

SEX BEHIND BARS: A CONSTITUTIONAL VIEWPOINT

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INTRODUCTION

Man, the period of whose life is one hundred years, should practice *Dharma*, *Artha* and *Kama* at different times and in such a manner that they may harmonize together and lead him to *Moksha*, i.e. release from further transmigration. *Kama* is enjoyment of appropriate objects through the five senses of hearing, seeing, feeling, tasting and smelling assisted by mind and soul together.¹ Thus, the *Kama* is the peculiar contact between the organ of sense and its object and the consciousness of pleasure which arises from it. Sexual urge is the strongest of all kinds of *Kama* and the prisoner being a human being is no exception to it. The epics of ancient India, the Ramayana and Mahabharata support the view that in ancient India, sex was considered a mutual duty between a married couple where husband and wife pleased each other equally. The ancient Indian Culture and scriptures had given a new dimension to sexual education with the construction of the architecturally beautiful temple of Khajuraho under the empire of Chandela Kings. The rights for satisfying this urge of prisoners can easily be traced back to rich historical texts of Hindus. Lord Krishna was born to parents while they were put behind bars by His Uncle, *Kansa*.

The conjugal rights of prisoners have been recognized as a matter of right in countries Canada, Brazil, Cuba etc. Hence the issue presently under consideration is whether the right to sex behind bars or right to conjugal visits for prisoners should be legalized in India where the existence of such right is also found in historical textbooks. The issue was highlighted once again after the recent litigations before Hon'ble Bombay High Court and Punjab and Haryana High Court. The Punjab legislature is also planning to come up with a policy about it. In the light of these events, it has become necessary to check that whether the Constitution of India and legal circumstances in India permits such right. The permissibility of such a right will be checked by presenting the following questions:-

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¹Vatsyayana, *Vatsyayana's Kamasutra: A Classic of Love* (Richard Burton & F.F. Arbuthnot, trans., 2007)

1. PERMISSIBILITY OF THE RIGHT

1.1 WHICH THEORY OF PUNISHMENT DO WE FOLLOW IN INDIA?

There are basically four theories of punishment i.e. Deterrent Theory, Retributive Theory, Preventive theory and Reformative Theory. Out of these four theories the two extreme points regarding this issue are the Deterrent and Reformative theory.² The Reformative Theory pleads for giving prisoners life with dignity and reforming their life for future. On the other hand, the deterrent theory strives to set an example by punishing a criminal in such a harsh manner so that no one else would do the same act. Hence the question arises is which theory of punishment does India follow. The Hon'ble Apex Court answered this question in *Mohd. Giasuddin v State of Andhra Pradesh*³ stating that deterring the crime is not our principle but reformation of the criminal should be done. This line of the judgment becomes the base of prison reform in India. Further this line can also be interpreted as reliance on the reformative theory and negation of the deterrent theory. Hence on the ground of this case, it is observed that a policy regarding the conjugal visits should be drafted to meet the end of this theory.

1.2 WHETHER PRISONERS HAVE THE RIGHT TO LIFE WITH DIGNITY?

Human Rights include human dignity which is protected by several provisions⁴ of the Indian Constitution.⁵ In early fifties, the Indian judiciary glorified public rights at the cost of individual rights. This can be substantiated from the decision in *Naranjan Singh v State of Punjab*⁶ and *Re Santa Ram*⁷. In the former, the Hon'ble Supreme Court held that Article 21 would be applied only when the procedure provided under Article 22 was violated. In the latter, it was held by the Hon'ble Supreme Court that the term 'life' does not include 'livelihood'. It was with the case of *A.K. Gopalan v State of Madras*⁸ where a new window of interpretation was opened by Justice Mukherjee by explaining personal

²Giriraj Shah & K.N. Gupta, *Human Right: Free and Equal*(2001) 121.

³*Mohd. Giasuddin v State of Andhra Pradesh* AIR 1977 SC 1926.

⁴The Indian Constitution, 1950, Preamble Art.XXI, XXXIX (e) & (f) & XXXXI.

⁵P L Mehta & Neena Verma, *Human Right Under the Indian Constitution*(2nd ed. 1999) 77.

⁶*Naranjan Singh v State of Punjab* AIR 1952 SC 106.

⁷*Re Santa Ram* AIR 1960 SC 932.

⁸*A K Gopalan v State of Madras* AIR 1950 SC 27.

liberty as the liberty relating to or concerning the principle or body of the individual.⁹ However this trend which was prevalent in the fifties was reversed totally with the decision of *Maneka Gandhi v Union of India*¹⁰. This decision gave a new dimension to the concept of 'Right to life' in India. Elaborating the same view a window of prison reform was opened in *Francis Coralie v Union territory of Delhi*¹¹ where Court said that the right to live was not restricted to mere animal existence.¹² Right to life included the right to live with human dignity and all that went along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow being.¹³ Hence from this, it can be easily deduced that the right to live with dignity forms a facet of right to life.

The position of the right to live with human dignity is quite settled and is not questionable in India. However, the question is whether these rights are given to prisoners or not in India. In other words, whether the "hands off doctrine" is applicable to prisoners or not. The applicability of the "hands off doctrine" was first time contended in the case of *Charles Sobraj v Superintendent Central Jail, Tihar, New Delhi*¹⁴ where Court intervened and did not take into consideration the above mentioned doctrine. Further the Fundamental Right to live with dignity is finally provided in *Sunil Batra (I) v Delhi Administration*¹⁵ stating that bar fetters shall be violative of human dignity and should be used if any violence or escape tendency is displayed by prisoner. It is pertinent to note that the above mentioned decision was not applied in *Prem Shankar Shukla v Delhi Administration*¹⁶ where the question under consideration was of handcuffing the prisoners for bringing them till Court for trial. However the notion of Right to Life with dignity for prisoner was never challenged and further well established in *Sunil Batra (II) v Delhi Administration*¹⁷. It was observed in the abovementioned case that no iron can be curtained between the prisoner and the Constitution. Hence it is a settled notion that rights under Article 21 are available to people behind bars. Even visiting rights of family and lawyers come under this ambit. It was in the case of *Francis C. Mullin v Union Territory of Delhi*¹⁸ that the provision of only one interview in Tihar Jail was challenged

⁹D J De, *Interpretation and Enforcement of Fundamental Rights* (2006) 610.

¹⁰*Maneka Gandhi v Union of India* AIR 1981 SC 746.

¹¹*Francis Coralie v Union territory of Delhi* AIR 1978 SC 597.

¹²J.N. Pandey, *Constitutional Law of India* (2004) 231.

¹³*Francis Coralie v Union Territory of Delhi* *Supra* note 11.

¹⁴*Charles Sobraj v Superintendent Central Jail, Tihar, New Delhi* 1979 SCR (1) 512.

¹⁵*Sunil Batra (I) v Delhi Administration* AIR 1978 SC 1675.

¹⁶*Prem Shankar Shukla v Delhi Administration* AIR 1980 SC 1535.

¹⁷*Francis C Mullin v Union Territory of Delhi* AIR 1981 SC 746A.

¹⁸(1980) 3 SCC 488.

and it was held that there should be at least two interviews in a week. Further, the Apex court has time and again put forth the need for judicial visits to protect such rights. Now the question arises, whether this right to life with dignity includes the right to sexual intercourse with one's partner?

1.3 WHETHER THIS RIGHT TO LIFE WITH DIGNITY INCLUDES RIGHT TO SEXUAL INTERCOURSE WITH ONE'S PARTNER?

This issue has not seen the light of the day till now. With reference to this issue, the decision of famous *Naz Foundation* case¹⁹ can be considered as turning point. A reference should be made to the following paragraph of the Delhi High Court Decision:-

*"The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem, build relationships of his or her choice and fulfil all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21. Section 377 IPC denies a person's dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution."*²⁰

Hence following this thought process; it is juvenile to not consider right to sexual intercourse with consent of sexual partner to be a fundamental right. Moreover, the instant issue is also inherently related with right to sexual intercourse and have relationships with people outside jails while being inside jails. Such a right can even solve problems like increase in HIV positive cases with unprotected sex behind the bars. This proposition was recently presented before the Hon'ble Bombay High Court in *Rama v State of Maharashtra & Others*²¹. The instant order was passed upon the bail application by one of the prisoners kept in Yerwanda Central Jail. However the bail application was rejected by the Court on the ground of lack of medical indication in his case. The issue raised out of this whole bail application became a reason for revolution. The application brought issues of lack of facilities, infrastructure, police escorts etc. and consequent deaths of HIV positive prisoners before the Hon'ble Court which proactively extended the scope of the application to address the health concerns of the prisoners. Justice Majumdar considering these issues, observed in this case that:

¹⁹*Naz Foundation v UT of Delhi* Delhi High Court Writ Petition No. 3504/2008.

²⁰*Naz Foundation v UT of Delhi supra* note 20, ¶ 8

²¹*Rama v State of Maharashtra* Criminal Application No. 371 of 2008 in Criminal Appeal No. 706 of 2006(Unreported)

“There may be physical needs. See whether a separate place can be given to a prisoner and his wife for a day or two. The government is spending crores of rupees to curb the AIDS menace in jails. Instead why don't you take preventive steps?”²²

Hence the Court recommended the Government to try to provide prisoners right to conjugal visits in privacy. As soon as the Hon'ble Bombay High Court recommended this mechanism, a request arrived from a prisoner couple in Patiala jail through a petition before Punjab & Haryana High Court.²³ This couple is kept in two different cells of the same prison i.e. Patiala Central Jail. They had demanded for sexual intercourse in private so that they could give birth to a son. The case is still pending before the Hon'ble High Court. Now the judgment of this case would be very important to determine any such right.

2. SEARCH FOR A PERFECT MECHANISM WITHIN INDIA

Before going to the details of the issue for selecting a mechanism, it is necessary to look towards the practices being followed in our own land to ensure healthy and lively environment in jails. One of such prevalent practices in India is the open jail. The promotion of such jails has been also recommended by the Hon'ble Apex Court in *Rama Murthy v State of Karnataka*²⁴. In such jails, a piece of land is given for developing the jail as a model of a small village created by the prisoners themselves with the money provided by the Government which consists of houses rather than prison cells. They live with their family member in these jails. The release of offenders on probation, home leave to prisoners, introduction of wage system, release on parole, educational, moral and vocational training of prisoners are some of the features of the open air prison (camp) system.²⁵

It has also been recommended by the Hon'ble Apex Court that there should be open jails at every state level.²⁶ Till date, there are only 27 open jails in the seventh largest country of the world.²⁷ It is shameful that the new phase of reformed prisons are negligible in numbers even after the recommendation from the Hon'ble Supreme Court.

²²Try to allow prisoners to have sex with wives: HC (*One India*, 2 May, 2010) <<http://news.oneindia.in/2010/01/15/try-to-allow-prisoners-to-have-sex-with-wives-hc.html>> accessed 2 May, 2010.

²³*Ibid.*

²⁴*Rama Murthy v State of Karnataka* AIR 1997 SC 1739.

²⁵Palok Basu, *Law Relating to the protection of Human Rights* (1st ed., 2007) 940.

²⁶*Rama Murthy v State of Karnataka supra* note 24.

²⁷Manish Dixit, 'Open House', (*India Today*, 4 May, 2010) <<http://indiatoday.intoday.in/site/Story/65413/Home/Open+house.html>> accessed May 4, 2010

Hence there is a need to create more such prisons.

Considering the negligible figures of people escaping from these prisons, the concept of open jails can be stated to be successful. There were just seven escapes between 1988 and 1997, which rose to 32 between 1998 and 2008.²⁸ The problems of managing such prisons were accepted by the Hon'ble Apex Court. However it was also negated by them calling it pitiable in nature.²⁹ The shocking fact about this concept is that it has not flourished in every part of India except Rajasthan. Out of the 27 open jails in India, 17 open jails are situated in Rajasthan. Hence it is need of the hour to establish more open jails all round India. Punjab has undergone a step ahead in this concept. This particular edge with regard to prison reform and their rights is evident from Punjab government in the form of a similar policy. A modern substitute to the Prisons Act is underway in Punjab, which has undertaken other reforms as well, including recognizing the importance of conjugal visits to beginning the construction of five new jails that collectively will contain a 50-bed hospital, educational facilities, a sewage treatment plant, workshops, and equipment for video conferencing.³⁰

However this model will only be able to provide conjugal visits or right to sexual intercourse to certain selected prisoners. This can also be justified by stating that the prisoners with good conduct should only be given such rights. However, it should be kept in mind at the same time that the right is interrelated with Article 21 and hence it is fundamental in nature. So this right should be given and ensured to every prisoner in the country. It can be inferred from the above dicta that a new mechanism is needed which can take care of this right for all prisoners.

This policy will not only provide rights to the prisoners but will also curb menaces like HIV/AIDS in jail. A similar policy was drafted by Zimbabwe in 1998 to curb the spread of HIV/AIDS in prisons.³¹ There are several countries which have adopted such policies. Canada is one of such countries providing conjugal visits as a matter of right. In Canada, eligible prisoners can have family visits of 72 hours in three months. There are certain maximum security prisons which have 48 hours as their limit. Visits are granted to homosexuals, as well as heterosexuals, and common law partners who could prove they had an "established relationship".³² It is also an interesting fact that the visit also

²⁸Dixit, *ibid* 27.

²⁹*Rama Murthy v State of Karnataka* *ibid* 24.

³⁰'Arresting the Problem: Toward Prison Reforms in India'(SADHRC May 2, 2010)<<http://www.hrdc.net/sahrdc/hrfeatures/HRF197.htm>> accessed May 2, 2010.

³¹'Sex on Sentence'(BBC news May 3, 2010)<<http://news.bbc.co.uk/1/hi/uk/812165.stm>> accessed May 3, 2010.

³²*Ibid*.

took place in beautifully designed apartments inside the prison. It is hoped that such apartments will sooner be found in Indian jails.

CONCLUSION

Recently, a big movement has risen in U.K. asking for these rights.³³ The inspiration to be taken from this movement in our legal system is that sooner or later this issue can also evolve as a challenge for our legal system also. Hence there is need to provide this right to each and every prisoner as it finds its root in the fundamental Right to Life and personal liberty enshrined in Article 21 of the Constitution. Hence there is definite need to provide sex behind bars as a right.

Mere conferring of this right will not ensure lack of any controversy in the future. If today this right is provided, then the biggest question in future would be whether this right should also be given to homosexuals and "live-in couples". Moreover, Indian judiciary has started giving favourable views on both the propositions. Section 377 was read down by the Hon'ble Delhi High Court in *Naz Foundation v UT of Delhi*³⁴. Live-in relationships have been held to not be illegal by the Hon'ble Supreme Court, as seen recently in the decision of the Khushboo case. Hence, this right should be provided irrespective of the fact that the couple is a common law couple. The only thing to be taken care of is that the intercourse should be consensual. Nevertheless the demand for such rights to homosexuals is subject to the decision of the Supreme Court. However the Delhi High Court has set a positive proposition. It is with the hope for better prison conditions and a reformatory outlook that we move toward the future.

³³*Ibid.*

³⁴*Naz Foundation v UT of Delhi* *ibid* 20.