

ANALYSIS ON THE SOCIO-LEGAL ASPECT OF RIGHT TO CONJUGAL VISITATION OF PRISONERS¹

INTRODUCTION

“Man is by nature a social animal needed the society as well as family to live in”

- Aristotle

A conjugal visit is a scheduled period in which an inmate in prison is allowed to spend several hours or days in private with a visitor. The visitor usually includes the spouse, children, other members of the families and friends. The psychologist believes that conjugal visits will reduce the frustration of the prison inmates, builds the family bonding and also motivate them towards good behaviour.² However, the current system hardly offers any prolonged contact between the convict and his family.

India follows a reformatory system of punishment which aims at reforming a criminal with the concept of individualization. It is based on the humanistic principle that even an offender commits a crime; he doesn't cease to be a human being.³ Justice Chandrachud, in 1974 quoted in judgment⁴ and it was again quoted by Justice V.R Krishnaiyer in Sunil Batra Vs Delhi Administration in 1979 that “convicts are not by mere reason of the conviction denuded of all the fundamental rights which they otherwise possess”.⁵ The significant object of incarceration is to curtail the freedom of movement and freedom of initiative as a consequence of the violation of established law of the land but it doesn't mean farewell to the fundamental rights established in part three of the constitution.

¹ S. Soundharya, SASTRA Deemed To Be University.

² Editorial, “Court Moot Panel to Consider Conjugal Visits for prisoners”, <https://www.thehindu.com/news/national/tamil-nadu/court-moots-panel-to-consider-conjugal-visits-for-prisoners-madurai-hc/article22522011.ece>, January 25, 2018.

³ Tanu Priya ,Reformatory Theory Of Punishment, <https://www.lawctopus.com/academike/reformatory-theory-of-punishment/>, Last Visited On 26.07.2019.

⁴ D.Bhuvan Mohan Patnaik and Others Vs State Of Andhra Pradesh and Others, 1974 AIR SC 2092.

⁵ Sunil Batra Vs Delhi Administration, 1980 AIR SC 1579.

COMMITTEES FORMED FOR PRISON REFORMS

Several committees have been established over decades on prison reforms. They are Justice Mulla Committee (1983), Justice V.R Krishnaiyer Committee on Women Prisoners (1987), Committee Under BPR&D (2005) and Draft National Policy on Prison Reforms and Correctional Administration.

The Justice Mulla Committee has given nearly 658 recommendations which are considered to be the comprehensive report till date on prison reforms. The basic recommendations of this report are changing the subject “prison” from the state list to the concurrent list and also it recommended the government to come up with the National Policy on Prisons. Justice Krishna Iyer committee on Women Prisoner stated that the women offenders should be allowed to meet their loved ones even during the trial. These committees have given several recommendations but the government is yet to enforce the structural and policy changes in India. Recently the apex court in 2018 constituted a committee under Justice Amitava Roy to present a comprehensive report on prison reforms.

MULAQAT SYSTEM

Present Mulaqat System:

The Mulaqat System is a significant aspect of prison reform system it helps the convicts to lead a civilized life once he is released from the prison. This Mulaqat system plays a vital role in keeping the personal bond intact between the inmates and their relatives. The prisoners are allowed to meet their family by Mulaqat System. The present Mulaqat is for a short period of time like twenty minutes and it is conducted in an uncomfortable place with no right to privacy. Previously in Tihar jail, the prisoner would stand in front of the visitor, the two being separated by a double-walled with grill windows, so they could see and talk to each other but could not touch each other so that there is not any transfer of objectionable material. Tihar jail improvised the Mulaqat Section by converting the grilled windows into thick toughened glass windows in the double-wall that separates the prisoners from the visitors.⁶ The Present Mulaqat system takes place in a crowded noisy place for a short period of time. The visitor and the inmate cannot able to talk about anything personal and express their feelings because they will be accompanied by the jail officials. This will

⁶ Priyadarshi Nagda, A Socio-legal Study of Prison System And Its Reforms In India, Available at <https://shodhganga.inflibnet.ac.in/bitstream/10603/147761/1/priyadarshi%20nagda.pdf>, Last Visited on 26.07.2019.

entirely collapse the bond between the family and the inmates. It is necessary to have some private time with family and friends because that will ensure the personal bonding between them. It is essential that the inmates feel these personal bonding and emotional bonding because this way the inmates will understand the mistake that he has committed and this will eventually help them to reform and also this will drastically decrease the prison crimes.

British Period Mulaqat System:

During the British colonialism, there are 2 types of Mulaqat that are Kacchi Mulaqat and Pakki Mulaqat. The Britishers were aware that regulating the sexual urge of convicts was important for smooth administration in jails hence they allowed conjugal visits. In the Pakki Mulaqat, the Inmates are allowed to spend their time with his wife in private. This practise has been done away now which has given rise to homosexuality and Physical Harassment inside the prisons. This Pakki Mulaqat enhances the integration of the inmate with his family and instils self-discipline and family responsibility. The Criminology and Criminal Justice Administration Unit of the Social Work Department of Lucknow University conducted a research and it points out that in several cases, Convicts often discover that their wives have either left them or developed a post-marital relationship which affects criminals and emotionally shatters them. Also at the time of research, there were about 78.5% married convicts in Model jail in Lucknow as well as in Tihar.⁷ This emotional trauma will only push them on the wrong side of the law that affects the very purpose of their jail imprisonment.

FUNDAMENTAL RIGHTS OF THE PRISONERS AND THEIR SPOUSE

“Innocence be protected than the guilt being punished”

- John Adams.

The denial of a conjugal visit to the inmates is not only punishment to them, but it is also a punishment to their spouses and family members. The present Mulaqat system doesn't serve the purpose of a conjugal visit. Imprisonment of a person not only affects him but also affects the Family emotionally and financially. As a consequence of incarceration, the inmate, the spouse of

⁷ Mridul Srivastava, Convicts need, Pukki Mulaqat, Available at <https://www.hindustantimes.com/india/convicts-need-pukki-mulaqat/story-wnbP3GfDTsIyWlezAlwDO.html> Last Visited on: July 21, 2019.

an inmate both are forced to undergo sexual frustration, which is a violation of civil and human rights. The imprisonment of the inmate also violates the fundamental rights of his spouse, which is nothing but can be seen only as collateral damage. This practice clearly violates Article 21 of the Constitution of India (i.e.) Right to life and personal liberty, which extends to our right to procreation and sexual satisfaction.

Marriage is an institution that can only be fulfilled when certain elements are there. One such significant element is sexual satisfaction. The concept of Sexual satisfaction holds paramount importance in holding the marriage institution, because “impotency” is a ground for divorce in India. Without any due process guaranteed in the constitution, these rights were denied to the spouse of the offender. The spouse of the inmate should be treated with due process of law. The inmates are not only the victims of this but also the innocents.⁸

As mentioned in *Sunil Batra v. Delhi Administration*, “Imprisonment doesn't mean farewell to the fundamental rights as laid down under part 3 of the constitution”. The desire for sexual intimacy and sexual expression is powerful that survives imprisonment. In *D.Bhuvan Mohan Patnaik and Ors Vs State Of Andra Pradesh and Ors*, it was held that convicts are not to be completely stripped of their fundamental rights that they possess otherwise, though incarceration denudes certain fundamental the right to move freely, engage in the profession of their choice etc. nonetheless, the convicts are entitled to the other constitutional guarantees which are not affected by incarceration, including those under article 21.⁹ From this case, it is clear that the inmates of the prison possess the conjugal rights to visit their family under Article 21 of the Constitution. The institution of family was made to suffer due to the denial of the right of the conjugal visit.

INDIAN CASES

JASVIR SINGH AND ORS v. STATE OF PUNJAB AND ORS:

Case Facts:

The petitioners were Husband and wife convicted for the offence of kidnapping, and brutally murdering a 16-year-old boy for ransom, charged under section 302, 364A, 201 and 120B under the Indian Penal Code. The trial court awarded the death sentence and the Supreme Court

⁸ Anamica Singh and Anupal Dasgupta, “Prisoner’s Conjugal Visitation Rights In India”, 4 CULJ 78 (2015).

⁹ D. Bhuvan Mohan Patnaik and Ors Vs State Of Andra Pradesh and Ors, (1975) 3 S.C.C. 488.

dismissed their criminal appeal and commuted the death sentence of the wife to life imprisonment. The petitioners sought enforcement of their perceived right to have conjugal life within the jail premises. They sought for the directions to be given to the jail authorities for the sake of progeny and asked to make all arrangements in this regard. They were also open to “Artificial Insemination”.¹⁰

Issues Involved:

1. Whether the procreation survives the concept of incarceration? And if so, whether such a right is traceable within our constitutional framework?
2. Whether the penological interest of the state permits or ought to permit the creation of facilities for the exercise of the right to procreation during incarceration?
3. Whether “Right to Life” and “Personal Liberty” constituted under Article 21 of the constitution includes the rights of convicts or jail inmates to have conjugal visits or artificial insemination?
4. If question no. (3) is answered in the affirmative, whether all categories of convicts are entitled to such rights?

Ratio Decidendi:

Justice J Surya Kant observed that,

1. Right to procreation survives incarceration. Such a right is traceable and squarely falls within the ambit of Article 21 of the Constitution read with Universal Declaration of Human Rights, 1948.
2. The penological interest of the state ought to permit the creation of facilities for the exercise of the right to procreation during incarceration, maybe in a phased manner, 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.
3. The “Right to Life” and “Personal Liberty” guaranteed under article 21 of the constitution, including the right of convicts are jail inmates to have conjugal visits or artificial insemination as an alteration. However, the exercise of these rights has to be regulated by the procedure established by the law and it is the sole prerogative of the state.

¹⁰ Jasvir Singh and Ors Vs State of Punjab and Ors, 2015 (1) R.C.R (Criminal) 509.

4. Ordinarily, all Convicts, unless reasonably classified, are entitled to the right to procreation while incarceration. Such a right, however, is to be regulated as per the policy established by the state. Which may deny the same to the class or category of convicts, as the aforesaid right is not an absolute right and it is subject to the penological interest of the state.
5. Finally, the establishment of the jail reforms committee was ordered which will suggest methods to implement 'conjugal visitation' in prisons and also suggest any reasonable classification that needs to be considered while granting such rights to the prisoners.

P. MUTHUMARI v. THE HOME SECRETARY (PRISON)

Case Fact:

Perumal was arrested in 2008 by Manoor police, Tirunelveli. In 2010, An Additional Court convicted him and sentenced him to life imprisonment. Initially, he was lodged in palayamkottai prison then transferred to Vellore Central Prison and then to Cuddalore Central Prison. Perumal Married Muthumari on May 2, 2018, when he was on parole.

Ratio Decidendi:

1. The Madras High court stated that The Madurai Bench of this court in Mehraj Vs The State and others observed that,¹¹ Man is a social animal. He needs a family as well as a society to live in. The man needs both to share his emotions and feelings. Being Human Beings, the prisoners also would like to share their problems with their life partner as well as with society. Just because they are termed as prisoners, their right to dignity cannot be deprived.
2. Conjugal visits lead to strong family bonds and keep the family functional rather than the family becoming dysfunctional.
3. India has observed the reformatory theory, as it says that human beings to be reformed would become a productive member of society. If that is to be done prisons have to be transformed as homes for the purpose of giving training morally as well as intellectually so that the prisoners are denuded of the qualities of the criminal.

¹¹ Mehraj v. The State and Ors, MANU/TN/0226/2018.

4. The psychologist and psychiatrist believe that the frustration, tension, the ill feelings, and the heart-burnings can be reduced and human beings can be better construed if they are allowed conjugal relationship even rarely.
5. Being in agreement with the observations herein, they considered it as appropriate to grant leave for 2 weeks to petitioner's husband for conjugal visitation to his home. The Petitioner's husband has to be escorted by the jail authorities and he is bound to follow the conditions imposed by the jail authorities.

PUBLIC INTEREST LITIGATION SEEKING CONJUGAL VISIT FOR PRISONER

The petition claims that the conjugal visit rights are not provided by Tihar Jail Authorities, Delhi citing the most of the prisoners fall under the sexually active age group between 21 to 50 years. On February 28, 2019, the 16 jails in Delhi prisons had 15,733 inmates. This includes 3105 convicts, 12,136 undertrials, 13 detenues besides others. out of the entire population, 7,921 are in the age group of 21 to 30 years, 5809 in the age group of 30 to 50 years and 101 falls under the age group of 50 to 65 years.¹²

1. The Public Interest Litigation has been filed in Delhi High Court seeking conjugal visit in Tihar Jail. On May 2019, the Delhi High Court issued a notice to the Director-General (Prison) over a PIL seeking conjugal rights for prisoners.
2. The petition gave notice to Tihar Jail authorities to make arrangements to provide conjugal visits to the prisoners lodged there.
3. The Chief Justice observed that it involves very sensitive and interesting issue, so, therefore, issued a notice to Delhi Government to file their response within 4 weeks and slated the matter for August 2, 2019.
4. The PIL also sought to scrap, section 608 of Delhi Prison Rule, 2018 which states that "meeting to take place in the presence of prison officer" particularly in a situation when the prisoner is meeting their spouse.

¹² Anonyms, Notice to Delhi Govt, DG prison over plea seeking conjugal rights of prisoners, https://www.business-standard.com/article/news-ani/notice-to-delhi-govt-dg-prison-over-plea-seeking-conjugal-rights-of-prisoners-119053100459_1.html, Last Visited on 26.07.2019.

COUNTRIES FOLLOWING CONJUGAL VISITS

Most of the countries started accepting Conjugal visit gradually as the right of prisoners. Conjugal visit as a modern-day concept was adopted by countries like Canada, Germany, Russia, Spain, Belgium, Pakistan, Saudi Arabia, Denmark etc and to some extent US, Brazil and Israel even allow same-sex conjugal visits.

Conjugal Visit in U.S.A:

Conjugal visits are allowed in the USA in the name of Extended Family Visits. Four states currently allowing Conjugal visits they are California, Connecticut, Newyork and Washington. Conjugal Visit happens only in states and not in Federal prison. The rules for the conjugal visits vary from state to state but their conjugal visits will be allowed based on their past 6 month's behaviour in the prison. Conjugal visits are allowed in 3 types of schedule, 6 hours, 12 hours and 24 hours, the inmates have to apply for the conjugal visit and they will be granted one or two conjugal visits in a year. The conjugal visits happen inside the prison in an apartment-style setting where some states charge for that visit and some states do not. In 2007 California allowed same-sex couples to have conjugal visits with the inmates. Before conjugal visit system started the prostitutes were brought inside the prisons Sunday evening for their service. This system forces the inmates in the prison to maintain good behaviour inside the prison, this also allows other family members along with children for a conjugal visit. This also helps the children to create a personal connection with the inmate.¹³

Conjugal Visit in Saudi Arabia:

In a Kingdom where the punishments are deterrent conjugal visits with the family are allowed every month. If an inmate has a single-family he is allowed to visit his family every month. In case if he has two marriages then is allowed to have two separate conjugal meetings with each family every month. Even the Jihadis were allowed to have conjugal visits during their rehabilitation program.

¹³ Victoria Cavaliere, How Conjugal Visits Work, <https://www.vocativ.com/underworld/sex/conjugal-visits-work/index.html> , Last Visited on 26.07.2019.

Conjugal Visit in Canada:

Canada allows the conjugal visit of 72 hours-3days in maximum. The Conjugal visit may be granted for every 2 months. Conjugal visits are called Private Family Visits. Not only family members but also friends, children's everyone is allowed for conjugal visits. It takes place inside the isolated apartment in the prison. The family members are allowed inside the prison after tight security check and also prison department takes a statement from inmate regarding "statement of voluntary participation and consent".¹⁴

Conjugal Visit in Pakistan:

Pakistan also granted Conjugal rights to prison inmates, Since Pakistan doesn't recognise same-sex marriage, and this provision is allowed only to straight couples. The spouse of the convict can stay any 1 night in the three months in jail. For this purpose, separate rooms were constructed inside the jail premises. This right is not available to criminals who are convicted of plotting against the government or for terrorism.¹⁵

Conjugal Visit in Spain:

Prisoners are allowed visits every four to eight weeks. They are held in private rooms and they can last up to three hours. They are provided with condoms, shower facilities and clean tower, conjugal visits are allowed for spouses if both are held in the same institution, but these last for only 20 minutes.¹⁶

ADVANTAGES AND DISADVANTAGES OF CONJUGAL VISIT

Conjugal Visit has many benefits which involve physical health, mental health and also it helps in the proper functioning of the prisons. As stated above in *Mehraj v. State & Ors.*, while considering the merits and demerits of allowing conjugal visits or allowing leave for the purpose of artificial insemination, the advantages are more than the disadvantages.

¹⁴ Marion Vacheret, Private Family Visits In Canada, Rehabilitation and Stricter Control: Portrait of a System,<https://journals.openedition.org/champpenal/2322>, Last Visited On 26.07.2019.

¹⁵ Aroosa Masroor, Prisoners Granted Conjugal Rights,<https://tribune.com.pk/story/11618/prisoners-granted-conjugal-rights/>, Last visited on 26.07.2019.

¹⁶Homepage, "Sex On Sentence", BBC NEWS, June 29, 2000.

Advantages:

1. Making Love through physical activity is considered as a great form of physical exercise. The testosterone produced during sexual activity makes bones and muscles strong. It also burns calories.
2. As mentioned above in a study conducted by a lecturer in Criminology and Criminal Justice Administration Unit of Social Work Department of Lucknow University, Homosexuality is on the rise in UP jails. This case is prevalent all over India in every jail, Only conjugal visits can end this culture in prisons.
3. There is an innumerable number of sexually transmitted diseases are highly reported among the members of the prisoners, because of the number of homosexual activity. The conjugal visit will drastically decrease that number.
4. During the continuation of the sexual activity, both the parties involved in the act produce endorphins, which acts as a painkiller. Sexual activity helps women to increase fertility, postpone the menopause and relieve PMS system.¹⁷
5. In India, more than 50% of men above the age of 40 years suffer from erectile dysfunction. Doctors believe that regular sexual activity is very important as to become more capable to perform considering that the best medicine against impotence in sex.
6. Conjugal Visits relieves the stress of the inmates. The conjugal visit provides some privacy to the family member and the inmates which greatly reduce the stress to both parties, as well as this, helps in mental well being of the inmate.
7. The number of sexual Harassment cases inside the prison will be decreased. The bond between the family and the inmate will become strong. This helps the inmate to reform very easily. The inmates try to behave in a good manner, in order to be allowed for a conjugal visit by the prison officer.
8. This conjugal visit acts as a lifesaver from the violation of the Fundamental Right of the spouse as a consequence of the imprisonment of the inmate.

¹⁷ Bhupal Battacharya and Nidhi Arora, "Prisoners Conjugal Rights: A Critical Analysis through Humanitarian Approach in Indian Perspectives", 119 IJPAM 3026 (2018).

Disadvantages:

1. The Number of Convicts and undertrial prisoners is high in prisons. When inmates are allowed to apply for conjugal visits, there will be a huge number of applications in queue for their turn.
2. In countries like the USA, there is a number of reported cases of usage of drugs and alcohol in this conjugal visit. There is a high assumption that family members or friends during a conjugal visit may bring such things.
3. There is a reported case in Germany where a man murdered his girlfriend during the conjugal visit. There are such risks of murder, assault and others involved in it.¹⁸
4. The state has to incur expenses for maintaining the conjugal visit if the institution is maintained by the state. Even though the state can collect some nominal fee, still there will be some expenses that have to be incurred by the state, if it plans to maintain the conjugal visit centre. If the prisoners are allowed to go home for a conjugal visit than that expense may not be there but the risk of absconding by the inmate is high.

CONCLUSION

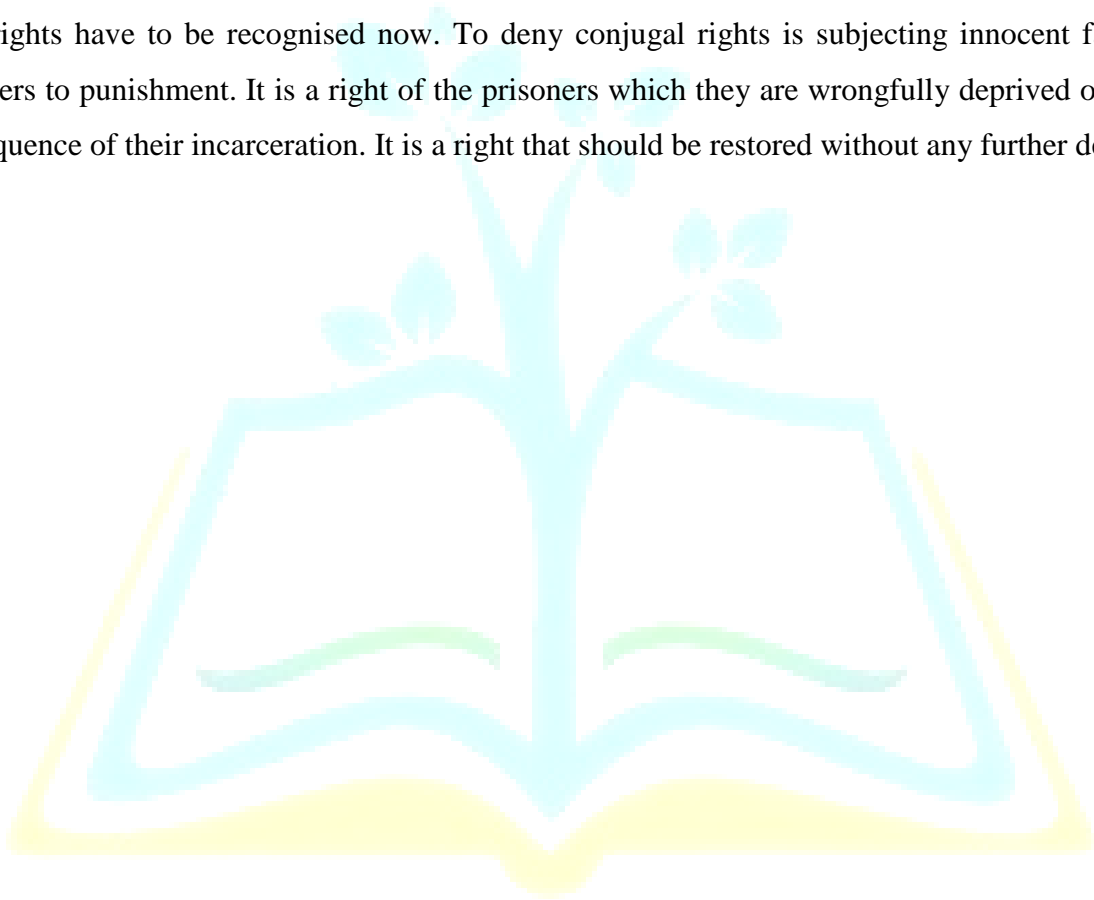
This Conjugal Visit system has been slowly but progressively adopted by countries all around the world because this system is one of the best ways of preserving social, family and conjugal ties between incarcerated individuals and their intimates. It has decreased the rate of the offence committed inside the prison. This system gives a better chance for reformation to the inmates. Not only Nations started to accept this concept gradually but Indian Judiciary started to accept this concept, but there is no express law to govern this conjugal visit in India.

It is High time for the enforcement of the conjugal visit system, judiciary started to recognise the need for the conjugal visit and its benefits. However, the term “Prison” is in the state list of schedule 7, which requires every state to bring separate legislation in this regard. As per Justice Mulla Committee recommendation, this term “prison” has to be moved to the concurrent list. For the effective implementation of the conjugal visit system. There should be a National institution to govern this system, so it is necessary to give the power centre some power through the

¹⁸ Anonyms, Prisoner murders girlfriend during conjugal visit, <https://www.lipstickalley.com/threads/prisoner-murders-girlfriend-during-conjugal-visit.231192/>, Last visited on 26.07.2019.

concurrent list. The state should categorize the prisoners and should specifically state, who are all entitled to Conjugal visit and who doesn't. It is necessary to have reasonable restriction in this subject matter since all the convicts don't stand in the same measure.

As stated by Justice Surya Kant, in *Jasvir Singh and Ors v. State of Punjab and Ors*, it is the sole prerogative of the state to regulate the Conjugal Rights of Prisoners. The legislation has to keep all the disadvantages in this system and should enact legislation with due diligence. Even without any rule of law, the spouse of the inmates also became prey to the imprisonment of the inmate, their rights have to be recognised now. To deny conjugal rights is subjecting innocent family members to punishment. It is a right of the prisoners which they are wrongfully deprived of as a consequence of their incarceration. It is a right that should be restored without any further delay.



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