

## Case comment

### **Punjab and Haryana High Court ruling on the prisoners' right to procreate**

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“Convicts are not by mere reason of the conviction denuded of all the fundamental rights which they otherwise possess.”

- Justice V.R. Krishna Iyer

(Sunil Batra Vs. Delhi Administration., 1978)

Article 21 of Indian Constitution embodies a catena of interpretations with respect to the term ‘life’. It states that ‘*No person shall be deprived of his life or personal liberty except according to procedure established by law*’<sup>2</sup>.

Article 21 uses four crucial expressions, viz., ‘life’ ‘personal liberty’ ‘procedure’ and ‘law’. Right to life includes living atmosphere congenial to human existence. The term ‘life’ has been of paramount importance for the judiciary while deciding the cases before them and this article has undergone sea changes post Maneka Gandhi Case before which this article was dormant.

This article within the ambit of the term ‘life’ embraces not only physical existence but the quality of life. The judgments range from providing right to life with human dignity<sup>3</sup>, right to life does not include right to die<sup>4</sup>, right to life aimed to provide for right to free legal aid to poor prisoners<sup>5</sup>, to latest Punjab and Haryana high court judgment pronouncing right to procreate children to the prisoners to be an ingredient of Article 21.<sup>6</sup>

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<sup>2</sup> Article 21 of Indian Constitution

<sup>3</sup> Francis Coralie v Delhi, AIR 1981 SC 746

<sup>4</sup> P. Rathinam v UOI, AIR 1994 SC 1844

<sup>5</sup> Hussainara Khatoon v State of Bihar, AIR 1979 SC 1369

<sup>6</sup> Jasvir Singh. vs. State of Punjab, (2014) (P&H)

Now this judgment carries within itself a major breakthrough in the pitiful lives of the prisoners. It declares that the right of convicts and jail inmates to have conjugal visits or artificial insemination for progeny was a fundamental right as they reiterated Article 21 of the Constitution includes the right of convicts and jail inmates to have conjugal visits or artificial insemination as an alternative.

This judgment came as a reaction to the criminal appeal being dismissed by the Supreme Court and commuting the death sentence of the petitioner (wife). The petitioners now seek enforcement of their perceived right to have conjugal life and procreate within the jail premises. The issues raised by them are indeed of paramount public importance. Equally significant are the related issues hovering around the concept of 'reasonable restrictions' or 'the extent of suspension of some of the fundamental rights during incarceration', 'radical jail reforms', 'the status of prisoners as protected citizen' within the Constitutional framework as well as the 'international perspective on the right to conjugal life in the precincts of jail', which too call for discussion.<sup>7</sup>

The court came to this judgment by referring to a couple of cases such as *D. Bhuvan Mohan Patnaik & Ors. Vs. State of Andhra Pradesh & Ors.*<sup>8</sup> and *Sunil Batra vs. Delhi Administration & Ors.*<sup>9</sup>, wherein the Hon'ble courts held that the right to life will not be denied to a prisoner which would have formed an integral part of his life had he been out of prison. These and various other cases emphasized that the allowing or encouraging visitation of the prisoner's families to these prisoners or allowing conjugal visits in jails would be step towards guaranteeing basic right to life comprising of certain other related rights which are denied only by virtue of they being confined.

If we look at close quarters to the International perspective in this regard then at our disposal we can quote what the United Nations' Basic Principles for the Treatment of Prisoners, 1990 has to say, '*except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and*

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<sup>7</sup> As cited in the judgment of *Jasvir Singh. vs. State of Punjab*, (2014) (P&H)

<sup>8</sup> (1975) 3 SCC 185

<sup>9</sup> (1978) 4 SCC 494

*Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.*<sup>10</sup>

Most of us assume that the prison life precludes all the private contact of the jail inmates with the outside world but now it is only a myth as not only India in particular a State but also other Countries in US and Saudi Arabia also have this concept of conjugal visits by the nomenclature 'Extended Family Visits' as it aims to keep the family as a unit and to enhance the chances of the prisoners to rehabilitate and reform for the betterment of the society and not to revert to the committing of the crime and landing back to prison after release.

In US there are at this point of time only six states which have promoted conjugal visits in their prison systems (California, Connecticut, Mississippi, New Mexico, New York and Washington). The prisoners here are not only allowed visits by their spouses but also by their children, parents, friends and relatives.

In Saudi Arabia, though being a Muslim nation it is a step further from other countries in a way that while monogamous men and women in jail are allowed one conjugal visit a month, bigamous men are allowed two separate visits a month, likewise there are certain other countries like Brazil, Belgium which allow homosexual visits in jails.

However here in India keeping in mind the decision of Punjab High Court on this issue they have floated the guidelines which will serve as the stepping stone for other state courts to follow. To quote, 'such a right, however, is to be regulated as per the policy established by the state which may deny the same to a class or category of convicts as the aforesaid right is not an absolute right and is subject to the penological interests of the state'.<sup>11</sup>

Right of conjugal visits to prisoners will not only be path breaking step but also will be seen as a means to protect and promote the spirit highlighted in Article 21 which impliedly ensures the right of prisoners. Prisoners have the right against handcuffing because handcuffing is prima facie inhuman & therefore unreasonable is over harsh. Prisoners have the right to vote. Prisoners also have the right like, write to book & publish it. Putting bar fetters for an unusually long

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<sup>10</sup> Article 5 of The United Nations' Basic Principles for the Treatment of Prisoners, 1990

<sup>11</sup> [http://highcourtchd.gov.in/lts\\_judgments/CWP-5429-2010f2.pdf](http://highcourtchd.gov.in/lts_judgments/CWP-5429-2010f2.pdf)

period without due regard for the safety of the prisoners & the security of the prison would certainly be not justified.

Therefore Article 21 gives the right against bar fetters to the prisoner. 'Right to bail' was included in the personal liberty under Article 21 & its refusal would be deprivation of that liberty which could be authorized in accordance with the procedure established by law. It depends on fact and circumstances of each case. The Supreme Court has condemned cruelty or torture as being violative of Article 21. In case of *Francis Corrali Mullin V. Union Territory of Delhi*<sup>12</sup> the Supreme Court condemned the illegal detention & confinement in police custody of innocent children belonging to the family of the accused on condition that they would be released only on surrender of the accused. The Court held this needless harassment of innocent people for detecting the crimes as violative of Article 21.

*Afzal vs. State of Haryana*<sup>13</sup>, Solitary Confinement means curtailment of liberty of the prisoners to share company with the co-prisoners, in case of *Sunil Batra V. Delhi Administration*<sup>14</sup> Supreme Court examined the constitutional validity of provisions of prisons Act, 1894 relating to imposing solitary confinement & bar fetters for security of prisoner. It has been held that the solitary confinement will be violative of Article 21, unless it has been backing of law.

Supreme Court has been held that the detente's right to have interview with his lawyer & family member is part of his personal liberty guaranteed by Article 21 of the Constitution and can not be interfered with except in accordance with reasonable, fair & just procedure established by law. The prisoner have right to acquire hold and dispose of property under the ordinary law. Prisoners have the right of freedom & expression, reading, writing, except in so far as it is circumscribed by the fact of imprisonment. The right guaranteed by Article 21 does not permit an accused to make successive bail applications when they have been earlier rejected by the higher Court.

The Court issued directions to the State to provide at least the minimum conditions ensuring human dignity to women and children in 'care homes' as required by Article 21. C.J. Bhagwati about incarceration of children in jail when the learned Judge warns the Government that on No account should the children be kept in jail and if a State Government has not got sufficient

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<sup>12</sup> AIR 1981 SC 745

<sup>13</sup> AIR 1996 SC 2326)

<sup>14</sup> AIR 1978 SC 1675)

accommodation in its remand homes or observation homes, the children should be released on bail instead of being subjected to in circulation in jail.

Various committees have been already set up so as to seek that there is a protection of prisoner's rights in India. These committees analyzed the situation and recommended some alternatives so as to improve the conditions of the Rights of the Prisoners. The first Committee on Prison Reforms was appointed in 1836, with Lord Macaulay as one of its member. The next committee was appointed in 1864. In 1877, there was a conference of experts to enquire into prison administration. Another committee was appointed to examine jail administration in 1888-89. On the basis of this report, the Prisons Act 1894 and the Prisoners Act 1900 were passed. The Indian Jails Committee examined the conditions of prisons not only in but also in other countries.

在 1956, the Government of India set up the All India Jail Manual Committee. This committee prepared the Model Prison rules in 1959 for the guidance of the State governments.

在 1977, Ismail Committee (constituted by the Tamil Nadu government) in its report submitted the allegations of ill treatment and beating. This committee made suggestions for prison reforms and rights of the prisoners. According to Justice Ismail, the state has a duty to spend for the rehabilitation and reformation of prisoners and making them to re enter into the mainstream of the society.

在 1979, the Tamil Nadu Prison Reforms Commission was constituted and it suggested that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity and rights of human persons. This Committee had made some progressive suggestions with regard to women prisoners and also suggested that short term prisoners should be given wages for their work. It also suggested that accused persons shall be segregated from convicted persons and must be given the status of a non convicted person.

在 The Government of India, has brought to the notice of the Law commission of India in its 78th report, the need for undertaking suitable judicial reforms and changes in law in order to deal with the problem concerning with a large number of under trial prisoners in Indian jails. This Commission has recommended speedy investigation of the case, and separate places of detention for under trial prisoners.

In 1983, Justice A.N.Mulla Committee of Jail Reforms made suggestions for the modernization of prisons in, and hence suggested the setting up of National Prison Commission. According to this Committee there was a total ban on heinous practice of clubbing together juvenile offenders with the hardened criminals in prison; and it also suggested the removal of the diarchy of prison administration at a union and state level. Justice Mulla Committee suggested that the classification of prisoners in jail should be rational as well as scientific.

In 1986-87, National Expert committee on Women prisoners was constituted. This Committee was headed by justice V R Krishna Iyer. In 1988, this Committee submitted its report to the Union Government. It suggested that, in police force the number of women must be increased. This Committee made recommendations to make aware among the women in custody about their rights and duties while in custody. In this view, the Committee suggested that literate prisoners must be given an easy readable text in which the fundamental rights of prisoners are contained in. Socio-legal counseling and legal aid camps are established in the prisons to support women inmates.

In 1991-93, the 9th Kerala Legislature Estimate Committee, made certain suggestions with regard to the rights of prisoners in the state of Kerala. This Committee submitted its report on 28th January, 1993. This Committee had taken into consideration an objective of imprisonment sufficient opportunities to be provided to the prisoners as a reformative move. It also made suggestions that the prison labour can be made more profitable if certain necessary provisions are made, in accordance with the ability and taste of the prisoner. The Committee also made recommendation to the government to enhance punishment for those prisoners who violates the conditions of parole.

In Kerala, the Travancore- Cochin Prisons Act, 1915 was enforced which extends to the whole area of the State of Travancore- Cochin.

In the Malabar District including the State of Madras, the Central Act 9 of 1894 was enacted.

A prisoner, whether a convict, under trial or detenu, continues to enjoy all his fundamental rights including right to life guaranteed to him under the Constitution of India. Therefore, in the light of such protections and remedies granted to them under the cloak of Article 21, providing for a

complete novel right of conjugal visits to the prisoners is appreciative and can be viewed as a value-oriented interpretation of Article 21 and a way forward for the amelioration and metamorphosis of the jail inmates as the present trend is that even after conviction; the judiciary has an effective supervising role with regard to the treatment of prisoners inside the jail. When, a person is put in prison he loses some of the fundamental rights like the freedom of movement, freedom to form association etc. The prisoners are entitled to claim the residuary fundamental rights even inside the prisons. The State is under a constitutional obligation to honour and protect their rights including the right to life and human dignity.

**References:**

- 1) Asim Pandya, Writs & other Constitutional remedies, first Edition (2009)
- 2) [http://highcourtchd.gov.in/lts\\_judgments/CWP-5429-2010f2.pdf](http://highcourtchd.gov.in/lts_judgments/CWP-5429-2010f2.pdf)
- 3) Acharya Durga Das Basu, Introduction to the Constitution of India (2007)
- 4) B.P, Dwiwedi, The changing dimensions of Personal liberty (1998)
- 5) M.P. Jain, Indian Constitution law, Fifth edition In India (2003)
- 6) Kailash Rai, The Constitutional law of India. 8<sup>th</sup> edition Central Law Publication (2009)
- 7) Narendar Kumar, Constitutional law of India 7<sup>th</sup> edition. (2008)
- 8) S.R. Myneni Constitutional Law I 1<sup>st</sup> edition Asha Law House. (2011)