundamentals of life and they can neither be given nor can it be striped of from an individual, without a due process established by law. Arrest, as defined in the ‘Dictionary of English Law (1959)’, “*The restraining of liberty of a man’s person in order to compel obedience to the order of a Court of Justice, to ensure that a person charged or suspected of a crime may be forthcoming to answer it. To arrest a person is to restrain him of his liberty by some lawful authority*”<sup>24</sup>. This deprivation of the liberty of an individual by legal procedure is necessary in order to cater the greater interest of the society, because, if the person’s

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<sup>20</sup> Vol. I, S.P. TYAGI, THE CODE OF CRIMINAL PROCEDURE, 1973, LAW, PRACTICE AND PROCEDURE 508, (3<sup>rd</sup> ed. 2020)

<sup>21</sup> State of Bihar V Madanlal Agarwalla, AIR 1967 PAT 63, 1967 CrILJ 237

<sup>22</sup> STATE OF UTTAR PRADESH V. DEOMAN UPADHYAYA, AIR 1960 SC 1125

<sup>23</sup> UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 3

<sup>24</sup> Vol. I, S.P. TYAGI, THE CODE OF CRIMINAL PROCEDURE, 1973, LAW, PRACTICE AND PROCEDURE 505, (3<sup>rd</sup> ed. 2020)



liberty of movement and activities are not brought under the custody, by the formal procedure of arrest, the larger liberty of the society will be put to stake, because a crime that is reported, is not committed merely against an individual but against the society at large. But at the same time, violation of dignity and violating the liberty of the individual without any reasonable nexus, is not permitted by the procedural law, because they are the arms and limbs of a human life, violation of the same would cause hindrance in promoting complete justice. With the emerging ambit of Human Rights, the procedure of arrest under the procedure are often subjected to checks and balances. The Law of the arrest and its procedure under the Code of Criminal Procedure, as observed in the case of *Joginder Kumar V. State of Uttar Pradesh*<sup>25</sup>, that the law, in order to serve the complete Justice, has to create a balance between the social security by checking a reported crime and between the social need for the protection of the liberty of the arrested person and to prevent the abuse of power by the Police authority or the law enforcement agency. To create a balance between the same the Hon'ble Supreme Court and the Hon'ble Legislature, have set rules and guidelines over the period of time in order to ensure unnecessary curtail of Human Right under the veil of the procedural Law.

#### **iv) Guidelines of Arrest along with Rights and Safeguards of an Arrested Person**

The definition of Arrest and the explanation to the definition gives a clear indication that arrest is the 'restraining the liberty of an individual by lawful means supported by a 'valid reason'. Under the Code of Criminal Procedure, Arrest can be conducted by a Police Officer, by a private person or by a magistrate as stated under 41, 43 and 44 of the Code of Criminal Procedure, 1973 respectively. The clauses of Section 41 and 42 of the Code, lays down, only when a police officer can arrest a person without a warrant, and the law enforcing agency or the police officer or even a private person cannot go beyond the specified code and vitiate the liberty of the subject. While discussing about the same, the Hon'ble Apex Court, time and again, has stated in a number of precedent when a person shall be arrested. Necessary guidelines are laid in order there is no misuse of authoritarian power and violation of dignity and liberty of an individual without any due cause. The precedent of *Joginder Kumar*<sup>26</sup>, laid emphasis on the 3<sup>rd</sup> Police Commission report, in page 4 of the Judgement, the Court observed by relying on the report that

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<sup>25</sup> JOGINDER KUMAR V STATE OF UTTAR PRADESH, 1994 CRI LJ 1981

<sup>26</sup> *Id.* at 24.

among the total number of arrests made, 60% of the arrest were unnecessary or unjustified.<sup>27</sup> The same is not only a misuse of power but leads to mental torture to the individual caused due to the unnecessary arrest leading to defile the dignity of the individual.

An offence under the Code can be classified into Bailable and Non Bailable offences, Cognizable and Non-Cognizable offenses. The code defines, ‘Bailable offence means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and non- bailable offence means any other offence’<sup>28</sup>. From the crux of the definition, we can take into note that in case of a bailable offence, bail is a right of the person arrested, on the other hand, in case of a non bailable offence, one can although apply for the bail, but cannot claim it as their mandatory right, as it is the discretion of the Court to grant or not to grant the bail in case of non-bailable offence. Offences which are stated as cognizable offences are those offences where a police officer may arrest a person without the warrant of a magistrate and non-cognizable offences are those offences, where police can arrest only with an arrest warrant. Non-Cognizable offences are listed under 1<sup>st</sup> Schedule of the Code of Criminal Procedure, 1973 and they are bailable in nature.

Although Section 41 of the Code of Criminal Procedure allows a police officer to arrest a person convicted of a cognizable offence without a warrant, there are yet certain guidelines and suggestion set for the same. Before invoking the procedure as stated under 41 of the Code, a ‘*reasonable complaint*’ that a cognizable offence is committed by the individual (against whom the complaint is made) shall be ‘*lodged*’, or there must be some credible information against the person committing the offence, or there must exist a ‘*reasonable suspicion*’ against the person committing the offence. The Hon’ble Court in a number of scenarios have clearly highlighted the fact that a mere existence of any credible information against the individual won’t satisfy the reasonability for the cause of arrest of the individual. Or to state more precisely, there should be the existence of ‘*reasonable suspicion*’ in order to invoke Section 41 of the Code of Criminal Procedure. In the landmark Judgement of Roshan Lal Goel V Superintendent Central Jail, Lashkar and Ors., the Hon’ble High Court of Madhya Pradesh, reinstated the fact that the information that is present with the police that leads to the reported ‘*reasonable suspicion*’ against the arrested individual must be based on some definite fact, it is necessary for the officer to verify the cause for which the person is needed to be arrested and it should not depend on

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<sup>27</sup> *Third Report of the National Police Commission*. p.35 (1980), <http://indianculture.gov.in/third-report-national-police-commission>

<sup>28</sup> Code of Criminal Procedure, 1973, § 2(a), No.2, Acts of Parliament, 1973(India)

some vague information, the information received shall specifically affirm the suspicion or point to the fact that the person is needed to be arrested by invoking section 41 of the Code of Criminal Procedure.

It is true that the Section 41 of the Code of Criminal Procedure, provides discretionary power to the Police officer to arrest an individual, but at the same time it becomes very crucial that the same power is not used capriciously by the police officer, i.e., the power to arrest shouldn't be administered just on the mere fact that the police is immune with the power to arrest an individual.

The laws of arrest have undergone several scrutiny times and again in order to serve complete justice and to prevent misuse of power by the law enforcing agency. The Hon'ble Court in the landmark judgement of DK Basu<sup>29</sup>, any form of torture, inhuman activities or degrading treatment upon the arrested person for whatsoever reason under the protection of law is grave violation of fundamentals rights under Article 21. The same activities if given protection under the ambit of law, would lead to breakdown of the legal structure in a civil society. The Court observes that there cannot be any degradation of dignity and human right of the arrestee. In order curb the arbitral use of the power to arrest given to a Police official, and to balance the right of the society and the rights of the arrestee, the Hon'ble Court hence issues certain requirement to be followed while carrying out arrest<sup>30</sup>.

These guidelines stated in the landmark judgement of DK Basu V. State of West Bengal<sup>31</sup>, have been further codified under Section 41A, 41B, 41C, 41D and has to be followed mandatorily when a police officer arrests an individual without a warrant from the magistrate. With strict notifications, it is clearly stated that failure to comply with the guidelines as provided in the following judgement would lead to contempt of court, punishment and penalties for violating the same would be invoked on the defaulting officer.

Arresting an individual, shall under no circumstances violate the absolute fundamental right of an individual. Arrest is not a determining result that the alleged offence has been committed by the alleged accused rather it is executed on a prima facie belief by the 'police officer' based on the 'information produced' that such person may have committed the offence and is necessary to arrest him for the purpose of interrogation or to prevent any further commission of any other offence. The rights of an arrestee, as provided above, are not only mere statutory rights but fall

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<sup>29</sup> DK Basu V State of West Bengal, 1997 (1) SCC 416

<sup>30</sup> DK BASU V State of West Bengal (1997 (1) SCC 416)

<sup>31</sup> *Id.* at 29.

under the fundamental rights mentioned in Article 22 of the Constitution of India, pairing directly with the 'Right to Life' under Article 21. Arresting an individual will only cover the ambit of restraining the movement of an individual till the extent it is required in order to complete the course of justice. This leads to opening of another fundamental right of an arrestee, the right of self-defense or right of a person (including an alleged accused or an arrestee) to remain silent, if any fact incriminates him, as the same would be a breach on the right to defense. The law protects an alleged accused from self-incrimination or compulsion from self-incrimination which was further affirmed in the case of *Nandini Satpathy V. P.L. Dani*<sup>32</sup>. This may have 2-fold explanation. The statements given to a police officer has no evidentiary value and can only be used for contradiction purposes. If an alleged accused gives a statement against himself, and incriminates himself, it would not only be difficult for the defense but also it would be hard to prove that the statements were received from the alleged accused at his own free will or he has actually said the statement not from any threat from exterior source. For example, a person may take the blame upon himself on receiving threats or exterior pressure, which may include police authority as well as from person who were also part of the alleged offence. The statement would not only incriminate the alleged accused but at the same time the investigation procedure would be hampered, it may happen that the alleged accused has committed several offences, but the offence alleged against him bears much less punishment as compared to other grave offences, the alleged accused may self-incriminate himself in order to hide the other major offences that may actually have taken place and face much less punishment. To my belief the right against self-incrimination is not only for the self-defense or for protection of alleged accused from incriminating himself, but also for the benefit of the prosecution and the police authority who on investigating may uncover greater offences. The same may also impact on the pre-trial and trial procedures, the Bail procedure may get adverse impacts and at the same time such statements may make the Judge preconceived during the tenure of trial leading to faulty orders.

### **ARREST OF WOMAN**

The procedure to arrest a woman in case of a cognizable offence shall not be compared with the procedure of arresting a male alleged accused. One should note that Article 15(3) of The Constitution of India clearly allows the state to make special provision for the protection of

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<sup>32</sup> *Nandini Satpathy V. P.L. Dani and Another*, (1978) 2 SCC 424.

woman and children, here woman means any woman irrespective of ‘who’ they are. At the same time, it should be taken into consideration that not all people in the society shall receive the same treatment as the same would collapse the pillars of equality. History of India shows that women are the oppressed section of the society for ages. This has led to breakage in the mental stamina of a woman as compared to a man. Questioning the chastity of a woman or putting the modesty of a woman at stake is evident even in the two oldest Epics of India- The Ramayana and Mahabharata. With the emerging concerns of humans’ rights across the world, the modesty, dignity and the social-physical-mental security of a woman has to be well guarded. Harassment of a woman by a police officer or detaining a woman for long in the police station would lead to mental and societal pressure of the woman and as well as impact the modesty of the individual as well. No stones shall be left unturned in order to provide the utmost security to the fragile section of the society subjected to years of oppression and who have faced violation of modesty and question upon dignity, even in the exceptional circumstances of arresting a woman. The Hon’ble Supreme Court in the case of Sheela Barse v. State of Maharashtra<sup>33</sup> has thus set directions covering all the areas in order to provide special protection to woman during the time of arrest, as ‘harassment’ in the name of ‘arrest procedure’, leading to violation of ‘modesty’ and ‘chastity’ of a woman, would break the balance of law and order in a civil society.

### **HANDCUFFING AN ARRESTED PERSON**

When an individual is arrested, the reputation of the individual by default is put to stake. The individual faces societal trial before a judicial trial, which creates a lot of pressure on the individual. Although a criminal trial proceeds under the practice of alleged accused is ‘innocent until proven guilty’, but the society tags the ‘alleged’ accused<sup>34</sup> as the offender in the alleged offence. Thereby a mere arrest causes irreparable loss to the self-esteem and reputation of the accused before the society, which even if he is proven innocent, is not completely restored to the original. The legislature even under the name of providing justice cannot harm the dignity, liberty and self-esteem of the individual unless it has a reasonable nexus for doing the same. The sole jurisprudence behind handcuffing is to prevent a highly dangerous prisoner/s to escape or to create any such moves that may cause danger not only to the law-enforcing agency but to the

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<sup>33</sup> Sheela Barse V. State of Maharashtra, 1983 AIR 378, 1983 SCR (2) 337

<sup>34</sup> It shall be noted that throughout the paper, I have used the word ‘alleged’ before ‘accused’, because an individual cannot be stated a mere accused until he is proven guilty by the prosecution before the Hon’ble Court by a fair trial procedure.

civilians in a society. Hence preventive measures like handcuffs and fetters shall then be imposed, which now has a definite reason, till the danger last, even if it is inhuman to do so.

At the same time, it has to be considered whether handcuffing an alleged accused is at all necessary or not. Handcuffing an accused, without any valid reasonable ground is ultravires to the provisions of ‘Right to Life’ under Article 21 of the Constitution of India, as the iron fetters put around the hands of an alleged accused, would lead to inhuman treatment to the life of the alleged accused, further affecting the self-esteem and dignity of the individual which shall not be permitted nor accepted. We shall remember “the life, under the right to live, is not a mere ‘life’, but a ‘life’ with dignity”<sup>35</sup>, and as stated in the case of Maneka Gandhi<sup>36</sup> and further cited in the case of Sunil Batra<sup>37</sup>, “life is more than mere animal existence”<sup>38</sup>. Hence the use of fetters, as strictly stated in the case of Sunil Batra<sup>39</sup>, inter-alia shall be used when it is an absolute necessity to be used in order to protect the goal of social justice.

## **BAIL AND REMAND**

A person allegedly accused of any offense and arrested has the right to apply for bail. The procedure of bail is a pre-trial procedure which is based on the importance of liberty of the alleged accused who is detained in an alleged offence. In case of a bailable offence, bail is a matter of right and shall be provided to the arrestee. In a non-bailable offence, bail is a matter of judicial discretion of the judge. But it has to be stated that bail cannot be denied merely on the ground that the case is non-bailable in nature. The reason behind the same is two-fold. Personal liberty of an individual is a matter of huge significance and is one of the most crucial part in the Right to Life. The liberty of the alleged accused, who is detained, is the matter of greater importance, as the criminal trial proceeds on the presumption of innocence, even in a case of non-bailable offence, leading to the undisputed legal doctrine “Bail is a rule, Jail is an exception”<sup>40</sup>. The deprivation of liberty of an alleged accused by denying bail without any reasonable ground for doing so or setting any such condition in bail which cannot be fulfilled or

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<sup>35</sup> JUSTICE K.S. PUTTASWAMY RETD. V UNION OF INDIA, (2017) 10 SCC 1

<sup>36</sup> MANEKA GANDHI V UNION OF INDIA, 1978 SCR (2) 621

<sup>37</sup> SUNIL BATRA V DELHI ADMINISTRATION, 1980 AIR 1589, 1980 SCR (2) 557

<sup>38</sup> Kharak Singh V State of UP, 1963 AIR 1295, 1964 SCR (1) 332; Maneka Gandhi V Union of India, 1978 SCR (2) 621; Sunil Batra V Delhi Administration, 1980 AIR 1589, 1980 SCR (2) 557.

<sup>39</sup> SUNIL BATRA V DELHI ADMINISTRATION, 1980 AIR 1589, 1980 SCR (2) 557

<sup>40</sup> STATE OF RAJASTHAN V BALCHAND ALIAS BALIAY, (1977) 4 SCC 308.

setting compensation to the victim as a condition in bail<sup>41</sup> by default leads to punishing the alleged accused before the trial process which not only violates the maxim of ‘El incumbit probatio qui dicit, non qui negat’ but also breaches the objective of bail which is “neither punitive nor preventive”<sup>42</sup>, further would hamper in the trial procedure as the matter would get preconceived by such order, leading to loss of faith among the people on the justice delivery system.

There can be no doubt in the legal doctrine of “bail is a rule; jail is an exception” but similarly the importance of ‘exception’ shall be measured with equal importance as that of the ‘rule’ in the doctrine. During a bail proceeding, certain conditions has to be considered and has to be weighed.<sup>43</sup> Importance shall be given not only to the alleged accused but the protection and safety of the victim and peace of the society shall also be considered, “the provision for being released on bail draws an appropriate balance between public interest in the interest in the administration of justice and the protection of individual liberty pending adjudication of the case.”<sup>44</sup> When a bail is denied, it can be argued that liberty of the alleged accused is denied but it can be justified with the explanation of “benefit outweigh the harm”, i.e., denying the bail, violates the liberty of the alleged accused but if that violation of liberty serves the greater interest of ‘justice’ or ‘protection of justice’, then that violation of bail or remand shall have a reasonable cause. What I mean by the statement, that although the interest of the alleged accused plays a greater role in a criminal trial, as a criminal trial proceeds on ‘presumption of innocence’ of the alleged accused, but during the remand proceeding, if on the prima facie on the analysis of the records produced, the Hon’ble Court is satisfied that the alleged accused has actually committed the alleged offence, and the alleged accused ‘if released on bail’, it may put the victim and their family’s life and liberty at risk or may tamper with the evidence of the prosecution to be produced before the Hon’ble Court during the stages of trial or may commit similar offence, last and not the least, remand to custody shall actually help in greater purpose of investigation which is one of the prime instrument leading to justice, then that denial of bail or remanding the alleged accused to the custody is said to be denied on judicial merit and is reasonable in nature. The remand, when given on judicial merit, protects the greater interest of the society and serves in providing complete justice not only to the victim but also to the society at large.

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<sup>41</sup> DHARMESH @DHARMENDRA @DHAMO JAGDISHBHAI @JAGABHAI BAGUBHAI RATADIA V STATE OF GUJARAT [CrA 432 of 2021], LL 2021 SC 292

<sup>42</sup> SANJAY CHANDRA V CENTRAL BUREAU OF INVESTIGATION, (2012) 1 SCC 40

<sup>43</sup> MAHIPAL V RAJESH KUMAR AND ANR., (2020) 2 SCC 118,

<sup>44</sup> *Id.* at 45.

## CONCLUSION

The law is often considered as the medium that when properly executed leads us to the ideal of justice. But unfortunately, time and again it is observed how the law is misused, or how harassment and inhuman activities are executed in the name of procedural law, which is absolutely not what the law has actually stated. The law or the law makers have created a balance between the societal needs and the rights of the alleged accused. Law has never allowed the violation of any fundamental right of any individual without any valid 'reasonable' cause. Time and again it has stated that no one, even the law enforcing agency has the right to treat an individual or the alleged accused disrespectfully<sup>45</sup> or do any such inhuman activities that shall lead to grave violation of the provision of 'Complete Justice'. It will lead to massive collapse in the system and the loss of faith on the Judiciary or on the law enforcing agencies. Yet till date, law commission reports, police reports have stated that misuse of procedural law and inhuman treatment to the alleged accused have put a stain on the Justice System or the law enforcing agencies. It shall be kept in mind that, if society can't exist without law and justice then vice-versa, that same law will have no effect if the society loses its faith on the Justice delivery System, thereby leading to the collapse of the entire society.

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<sup>45</sup> Sunil Batra V Delhi Administration, 1980 AIR 1589, 1980 SCR (2) 557