VOLUME 17 ISSN: 2456-9704

SEXUAL RIGHTS OF THE PRISONERS

By Prithivi Raj
From Rajiv Gandhi National University of Law, Punjab

ABSTRACT

This article examines the sexual rights of the prisoners by justifying loneliness, sexual satisfaction, and quality of life among prison inmates having heterosexual romantic relationship with a fellow prisoner, inmates with a partner outside the prison, and inmates without a partner. After controlling for age, nationality, total time in prison, actual sentence time served, and estimated time to parole, the results showed a lower level of romantic loneliness, and a higher level of sexual satisfaction and global, psychological, and environment quality of life. A right of the prisoners raises a question as to what extent it can incorporate conjugal rights to the prisoners in the jail premises. This article is intended to discuss whether conjugal rights are a privilege or a right. In India, conjugal visit is not permitted. A conjugal visit is a private meeting between sexual partners with an inmate of jail. The original purpose for marital visit is to urge detainees to keep up family ties. The Consultation suggested that to achieve sexual health, sexuality and sexual relationships should be approached positively and respectfully. Apart from conjugal rights the author also examines the sexual autonomy of the prisoners and there right to it. Further, the sexual rights of every person must be protected the laws and policies which must reflect a positive and respectful approach to sexuality and sexual relationships of prisoners.

STATEMENT OF THE PROBLEM

Homosexuality is the emerging social problem in society. The most enabling environment to involve in same sex activity is prison centres. Consequently, there might be consensual or non-consensual sex among inmates which ultimately violates the right to physical integrity of a person because of instances of an act of rape of same sex.

Prison conjugal visits were used as an incentive to motivate working prisoners to be more productive. It can also be seen in the point of rehabilitation. States believe that preserving the bond of the family unit makes the chances of the inmates rehabilitation greater. They were scheduled visits that allowed the prison inmate to spend one-on-one time with his or her legal spouse. Prisoners were lured by the idea of having the opportunity to have sexual contact with their spouses. Today, the main purpose of these visits is to preserve the family unit. It allows them the chance to interact privately with each other. Permitting prisoners to have a conjugal visit is also respecting the right of the spouse of the inmate because a spouse who hasn't committed a crime shouldn't be punished.

INTRODUCTION

It is not disputed that sexuality is a central aspect of being human. Sexuality is experienced and expressed in diverse ways in relationships to the self or others, in solitude or in communion. Sexuality is therefore part and parcel of all cultures, including prison cultures. Various factors influence the expression of sexuality, including biological, psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors. These interrelated factors also influence prison conditions, and how society treats prisoners. The experience and expression of sexuality in prison is inevitably shaped by

VOLUME 17 ISSN: 2456-9704

prison conditions which are influenced by the above-mentioned factors. In prison, men (and women) spend long periods of time together and in close proximity. This increases the likelihood of sexual activity amongst them. Persons who do not identify as homosexual may nevertheless be involved in sex with other men simply because there are no women in prison. Although prisons have the power to shape sexual expression, it would be illusory to suppose that prisons have control over the sexuality of prisoners. Prison systems can only shape the expression and experience of sexuality. This is crucial because prisons contribute towards the sexual health of prisoners, positively or negatively.[872]

Prisoners are human and sexual beings. They will therefore always express themselves sexually in one way or another, and this may include physical sexual activity. The prison system cannot control or repress the expression of sexuality, although it can play a role in shaping such expression. Indeed, Haney notes that prisons generally have a powerful influence on the expression of sexuality: "These inverted sexual dynamics in which hypermasculinity is performed through forced homosexual behaviour are a testament to the power of prison to fundamentally change people, to distort and disturb their sexual identities as well as other core aspects of their pre-existing 'self'."[873]

The technical consultation defined sexual health as follows:[874] "Sexual health is a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence."

Sexual health in prisons is not merely the absence of disease or dysfunction. It is not merely the absence of HIV in prison. Indeed, neither is it the mere absence of sexual violence or abuse. Sexual health involves the whole person; the physical, the emotional, the mental and social aspects of the person. Advancing sexual health in prisons means paying attention to all these aspects, and addressing the needs of the prisoner holistically rather than piecemeal. Sexual health is related to life's basic necessities, such as food, clothing, bedding, leisure activities, the personal security of the person, and adequate living space. General living conditions are not dissociated from sexual health. Separating these from sexuality and sexual health is perhaps another illusion of prison systems. A crucial step to advancing sexual health in prison is to foster a positive and respectful approach to sexuality and sexual relationships. Prison systems must imagine the possibility for healthy sexual experiences among prisoners. This, however, is one of the greatest challenges and involves a shift of social attitudes about sexuality and gender relations. The technical consultation also stated that, in

[872] Godfrey D Kangaude, A sexual rights approach to addressing gender-based sexual violence among male prisoners in Malawi, African Human Rights Law Journal, P.4

[873] Godfrey D Kangaude, A sexual rights approach to addressing gender-based sexual violence among male prisoners in Malawi, African Human Rights Law Journal, P.4; C Haney 'Perversions of prison: On the origins of hypermasculinity and sexual violence in confinement' (2011) 48 American Criminal Law Review 127.

[874] World Health Organisation (WHO) Defining sexual health: Report of a Technical Consultation on Sexual Health 28-31 January 2002 (2006) 5.

VOLUME 17 ISSN: 2456-9704

order to achieve sexual health, sexual rights must be respected, protected and fulfilled. Sexual rights were defined as follows:[875] "Sexual rights embrace human rights that are already recognized in national laws, international human rights documents and other consensus documents. They include the right of all persons, free of coercion, discrimination and violence, to … respect for bodily integrity … consensual sexual relations … pursue a satisfying, safe and pleasurable sexual life." The concept of sexual rights is still a contested one and there is no consensus at the global level. However, the technical consultation appeals to the fact that sexual rights are not new rights but the very same human rights already recognised in national laws and international human rights documents. Freedom from violence, respect for bodily integrity, and the right to choose one's sexual partner and to pursue sexual intimacy that enriches one's life are founded upon the fundamental and basic rights already articulated in various human rights documents. Human rights are sexual rights when the basic fundamental rights are applied to sexuality and sexual relationships. Sexual rights are therefore a conceptual tool for advocating for sexual health, because without the realisation of these rights, sexual health cannot be attained.[876] Prisoners also have the right to the highest attainable standard of physical and mental health, including sexual health.[877]

Sexual health and rights are about creating conditions for respectful gender and sexual relations which are the bases for persons to engage in sexual relationships and activity without coercion and discrimination, and based on mutuality and equality rather than power and subjugation. The concept of sexual rights is a useful tool to guide the transformation of hegemonic masculinities into positive and gender-equal relationships among men in prison.[878]

ASPECTS OF SEXUAL RIGHTS

Sexual Rights can be divided into Conjugal Rights & Sexual Autonomy of the prisoners.

CONJUGAL RIGHTS OF PRISONERS

Prisoners' Right to Conjugal Visit is the most controversial and not as such widely researched theme of right at National and International level. Some scholars and peoples believe that the right to conjugal visit is the extended family visit which gives a chance for spouses to spend some private time. Even if, this right is not widely acknowledged by many states, still there are countries in which the right to conjugal visit is expressly recognized under their law and the enjoyment of this right is fully respected. In India, the jurisprudence on the concept of conjugal rights is still in its infancy. There is no statutory law that discusses or confers conjugal rights to prisoners. In the absence of the same, the prisoners knock the doors of courts under Article 21 of the Constitution. This is because the facility will be made available only to those prisoners who are married and have their marriage intact. Such visits cannot be allowed to unmarried prisoners or prisoners with broken marriage. That is, such visits cannot be made available on the basis resembling "equal opportunity" for all prisoners.[879] Thus, conjugal visitations can

[875] World Health Organisation (WHO) Defining sexual health: Report of a Technical Consultation on Sexual Health 28-31 January 2002 (2006) 5.
[876] Supra. Note.1
[877] Art 25 Universal Declaration; art 12 ICESCR.
[878] Supra Note 1
[879] Donald R. Johns, "Alternatives to Conjugal Visiting", Federal Probation, Vol.35, 1971, pp.47-51, at p. 47

be enjoyed only by those prisoners who have their marriages intact whereas parole or furlough does not require this as a pre-condition for release.

Psychology behind Conjugal Rights

A marriage is a natural bond guided by natural laws taught by motivation conscience, nature and custom. Marriage is defined as: The contract made by a man and a woman to live as husband and wife.[880] It can also be described as culturally or legally sanctioned union. So, marriage is supposed to be a relationship that joins a man and a woman together through an implied binding contract or a spiritual belief; as is applicable and accepted in different societies. It legalizes sexual activities, makes couples feel relaxed; builds compatibility in tune with each other, and smoothes the overall relationship. The ancient and basic idea behind marriage is to legalize sexual intercourse meeting the sexual urge and to bring virtuous child and to build a good society. Thus the word marriage itself suggests that sex is permitted between the couples which strengthens the emotional bonds and drives the stress away between them. Sex is accepted as a sign of loving the partner alternative to verbal expression of showing of care and emotion.[881]

A conjugal visit can be defined as in which an inmate's has a right to meet his or her spouse, during which the couple is allowed to engage in sexual relations. Mostly visits are meant to associate with sexual activity. Physical intimacy in conjugal visits includes any personal activity which they desire such as holding hands, hugging, kissing, romantic touching and sexual activity. The ideas behind allowing conjugal visits were to bind the family ties from being broken. It was thought that if inmates are allowed to meet their family once in a while then there will be moral reform in the prisoner's and social adjustment will be there. The general biological characteristics of men are not good in expressing their concerns to other living partners, so making love is a way of their expression. To women, sex is an act. They need to be caressed, kissed and loved. Thus both help to deepen the couple's wife and to build a strong bonding and to also help to drive the stress away. Physical intimacy when welcomed by our bodies by hug or a touch or other experiences, then it releases various chemicals: serotonin oxytocin and dopamine. Oxytocin increases our desire to bond, Dopamine improves our mood and serotonin helps us to fight against depression and left with a very pleasurable feeling on the couples.[882]

The psychological impact upon the inmate is even more profound. Virtually all contacts with the opposite sex are cut off. The denial of conjugal visiting rights deprives the inmate of an important source of emotional support.[883] Perhaps the most significant psychological effect of the deprivation of heterosexual relations, however, is the impact upon the prisoner's self-image.[884] The sexual frustration felt by a male inmate deprived of heterosexual relationships can cause him anxiety concerning his status as a male.[885] Where the inmate's adjustment to the sexual deprivation of prison evokes latent homo-sexual tendencies and behavior the result is likely to be an acute psychological

[880] Dictionary.reference.com
[881] International Journal of Pure & Applied Mathematics, Vol.119 No.15 2018,P. 3019-3035
[882] Ibid.
[883] C.Hopper, Sex in Prison 5-6 (1969) P.147; H.Klare, People in Prison 64-66 (1973)
[884] G. SYKES, THE SOCIETY OF CAPTIVES 71 (1958)
[885] Ibid.

VOLUME 17 ISSN: 2456-9704

onslaught upon the inmate's "ego image."[886] Even where homosexual tendencies do not develop into behavior, they will "arouse strong guilt feelings at either the conscious or unconscious level."[887] Moreover, especially in the case of adolescent inmates, life-time patterns of sexual behavior may be shaped by homosexual experiences in prisons.[888] Finally, conflicts arising from relationships may lead to physical violence.[889] The fact that the prisoner's right of marital privacy is shared by a non-prisoner spouse provides another reason for according this right great weight.

In Jasvir Singh and Another Vs State of Punjab and Other[890] Punjab and Haryana High Court has given a very novel judgment recognising conjugal rights of the prisoners within the jail premises considering it as part and parcel of right to life under Article 21. The petitioners thereafter sought enforcement of their perceived right to have conjugal life and procreate within the jail premises. They sought a command to the Jail authorities to allow them to stay together and resume their conjugal life for the sake of progeny and make all arrangements needed in this regard. Amicus curiae was appointed by the court keeping in view the vital issues of public importance. Various observations made by him are reproduced below:

"The husband claimed to be the only son of his parents and eight months into their marriage they got caught in the criminal case. The petitioners claimed that their demand is not for personal sexual gratification. The petitioners were also open to artificial insemination. The petitioners' fundamental focus was on Article 21 of the Constitution. They insisted that the right to life has two essential ingredients, namely, (i) preservation of cell; and (ii) propagation of species of which sex life is a vital part."

The following, amongst other issues emerged for determination before the Court:

i. Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?

ii. Whether penalogical interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?

iii. Whether 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?

v. If question number (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?

Judgement

i. The State of Punjab was directed to constitute the Jail Reforms Committee to be headed by a former Judge of the High Court. The other Members shall include a Social Scientist, an Expert in Jail Reformation and Prison Management amongst others;

ii. The Jail Reforms Committee shall formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and shall identify the categories of inmates entitled to such visits,

[886] Ibid.
[887] Ibid.
[888] H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 510-11 (3d 1959)
[889] P. BUFFUM, HOMOSEXUALITY IN PRISONS 28 (1972)
[890] CWP No.5429 of 2010 Date of Decision: 29 May 2014

VOLUME 17 ISSN: 2456-9704

keeping in mind the beneficial nature and reformatory goals of such facilities;

iii. The said Committee shall also evaluate options of expanding the scope and reach of 'open prisons', where certain categories of convicts and their families can stay together for long periods, and recommend necessary infrastructure for actualizing the same;

iv. The Jail Reforms Committee shall also consider making recommendations to facilitate the process of visitations, by considering best practices in the area of prison reforms from across jurisdictions, with special emphasis on the goals of reformation and rehabilitation of convicts and needs of the families of the convicts;

v. The Jail Reforms Committee shall suggest ways and means of enhancing the facilities for frequent linkage and connectivity between the convict and his/her family members;

vi. The Jail Reforms Committee shall prepare a long-term plan for modernization of the jail infrastructure consistent with the reforms to be carried out in terms of this order coupled with other necessary reforms;

vii. The Jail Reforms Committee shall also recommend the desired amendments in the rules/policies to ensure the grant of parole, furlough for conjugal visits and the eligibility conditions for the grant of such relief;

viii. The Jail Reforms Committee shall also classify the convicts who shall not be entitled to conjugal visits and determine whether the husband and wife who both stand convicted should, as a matter of policy be included in such a list, keeping in view the risk and danger of law and security, adverse social impact and multiple disadvantages to their child;

ix. The Jail Reforms Committee shall make its recommendations within one year after visiting the major jail premises and it shall continue to monitor the infrastructural and other changes to be carried out in the existing jails and in the Prison Administration System as per its recommendations.

x. The Jail Reforms Committee shall be allowed to make use of the services of the employees and officers of the State of Punjab, who is further directed to provide the requisite funds and infrastructure including proper office facilities, secretarial services, travel allowances and all necessary amenities and facilities, as required by the Jail Reforms Committee.

The decision in State of Andhra Pradesh Vs ChalaramKrishna Reddy[891]was relied upon to urge that a prisoner whether convict, under trial or a detenue, continues to enjoy the Fundamental Rights including right to life which is one of the basic Human rights. The petitioners also referred to well regulated concept of conjugal visitations successfully implemented in the advanced countries like the USA, Canada, Australia, UK, Brazil, Denmark and Russia etc. The State of Punjab opposed the petitioners' prayer essentially on the plea that the Prisons Act, 1894 contains no provision to permit conjugal visitation; its section 27 rather mandates proper segregation of male and female prisoners. Para 498 of the Punjab Jail Manual, lays down the method for separation of male and female prisoners. Even artificial insemination as a viable and alternative solution suggested by the petitioners, was not acceptable to the State of Punjab as according to its affidavit "there is no such provision in the Prisons Act, 1894 and Punjab jail Manual to allow the husband and wife convicts to be in the same cell in the jail or to allow for artificial insemination of the convicts…". The father of the minor victim, who was murdered for

[891] (2000) 5 SCC 712

VOLUME 17 ISSN: 2456-9704

ransom by the petitioners, also joined these proceedings to oppose the petitioners' prayer.

The following, amongst other issues emerged for determination:

I. Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our constitutional framework?
II. Whether pen logical interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?
III. Whether 'right to life' and 'personal liberty' guaranteed under article 21of the constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?
IV. If question number (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?(either the convicts or the under-trials)

Judgment

The writ petition was disposed of with the following directions:

The Jail Reforms Committee shall formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and shall identify the categories of inmates entitled to such visits, keeping in mind the beneficial nature and reformatory goals of such facilities;

The Jail Reforms Committee shall also recommend the desired amendments in the rules/policies to ensure the grant of parole, furlough for conjugal visits and the eligibility conditions for the grant of such relief;

The Jail Reforms Committee shall also classify the convicts who shall not be entitled to conjugal visits and determine whether the husband and wife who both stand convicted should, as a matter of policy be included in such a list, keeping in view the risk and danger of law and security, adverse social impact and multiple disadvantages to their child.

The impact of the judgment was;

The court observed that the learned amicus curiae canvassed that the right to life includes right to 'create life' and 'procreate' and this fundamental right does not get suspended when a person is sentenced and awarded punishment thereby limiting him to stay in the jail. In Lawrence v. Texas, [892] the court noted that "after Griswold, it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship." Also Planned Parenthood v. Casey[893] recognized the right to "bear or beget a child" as fundamental. In Skinner v. Oklahoma[894] held that the right to procreate is a fundamental right guaranteed by the Constitution. A person does not lose his human rights merely because he has committed some offence as he also has some dignity which must be protected.[895]

COMPARATIVE ANALYSIS OF CONJUGAL RIGHT

Canada

The Private Family Visit (PFV) was established by the Correctional Service of Canada (CSC) to encourage inmates to develop and maintain family and community ties in preparation for their return to the community. If they meet certain criteria identified in their correctional plan, inmates have the opportunity to use special units within the

[892]539 U.S. 558, 565 (2003),
[893]505 U.S. 833, 851 (1992)
[894]316 U.S. 535, 542-543 (1942)

[895]JUDICIAL INTROSPECTION OF CONJUGAL RIGHTS VIS-A-VIS HUMAN RIGHTS OF THE PRISONERS by Dr.Sunaina

VOLUME 17 ISSN: 2456-9704

confine of a correctional institution. Most units are simple two –bedroom structures with combination of kitchen and living area. Inmates are eligible for private family visits unless they are at risk for family violence, participating in unescorted temporary absences for family contact purposes, in a special handling unit, or recommended or approved for transfer to special handling unit or in disciplinary segregation at the time of the scheduled private family visit. Under the Canadian rule the immediate family members are the first group of persons entitled to private family visit which ultimately incorporated the inmate's spouse or common-law partner.[896]

MICHIGAN

The Supreme Court also adopted the balancing ap- proach in Pell v. Procunier[897] In that case inmates challenged under the first and fourteenth amendments a California prison regulation prohibiting press interviews with specific inmates. Assuming without deciding that first amendment rights were at stake, the Court characterized *Pell* as a case "where 'we are called upon to balance First Amendment rights against legitimate governmental interests.'[898] An important factor in the balancing process was the Court's recognition that the prisoner's right to communicate by mail or through visits provided alternative means of communication with the outside world. Moreover, permitting the press interviews would have created security and administrative problems. The combination of these factors led the Court to hold the regulation valid. Such a balancing technique is not necessarily inconsistent with the established constitutional doctrine that deprivations of fundamental rights must be justified by compelling state interests. The state, through criminal convictions comporting with due process of law, has presumably shown compelling reasons for incarcerating prisoners. The state thus has already shown a compelling interest in depriving convicted persons of those rights that are inconsistent with incarceration. The sole issue presented when a prisoner challenges a particular deprivation, therefore, is whether the exercise of the right is inconsistent with incarceration. In *Pell* the Supreme Court seemed to base its use of balancing with regard to first amendment rights on a similar analysis, stating: "A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law".[899] The Court apparently viewed balancing as the appropriate means of reconciling the asserted first amendment rights with the legitimate policies and goals of the correctional system. Balancing seems equally appropriate where other fundamental interests are at stake.[900]

In Procunier v. Martinez[901] the Supreme relied upon the non-prisoner rights infringed by censorship of to

[896] http://www.csc-scc.gc.ca/family/003004-1000-eng.shtml,
[897] 417 U.S. 817 (1974)
[898] Ibid.; Kleindienst v. Mandel 408 US 753, 765 (1972)
[899] 417 US 822
[900] Ibid.
[901] 416 US 396 (1974)

invalidate prison censorship regulations. Because non-prisoners'rights were at stake, the Court employed a strict standard of review,[902] holding that the prison officials' discretion to censor "statements that 'unduly complain' or 'magnify grievances,' expressions of 'inflammatory political, racial, or religious, or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate' was "far broader than any legitimate interest of penal administration."[903]The Court found it unnecessary to decide whether the first amendment rights of prisoners alone would invalidate the censorship. Finally, the prisoner's right of marital privacy is entitled to great weight because the deprivation is total: Prisoners have no privacy in their marital relations when conjugal visitation is prohibited. The situation is thus fundamentally different *Pell*, where the Court relied upon the availability to inmates of alternative for achieving means of communication to uphold a prison regulation prohibiting press interviews. A prisoner's only alternative for achieving marital privacy is the home furlough, which is frequently available.[904]

EUROPE

In Europe, conjugal rights of visitation and artificial insemination are claimed on the basis of European Convention on Human Rights. The Convention guarantees right to respect for privacy or family life as well as the right to marriage. Article 8 of the Convention provides that everyone has a right to respect for his private life, his family life and his home and that there shall be no interference by a public authority with the exercise of that right, save in accordance with law or as necessary in a democracy for certain named purposes (which include public safety, health or morals). Article 12 of the Convention provides that a prisoner of marriageable age has a right to marry and to found a family according to national laws governing the exercise of the right. All parties of Council of Europe are member to this Convention and are under an obligation to make provisions in accordance with the Convention. In accordance with it, many states in Europe allow conjugal visits of prisoners. For example, conjugal visits are allowed in Spain, France, Sweden and Denmark to name a few.[905] The Spanish prison system gives prisoners access to conjugal visits on a monthly basis and prisoners can invite members of their families as well as close friends.[906] Swedish prisons allow inmates to have visits with family members that can last for up to nine hours.[907] It is pertinent to note that the European Court of Human Rights has not yet interpreted the Convention as requiring Contracting States to make provisions for such visits.[908] And this is an area in which the Contracting states enjoy wide margin and it is for the states to see that what steps are taken to ensure compliance with the convention. The European Court of Human Rights in the case of Dickson v. the United Kingdom[909] has denied permission of

[902] 416 US 396 at 413-414

[903] Ibid.

[904] Supra Note.17; An Evaluation of the Home Furlough Program in Pennsylvania Correctional Institutions, 47 TEMP. L.Q. 288 (1974

[905] Rachel Wyatt, "Male Rape in U.S. Prisons: Are Conjugal Visits the Answer", Case Western Reserve Journal of International Law, Vol. 37, Issue 2, 2006, pp. 579-614, at p.602.

[906] Dirk Van Zyl Smit, Frieder Dunker (eds.), Imprisonment Today and Tomorrow: International Perspective on Prison Rights and Prison Conditions, Kluwer Law International, Hague, 2001, at p. 612

[907] Ibid, at p. 635.

[908] Jasvir Singh vs. State of Punjab 2015 Cri LJ 2282 (2293)

[909] Application No. 44362/04 decided on 4th December, 2007 by European Court of Human Rights

VOLUME 17 ISSN: 2456-9704

artificial insemination to prisoners. The petitioners in this case were husband and wife and both were incarcerated. They sought permission for access to artificial insemination and relied on Article 8 and 12 of European Convention on Human Rights. Their application was turned down by the Secretary of State as well as by the High Court. The European Court of Human Rights also turned down their application and observed that more than half of the states have provisions for conjugal visits. In such a scenario, there was no need of obviating the authorities to provide additional facilities for artificial insemination. The Supreme Court of Judicature in United Kingdom in the case of R v. Secretary of State for Home Department[910] also denied the claim of a prisoner for artificial insemination. The Court held that the refusal to permit the appellant the facilities to provide semen for artificial insemination of his wife was neither in breach of the Convention nor unlawful or irrational. The Court culled out three reasons for sustenance of the policy that restricts the provision of facilities for artificial insemination. Firstly, it is an explicit consequence of incarceration that prisoners should not have the opportunity to beget children while serving their sentences except when they are allowed to take temporary leave; secondly, there is likelihood of a serious and justified public concern if prisoners continue to have the opportunity to conceive children while serving sentences; and thirdly, there are disadvantages of single parent families.

UNITED STATES OF AMERICA

There are 195 prison facilities operated by the Federal Bureau of Prisons; the facilities house approximately 211,000 prisoners.[911] In relation to Conjugal visit currently, only six U.S. states allow prison conjugal visits within their prison systems; California, Connecticut, Mississippi, New Mexico, New York and Washington. All of these states have their own regulations and policies on the management of conjugal visits. For the purpose of this topic let us have a look on Mississippi Prison.[912] The Conjugal visit at Mississippi state penitentiary for example should not be viewed as an isolated phenomenon; it is only a part of the general visitation and leave program which has been in operation in the prison since 1944 and which is the most liberal in the United States. Under the Mississippi program, called the Holiday suspension program, each year from December 1 until March 1, inmates who have been in the penitentiary at least three years in good behavior records may go home for a period of ten days. As evaluated by Mississippi prison and state officials, this program has proved a success and an important element in the rehabilitation and morale of the inmates.[913] Apparently, much of the success of conjugal visits depends on the adequacy of the facilities provided for the privacy of the inmate and his wife. For this effect the Mississippi prison made considerable change building the so called Red Houses, which are private rooms .But the red houses are still unsatisfactory in terms of absolute privacy. Another important element in the Mississippi prison, conjugal visiting appears to be the small community camp arrangement. This arrangement seems to be amenable to the conjugal visit. It affords more freedom of visitation in general since each camp is somewhat isolated. The visitors go directly

[910] [2001] EWCA Civ 472

[911] American Prison culture in an International Context ;an examination of Prisons in America ,Netherlands and Israel ,Lucian E.Dervan,p.415

[912] Nahom Duba, The Status of Prisoners' Right to Conjugal visit in Ethiopia, 2016

[913] Ibid.

VOLUME 17 ISSN: 2456-9704

to the camp they wish to visit, where the sergeant searches the male visitors and the sergeant's wife searches the female visitors. Since all inmates are not married one and because of the arranged schedule the number of inmates wishing to visit to use the red house is never large. The small numbers add a more respectable atmosphere and provide a more informal situation.[914] One unified policy that all six states agree on is that Extended Family visits are "not a right, but a privilege". Prisoners must earn the opportunity to participate in this program. They must be low-to-medium security level prisoners, with no history of disciplinary problems within the prison system. They cannot be incarcerated for violent offences or have a history of child abuse or domestic violence.[915]

In USA, federal prisons do not allow conjugal visitations. However, many states allow conjugal visitation programs. These visitations are subject to a variety of restrictions which are provided by the concerned state. The oldest conjugal visiting program for inmates is at the Mississippi State Penitentiary in Parchman. Conjugal visitation privileges in this institution date back to 1918, although many penitentiary employees believe the program has been in existence since the institution was first opened in 1900.[916] Earlier, the program was open only for black inmates only but later on it was extended to all prisoners. The conjugal visitation program in the Mississippi got evolved with time and was never formally established by law. The visits take place every two weeks and can last for up to three days. Prisoners and their families are taken to the cottages located on the prison grounds, which are equipped with beds and tables.[917] In addition to conjugal visitation, the prison authorities also use the program of home furloughs. Various other states in USA also have programs for conjugal visitations.[918] For example, in the state of California the first conjugal visit program was instituted in 1968 and has been expanded since then. The inmates in California are allowed to have visits with their children, spouses, siblings and parents in modular homes located on the prison grounds.[919] Similarly, conjugal visitation programs are also available in New York,[920] New Mexico, Washington and Connecticut. However, the programs in New Mexico[921] and Mississippi have been closed.[922] The United States Court of Appeal, Ninth Circuit, in the case of *William Gerber v.*

[914] Journal of Criminal law and criminology, the conjugal visit in Mississippi State Penitentiary, Columbus B.Hopper,vol.53.Issue 3 Sept. p 342-343

[915] http://crime-punishment.yoexpert.com/prison-system/2-what-us-states-allow-prison-conjugal-visits-3543.html

[916] Michael Braswell and Donald A. Cabana, "Conjugal Visitation and Furlough Programs for Offenders in Mississippi", New England Journal of Prison Law, Vol. 67, No. 2, 1975, pp. 67-72, at p. 67.

[917] Christopher Hensley et al, Conjugal Visitation Programs: The Logical Conclusion: From Prison Sex: Practice and Policy, 2002, pp. 143- 156, at p.144.

[918] Carolyn Simpson, "Conjugal Visiting in United States Prisons", Columbia Human Rights Law Review, Vol. 10, 978-79, pp. 643-671, at p. 662.

[919] Rachel Wyatt, "Male Rape in U.S. Prisons: Are Conjugal Visits the Answer", Case Western Reserve Journal of International Law, Vol. 37, Issue 2, 2006, pp. 579-614, at p. 600.

[920] Bonnie E. Carlson, "Inmates and their Families: Conjugal Visits, Family Contact and Family Functioning", Criminal Justice and Behavior, Vol. 18, No. 3, 1991, pp. 318-331, at p. 319.

[921] New Mexico to eliminate conjugal visits for prisoners, 16 April 2014 available at http://www.reuters.com/article/us-usa-prisons-newmexico-idUSBREA3F21220140416.

[922] Ibid.

VOLUME 17 ISSN: 2456-9704

Rodney Hickmen[923] denied the claim of petitioner for allowing him to provide a sperm to his wife for artificial insemination. In this case the husband was imprisoned for a sentence to a hundred years to life plus 11 years. He wanted a baby and no date was set for his parole due to long sentence. Therefore, he claimed that he should be allowed for providing a sperm to his wife for artificial insemination and denial of such a claim would amount to violation of his constitutional right.[924] The Court of Appeals with a majority of 6-5 held that (i) many aspects of marriage that make it a basic civil right, such as cohabitation, sexual intercourse, and the bearing and rearing of children, are superseded by the fact of confinement and (ii) prisoners have no Constitutional right while incarcerated to contact visits or conjugal visits. The Court further observed that keeping in view the nature and goals of a prison system, it would be a wholly unprecedented reading of the Constitution to command the warden to accommodate Gerber's request to artificially inseminate his wife as a matter of right.

RIGHT TO SEXUAL AUTONOMY IN PRISON

> …the body implies mortality, vulnerability, agency: the skin and the flesh expose us to the gaze of others but also to touch and to violence. The body can be the agency and instrument of all these as well, or the site where "doing" and "being done to" become equivocal. Although we struggle for rights over our own bodies, the very bodies for which we struggle are not quite ever only our own. The body has its invariably public dimension; constituted as a social phenomenon in the public sphere, my body is mine is not mine. (Butler, 2004, p. 21).

In the passage above, Butler writes of a body that is both "mine and not mine." Indeed, my experience as a free world body in carceral spaces is an exaggerated but apt example of exactly this truth: under white supremacy and capitalism, bodies are not only not-free, but also contingent, limited, and conditional. As sexual beings, then, different bodies are granted different access to humanizing interaction, whether they are sexual or not. As previously discussed, being forbidden to touch inmates was always already about a presumed sexual deviance—despite the fact that touch in yoga is non-sexual.[925]

In *Turner v. Safley*,[926] the Supreme Court articulated the standard of review for constitutional challenges of prison regulations. The Court attempted to strike a balance between ensuring that prisoners retain the right to seek redress of constitutional grievances and making sure that courts accord appropriate deference to the expertise of prison administrators. The Court recognized that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution" and that the "expertise, planning, and the commitment of resour- ces" that go into running a prison are "peculiarly within the province of the legis-lative and executive branches of government." Ultimately, the

[923] 291 F. 3d 617 (2002)

[924] Brenda V. Smith, "Analyzing Prison Sex: Reconciling Self-Expression with Safety", Human Rights Brief, Vol. 13, Issue 3, 2006, pp. 17-22, at p. 18.

[925] RAECHEL TIFFE, Toward a Decarceral Sexual Autonomy: Biopolitics and the Compounds of Projected Deviance in Carceral Space, Journal of Prison Education and Reentry, Vol. 4 No. 2, December 2017

[926] 482 U.S. 78, 89 (1987).

Court held that "when a prison regulation impinges on inmates' constitutional rights, the regula-tion is valid if it is reasonably related to legitimate penological interests." Courts consider four factors to determine whether a prison regulation is reasonably related to a legitimate penological interest: (1) whether there is a "'valid, rational connec-tion' between the prison regulation and the legitimate governmental interest put forward to justify it;" (2) whether there are alternative means available for exer-cising the asserted right; (3) how the accommodation of the asserted right will impact guards, other incarcerated persons, and the allocation of prison resources; and (4) that "the absence of ready alternatives is evidence of the reasonableness of a prison regulation" and vice versa.[927]

First, Supreme Court precedents arguably support a general constitutional right to masturbate. While the Supreme Court has never directly addressed this question, *Griswold v. Connecticut* and *Lawrence v. Texas* imply a constitutional right to masturbate. The right to masturbate may be the correctional context by applying the four *Turner* factors. The Supreme Court has not directly addressed whether the Fourteenth Amendment includes a constitutional right to masturbate. One reason for this might be the sheer un-administrability of a masturbation ban outside of the prison context.[928] The right itself may also be so obvious that states simply would not seek to prevent the practice in the first place.[929] Whatever the reason, the fact that the right to masturbate has not been specifically upheld by the Court does not make that right any weaker or less fundamental.[930] Indeed, Supreme Court precedent strongly implies a fundamental right to masturbate in private.[931] The strongest sup-port for this right derives from the Court's decision in *Lawrence v. Texas*.[932] Before discussing *Lawrence*, it is instructive to consider the decisions undergirding the Court's holding in that case.

At the root of the Supreme Court's jurisprudence surrounding sexual privacy rights is its decision in *Griswold v. Connecticut*.[933] In *Griswold*, the Court found that a state law prohibiting the use of contraceptives and any consultation regard-ing contraceptives violated a fundamental right to privacy.[934] The Court held that the "sacred precincts of marital bedrooms" were protected by a right to privacy that was "older than the Bill of Rights" itself.[935]

In Eisenstadt v. Baird,[936] Seven years after the decision in *Griswold*, the Court extended the right to make decisions regarding contraception and sexual conduct beyond the marriage rela-tionship. In *Eisenstadt v. Baird*, the Court recognized that the right of privacy articulated in *Griswold* was dependent on the marital relationship, and extended it to unmarried couples as well.[937] The Court also recognized that the marital couple is made up of two individual people. It ultimately held that "[i]f the right of privacy means anything, it is the right of the individual,

[927] Ibid.
[928] David Oshinsky, *Strange Justice: The Story of* Lawrence v. Texas *Book Review*, N.Y. TIMES (March 16, 2012), https://www.nytimes.com/2012/03/18/books/review/the-story-of-lawrence-v-texas-by-dale-carpenter.html
[929] Williams v. Pryor, 220 F. Supp. 2d 1257, 1296
[930] Lawrence v. Texas, 539 U.S. 558, 565 (2003)
[931] Ibid.
[932] Ibid.
[933] 381 U.S. 479 (1965)
[934] Ibid.
[935] Ibid.
[936] 405 U.S. 438, 447 (1972)
[937] Ibid.

married or single, to be free from unwarranted governmental intrusion" into family planning decisions.[938] The Court's strongest proclamation in favor of sexual autonomy and the consti-tutionally protected privacy interest in private sexual conduct came in *Lawrence*.[939] In *Lawrence*, the Court overruled *Bowers v. Hardwick* and invalidated a Texas statute prohibiting sodomy. In doing so, the Court reaffirmed the "promise of the Constitution that there is a realm of personal liberty which the government may not enter." Most significantly for present purposes, the Court held that the right to be free from governmental intrusion into "the most private human conduct, sexual behavior" is a liberty protected by the Constitution. Finding no legitimate state interest in prohibiting homosexual sex, the Court proclaimed that the government is not permitted to "demean [the] existence or control [the] destiny" of anyone who chooses to engage in homosexual conduct in the privacy of their homes. Although the Court did not explicitly address masturbation in *Lawrence*, it is difficult to imagine how a masturbation ban would pass constitutional muster in the wake of the Court's holding. After *Lawrence*, it is clear that individuals are entitled to "respect for their private lives" and that "private sexual conduct" between two consenting adults falls under the penumbra of the constitutionally protected private life. If private sexual conduct between two consenting adults is constitutionally protected under the Due Process Clause, then it can be inferred *a fortiori* that private sexual conduct between an individual *and no one else* is also constitutionally protected under the Due Process Clause. Indeed, Justice Scalia explicitly worried that *Lawrence* would implicitly include a constitutional right to masturbate. Detailing a parade of horribles, Justice Scalia laments that "laws against . . . same-sex marriage, . . . prostitution, *mastur-bation*, adultery, fornication, . . . and obscenity" are only sustainable in light of *Bowers*. Justice Scalia understood that private masturbation could not be regu-lated once *Lawrence* overruled *Bowers* and granted "substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Although lower courts are split as to the precise scope of the holding in *Lawrence*,[940] the Fifth Circuit has held that, in the wake of *Lawrence*, individuals enjoy a constitutional right to "to engage in private intimate conduct" without in-terference from the government.[941] In *Reliable Consultants, Inc. v. Earle*, the Fifth Circuit relied on *Lawrence* to invalidate a Texas statute that criminalized "the selling, advertising, giving, or lending of a device designed or marketed for sexual stimulation." The court held that the Texas statute heavily burdens the constitutional right of an individual who "wants to legally use a safe sexual device during private intimate moments alone or with another" and that the state's interest in public morality "cannot constitutionally sustain the statute."[942]

When inmates enter prison, they begin to adapt to the prison lifestyle and the subcultures that are present. According to Einat and Einat (2000), they are participating in the concept of "prisonization." Multiple researchers have attempted to provide theoretical explanations of the adjustment and

[938] Eisenstadt, 405 U.S. at 453
[939] 539 U.S. at 579
[940] Compare Williams v. Att'y Gen. of Alabama, 378 F.3d 1232, 1236–37 (11th Cir. 2004)
[941] Reliable Consultants, Inc., 517 F.3d at 744
[942] Ibid.

VOLUME 17 ISSN: 2456-9704

behavior of prison inmates (Clemmer, 1940; Irwin and Cressey, 1962; Sykes, 1958; Toch, 1977), with two main theories receiving the most support. The deprivation model asserts that deprivations (or losses of liberties) experienced in prison are the main influence on an individual's response to incarceration. According to Sykes (1958), five main pains (or losses) result from imprisonment:

1. Liberty and freedoms available to those not incarcerated.
2. Goods and services, ranging from choosing a grocery store to picking a mechanic.
3. Heterosexual relationships with men and women of an individual's choice.
4. Autonomy and self-sufficiency.
5. Security and protection from harm.

As a mechanism for coping with the loss of these freedoms and liberties, the inmates form a new set of values and norms, some of which lead to inappropriate behavior during incarceration (Marcum, Hilinski, and Freiburger, forthcoming). For example, individuals on the outside have the freedom to participate in heterosexual relationships at their leisure. As incarceration only allows the cohabitation of others of the same sex, many inmates choose to participate in homosexual relationships, an activity that is banned in prison.[943]

Participating in autoerotism is often a behavior inmates will choose to relieve sexual tension. Of the few studies done on this behavior, it appears to be acceptable among the inmate population. Wooden and Parker (1982) found that every inmate in their study reported masturbating while incarcerated, with 46 percent masturbating three to five times per week and 14 percent masturbating daily. Furthermore, Hensley, Tewksbury, and Koscheski (2001) found that 99.3 percent of their male inmate sample reported masturbating while incarcerated. Interestingly enough, the more educated inmates were more likely to be frequent masturbators. Although Hensley, Tewksbury, and Wright (2001) found that less female inmates admitted to the behavior, a large portion (66.5 percent) of female inmates in a southern facility participated in regular masturbation. Inmates know this behavior is normally forbidden during incarceration.

However, research has indicated that male inmates will rationalize this behavior in order to continue to participate in masturbation. Worley and Worley (2013) tested this behavior with Sykes and Matza's neutralization theory, which has been used to explain many types of criminal behavior, such as shoplifting (Cromwell and Thurman, 2003), digital piracy (Morris and Higgins, 2009), and sex trafficking (Antonopoulos and Winterdyk, 2005).[944]

While the majority of correctional facilities have rules against public autoerotism, this behavior still occurs in prison, sometimes to the point of creating an adverse environment for inmates and correctional staff. In *Beckford v. Department of Corrections* (2010), a federal appellate court ruled that the Florida Department of Corrections failed to fix a hostile work environment for female health-care workers and correctional staff. Male inmates in maximum security continuously masturbated in the presence of fourteen female employees over the course of three years. They would participate in "gunning," where the inmates openly masturbated in the presence of the employees by standing on toilets or

[943] Catherine D. Marcum and Tammy L. Castle, Sex in Prison: Myths and Realities, 2014

[944] Catherine D. Marcum and Tammy L. Castle, Sex in Prison: Myths and Realities, 2014

VOLUME 17 ISSN: 2456-9704

mattresses to ensure the victims could see the behavior. They would ejaculate through the food slot on their doors. The staff resorted to wearing sunglasses and headphones to avoid the harassment, as the Department of Corrections refused to attempt to amend the inmates' behavior.[945]

COMPARATIVE ANALYSIS OF SEXUAL AUTONOMY

Prison rules and regulations are essential to combating threats to safety and security and to maintaining order within the institution. An appeal to the "orderly operation of the institution" often undergirds the justification for a ban on sexual activity and masturbation while in custody.[946] However, the experience of correctional facilities in the rest of the English-speaking world suggests that institutional order can be maintained without a draconian ban on masturbation.

Prison regulations in Queensland, Australia, do not contain categorical prohibitions on masturbation or other consensual sexual activity.[947]

In the State of Western Australia, condoms are made available to incarcerated persons of all genders.[948] Far from encouraging an over-sexualized and dangerous institutional environment, Australia's relatively liberal attitude towards sex in prison is correlated with institutional order. A recent study from the University of South Wales found that sex in prison was a relatively rare phenomenon and when it did happen between two prisoners, it was overwhelmingly consensual.[949]

Canadian prisons also recognize significantly more sexual rights than American prisons. In Ontario, the Ministry of Correctional Services Act authorizes the promulgation of regulations "respecting the ……. discipline, control, grievances, and privileges of inmates."[950] The regulations do not include any prohibition on sexual activity or masturbation.[951] Other Canadian provinces go even further than Ontario; prisons in Nova Scotia provide condoms and dental dams to facilitate safe sex while incarcerated.[952] The lack of prohibitions on sexual activity, ready availability of condoms and dental dams, and a generous conjugal visit policy[953] all suggest that Canadian corrections officials recognize that an opportunity to establish healthy sexual practices is important for rehabilitation and consistent with maintaining institutional order.

CONCLUSION & SUGGESTION

[945] Ibid.

[946] Ohio Admin. Code 5120-9-06(A) (2014).

[947] *Corrective Services Regulation 2017* (Qld), sub-div 2(i) (Austl.) (prohibiting indecent or offensive acts only in someone else's presence).

[948] Adult Custodial Rules 2002 (WA) AC 9, Prioision of Condoms and Dental Dams to Prisoners (Austl.), http://www.correctiveservices.wa.gov.au/files/prisons/adult-custodial-rules/ac-rules/ac-rule-09.pdf.

[949] Univ. Of New South Wales, Sex In Australian Prisons: The Facts (Apr. 13, 2011), https:// newsroom.unsw.edu.au/news/health/sex-australian-prisons-facts.

[950] Ministry of Correctional Services Act, R.S.O. 1980, c 275, s 47(d) (Can.).

[951] MINISTRY OF COMMUNITY SAFETY & CORR. SERVS., Inmate Information Guide for Adult Institutions30(S.O.)(Sep.2015)(Can.),https://www.mcscs.jus.gov.on.ca/english/corr_serv/PoliciesandGuidelines/CS_Inmate_ guide.html.

[952] NOVA SCOTIA CORR. SERVS., Offender Handbook 29 (S.N.S.) (2016) (Can.), https://novascotia.ca/just/Corrections/_docs/Adult_Offender_Handbook_EN.pdf.

[953] CORR. SERV. OF CAN., PRIVATE FAMILY VISITS WITH OFFENDERS (Mar. 27, 2018) (Can.), www.csc-scc. gc.ca/family/003004-1000-eng.shtml

VOLUME 17 ISSN: 2456-9704

Sex is a physiological need that strengthens the bond between couples thus the plea from some prisoners to be allowed to satisfy their sexual needs in a move to cut down on sodomy in prisons is reasonably justified. Sexual health in prisons cannot be attained unless these misconceptions and misunderstandings about gender and sexuality based on hegemonic masculinities ideals are quashed. It requires transforming laws and policies to accommodate sexual and gender diversity and to protect every person from sexual violence, and to allow every person the freedom to pursue sexual relationships safely and freely without discrimination, coercion and violence. The protections of the Constitution do not end at the prison walls. It is incumbent upon our criminal justice system to respect and protect the rights of the accused and of the convicted. Those rights include the right to sexual autonomy. A system that can punish a natural, private activity like masturbation with solitary confinement is an extraordinarily flawed system. If prisons refuse to lift these draconian restrictions on a fundamental right, courts must step in to protect those whose constitutional rights are being trampled. The right to procreate through artificial insemination as a supplement should be viewed as an alternative. However, in view of limited resources available with the state the state shall initially focus on developing facilities for conjugal visitation in jails and this method must be a part of long term planning. There should be provisions of parole and furlough should be used liberally by the state so as to ensure that prisoners can establish relations with their families. The state should allocate resources for construction of facilities for conjugal visitations. Although there are weighty interests on both sides of the issue, a strong argument can be made that a court must find that married prisoners and their spouses have a constitutional right to participate in a program of conjugal visitation. If rehabilitation remains the favoured goal, as it now seems to be, the benefits of conjugal visiting should tip the scales in the prisoner's favour. Prisons will remain unpleasant places even if conjugal visiting is allowed several times a month. Imprisonment will confer no less of a social stigma because of the presence of such a program. If a prisoner is not allowed to meet his spouse in the prison, than the spouse of prisoner equally faces similar torture for no offence. Imprisonment is a legal punishment imposed upon the offender by the state for the commission of a wrongdoing or defying the rule. The State is under a commitment for securing the human rights of its citizens and also to ensure the society everywhere and is approved to do so. To shield the nationals from any conceivable mishandle of this authority, they ought to be given certain fundamental benefits which are perceived by the Constitution of India as of Rights. That it would offer potential psychological benefits to the prisoner, reduce prison homosexuality, and allow the inmate to preserve or her marital ties.

*****