

CASE COMMENTS

GIAN KAUR vs. PUNJAB: A REQUIEM FOR REASON?

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A. INTRODUCTION

The issue of suicide raises many fundamental questions about the very nature of liberty. The temptation to indulge oneself in jurisprudential debate is very strong. However, the only real basis for determining the validity or otherwise of criminalising suicide is the Constitution. In this Article I will attempt to confine myself to Constitutional issues.

The genesis of the debate is in the 42nd Law Commission Report, 1971, which recommended that S. 309¹ of the Indian Penal Code, 1860² be repealed.

This was followed by the decisions in *State v. Sanjay Kumar*³ and *Court on its own motion v. Yogesh Sharma*,⁴ where the court observed that S. 309 I.P.C. is anachronistic.

The constitutionality of the provision was assailed in two High courts which came to different conclusions. The High Court of Bombay in *Maruti Shripati Dubal v. State of Maharashtra*⁵ held that S. 309, I.P.C. was held to be violative of Art. 14 and Art. 21. Art. 14 was held to be violated as S. 309, I.P.C. is discriminatory in nature and arbitrary. Art. 21 was construed to include the "right to die", making S. 309, I.P.C. invalid.

The Andhra Pradesh High Court in *Chenna Jagadeeshwar & Anr. v. State*⁶ held that S. 309 of the I.P.C. is not violative of the constitution. The argument that there is a right to die in Art. 21 was rejected. The court held that S. 309 I.P.C. is not violative of Art. 14 as the courts have sufficient power to mitigate harsh punishment.

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1 S. 309 makes an attempt and any act towards suicide a crime.

2 Hereinafter I.P.C.

3 1985 Cri.L.J. 931.

4 (Unreported) Cri. Revision No. 238705.

5 1987 Cri.L.J. 743.

6 1988 Cri.L.J. 549.

This debate seemed to have ended with *P. Rathinam/N. Patnaik v. Union of India*⁷ where the Supreme Court held that S. 309, I.P.C. is violative of Art. 21 of the Constitution, as there exists under Art. 21 a "right to die". The court however rejected the contention that Art. 14 is violated on the ground that there was sentencing discretion.

The question has been reopened in *Smt. Gian Kaur v. Punjab*.⁸ The appellants in this case were convicted under S. 306 I.P.C.;⁹ in appeal, it was contended that abetment of suicide cannot be a crime as it only amounts to assisting another person assert a fundamental right. Thus, S. 306 I.P.C. is equally violative of Art. 21, was the contention. The entire question including the validity of the decision in *Rathinam* came to be referred to a Constitution Bench, given the difficulties in holding S. 306 also invalid.

B. IDENTIFICATION OF ISSUES

The problem of suicide has always led to various contentious issues being thrown up. This hotch-potch of issues and questions has led to a great deal of confusion in the very identification of issues. It is submitted, with respect, that the issue is not either the right to die or even the right to choose,¹⁰ nor is it that S. 309 is arbitrary, insofar as it makes no distinction between various forms of suicide. The question appears, merely to be: whether it is just, fair and reasonable to punish a person who has attempted to commit suicide?

The answer to this question is the only necessary exercise. This has to be answered solely on the basis of the Constitution.¹¹ Other considerations, though valid, are certainly irrelevant, within the framework of the Constitution.

The Constitution Bench has dealt with the same two issues that the Division Bench had addressed; namely, whether there is a "right to die" under Art. 21? And whether S. 309, I.P.C. is arbitrary and therefore violative of Art. 14?

This disaggregated approach itself may be the object of criticism.¹² Certainly such an approach is not warranted given the decisions in *R.C. Cooper v. Union of India*¹³ and *Maneka Gandhi v. Union of India*,¹⁴ where the doctrine of exclusivity

7 1994(3) SCC 394.

8 1996(2) SCALE 881.

9 S. 306 punishes the abetment of successful suicide.

10 Dr. Rajeev Dhavan, "The Right to Die", *The Hindu* (April 12, 1996). In this Article Dr. Dhavan has argued that the question is not the right to die but the right to choose. He has asserted that the right to choose is part of the liberties of a person.

11 Mr. Justice Verma has certainly endorsed this view. See, *Smt. Gian Kaur v. State of Punjab*, 1996(2) SCALE 881 at p. 886 (para 18).

12 Dr. Rajeev Dhavan, *op. cit.*

13 1970(1) SCC 248.

14 1978(1) SCC 248.

was rejected. Hence, it is submitted, the court should have framed the issues in a more holistic manner.

C. IS THERE A RIGHT TO DIE?

The contention that was taken in this case: if there is a right to die, the abetment of suicide cannot be criminal, exposes the infirmity of recognising a positive right to die. If a right to die is recognised, it automatically means both S. 306 and S. 305 which punish abetment of suicide are invalid. It will be catastrophic if S. 305, which punishes, more severely, the abetment of suicide by a minor or an insane person, is held invalid.

In *P. Rathinam v. Union of India*¹⁵ it held that since Art. 21 recognised the right to live it also recognised the right to die, as fundamental rights have both positive and negative aspects. The Division Bench held the view that the right to live is on different footing as the negative of the right to live will mean extinction of the positive aspect, is unfounded. The court held that the right to live under Art. 21 has in its trial the right not to live a forced life.

The Constitution Bench has disagreed with the Division Bench on this ground. It held that the decisions which hold that a right to associate includes the right not to associate etc., merely hold that the right to do an act includes a right not to do that act. Protection from intrusion does not mean a right to discontinue the exercise of the right to life. Further, when rights like the right not to associate was exercised, there was no positive or overt act; when a person commits suicide there is certainly an overt and positive act.¹⁶

Therefore, the Constitution Bench held, "... Right to Life is a natural right embodied in Art. 21 but suicide is an unnatural termination or extinction of life and therefore, incompatible and inconsistent with the concept of 'right to life'..."¹⁷

This is consistent with the view taken by Prof. B.B. Pande.¹⁸ It is quite anomalous when, the court is expanding Art. 21 and including various rights to include a negative aspect, and thereby reverse development.

The recognition of the right to die does throw up some constitutional and jurisprudential issues that are left unanswered.¹⁹ One basic constitutional issue is whether the right to die means waiver of the right to live. If the right to die is seen as a waiver of the right to live, then there is conflict with the decision of the

15 1996 (2) SCALE 881.

16 *Ibid.*, per Verma J., at pp. 887-888 (para 20).

17 *Ibid.*, p. 888 (para 21).

18 Prof. B.B. Pande, "Right to life or death? For Bharat both cannot be right", 1994 (4) SCC (J).

19 See, Lawrence Liang and Bhavana Thakur, *P. Rathinam/N. Patnaik v. Union of India*, 7 *Student Adv.*, p. 126 (1995).

Supreme Court in *Basheshar Nath v. C.I.T.*,²⁰ where it was held that fundamental rights cannot be waived.

Further, if a right is recognised, there must be, in the Hohfeldian scheme, a corresponding duty. In the case of a fundamental right the duty has to be on the state. If this is correct, it will mean that the state has a duty to kill, or at least provide adequate facilities for suicide!²¹

Hence, it is quite clear that the Hon'ble Division Bench erred. However, a certain confusion has crept in due to the observations of the Constitution Bench, it has held:

*".. 'The right to life' including the right to live with human dignity would mean the existence of such a right upto the end of natural life. This also includes the right to a dignified life upto a point of death. In other words this may include the right to dying man to die with dignity..."*²²

The court goes on to add:

*".. A question may arise in the context of dying man, who is, terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life, in these circumstances. This category of cases may fall within the ambit of the right to die with dignity as part of right to live with dignity... The debate even in such cases to permit physician assisted termination of life is inconclusive..."*²³

This is judicial legislation at its worst. A Pandora's box has been opened. A limited right to die, under certain circumstances, has been recognised. The same problems will reassert themselves, can a physician, who helps a terminally ill patient assert his right to die, be prosecuted under S. 306? Can a terminally ill patient be prosecuted under S. 309 for attempted suicide, given the limited right to die? When is a person to be thought of as "dying"? What is a persistent vegetative state? When is it "apparent that the process of natural death has commenced?" ... Perhaps another constitution bench may have to be constituted to answer these questions...

D. IS S. 309 VIOLATIVE OF ARTICLE 14?

It is very surprising that the Court has chosen to even consider the question, given the principles of judicial restraint. The question does not arise in this case as the validity of S. 306 is being questioned only on the basis of the "right to die". Once

20 1959(1) SCR 528.

21 Lawrence Liang & Bhavana Thakur, *op. cit.* pp. 128-129.

22 *Smt. Gian Kaur v. State of Punjab*, 1996(2) SCALE 881 at p. 888 (para 23).

23 *Ibid.*, p. 888 (para 24).

the court came to the conclusion that there is no right to die. The contention that S. 309 is violative of Art. 14 had already been rejected in *Rathinam*. Invalidity on the anvil of Art. 14 will not render S. 306 unconstitutional as no positive right will be created.

However, it may be that the court felt constrained to answer the question given the contentions that were raised. It was contended that both Ss. 309 & 306 are monstrous and barbaric and violate the equality clause as being discriminatory and arbitrary. It was also contended that the wide amplitude of Art. 14 read with the dignity of life guaranteed under Art. 21 renders S. 309 unconstitutional.²⁴

The Constitutional Bench repeated the decision in *Rathinam* with reference to Art. 14. They held S. 309 is not violative of Art. 14 as:

1. The definition of suicide is capable of broad definition and there is no real ambiguity in determining what acts constitute suicide. Hence, S. 309 is not arbitrary.
2. There is sentencing discretion and hence all suicides are not treated alike, therefore S. 309 is not violative of Art. 14.

The main plank of argument that S. 309 is "barbaric and monstrous" was not even addressed. The main argument is that S. 309 is violative of the fundamental rights, read together as common code, as it is unfair, unjust and unreasonable. Further, Art. 14 after *Maneka Gandhi v. Union of India*,²⁵ is the repository of reasonableness which is an "essential element of quality or non-arbitrariness." Thus S. 309 may be violative of Art. 14, as it may be unreasonable, unfair and unjust to punish a person for attempting to commit suicide. Attempts to commit suicide are indeed to be looked at with compassion, they are not to be even tried even if they are not punished eventually.

It is submitted that the facts that there is sentencing discretion or even that attempts to commit suicide are treated compassionately are not relevant in deciding the constitutionality of a provision. It is surprising that such a consideration weighed with the court, given its affirmation at the very outset that the question must be decided with reference to the Constitution alone.²⁶

In *Mithu v. State*,²⁷ Chief Justice Chandrachud held

*".. If a law were to provide that the offence of theft will be punishable with the penalty of the cutting of the hands, the law will be violative of Art. 21..."*²⁸

24 The contentions are recorded by Verma J. at p. 889 (para 28).

25 1978(1) SCC 248. See also, *Gudikanta* 1978 1 SCC 240, *Babu Singh* 1978(1) SCC 579 & *Hoskot* 1978(3) SCC 544.

26 *Supra* n. 7.

27 1983(2) SCC 278.

28 *Ibid.*, at p. 284.

It will be no defence of the provision (of cutting hands for theft) that there is sentencing discretion or that no hands have been cut as yet. Such a provision is on the face violative of Art. 21, it may be said that by the same token S. 309 is violative of Art. 21 or Art. 14 as the case may be.

It must be mentioned that, the power of the court to examine the reasonableness or otherwise of the substance of a provision may not exist.²⁹ However, the right to examine the reasonableness of procedure is established.³⁰ It is not very clear whether we have substantive due process or only procedural due process, in spite of Justice Krishna Iyer's protestations.³¹

Such legal substitutes have not weighed with the current Supreme Court in its apogee of activism. In this context, it is worthwhile to note that judicial activism has been defined as the pursuit of an ideology with scant respect for established source of law. The Supreme Court in both *Rathinam* and *Gian Kaur* has not even addressed the question.

E. ABETMENT OF SUICIDE OR ITS ATTEMPT

It has been seen that the right to die has been recognised in a limited circumstance as part of the right to live with dignity. The court has held that the right to live with dignity allows a terminally ill person in a persistent vegetative state to kill himself. When death is certain, the process can be accelerated without attracting censure.³²

However, even in such cases the problem of physician assisted termination was left unresolved. The court made a distinction between active interference in the process of dying, and allowing a person to die. The Court cited various decisions from other jurisprudence to show that even physician assisted termination may be illegal.³³

Given that there are so many limitations on physician assisted suicide, suicides assisted by lay-persons have no rational basis to claim exclusion from the principle of sanctity of life, the Court opined.³⁴

Thus, in sum the position is that a terminally ill patient can attempt to commit suicide without fear of penal consequences if she fails to succeed. However, there can be no active assistance from the physician.

29 *A.K. Roy v. Union of India*, 1982(1) SCC 271 at p. 301. The Court held there is no power to examine the justice of a law itself. *See also* Solil Paul, "Was Due Process Due?" - A critical study of the projection of 'reasonableness' in Art. 21 since *Maneka Gandhi*", 1983(1) SCC (J).

30 *Bachan Singh v. State*, 1982(3) SCC 24. *See also*, Justice A.M. Bhattacharjee, "Art. 21 and 'Due Process' and 'Exclusionary Rule of Evidence'" 1983(3) SCC(J).

31 *See, Sunil Batra v. Union of India* 1978(4) SCC 494.

32 *Smt. Gian Kaur v. State of Punjab*, 1996(2) SCALE 881 At 888 (para 23-24).

33 *Ibid.*, p. 888 (para 23) and pp. 891-892.

34 *Ibid.*, p. 893 (para 42).

The Court has held that an attempt to commit suicide and the abetment of suicide are distinct offences. The abetment of an attempt to commit suicide is also a distinct offence punishable under S. 309 read with S. 107, I.P.C.³⁵ Invalidation of S. 309, without the creation of the "right to die" will not affect the validity of S. 306. The abetment of an attempt to commit suicide is punishable under S. 108, read with S. 309 I.P.C. only if the abetment is of an offence; an act which is not punishable is not an offence.³⁶ Therefore, if S. 309 is held invalid, abetment of an attempt to commit suicide is not punishable.

The limited right to die that has been recognised as part of the right to live with dignity is not reconcilable with the *dicta* that abetment of suicide is illegal. If there is a limited right to die, it naturally means there is a limited right to abet the procurement of such right. Hence, abetment of suicide by a terminally ill patient cannot be an offence.

The question is whether S. 306 and Ss. 107, 108 and 109 I.P.C. are capable of being read down, so as to exclude those who abet the suicide or attempted suicide by terminally ill people. It is my opinion that S. 306 is clear in terms, and it may not be possible to exclude those people who abet the suicide by terminally ill patients. People abetting the attempt to commit suicide by a terminally ill patient are also liable to be punished; S. 108 which is the general provision making abetment of an offence, will operate even if the main offender is not guilty.

It is submitted that in India, the main offender's guilt does not affect the abettor's guilt. In India we have adopted the broad theory of accessorial liability rather than the narrow one. The narrow theory depends on the imputation of liability from the perpetrator to the abettor, hence if the perpetrator is excused, so is the abettor.³⁷ This is not the case in India, under S. 108 the abettor is punished even if the perpetrator is excused.³⁸ Culpability is personal under the Indian Penal Code.

It is clear then that the abetment of suicide or attempted suicide by normal or terminally ill-patients is an offence. The limited right to die that has been created, allows the contention that there is a limited right to abet the commission or abetment of the commission of suicide. This is in contradiction of the express conclusions for Justice Verma, he rules that assistance of suicide or attempt, is illegal. This is an inherent contradiction.

35 S. 307, I.P.C. defines abetment, while S. 108, I.P.C. makes the abetment of an offence and S. 109, I.P.C. prescribes the punishment, where no express provision has been made for punishment.

36 S. 40, I.P.C. defines an offence as thing which is punishable.

37 George P. Fletcher, *Rethinking Criminal Law*, 640-643 (1978). See also, J.C. Smuth & Brian Hogan, *Criminal Law*, 142, 380 (1992).

38 The illustration (a) to S. 108, I.P.C. makes it clear that abetment of a lunatic or a child is still punishable.

F. CONCLUSION

This decision was made necessary only because of the creation of a "right to die" in *Rathinam*. The creation of a "right to die" meant that abetment of suicide, which is undoubtedly criminal, would become unconstitutional: it was only abetment of the enforcement of a fundamental right. This only emphasises the care that must be taken in constitutional adjudication. The perils of indiscriminate right creation, stand highlighted. The same impasse would result in the event that S. 309 was held invalid on the basis of a right to choose. However, this decision has resulted in the baby being thrown out with the bath-water.

It is respectfully submitted that the Constitution Bench should have, assuming that there is substantial due process, restricted itself to answering the question whether S. 309, I.P.C. was monstrous and barbaric or whether it is just, fair and reasonable to punish an attempted suicide.

Further, this decision has opened a veritable Pandora's Box by its remarks on euthanasia. The right, albeit limited, of a terminally ill person to commit suicide has been recognised. The court has created this right, without properly defining the terms it has used. This suffers from the usual infirmities of judicial legislation that has been seen in recent times. Perhaps the question will be clarified by oral observations at a future date - this seems to be the current practice on contention questions...