
PROCREATION RIGHT OF PRISONERS

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“Imprisonment does not mean farewell to fundamental rights as laid down under Part-III of the Constitution”. Justice Krishna Iyer (Sunil Batra Judgment 1978)

On 12th October 2020, while hearing the writ petition by the wife of a prisoner, Patna High Court in the case of *Rajeeta Patel v. State of Bihar and Other* (2020 SCC Pat 1759) dealt with the issue of Right to Procreate of prisoners and answered positively in the favour of the right and declared Right to Procreate is part of *Right to Life* under Article 21 of Indian Constitution and survives incarceration. Reaching this conclusion, court relied on the single bench judgment of Punjab & Haryana High Court (P&H HC) in case of *Jasvir Singh and Anr. v. State of Punjab & Ors.*, (2014 SCC P&H 22479).

In the latter case court discussed at length, the issue of right to procreate vis-a-vis right to life of the prisoners and made certain observations for the same and issued guidelines to Punjab Government to setup Jail Reforms Committee in order to create environment for conjugal and family visits for jail inmates (para 96). Same guidelines were recommended to Bihar Government in the former case. So far, nothing has been ensured by the Punjab Government in this regard (The Print, 2021).

Perspective of the Government

While making the argument counsel for state of Punjab in *Jasvir's Case* contended that no such right can be made available to the petitioner as nothing has been mentioned in the Prison Act, 1894. Article 21 of Constitution of India states that: “*No person shall be deprived of his life or personal liberty except according the procedure established by law.*” In case of *D. Bhuvan Mohan Patnaik v. State of Andhra Pradesh* (1975 3 SCC 185) Supreme Court of India clearly laid down that because of mere conviction no fundamental right can be denied to convicts which they otherwise possess (para 6). Article 21 plainly states that without procedure established by law no one will be deprived of his right to life, but the argument of counsel for State of Punjab reflects that no such right will be provided except if provided by law. This is how state acts when it comes to the protection of fundamental rights of individual including

prisoner. Hesitancy is common when need arises for the promotion and practice of human rights in India which are developing with the development of international norms and jurisprudence of fundamental rights. Such regressive practices are shared in India, due to pessimistic attitude towards reforms and lack of political will.

Observations of the Court

In Jasvir's case P&H HC framed few questions relating to constitutionality of procreation rights of the prisoners and what categories of prisoners should be allowed this right if it is made available. Court discussed various national and international judicial decisions and academic work at length on this very issue and reached a conclusion. Upholding the right to procreation of prisoners which is traceable through Article 21 of constitution, court held that though it is ordinarily available to all convicts but must be subject to penological interest of the state. It further laid down that exercise of this right is to be regulated by procedure established by law, which is sole prerogative of the state. Court observed that the providing facility of conjugal visits falls in the domain of legislature and they must come with an effective mechanism. Court also confessed to poor conditions of prisons and limited infrastructure and observed that this right cannot be made available within existing prisons.

Dehumanising of Prisoners

Prisoners form the most ignored community, and their rights are most overtly denied and treated as degraded human beings (Kaur, 2019). Prisons are looked down as burden on state exchequer. Allocation for welfare activities of prisoners formed only 0.6 % (NCRB 2015) of total prison budget. Prisons are highly congested with minute care toward maintenance, hygiene, sanitation, and quality of food along with severe staff crunch (Rath 2017). Our prison system is mostly based on retributive and punitive theories of punishment where prisoners are badly treated following colonial era practices. No government prioritise jail reforms. A slew of reforms has been proposed by Justice Mulla Committee in 1983, but implementation of proposed reforms has yet to take practical form. It becomes important to mention here that in all such proposed reforms all debate around right of procreation is missing.

Procreation Rights and Prisoners: Present Status and Further Arguments

There are few judicial decisions that too of High Courts as discussed earlier including some

other judgments and complete absence of political determination in determining right to procreation of prisoners. Supreme Court of USA in 1942 in *Skinner v. Oklahoma*, 316 U.S. 535 (1942) recognized the Right to procreate as “one of the basic civil rights of man” and procreation is fundamental to the existence of human race while decided against forced sterilisation of habitual offenders. Further Ninth Circuit court extended it to the prisoners in case of *Gerber v. Hickman* (Harvard 2002). In India there is no Supreme Court ruling or policy of government ensuring this right as of now.

In colonial era practice of ‘*Pakki Mulaqat*’ was followed whereby a special class of convicts were allowed to spend time with their wives in isolation (Lalli, 2015). With the dawn of independence this practice was done away with.

Through the Sunil Batra Judgment¹, Justice Krishna Iyer extended the ambit of Article 21 whereby prisoners’ right to life was give new recognition which was otherwise denied. Through the present judgments of *Jasvir and Rajeeta* HCs have further extended scope of Article 21 to prisoners’ procreation right.

So far nothing concrete has followed into procreation rights of prisoners except few decisions of High Courts. Model Jail Reform Manual 2016 seems another document left for discussion purposes only. Jail Infrastructure does not permit conjugal visit (TOI, 2017). Whenever this is mooted in any court to provide such rights, States remain in denial and shows their inability by reason of no statutory provisions in this regard as well as because of practical situation of Indian prisons.

Recently, Uttarakhand HC has took cognizance of the petition filed by the wife of a convict for allowing conjugal visit whereby HC will investigate the constitutionality of such right (Jha, 2021). The bench further stated that apart from the rights of the incarcerated persons, right of the women, children born out of such arrangement will also be looked into.

Right to procreation is not something to be discussed in isolation. Debate around this right opens a pandora box. Issue of women’s right to procreate and their say in availing this right in Indian prison settings cannot be overshadowed. Further rights of the offspring of such

¹ Sunil Batra v. Delhi Administration, (1978) 4 SCC 494

arrangement and concerns about their future, demands due importance while settling issue around prisoners' right to procreate.

Women's Right over procreation

"When we talk of reproductive rights in this country, then there is hardly any choice so far as the woman is concerned," Justice Sikri (ET, 2017).² He further emphasised that structure of patriarchy is deeply rooted in our society which must be broken and women can only be freed, if they have right over their own body. Women face lot of difficulty during pregnancy. As per the WHO report in 2016, every 5 minutes, at least one woman dies during pregnancy or childbirth (Sharma, 2016). Also, if this right is allowed to inmates, what would be the facilities there for pregnant women. Already prisons are condemned institutions because of poor living standards and set-up, such arrangements will only add to the problems in given infrastructure.

Status of Children

As observed by the Supreme Court "In no case prison environment is conducive for the normal growth and development of the children and children born in prisons do not experience normal life till 4-5 years of age."³ Moreover there is stigma attached to the children of imprisoned parent and they often tend to show behaviours of sadness, anger or worry and sense of loss, though based on circumstances (Robertson, 2007). The reflection of attitude of society, faced by prisoners, toward their children is inevitable. Such children form the lost victims of prison arrangements. Rights and Future of all such children will require a due and progressive care, whereby they must be able to access all the positive opportunities of a dignifies human life.

Conclusion

Right to procreation though fundamental to human being attracts many responsibilities mostly attached to the rights of women and rights of the children. No doubt, prisoners do hold their humanness even if they are incarcerated and cannot be denied their right to life merely because of conviction. They must be provided with all dignified way of life even during imprisonment

² Justice Sikri was speaking at a symposium -- Reproductive Rights in Indian Courts: Celebrating Progress, Identifying Challenges and Discussing the Way Forward-- organised by the Jindal Global University (JGU).

³ Cited by the Supreme Court in case of R.D. Upadhyay v. State of Andhra Pradesh, (2007) 15 SCC 337 from taking note of report prepared by Tata Institute of Social Science on the situation of children of prisoners.

as they are already denied of other rights includes right to free movement, to association, to community living or even in most cases to privacy and private life.

Currently, prisons are the hub to the suppression of human dignity and natural rights. Mostly overlooked, extremely stigmatised and least cared and discussed for, and mostly coming from the already marginalised sections, prisoners get trapped in the vicious circle of living a hell life. Prison reforms demand radical changes. Improvement must take place from the scratch. For the welfare of children involved in prison system, stigma attached to it must be limited. Denouncing the retributive and deterrent theories of incarceration, reformation must be taken care for. Rights of the undertrial prisoners and speedy trial need to get a life. It's the crime which need to be shaded off not the criminal per se. Only with such improvements availability of procreation right would bring respite especially toward the women and children involved. Things need to be moved hand in hand.

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