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Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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CONJUGAL VISIT OF PRISONERS IN BANGLADESH: AN EMERGING SEMBLANCE OF HUMAN RIGHTS; SPECIAL REFERENCE TO INDIAN JUDICIAL DEVELOPMENTS

AUTHORED BY - NAEEM AHSAN TALHA

Research Intern of Bangladesh Institute of Labour Studies

South Asian University, New Delhi

Abstract

The conjugal rights of the prisoners refer to their marital rights. Conjugal right is a recognised inherent right of a married couple in society and includes the right of a couple to associate together, construct a house together, and enjoy all the pleasures of an interpersonal relationship, including the right to have 'sex' and 'procreation' Regarding the utility and desirability of granting conjugal rights to prisoners, opinions vary. The society is torn between the benefits and drawbacks of granting inmates such privileges. Some explain it as a supplement to the right to life, while others emphasise the difficulty of granting such a benefit. Regarding conjugal rights for inmates, many international regimes have their own justifications. The European Convention on Human Rights identifies marital rights as a fundamental human right. Sweden and France are two of the most liberal countries that have guaranteed these rights in their full, whereas in the United States, state rules on punishment are regarded as more holy than the institution of marriage. There is no statute that discusses or grants convicts conjugal rights. Article 21 of the Constitution mandates that, in the absence of such, inmates knock on the doors of courts. In this paper, the author examines the court decisions in these cases as well as the prevalent law in other jurisdictions regarding conjugal rights.

Keywords: Prisoners, Conjugal Rights, Homosexuality, Conjugal Visitations, Artificial Insemination, Judicial evolvement, Human Rights, Right to life, Imprisonment and *etc.*

Introduction

Human rights are the basic protections and liberties that every person on Earth is entitled to just for being human. Articles 27 to 44 of the Bangladeshi Constitution provide all citizens with an extension of these human rights in the form of Fundamental Rights. All citizens, including inmates (and even some non-citizens), are guaranteed these fundamental rights. In *Charles Sobraj v. The Superintendent, Central Jail, Tihar*¹, Justice Krishna Aiyer remarked, "*Imprisonment does not proclaim farewell to basic rights albeit, by a realistic re-appraisal, Courts will refuse to recognise the entire panoply of Part III possessed by a free citizen.*" Therefore, inmates will only be deprived of rights incidental to their punishment, such as the right to freedom of movement, while they retain all other fundamental rights. The 'Right to Life and Personal Liberty' occupies a preeminent position in the discussion of prisoner rights.

Every one of us is relieved at the notion of going home and spending the remainder of the day comfortably with our family, or when we are away from them for a long period, we excitedly anticipate the holidays so we can see them. However, inmates are not permitted to do or possess such things. Frequently, their family gatherings are improper, and they lack a conducive setting in which to discuss their difficulties. Prison sentences are not only a penalty for the incarcerated, but also for their family members, especially their spouses and dependents². In particular, the spouses of inmates are victims of their existing marital situation³. Absence of private rights to meet one's spouse frequently results in the dissolution of their marriage and the emergence of homosexuality, sexual offence, and violence.⁴

Although conjugal visits are permitted in many parts of the United States, Europe, Asia, and Africa as a form of rehabilitation⁵ and adherence to a positive lifestyle⁶, it is unimaginable in Bangladesh due to the shortcomings of the legal system and the social stigma associated with the practice. As a result of a legal provision in Bangladesh that permits the dissolution of a marriage if the husband is incarcerated, it is logical to offer conjugal visits as an incentive for well-behaved inmates to

¹ Air 1978 Sc 1514

² Anna Kotova, 'Time ... Lost Time: Exploring How Partners Of Long-Term Prisoners Experience The Temporal Pains Of Imprisonment' (2019) 28 (2) Time & Society.

³ Meera Emmanuel, 'Right Time For Government To Explore Possibility Of Conjugal Visits For Prisoners: Madras Hc' (2018) Bar & Bench.

<<https://www.barandbench.com/news/government>> Accessed 15 November 2022

⁴ Samson C R Kajawo, 'Conjugal Visits In Prisons Discourse: Is It Even An Offender Rehabilitation Option In Africa?' (2021) 8(1) Advanced Journal Of Social Science, 67,76

⁵ Gordon, Jill, And Elizabeth H Mcconnell, 'Are Conjugal Visits And Familial Visitations Effective Rehabilitative Concepts?' (1999) 79 (1) The Prison Journal, Philadelphia, Pa.

⁶ Cf Kajawo (N 23)

save their marriage⁷. In contrast, prisoners should have been provided with the humane living conditions, health checkups, nutritious food, leisure activities, vocational training, and conjugal visits that they are entitled to as human beings.

Legal Framework relating to rights of Prisoners

In Bangladesh, prisoners' rights, facilities, and overall jail existence are governed by three distinct Acts -

1. the Prisons Act of 1894,
2. the Prisoners Act of 1900, and
3. the Identification of Prisoners Act of 1920.

The Prisons Act of 1894 stipulates that the provisions of the Civil Procedure Code of 1908, the Code of Criminal Procedure of 1898, and the Penal Code of 1860 pertaining to the confinement of prisoners, the execution of sentences, prisoners' appeals, lunatics, and similar matters must also be observed.

A jail that simultaneously serves as a prison. Though this distinction isn't often properly observed in everyday speech, prison and jail have different definitions. A state or federal government is in charge of running a prison or penitentiary, which houses individuals for longer periods of time, such as many years. Inmates are typically housed in jails, which are typically run by local governments, for shorter lengths of time (such as for lesser sentences or pre-trial detention). The terms "prison" and "jail" frequently mean the same thing⁸. According to Section 3(1) of The Prisons Act of 1984, the term "prison" encompasses any jail or facility used continuously or temporarily under the general or specific orders of the government for the custody of prisoners, as well as all lands and buildings appurtenant to such facilities. Section 1 of the Prison Security Act of 1992 defines "prisoner" as any individual who is currently incarcerated due to a court order or other legal requirement that he be held in legal custody. Consequently, a prisoner is a person confined in jail or prison pursuant to a legal order from a court or tribunal for the violation of any law on the territory.

There is no specific provision for conjugal visit. Section 40 of the Prisons Act of 1894 allows

⁷ The Dissolution Of Muslim Marriage Act 1939, Sec 2 (iii) Provides, A Woman Married Under Muslim Law Shall Be Entitled To Obtain A Decree For The Dissolution Of Her Marriage On The Ground That Husband Has Been Sentenced To Imprisonment For A Period Of Seven Years Or Upwards.

⁸ Larson, Aaron (5 June 2017). "What Is The Difference Between Jail And Prison". Expertlaw.

prisoners to meet with anyone of their choosing. Essentially, there is a facility within the prison that allows families to see the inmate by obtaining a ticket from the prison administration. However, the room is frequently so congested that visitors and convicts cannot see one another. In this context, a conjugal visit is the means by which inmates can spend private time with their family, typically their legal spouse, in a jail chamber where they may engage in sexual behaviour.

When seen from a punitive perspective, this disadvantage is viewed as part of the offender's punishment or the pain they must endure for committing the offence. New conceptions of punishment, such as the reformation of the individual and their reintegration into society as a new person, abandoning and mending their old habits, have recently challenged and altered this approach. Therefore, there are divergent opinions on whether or not convicts must be permitted conjugal and family visits, and the purpose of this research is to comprehend and assess the need for a legislation addressing this contentious issue. What conjugal rights does it also discuss, as well as whether incarcerated individuals are entitled to conjugal rights?

Conjugal Visit of Prisoners: Global Perspective

Marriage gives each partner the legal right to enjoy the company of their spouse, a concept known as "conjugal rights." These protections are enshrined in law, both in the civil law that governs marriage and divorce and the criminal law that mandates spousal alimony payments. During a conjugal visit, an incarcerated person is permitted to spend time with their spouse. The length of the visit, during which sexual activity may take place, can range from a few hours to several days. Since many conjugal visits in the United States also include children and other loved ones, the government has given them the name Extended Family Visits or, in New York, the Family Reunion Program to reflect the fact that they are not just based on sexual relationships. Private Family Visits (PFVs) programme permits offenders to spend up to 72 hours every two months with their families. The objective of this approach is to go beyond sanctions and assist them in recognising that they have a family and a promising future. Canada, Germany, Russia, Spain, Belgium, Spain, Saudi Arabia, and Denmark have all adopted the practice of conjugal visits to inmates. The United States, Brazil, and Israel also permit some same-sex conjugal visits⁹. Saudi Arabia permits a once-per-month visit; however, if a man has many wives, he receives once per month per wife, and the state covers the travel fees. In Pakistan, convicted detainees may petition the Sindh home department for conjugal rights, which would allow them to see their spouses for

⁹ Ruth Shonle Cavan And Eugene S. Zemans, Marital Relationships Of Prisoners In Twenty-Eight Countries, 49 J. Crim. L. & Criminology 133 (1958)

one day or night every three months. As part of the government's jail reforms, a notification was issued on April 6, 2010 in response to a Supreme Court order to implement the same in all provinces. In Canada, inmates are permitted 72-hour conjugal visits once every two months. Only four states in America permit such visits. There are numerous reasons for such trips, but rehabilitation is typically the focus. The visits help the inmates to maintain close relationships with their families, to whom they will return upon their release. Additionally, convicts are permitted family visits a few months prior to their release in the United Kingdom to assist them in re-establishing community ties¹⁰. California, Connecticut, New York, and Washington are the only states in the United States that allow conjugal rights for prisoners. The rights are not legally recognised by law, but all prisons have adopted the practise. The inmates are permitted to see their spouses twice per week. The majority of the time, a large number of inmates is housed in the same room, and visiting occurs under overcrowded conditions. In New York, extended family visits are only permitted for prisoners with a one-year sentence who have been in the best of behaviour. For conjugal visits, a furnished apartment is provided for the couple's stay and leisure. The justification for granting conjugal rights to inmates is that it aids in their rehabilitation and reduces their stress and frustration. Here, punishing rules are regarded as more important than marriage¹¹.

The European Convention on Human Rights, which protects the right to marriage and the right to privacy, is the foundation upon which conjugal rights are based in Europe. The majority of European nations consider the right to marry and procreate a sacred obligation. These countries have more liberal and promising conjugal rights. For instance, France permits conjugal visitation twice a week while New Zealand permits an hour of conjugal visitation per week. Sweden is regarded as the most liberal nation, granting unsupervised visiting privileges to spouses on the first Sunday of the month. Additionally, it permits home departures and private visits¹². Unlike the countries listed above. According to a 1982 survey of the New York prison population, convicts who received extensive family visits were about 70 percent less likely to return to jail within three years than other offenders. Thus, preventing recidivism is one of the primary motivations for campaigning for this privilege.

In an effort to harmonise laws with its sister tribunal in ex-Yugoslavia (*ICTY*) and expand the

¹⁰ Gordon, Jill, And Elizabeth H McConnell, 'Are Conjugal Visits And Familial Visitations Effective Rehabilitative Concepts?' (1999) 79 (1) The Prison Journal, Philadelphia, Pa.

¹¹ Eugene S. Zemans And Ruth Snonle Cavan, Marital Relationships Of Prisoners In The United States, Jour. Or Cnr. Law, Crimol. And Pol. Scr. 49, 1, 50-57. (May-June, 1958.)

¹² Hardy Granson, Some Aspects of The Swedish Prison System (Pamphlet Of 7 Pages), Stockholm: Regent Boktryckeri, 1955; Torsten Erskssonq, Postwar Prison Reform In Sweden, Axanas 293 (1954), 152-162.

scope of basic human rights, the *International Criminal Tribunal for Rwanda (ICTR)* has revised its policy and now allows conjugal rights for detained and convicted persons. Since its establishment in 1993 to try those accused for grave violations of international humanitarian law on the territory of the former Yugoslavia, ICTY inmates have enjoyed the facilities. In May 2008, the Registry announced a new policy permitting conjugal visits as part of the harmonization of policy matters between the ICTR and the ICTY¹³.

Judicial Developments in India

The judiciary is gradually entering the debate and contributing to the improvement of prisoner conditions. It adheres to the values of Article 21 in all aspects of its work. It is maintained that, although granting conjugal rights preserves prisoners' right to live with dignity, it is difficult to execute such rights in India, because jails are always overcrowded and convicts lack access to basic amenities.

In India, conjugal visits are encouraged for prisoners due to its rehabilitation benefits¹⁴. However, the government is required to investigate the potential of providing conjugal visit services by appointing a committee to assess the advantages and disadvantages of such visits¹⁵. While statutory regulations for conjugal visits may benefit in the rehabilitation of criminals. *Justice Iyer* ruled in the case *Sunil Batra vs. Delhi Administration*¹⁶ that "*visits to prisoners by family and friends are solace in isolation - and only a dehumanised institution can get vicarious delight in denying jail inmates of this humanistic luxury.*" In light of Article 19 of the Constitution of India and its scope, the right to the company of one's fellow citizens, parents, and other family members cannot be denied. The Supreme Court ruled in the case of *Francis Coralie Mulin vs. the Administrator of Delhi*¹⁷ that incarcerated people have the same constitutional rights as free people, with the exception of those rights that are inherently incompatible with incarceration. The Court was presented with the question of whether or not convicts have access to conjugal rights. The answer to this question has changed over the years as a result of several cases.

The couple was found guilty of murder and given the death penalty in the case of *Jasvir Singh v.*

¹³Ictr/Prisoners - Ictr Authorises Conjugal Rights For Detainees, accessed in <https://www.justiceinfo.net/en/15509-en-en-040708-ictprisoners-ict-authorises-conjugal-rights-for-detainees62756275.html>

¹⁴ Anamika Singh And Anupal Dasgupta, 'Prisoners' Conjugal Visitation Rights In India: Changing Perspectives' (2015) 4 (2) Christ University Law Journal 4, 73

¹⁵ Cf Emmanuel (N 22)

¹⁶ AIR (1978) 4 SCC 409

¹⁷ AIR 746 (1981) SCR (2) 516

State of Punjab. The couple petitioned the court to enforce their conjugal procreation rights. The primary issue in this case is whether inmates' "right to life" includes the "right to conjugal visits" and "right to procreate." The Punjab and Haryana High Court declared that the right to procreate is extended to inmates as well. This right can be linked to Article 21 of the Constitution when read in conjunction with the UDHR. The Court ruled that only the rights ancillary to incarceration will not be available to prisoners and as there is no nexus between conjugal rights and incarceration, the inmates are entitled to the enjoyment of such rights, subject to reasonable constraints. The Court finally determined that inmates' access to Article 21 includes the right to conjugal visits and artificial insemination (alternative). In addition, the Court ruled that the exercise of these rights must conform to the method established by the State. In *Maharaja vs. State of Tamil Nadu and Others*¹⁸, the wife of a life-sentenced convict petitioned the High Court of Madras, citing exceptional circumstances, to seek temporary leave for her husband so he could aid her with infertility treatment. In this decision, the court emphasised the importance of family ties and relationship with a spouse in the reformation of a prisoner and ruled that a prisoner cannot be denied of his right to dignity in society simply because he is a prisoner. The Court declared that a man's marital rights are a vital component of his right to life. The court determined that the right to conjugal visit is within the scope of inmates' right to life, and consequently prisoners have the same right. Section 59 subsection (25) of the Prisons Act, 1894, the current fundamental law for the operation of prisons in the country, stipulates that the states shall establish rules for the appointment and guiding of inmates' visitors. But there are no unique provisions supporting conjugal rights in any state-framed visitation rules. Under Rule 20 of the Tamil Nadu Suspension of Sentence Rules, 1982, there have been a few instances in which a prison sentence has been suspended on the basis of conjugal rights. These regulations grant inmates temporary leave under certain "exceptional situations."

Conjugal visit from Punitive view to rehabilitative view

The purposes of imprisonment can be summed up as follows: retribution, deterrent, incapacitation, and rehabilitation. As a form of punishment for crimes against society, retribution deprives criminals of their freedom in order to make them pay for their actions. Incapacitation is the expulsion of offenders from society in order to safeguard the general population. Deterrence involves the prevention of future criminal behaviour. It is hoped that jails serve as deterrents for those who are considering breaking the law, and that the risk of incarceration will serve as a tool for the reformation and rehabilitation of convicts. In addition, it is argued that a good manual is

¹⁸Criminal Appeal No. 2270 of 2008, In The Supreme Court of India.

required to induce behavioural changes in inmates so that their likelihood of returning to criminal activity upon release is minimal.

On the other side, the argument against conjugal rights for inmates is built on the view that punishment should not come with privileges. This school of thought, while acknowledging that convicts are human beings entitled to fundamental human rights, holds that punishments lose their significance when they include advantages. Sending someone who has been convicted of a crime to jail is the government's approach of giving the offender the opportunity to take time off their typical lifestyle, ponder upon their misdeeds and perhaps, be shaped and rehabilitated to be law abiding citizens. In this context, denying convicts of pleasures such as sex is viewed as a means of teaching them that committing a crime has consequences beyond the loss of liberty and freedom of movement. In studying criminology, one realises that the failure of the prison system is primarily due to the inability to strike a balance between the objectives of imprisonment, particularly punishment and rehabilitation. The global rate of recidivism demonstrates this. 68 percent of 405,000 inmates released in 30 states in 2005 were arrested for a new offence within three years, and 77 percent were imprisoned within five years, according to a report by the *Bureau of Justice Statistics (BJS)* in the United States. In 2010, Ministry of Justice statistics in the *United Kingdom (UK)* revealed that 14 prisons in England and Wales, the majority of which house short-term offenders, have re-conviction rates over 70%. The figures demonstrate that the criminal justice system is inefficient over the long run at diverting repeat criminals from a life of crime. Over time, it has been recognised that the focus placed on punishment as a consequence of incarceration is somewhat excessive. The argument against extending conjugal privileges to convicts seems to overlook the fact that harsh punishment tends to harden individuals who want correction.

In the past, it was believed that a person cannot be reformed or that the only way to do so is by severe punishment. In recent years, there have been a number of instances in which reformation through lighter measures that focus on resolving the issues that prompted the offender to commit the crime in conjunction with rehabilitator aspects has been successful¹⁹. Frequent family or conjugal visitation might help offenders appreciate their duties and maintain hope for a good future.

¹⁹ Walter Webster Argow, 'Efficacy of Prison Mental Tests As a Guide to Rehabilitation' (1934) 24(6) Am Inst Crim L & Criminology, 1074,1080

The right to life encompasses the right to a dignified life. A little effort is required to improve the living conditions, and granting convicts marriage rights could be one step in that direction. Since ancient times, it has been believed that familial love and affection can transform a person's personality. It helps him rehabilitate so that he can coexist with society once he is released from prison. This helps to reduce the violent behaviour of offenders in prisons. Also, it can be questioned why the spouses of prisoners should be forced to live a non-marital existence owing to the prisoner's wrongdoing. A further benefit of granting conjugal rights to convicts is that it reduces non-consensual homosexual activity. The frustration caused by being confined to a room for days leads the prisoner to engage in homosexual behaviours. The proponents of conjugal rights for prisoners argue that this has led to a significant rise in prison-based homosexual rape²⁰. In a study published by the American Journal of Criminal Justice, it was shown that states that enable conjugal visitation have lower incidence of sexual assault among inmates than ones that do not. Only in the case *Sunil Batra v. Delhi Administration* did the subject of minors engaging in homosexual activities become public knowledge. A lack of sexual fulfilment among convicts is contributing to an increase in homosexuality and related crimes. According to research undertaken by *S.P. Srivastava* at the Central Jail in Bareilly, Uttar Pradesh, approximately 10 to 15% of convicts are situational or regular homosexuals. Many individuals, when confronted, mentioned the lack of conjugality as the basis for such deviance. It was also discovered that in order to satisfy their urges, offenders frequently contacted younger inmates who are extremely susceptible to seduction²¹. These unprotected homosexual behaviours lead to an upsurge in HIV-AIDS cases, causing a crisis in prison health and sanitation.

Conclusion

The core argument of the detractors is that allowing such visits undermines the whole intent of punishment by allowing inmates to live a comfortable existence, receiving food, shelter, etc., and working unskilled or semiskilled jobs within prisons. In addition, they allege a lack of administrative competence to construct the necessary conditions for such conjugal visits in jails. The prisons are understaffed, badly maintained, and overpopulated. They view alternative methods such as parole and furlough as adequate for preserving family and social bonds. We have adopted a correctional system in Bangladesh that is reformatory in nature, incorporating methods that are favourable to reformation and recognising inmates' rights to a reasonable quality of living.

²⁰ Timothy J Flanagan, 'Long-Term Imprisonment: Policy, Science, and Correctional Practice' (1993) Sage Publications Inc.

²¹ Anamika Singh and Anupal Dasgupta, 'Prisoners' Conjugal Visitation Rights in India: Changing Perspectives' (2015) 4 (2) Christ University Law Journal 4, 73

This denial is the fundamental cause of many moral wrongs, such as adultery, etc., and offences, such as prison rape, child abuse in the families of offenders, and the high chance of their children becoming offenders owing to their familial situations, etc. A government-created family and conjugal visitation programme could prevent all of these harmful effects.

According to psychologists, interaction with family and spouse is an important component of a man's life that relieves stress and promotes happiness. The institution of the family is firmly ingrained in Bengali culture. The provision of conjugal rights ensures that family bonds do not deteriorate and stay strong, which is one of the most significant arguments advanced by proponents. To maintain a fair system of incarceration, conjugal rights must be granted to prisoners, as they aid in the reformation and rehabilitation of inmates, which is consistent with the penal law of the Indian subcontinent. The current legislative structure governing inmates has no provision for granting conjugal rights to convicts; thus, this shortcoming must be corrected promptly. After weighing the benefits and drawbacks of granting convicts' conjugal privileges, we conclude that such rights are desirable.

