

Activating the legal seclusion system as a mechanism for rehabilitating detainees under comparative penal systems

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Abstract---Some human rights and freedoms are considered fundamental to human existence. They are inherent in any person because of his humanity and are based on respect for the dignity and value of every person. They are not privileges granted by the state or the authorities. In return, no arbitrary authority has the right to remove them. Perhaps the most important of these rights is the right of the imprisoned person to practice his sexual life normally with his wife, given that he is a person who violated the legal rules and whose freedom was taken away in order to be reformed and socially reintegrated, but this does not mean that his natural rights as a human being are taken away. Thus, the view will shift to prison as a place to re-evaluate the offender's behavior instead of considering this detention as retaliation, especially since the issue of humanizing punishment and the continuous search for alternatives to it is still the subject of widespread jurisprudential controversy by proposing several different theories that have developed in parallel with the international system towards greater dedication to human rights, which are considered an essential tool for his social rehabilitation.

Keywords---Imprisoned, sexuality, human rights, modern punitive politics.

Introduction

The development of the human rights system has been characterized by greater support for the universality of these rights. A person, regardless of his social, economic and political status, enjoys his human rights on an equal footing. This comprehensiveness has extended to sweep and defend a specific

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group of human society who committed a criminal act in violation of that law. Accordingly, the imprisoned person was recognized as having the necessity of enjoying all human rights, especially since penal institutions today are considered measures of human development (Mounir Al-Ash, 2017). In general, the basis of some human rights is still the subject of controversy in various local penal systems, including the right of the imprisoned person to sexual life. This right has sparked many controversies since the second half of the twentieth century, and jurisprudential opinions have been divided between supporters and opponents. This controversy is still ongoing to this day, which has been reflected in local penal systems, which have been divided into three trends: a trend that has approved this right and enshrined it legislatively, The trend of refusing to recognize this right of the imprisoned person, and the trend of the legislator remaining silent on this issue and leaving the matter to the punitive administration (2017, p. 29).

Hence, the scientific importance of addressing the issue of guarantees of the prisoner's right and its relationship to the practice of sexual life appears, as it is one of the sensitive topics or those that are forbidden to talk about and discuss, especially since we are in a conservative society like Algerian society, which considers talking about this topic to be forbidden. However, addressing this topic from all its angles and highlighting its dimensions will make clear the extent of its importance and necessity. The practical importance lies in the fact that the detainee or criminal is a human being before any other status assigned to him simply for violating legal rules. No matter how heinous the crimes he commits, no authority can strip him of his human status. Human rights are, in principle, an integral part of any human individual, and recognizing this right plays an important role in rehabilitating the detainee within the penal institution on the one hand, and in preserving family and social ties on the other.

In order to address this extremely important issue, the core of its problem must focus on the following:

To what extent have comparative penal systems been able to enshrine the detainee's right to engage in sexual life as a mechanism for his rehabilitation?

To answer the problem raised above, we decided to follow a two-pronged plan in which we will address the extent of the repercussions of sexual deprivation on the rehabilitation of the prisoner (the first section), and then we will address how the prisoner practices sex in comparative penal systems (the second section).

Section One: The repercussions of sexual deprivation on the rehabilitation of the prisoner

Depriving a prisoner of the right to engage in sexual life with his wife as a human being has taken away his freedom, but it is unreasonable to take away his natural right to satisfy his sexual needs. There is no doubt that this deprivation will have negative effects that hinder the process of reforming him, which is represented by violence within penal institutions (the first demand) The spread of sexual assaults within penal institutions (the second requirement) and then the spread of homosexuality in the prison space (the third requirement).

The first requirement: the phenomenon of violence within penal institutions

Sexual deprivation for the imprisoned results in negative damage that affects physical, psychological and sexual health, and thus affects his behavior inside a closed environment. In this regard, scientific experiments have confirmed, especially among males, that the behavior of aggression, control and violence is linked to the amount of internal secretions of the sex glands. Sexual deprivation is nothing but an incentive for the individual to become imprinted in his character with control more than submission and brutality more than good character. Thus, the sexual issue creates for him, of course, evil and fierce (2017, p. 114).

Violence in prison takes on another meaning, as it constitutes a means of affirming strength and masculinity, and is understood as a characteristic of the dominant male. The man in prison, by losing power and being deprived of sexual relations, feels that he is weak in his masculinity, and thus expresses it through aggressive behavior that may take the form of physical violence or verbal violence to the

point that cursing turns into a characteristic that distinguishes sexual culture. In fact, reliance on the use of obscene language can be postponed to the repression and sexual deprivation imposed on them (2017, pp. 115-116).

The second requirement: the spread of sexual assaults within penal institutions

The causes of sexual assaults in prison are generally due to several factors, the most important of which are: authority, sexual satisfaction, debt payment, punishment after violating the law and rules of inmates... etc (2017, p. 117).

Satisfying a person's sexual instinct, whether male or female, is the reason for the balance of his personality, but in some cases it may constitute a factor in many crimes and tragedies, especially if it obscures the light of reason and moves the ugly side of people. One of the most prominent manifestations of this is sexual assault, which is considered one of the most heinous crimes. It can be an act of rape or limited to sexual touching. These attacks occur in the case where the individual engages in sexual relations under duress and without his partner's consent. Therefore, they represent a violation of the human body, given its right to protect its body from any sexual intercourse that occurs to it without its will. They also represent an assault on the prevailing and agreed-upon human morals regarding sexual intercourse, which require that it be practiced within the framework of mutual consent and respect for the law (2017, p. 117).

In fact, a significant black number surrounds this phenomenon due to the lack of mention of sexual assault as part of complaints. This may be due to the silence of victims of sexual assault in prisons for fear of retaliation and shame, or because they do not trust prison staff and prison institutions in general and their psychological and medical interventions. Not only does the victim avoid complaining, but she will not even dare to seek medical attention and a rapid test for the possibility of sexually transmitted infections. It is worth noting in this regard that many detainees are convinced that the administration of penal institutions is aware of sexual assaults (2017, pp. 118-119).

Most research in this field has confirmed that there are, in fact, special groups that are more vulnerable than others to the possibility of being victims of sexual assault, and they include: sodomy and transgender people, minors and young people with weak physical structures, new prisoners and non-violent prisoners. The most common victims are those with mental or physical disabilities, and those who commit sexual crimes (2017, p. 121).

The third requirement: the spread of homosexuality

Homosexuality is one of the most prominent social factors that emerge from sexual life within the framework of creating a kind of psychological balance between the individual's needs and the controls of the system's requirements, as sexual deprivation affects the behavior and psychology of the inmate, which results in repressed abnormal states that take an immoral path, with which the inmate becomes vulnerable to homosexuality, which the prisoner resorts to to satisfy his desires in response to sexual deprivation and in response to the restrictions imposed by the prison context (2017, pp. 132-133).

In the same context, many studies that focused on the issue of prisons and its relationship to the phenomenon of homosexuality in its two forms confirmed "sodomy and lesbianism", whether through mutual consent between the two parties, the use of force, or even the use of tricks. Field studies have shown that a prisoner is usually exposed to sexual ordeals that reach the point of assault, whether by using force, luring with economic temptations, or being raped after being anesthetized. However, the practice of homosexuality does not always proceed in this manner. Rather, in many prisons, it takes a regular and repeated form among specific individuals, some of whom play a passive role for a fee or without a fee (Ghanem, 2014, p. 236).

Many field studies have also shown the prevalence of homosexuality within the walls of penal institutions, including: A study on homosexuality in California prisons, completed in 1982 by two researchers, Wooden et Parker, entitled "Men Behind Bars: Sexual Exploitation in Prison," based on a sample of 200 inmates, found that more than 65% of them were involved in a homosexual relationship. In addition, another American study conducted in 1983 in 17 prisons showed that 30% of male inmates had engaged in homosexual sex while in detention (2017, p. 134).

A recent study conducted by the National Center for Social and Criminological Research also shows that the prevalence of homosexuality within the outside community is 2%, while inside prison it increases to 15% of the total number of inmates, which reflects the role that imprisonment plays in deepening and spreading the phenomenon of homosexuality (2017, p. 135).

Section Two: The sexual practice of the imprisoned in comparative penal systems

The importance of the sexual life of the imprisoned has emerged as a human right that is adopted as a fundamental pillar for achieving the modern purpose of punishment on the ground. History has proven to human rights activists, jurists, and religious scholars that the natural right includes the necessity of recognizing human rights that are consistent with his humanity. Therefore, the issue of sex in prison has been taken into consideration since the seventies and eighties of the last century by many countries that have tried to provide answers by implementing various mechanisms and methods of marital dating and continue on the path of adopting the sexual practice of the imprisoned to this day (2017, pp. 171-172).

Based on the above, in this section we will study the foundations for adopting the sexual practice of the imprisoned at the level of Arab countries (the first demand), then the extent of the position of Islamic penal legislation on the sexual practice of the imprisoned (the second demand), all the way to how the methods of sexual practice of the imprisoned (the third demand).

The first requirement: Foundations for adopting the sexual practice of detainees at the level of Arab countries

The Kingdom of Saudi Arabia is considered a pioneer in this field, as it has granted inmates the right to practice sexual life with their wives since 1978 pursuant to Interior Minister Resolution No. 3191 dated August 26, 1978, relating to the prison and detention system. Article 12 thereof, relating to the rights and benefits granted to detainees, stipulates that: Convicts and detainees who have been in prison for three months or more have the opportunity to legally seclude themselves with their wives once a month for three hours (faghrour & abdelkader, 2018, pp. 523-524).

Then, Ministerial Resolution No. 1745 of 1990 was issued, regulating some provisions related to the sexual practice of the imprisoned. One of the most important provisions of this resolution was doubling the number of times of legal seclusion to twice a month, provided that it does not exceed four times a month in the case of polygamy. In addition to the right to advance or delay the date of the legal seclusion by the prison director as appropriate to the latter's circumstances, provided that the legal seclusion takes place in accordance with the same decision in a designated building separate from the sight of visitors (faghrour & abdelkader, 2018, p. 524).

What is criticized about this system is that although it provided the right to sexual life for convicted and temporarily imprisoned detainees, and also gave importance to the issue of polygamy, in contrast it limited this right to male detainees only and did not recognize it for female detainees, which requires reconsidering the penal text.

The Jordanian legislator also recognized this right by stipulating that: "Every inmate sentenced for a period of one year or more may be alone with his legal spouse in a place in the Central Bank designated for that purpose that meets the conditions for legal seclusion and in accordance with instructions issued

by the director" In accordance with Article 20 of the Jordanian Correctional and Rehabilitation Centers Law No 09 of 2004.

By examining the Jordanian legislator, it becomes clear to us that there is a legislative deficiency regarding the issue of regulating sexual practice, by limiting this right to the convicted prisoner without the temporary prisoner, in addition to the period of imprisonment that he specified as a full year or more, which is considered a long period that will deprive many prisoners of exercising their natural right.

We also find the State of Kuwait, which recently announced on April 13, 2016, granting detainees the right to engage in sexual intercourse within the framework of the Family Home Project. The Ministry of Interior announced that the decision does not include all detainees and will apply to Kuwaiti detainees only, men and women, and that they must be accused of minor crimes be of good conduct, have served 4 months of their sentence, and be an active participant in the prison's social activities. While some of those accused of state security crimes, murders, and drug trafficking crimes were deprived of this right, he was granted a monthly visit ranging between one and three days in a residential unit consisting of two rooms and a hall in a private atmosphere away from the prison atmosphere (2017, pp. 207-208).

Referring to the Egyptian Prison Organization Law No. 396 of 1956, amended by Law No. 14 of 2022, we find that it did not stipulate legal seclusion. However, this does not deny that the last two eras of the twentieth century and the first decade of the twenty-first century witnessed some incidents of implementing legal seclusion. However, this right is applied to some Egyptian prisons, such as Tora Prison, and not to other prisons. Perhaps the most important factor is the absence of financial mechanisms that prevent the prisoner from exercising his right to sex, such as the lack of special rooms for legal seclusion (Radwan).

As for the position of the Algerian legislator towards the issue of regulating the right of the prisoner to engage in sexual life with his wife, at a time when many countries of the world have framed and regulated this right, we find that the Algerian legislator, when regulating the right to visitation, did not address granting the prisoner the right to legal seclusion with his wife, because this guarantee is still described as "taboo" and continues to be dropped from the ladder of rights of prisoners in Algeria. While many human rights activists agree that this is an indisputable right due to the advantages it achieves, whether in terms of maintaining the psychological stability of the detainee and making him voluntarily undergo rehabilitation programs, or in terms of its spouse, it creates a kind of solidarity and provides the opportunity for detainees to continue with their spouses.

The second requirement: The position of Islamic penal legislation on the sexual practice of the imprisoned

The clergy differed on the issue of regulating the sexual practice of a prisoner with his wife and were divided into three schools of thought regarding the adjudication of this right:

The first opinion: The person imprisoned is allowed to have intercourse with his wife if he requests it and the appropriate place is available for that purpose, which is the most correct opinion according to the majority of the Hanafis, Hanbalis, some Malikis, and some Shafi'is, and they used reasonable and analogy as evidence for the permissibility of that. It is reasonable that the husband's enjoyment of his wife is one of the wife's rights over him, and therefore taking away freedom does not prevent that. It is an analogy to measure the desire for the private parts over the desire for the stomach, stating that each of them has a need that he cannot do without (Saada & bouhalit, 2022, p. 431).

The second opinion: The prisoner is prohibited from being legally alone with his wife. This is the Maliki school of thought and a Hanafi opinion. Ibn Farhun says: "A man is not allowed to allow his wife to enter his prison, even if he is imprisoned against her, because the purpose of prison is to restrict him and not to restrict him while enabling him to enjoy his pleasure" (faghrou & abdelkader, 2018, p. 521).

The proponents of this opinion cited as evidence that prison was legislated to deter the prisoner, restrict the prisoner, and make him bored, and to enable him to be alone with his wife for entertainment and bliss that contradicts those purposes for which prison was legislated, just as intercourse is not one of the basic requirements like food (faghrou & abdelkader, 2018, p. 521).

The third opinion: The basic principle is that a prisoner having intercourse with his wife is one of his legitimate rights, and he is not prevented from doing so unless the interest requires it. This is the opinion of some Shafi'is (faghrou & abdelkader, 2018, p. 521).

In general, most jurists agreed that the right of a prisoner to legal seclusion with his wife in penal institutions is not an intellectual luxury or entertainment for the convict that conflicts with the requirements of a criminal punishment that restricts or deprives him of his freedom, but rather it is a demand for a right protected by the provisions and principles of Islamic Sharia, which came to govern the behavior of all human beings, protect their rights, and preserve their dignity and humanity. Therefore, establishing this right would preserve the psychological and moral balance and stability of the imprisoned person, as warding off corruption takes precedence over bringing benefit (2017, pp. 202-203).

Despite the differences in the trends of Islamic Sharia jurists, this is not a modern topic as some think. Rather, it was applied during the reign of Caliph Omar ibn al-Khattab, when a prisoner was allowed to visit his wife and then return to prison, as well as during the reign of Imam Malik, who agreed to the prisoner's right to legal seclusion, basing this on the fact that the punishment was limited to the convicted person and did not extend to anyone else (2017, p. 199).

The third requirement: methods of sexual intercourse for the imprisoned

Referring to the penal systems that adopted the prisoner's right to sexual practice, we find that they relied on several mechanisms to exercise this right. Some of them resorted to the prisoner's sexual practice within the penal institution (first), and some of them adopted the prisoner's sexual practice outside the penal institution (second).

First: The sexual practice of a detainee within the penal institution

The sexual practice of an imprisoned person within the penal institution takes several forms: either the marital visitation system (a) or the family visitation system (b).

A- Marital visitation system

This system allows the detainee to receive his wife in general in a private room prepared for the purpose in an atmosphere of complete privacy, as the detainee is allowed, within the framework of this visit, an intimate, unattended moment away from the eyes of the prison security personnel, the inmates and all those involved in the prison space. This type of visit is subject to several conditions, some of which are related to the detainee, as he is the same whether he has been sentenced permanently or temporarily, and he must be of good conduct and behavior. As for the visitor, he must prove the establishment of a marital relationship between the detainee and his wife with an official document. As for the duration of the visit, it should not be less than two hours, at least once a month. The marital visit is also linked to the inspection to which both the detainee and the visitor are subjected, in order to ensure the security of the penal institution and respect its proper functioning and regulations, especially by preventing the entry of prohibited items into the prison (2017, pp. 214-216).

B- Family visit system

It is a system through which the right to sexual life is exercised in apartments located within the penal facility within the framework of what is known as family visitation, by allowing the detainee to leave prison for two or three days. Family visitation usually lasts between a minimum of six hours and a maximum of seventy-two hours. He spends it with his wife and children under conditions determined in advance by law that are similar to those required to benefit from the legal seclusion system in countries

that adopt this system so that the right to legal seclusion between prisoners and their spouses can be implemented in a realistic manner, especially since the family visits system has been implemented in many countries of the world and has achieved positive results (Liratni & Naciri, 2024, p. 292).

Family visits have positive effects for the prisoner, as they give them the opportunity to share moments and daily life behaviors with visitors, and allow them to regain the lifestyle they were deprived of. They also give them the opportunity to meet with the family in places specially equipped to respect the material and moral organization necessary for the confidentiality and privacy of family life in general and sexual life in particular (2017, p. 219).

Second: The sexual practice of a detainee outside the penal institution

There are many methods of sexual intercourse for a person imprisoned outside the penal institution, including adopting either: the exit leave system (A) or the punishment division system (B).

A- Exit leave system

This system allows a detainee to be absent from the penal institution for a specific period of time that is counted as part of the sentence period. This system is applied in Algeria and allows a detainee of good conduct and behavior who has been sentenced to a custodial sentence for a period equal to three years or less due to his ordeal to be allowed to leave without guard for a maximum period of 10 days in accordance with Article 129 of Law No. 05-04 containing the Law on the Organization of Prisons and the Social Reintegration of Detainees.

Although many jurists and jurists have emphasized that the right to leave and a license is one of the rights of a prisoner in general, obtaining temporary absence in the various penal systems that have adopted it is a privilege and not a right, and it is granted for various reasons: medical, humanitarian, family, etc (2017, p. 222).

B- Penalty segmentation system

This system allows for the division of punishment by implementing the custodial punishment at regular intervals for a specific period. One of its most important methods is the weekend reservation method, which is a system through which the punishment period is implemented in installments on weekends and annual holidays so that the period of imprisonment is spent during official holidays, at the end of weeks, and outside daily working hours, instead of spending the period of imprisonment continuously during working days, as is the case in French legislation (2017, p. 232), as Chapter 1-720 of the French Code of Criminal Procedure stipulates that: 'The execution of a penalty depriving liberty in the misdemeanours article may be divided when the remaining period of the penalty does not exceed one year for serious reasons of a medical, family, professional or social nature over a period not exceeding 3 years and the duration of each part is not less than two days' imprisonment.

Conclusion

At the conclusion of the study, we concluded that despite the principles approved by the modern penal policy, which aims to enable the imprisoned to enjoy all his human rights with the aim of achieving his reform and social integration, especially since prisons today have become the standard by which most democratic countries are measured, Imprisonment only strips the prisoner of his freedom, considering it a custodial punishment, not a deprivation of his natural rights as a human being. However, the debate over this right is still a matter of dispute, whether among Islamic Sharia or legal scholars. It has not been widely applied across all penal systems due to the negative social view that denounces the treatment of the prisoner as a human being and the absence of the material mechanisms that guarantee the exercise of this right, such as building places designated for the exercise of this right.

Depriving the detainee of sexual activity has a negative impact on the relational dimensions within the penal institution and is reflected in the form of a behavioral disorder for the detainee, such as resorting to violence, homosexuality, and other things, and enshrining this right will undoubtedly have an effective role in eliminating such phenomena within the prison space. Granting the detainee the right to sex is a health care requirement called for by most international treaties and instruments, as it preserves the prisoner's physical health and psychological balance.

Establishing a guarantee for the prisoner to have sexual relations with his wife would preserve the convict's social ties, as depriving the prisoner's husband of his right to also have a normal sexual life would violate the principle of the personality of the punishment, the effects of which should only extend to the convict. Based on the findings of this study, we will propose some recommendations that would fill some legal gaps, as follows:

- The necessity of stipulating the right of the prisoner to engage in sexual life according to certain conditions, just like the rest of the rights stipulated in the Prison Organization Law. Human rights are not just letters written on paper, but rather they are applied on the ground.

Given the specificity of Arab societies and Algerian society in particular, which denounce this right, we propose activating the exit leave system stipulated in accordance with Article 129 of the Law on the Organization of Prisons and the Social Reintegration of Detainees or by introducing a system of division of punishment as is in effect in many countries.

- Establishing special facilities within penal institutions that guarantee the privacy of the encounter between the detainee and his wife within the prison space, in accordance with international standards. This facility allows for the effective implementation of penal treatment programs and the provision of detention conditions that guarantee the minimum human rights to maintain his physical and mental health.

There must be political will to consolidate the reform approach aimed at humanizing prison sentences.

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