

## CONJUGAL RIGHTS OF PRISONERS

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### Abstract

Conjugal rights of the prisoners mean the marital rights of the prisoners. Conjugal right is recognized inherent right of a married couple in society and encompass within itself the right of a couple to associate together, build a home together and enjoy all the privileges of an interpersonal relationship together including the right to have 'sex' and 'procreation'. There is agreement-disagreement about the value and desirability of allowing conjugal rights to prisoners. Those who advocate this concept say that this would help in solving the problem of homosexuality and would also help in molding the behavior of the prisoner. Those who do not agree with this point out that, factors like custody and security problems, single parenting, smuggling of contraband goods from outside etc. neutralize the positive effect. 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. The author in this article studies the decisions rendered by the courts in these cases along with the law prevalent in other jurisdictions regarding conjugal rights.

**Key words:** prisoners, conjugal rights, homosexuality, conjugal visitations/associations, artificial insemination

### Introduction

Jail is the most ancient and oldest penal institution meant for detaining prisoners. The prisoners detained in the jail fall broadly into two categories, that is, the convicts and the under trials. Conjugal rights of the prisoners mean the marital rights of the prisoners. A prisoner can enjoy his conjugal rights when he/she is allowed to meet his/her spouse and spend time with him/her. The author in this article discusses the concept of conjugal rights of prisoners, the arguments in favor or against conferring such

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rights to the prisoners as well as the modes of enjoying such rights in the precincts of jail. In the next part of the article the author traces the legal dimensions of this right in India and also discusses the laws regarding conjugal rights in other jurisdictions. In the last part of the paper some suggestions are put forward by the author.

### **Concept of conjugal rights of prisoners**

The term ‘conjugal’ refers to the rights that are the recognized inherent rights of married couples in society.<sup>1</sup> It encompasses the rights of a couple to associate together, build a home together and enjoy all the privileges of an interpersonal relationship together including the right to have ‘sex’ and ‘procreation’.

- **Arguments in favour or against conjugal association of prisoners**

At the very outset, it is necessary to address the debate concerning the value and desirability of allowing conjugal rights to prisoners. Some of the authors favour conjugal association of prisoners whereas others point out the weaknesses of this association. The points for agreement-disagreement are discussed herewith.

One of the biggest problems faced by the prison system is of ‘homosexuality’. Some authors advocate the view that if a more intimate relationship is available to prisoners then, the problem and tension of homosexuality can be reduced to a great extent.<sup>2</sup> They also advocate the point that it can help reduce and prevent the incidence of male rape which has become a matter of serious concern for many states.<sup>3</sup> By allowing prisoners to spend significant amount of time with their families, the negative effect of the unisex prison environment can be diminished. It helps them to reaffirm their masculinity and reduce their need to establish a manly self-image by victimizing other inmates. However, two main arguments that are advanced in opposition to this viewpoint are firstly, it has been suggested that prison homosexuality is

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<sup>1</sup> 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.598.

<sup>2</sup> Eugene Zemans and Ruth Shonle Cavan, “Marital Relationships of Prisoners”, *The Journal of Criminal Law, Criminology and Police Science*, Vol. 49, No. 1, 1958, pp. 50- 57, at p. 54.

<sup>3</sup> James E. Robertson, “A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison,” *North California Law Review*, Vol. 81, 2003, pp. 433-481, at p. 434.

not related to heterosexual deprivation but rather is an expression of the urge for mastery by people who have been placed into a position of powerlessness and secondly, the frequency of heterosexual activity is so limited that it will have only minimal or negligible effect.<sup>4</sup>

Another point argued in favour of conjugal association is that it helps to change and mould the behavior of the prisoner. By establishing ties with the family, there is a normalizing effect. This behavioral change will reduce the incidence of violence in jail and will also prepare the prisoner for re-entering the society successfully, once he is released.

However, those who argue against it are of the view there is paucity of research to support this view and the results are mere speculations. They point out that factors like custody and security problems, smuggling of contraband goods from outside etc. neutralize the positive effect, if any.<sup>5</sup>

Another point of disagreement is moral grounds. Those who advocate conjugal association argue that humanism requires that prisoners should be allowed to spend some time with their families in privacy. They also advance the argument of “innocent” spouse and his/ her emotional and sexual frustration associated with severance of marital ties by incarceration. The main rebuttal to this particular argument is that society holds no moral obligation to grant inmates the privilege of sexual license and it is an explicit consequence of incarceration that prisoner should not have the opportunity to enjoy conjugal rights or beget children.

Further, allowing conjugal visitations would mean a one-parent family for years before the prisoner is released. This is another social question which is raised against allowing conjugal association to prisoners. This question is further aggravated when both the spouses are in prison and conjugal association is allowed. In such cases, the vital issue that rises is the ‘best interest of unborn child’.<sup>6</sup>

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<sup>4</sup> Ann Goetting, “Conjugal Association in Prison: The Debate And Its Resolutions”, *New England Journal On Prison Law*, Vol. 8, 1982, pp. 141-154, at p. 142.

<sup>5</sup> Ann Goetting, “Conjugal Association in Prison: The Debate And Its Resolutions”, *New England Journal On Prison Law*, Vol. 8, 1982, pp. 141-154, at p. 144.

<sup>6</sup> See R.P. Upadhyay vs. State of Andhra Pradesh and Others, AIR 2006 SC 1946.

The above debate reveals that there is disagreement on allowing conjugal association to prisoners. However, with the changing times and sensitization of society towards human rights, there is need to change the attitude towards prisoners also. A society which is currently debating on 'gay rights' or 'third gender rights' need to deliberate on prisoners conjugal rights also.

- **Modes of conjugal association**

Conjugal association can be established when a prisoner is allowed to spend some time with his spouse or family in privacy. During incarceration, the conjugal rights can be enjoyed by the prisoner if the state has provisions for allowing 'conjugal visits' in jails. Conjugal visits in jails means when a prisoner is allowed to spend some time in privacy with his spouse and family members in the precincts of jail. The state provides infrastructure such as separate rooms or cottages in a separate designated area within the premises of jail where the prisoner and his family is allowed private time. This visit may continue for hours or days depending upon the policy of concerned state. The State also provides facilities like separate washrooms, linen etc. for the prisoner and his family. Thus, a prisoner can enjoy his conjugal rights in the precincts of jail if conjugal visits are allowed. It is pertinent to note that many of the states do not have these conjugal visitation programs because of varied reasons which shall be discussed in the later part of this section.

Another mode for enjoying conjugal rights by prisoners is 'parole' or 'furlough'. That is, when the prisoner is released for a temporary period from the jail and during such release he spends time with his spouse or family. Almost all the States have framed Rules for release of persons on parole or furlough.

The difference between conjugal visits and 'furlough' or 'parole' is that the latter involves unsupervised trips away from the correctional facility for a spectrum of undefined purposes, one of which may be conjugal visitation.<sup>7</sup> Both systems have their own merits and demerits. One of the cons of allowing conjugal visits is inequitable treatment to prisoners. 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

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<sup>7</sup> Norman Elliot Ken, "The Legal and Sociological Dimensions of Conjugal Visitation in Prisons", *New England Journal on Prison Law*, Vol. 2, 1975, pp. 47-68, at p. 47.

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.<sup>8</sup> Thus, conjugal visitations can 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. Another strong objection to development of conjugal visitation programs is that conjugal visitations cause an extra burden on the exchequer of the state as the state has to develop infrastructure for making such facilities available to prisoners and has to shell money from the already squeezed budget whereas parole or furlough do not require additional infrastructural facilities and keeping in mind the other competing interests like overcrowding of jails, lack of basic infrastructure facilities like toilets etc., it is unlikely that the state would spend on the construction and development of facilities required for conjugal visits. In parole or furlough the prisoner visits his home and the environment of home is more conducive, warm and friendly for establishing family ties. Jail authorities cannot create such an environment in jail. However, on the other hand there is always an inherent risk of the prisoner absconding in parole or furlough. Moreover, many of the prisoners who do not satisfy the conditions for parole or furlough (because of length of sentence or non-fulfillment of other conditions like bail bond) may lose this right of conjugal enjoyment also.<sup>9</sup>

One of the essential facets of conjugal rights is ‘procreation’. With advancement of science, it has become possible that procreation is done by the way of artificial insemination. That is, when the male and female do not come in physical contact with each other, rather the male gives a sperm for artificial insemination and the female gets pregnant through it by using the facilities of artificial insemination. In the recent times, the prisoners have knocked the doors of courts to have access to the facilities of artificial insemination for the purposes of procreation especially when the state does not have programs for conjugal visitation or the prisoner does not qualify for claiming such right or for temporary release on parole or furlough.<sup>10</sup>

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<sup>8</sup> Donald R. Johns, “Alternatives to Conjugal Visiting”, *Federal Probation*, Vol.35, 1971, pp.47-51, at p. 47.

<sup>9</sup> Norman S Hayner, “Attitudes towards Conjugal Visits for Prisoners”, *Federation Probation*, Vol. 36, 1972, pp, 48- 53, at p. 48.

<sup>10</sup> Temporary release like parole or furlough depends upon various factors like conduct of accused, severity of sentence, fulfillment of conditions like

It is pertinent to note that the provisions regarding parole or furlough exist in all jurisdictions across the globe. The main point for discussion is the programs of conjugal visitations and procreation on the basis of artificial insemination.

### **Legal dimensions of conjugal rights of prisoners in India**

After studying the justification for providing conjugal rights to prisoners and the modes through which such rights can be exercised, the next question which is addressed is the legal dimensions of this right in India. In this part the jurisprudence that has developed on conjugal rights of prisoners in India has been analyzed.

- **Constitutional framework**

The United Nations Basic Principles for the Treatment of Prisoners, 1990 states that except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights and where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.<sup>11</sup> India is a signatory to the Universal Declaration of Human Rights and the Covenants. These rights are enshrined in our Constitution in the form of fundamental rights and directive principles of state policy.

Article 21 of the Constitution guarantees that no person shall be deprived of his life and personal liberty except according to procedure established by law. It includes within its ambit the prisoners also. The Supreme Court in the case of *D. Bhuvan Mohan Patnaik and Others v. State of Andhra Pradesh and Others*<sup>12</sup> declared that convicts cannot be denied the protection of fundamental rights which they otherwise possess, merely because of their conviction. It said that a convict whom the law bids to live in confinement stands denuded of some of the fundamental rights like the right to move freely or the right to practice a profession but such convict shall continue to enjoy

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furnishing of bail bond etc. Each state has its own rules for temporary release of prisoners. Similarly, the states which have programs for conjugal visitation have Rules for accessing it.

<sup>11</sup> Principle 5 of the Basic Principles for the Treatment of Prisoners (1990).

<sup>12</sup> AIR 1974 SC 2092.

other constitutional guarantees including the precious right guaranteed by Article 21 of the Constitution.

Thereafter, the Supreme Court in the case of *Sunil Batra v. Delhi Administration*<sup>13</sup> (popularly known as *Sunil Batra I*) emphatically espoused that it is an onerous duty of the Court to ensure that during detention and subject to Constitution, the detenu does not suffer from any torture. The Supreme Court in this case emphasized the need of social justice by re-orienting, re-visiting and re-humanizing the existing strategies in the context of prisoners. The Court in this case ruled that the condemned prisoners shall be kept in custody and shall not be put to work like those sentenced to rigorous imprisonment. The Court held that convicts shall be entitled to amenities of ordinary inmates in the prison like games; books; newspapers; reasonably good food; right to expression, artistic and other; and normal clothing and bedding.

Two years later, the Supreme Court in the case of *Sunil Batra v. Delhi Administration*<sup>14</sup> (popularly known as *Sunil Batra II*) phenomenally liberated the jail inmates from the atrocities inflicted through mental torture, psychic or physical pressure and it brought a catenation of radical changes in prison conditions like (i) separation of under-trials from convicts in jails; (ii) their right to invoke Article 21 of the Constitution; (iii) separation of young inmates from adults; (iv) liberal visits by family and friends of prisoners; (v) ban on confinement in irons; (vi) duties and obligations of the Courts with respect to rights of prisoners; and (vii) re-defining the duties of District Magistrate etc. The Supreme Court in this case pointed out various maladies in the jail precincts including the victimization of young inmates at the hands of adults.

In the case of *Francis Coralie Mulin v. The Administrator, Union Territory of Delhi*,<sup>15</sup> the Supreme Court expanded the expression “personal liberty” embedded in Article 21 of the Constitution in the context of the rights of a detenu and it held that the prisoner or detenu has all the fundamental rights and other legal rights available to a free person, save those which are incapable of enjoyment by reason of incarceration. The Court held that no law which authorizes and no procedure which leads to cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-

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<sup>13</sup> AIR 1978 SC 1675.

<sup>14</sup> (1980) 3 SCC 488.

<sup>15</sup> AIR 1981 SC 746.

arbitrariness and thus would plainly be void and violative of Articles 14 and 21.

In addition to above, there are various other landmark judgments wherein wide connotation is given to the prisoner's rights within the four walls of the jail. For example in the case of *State of Maharashtra v. Prabhakar Pandurang Sangzgiri and Another*<sup>16</sup>, the Supreme Court held that the detainee has a right of publication of his books; in *Sheela Barse v. State of Maharashtra*,<sup>17</sup> the Court reiterated the right to legal aid to under trial and convicted persons and issued directions for providing fast and efficient legal assistance to prisoners in jail and to provide protection to women prisoners in lock-ups to name a few.

Although the above judgments are true milestones in recognizing the rights of the prisoners yet they do not deal with the conjugal rights of the prisoners. It was only in *Sunil Batra II* that the court noticed the problem of homosexuality or sexual abuse of underage in jail. But here also the issue of conjugal rights was not raised.

- **Statutory framework**

In India, there is no Statute or Rulebook which discusses or confers conjugal rights to prisoners. There is no mechanism or scheme for allowing conjugal visits in jails. As far as provisions of parole or furlough are concerned, these powers are exercised by the concerned state government and there is no central legislation to regulate it. For example, in the state of Punjab the release of prisoners on parole and furlough are regulated by the Punjab Good Conduct Prisoners (Temporary Release) Act, 1962 read with the Rules framed there under and the State Policy and Instructions issued by the state government for the release of convicts on parole, furlough etc. Section 3(1) of the Act enables the State Government to release the prisoners temporarily for a specified period on parole, if it is satisfied that : (1) a member of the prisoner's family had died or is seriously ill; or (b) the marriage of the prisoner's son or daughter is to be celebrated; or (c) the temporary release of the prisoner is necessary for ploughing, sowing or harvesting or carrying on any other agricultural operation on his land and no friend of the prisoner or a member of the prisoner's family is prepared to help him in this behalf in his absence; or (d) it is

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<sup>16</sup> AIR 1966 SC 424.  
<sup>17</sup> (1983) 2 SCC 96.



desirable to do so for any other sufficient cause. Section 4 of the Act empowers the State Government to release prisoners temporarily, on 'furlough' subject to his good behavior and the quantum of sentence awarded or the nature of offence committed. Section 6 of the Act creates an embargo against the release of a prisoner, if it is likely to endanger the security of the State or the maintenance of public order. The Act also prescribes penal consequences if the prisoner fails to surrender on the expiry of release period.<sup>18</sup>

It is pertinent to note that conjugal rights or visitations are not a ground for release of the person on parole and furlough. The Supreme Court in its various decisions has stated that parole is a penological innovation to check recidivism and has recommended the liberal use of the same.<sup>19</sup>

- **Judicial decisions**

In the absence of any specific law on conjugal rights of prisoners, the prisoners to get their conjugal rights enforced have knocked the doors of various high courts in recent times. In 2012, such an unsuccessful attempt was made in the case of a PIL filed before the Andhra Pradesh High Court in the case of *Ms. G. Bhargava, President M/s. Gareeb Guide (Voluntary Organisation) v. State of Andhra Pradesh*<sup>20</sup> wherein a direction was sought to take immediate steps and allow conjugal visits to spouses of prisoners in jails across the State of Andhra Pradesh. The Court rejected the claim of the petitioner and observed the following: firstly, if conjugal visits are allowed keeping in view good behavior of the prisoners, then chances of the environment getting disturbed cannot be ruled out as it will have an adverse impact on the other inmates of the jail who have not been selected and extended such benefit. Secondly, Chapter-IV of Andhra Pradesh Prison Rules, 1979 provide for the release of prisoners on furlough/ parole and during this temporary release the prisoners can lead family life with their spouses. Thus, High Court denied any facilities of conjugal visits to jails. It also pointed out that such an issue of allowing conjugal visits in jails is a policy matter which falls within the exclusive domain of the state.

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<sup>18</sup> Section 8 of the Punjab Good Conduct Prisoners (Temporary Release) Act, 1962.

<sup>19</sup> See the case of *Suresh Chandra vs. State of Gujarat*, 1976 CriLJ 1890. Also see *Krishan Lal vs. State of Bihar* 1976 Cri LJ 854.

<sup>20</sup> PIL No. 251 of 2012 decided on 16th July, 2012.

Two years later, in 2014 a similar petition was filed before the Punjab and Haryana High court in the case of *Jasvir Singh and Another v. State of Punjab*.<sup>21</sup> The facts of the case were that the petitioners were husband and wife. They were prosecuted and convicted for kidnapping and murdering a 16 year old minor for ransom. The trial court awarded death sentence which was confirmed by the High Court. The Supreme Court also upheld the conviction. However, the death sentence of wife was commuted into life imprisonment. Both were lodged in the same jail in separate cells.

The couple had got caught in the criminal case within eight months of their marriage. In the instance case, they demanded that a command must be issued to the jail authorities to allow them to stay together and resume their conjugal right for the sake of progeny. The petitioners claimed that their demand was not for personal sexual gratification and thus they were open for artificial insemination also.

The case involved important questions of law regarding conjugal rights of the prisoners. Therefore, the court also appointed an *amicus curae* in the matter. The core issues in the case were (i) whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework? (ii) Whether penological 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)? And (iv) If question No. (iii) is answered in the affirmative, whether all categories of convicts are entitled to such rights?

The plea of the petitioners was opposed by the state of Punjab and the father of the minor victim who was kidnapped and murdered for ransom. The main point advanced by the state for opposing the petition was that the right to procreation does not find any mention in the Rulebook or Statutes. They contended that there was no provision for 'conjugal visitation' under the Prisons Act, 1894 and the Punjab Jail Manual. There was no provision in the said Acts for artificial insemination also.

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<sup>21</sup> 2015 Cri LJ 2282.

Moreover, Section 27 of the Prisons Act, 1894 mandates proper segregation of male and female prisoners.<sup>22</sup>

The main arguments put forth by the *amicus curae* were firstly, the Principles enshrined in the Constitution are of widest amplitude and have been intentionally left open ended so that the courts are not shackled by the limited interpretation. Secondly, he contended that the right to procreation cannot be denied merely because such a right does not find any mention in the Rule-books or Statutes. In the absence of such a right having been spelt out in a codified-law, it cannot be assumed that the petitioners' prayer contravenes any law. The denial of the right to procreate thus is alleged to be unreasonable, arbitrary as such a right not being violative of any rule or law, its denial amounts to be a monstrous violation of Article 21 of the Constitution. Thirdly, he 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 put in jail. There is no provision, explicit or implied, in any penal law or constitution that takes away the prisoners right to decent life which squarely falls within Article 21 of the Constitution. He argued that although husband has been sentenced to death, but his 'right to life' cannot be taken away till his execution. Fourthly, he submitted that court has ample powers under writ jurisdiction to enforce fundamental rights and therefore, it could direct the prison authorities to allow conjugal visits for the sole purpose of procreation in the instant case.

After giving cautious hearing to the parties and the *amicus curae* appointed in the matter, the court answered the questions as follows. The Court answered the first question in affirmative and held that the right to procreation survives incarceration. And such a right is traceable and squarely falls within the ambit of Article 21 of our Constitution read with the Universal Declaration of Human Rights.

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<sup>22</sup> Section 27(2) of the *Prisons Act*, 1894 states 'separation of prisoners': The requisitions of this Act with respect to the separation of prisoners are as follow:

(1) XXX XXX XXX

(2) in a prison where male prisoners under the age of twenty-one are confined, means shall be provided for separating them altogether from the other prisoners and for separating those of them who have arrived at the age of puberty from those who have not;

(3) un-convicted criminal prisoners shall be kept apart from convicted criminal prisoners.

As regard to second question the court held that the penological interest of the State ought to permit the creation of facilities for the exercise of right to procreation during incarceration as there is no inherent conflict between the right to procreate and incarceration. However, the same is subject to reasonable restrictions, social order and security concerns. The court held that the facilities may be made available in a phased manner.

Answering the third question, the court held that '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). However, the court was conscious of the intricacies involved and held that exercise of such rights are to be regulated by procedure established by law and is the sole prerogative of the State.

As regards, availability of right to all prisoners the court held that ordinarily all convicts are entitled to the right to procreation while incarcerated, unless reasonably classified. The Court left it to the state to frame policy for reasonable classification as the right is not an absolute right and is subject to the penological interests of the State.

The Court in this case issued directions to the State of Punjab to constitute a Jail Reforms Committee to formulate a scheme for creation of an environment for conjugal visits in jail. The court also ordered that until the issue is addressed effectively by the state, the provisions relating to parole or furlough should be used and shall treat the conjugal visits of a married and eligible convict as one of the valid and sufficient ground for the purpose of his/her temporary release on parole or furlough though subject to all those conditions as are prescribed under the Statute.

However, in this case, the claim of the petitioners was denied mainly on the ground that the offence committed by them was grave in nature. Moreover, both were convicted and the justification of 'innocent spouse' does not hold any ground in this case. Along with this, the Court held that the existing infrastructure and overall environment do not support emergent measures.

## Law in other jurisdictions

- **United States of America**

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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> Similarly, conjugal visitation programs are also available in New York,<sup>27</sup>

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<sup>23</sup> 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.

<sup>24</sup> Christopher Hensley et al, *Conjugal Visitation Programs: The Logical Conclusion: From Prison Sex: Practice and Policy*, 2002, pp. 143- 156, at p.144.

<sup>25</sup> Carolyn Simpson, “Conjugal Visiting in United States Prisons”, *Columbia Human Rights Law Review*, Vol. 10, 978-79, pp. 643-671, at p. 662.

<sup>26</sup> 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.

<sup>27</sup> 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.

New Mexico, Washington and Connecticut. However, the programs in New Mexico<sup>28</sup> and Mississippi have been closed.

On artificial insemination: The United States Court of Appeal, Ninth Circuit, in the case of *William Gerber v. Rodney Hickmen*<sup>29</sup> 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.<sup>30</sup> 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.

- **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.

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<sup>28</sup> New Mexico to eliminate conjugal visits for prisoners, 16 April 2014 available at <http://www.reuters.com/article/us-usa-prisons-newmexico-idUSBREA3F21220140416>.

<sup>29</sup> 291 F. 3d 617 (2002).

<sup>30</sup> 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.

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.<sup>31</sup> 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.<sup>32</sup> Swedish prisons allow inmates to have visits with family members that can last for up to nine hours.<sup>33</sup>

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.<sup>34</sup> 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.

On artificial insemination: The European Court of Human Rights in the case of *Dickson v. the United Kingdom*<sup>35</sup> has denied permission of 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*<sup>36</sup> also denied the claim of a prisoner for artificial insemination. The Court held that the refusal to permit the appellant the facilities

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<sup>31</sup> 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.

<sup>32</sup> 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.

<sup>33</sup> Ibid, at p. 635.

<sup>34</sup> *Jasvir Singh vs. State of Punjab* 2015 Cri LJ 2282 (2293).

<sup>35</sup> Application No. 44362/04 decided on 4<sup>th</sup> December, 2007 by European Court of Human Rights.

<sup>36</sup> [2001] EWCA Civ 472.

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.

### **Conclusion**

In India, the jurisprudence on the concept of conjugal rights is still in its infancy. The right to conjugal visits and procreation is a component of the right to live with dignity and is thus ingrained in the right to life and liberty guaranteed under Article 21 of our Constitution. The conjugal rights of prisoners are crucial and time has come when all the stakeholders should sit and deliberate on the issue. Some of the suggestions are:

- The 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 concept of allowing conjugal visits in jails requires a detailed, careful and systematic study. The High Court of Punjab and Haryana also recognized that issues like allowing conjugal visits in jails essentially fall within the realm of policy makers and it is for them to evolve an effective mechanism for implementing it. The Court in this case issued directions to the state government to constitute a Jails Reforms Committee to formulate a scheme for allowing conjugal and family visits for jails. Such a Jail Reforms Committee should be formulated at the earliest.
- The Committee should identify the categories of inmates entitled to such visits, facilities required for facilitating such visits and process of visitation.
- The scheme should be adopted in a phased manner starting from the Model Jails.
- The state should allocate resources for construction of facilities for conjugal visitations.



- Research should be conducted in the area to see the effectiveness of conjugal visitations as well as parole or furlough on the behavior of the prisoners.
- 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.

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