Family Matters: The Socio-Legal Importance of Maintaining Conjugal Rights of Prisoners in India

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Abstract: *This paper examines the issue of recognition of conjugal rights for prisoners in India. While the Supreme Court has not conclusively ruled on the matter, the High Courts have given varied judgments. The primary aims of this piece are to analyse approaches taken in other countries and discuss challenges to reforming policies in India. It first discusses the impact of denying conjugal visits on prisoners, raising social, legal and ethical arguments on the issue. Drawing from studies on women prisoners in the US and inmates in Nigeria, the paper highlights how denial of such rights can negatively impact prisoners' mental health and increase risk of sexual violence or disease within prisons. International standards like the UN Standard Minimum Rules for the Treatment of Prisoners emphasise maintaining family bonds. However, current Indian policies restrict family contact and do not recognize conjugal visits. The paper then analyses policies in countries like the US, Canada, Germany, and Kenya that have recognized conjugal rights to varying extents. Challenges to reform in India include overcrowding in prisons, lack of reliable data, and social stigma against prisoners. However, evidence suggests conjugal visits could help reduce prison violence and recidivism while strengthening family ties and post-release rehabilitation. The paper concludes by recommending reforms like liberalising parole, designating visitation areas, implementing committee recommendations, and recognizing rights for all relationships (including same-sex couples as they have already been decriminalised). Such recognition of conjugal rights is seen as progressive for prisoner welfare and justice administration as well as from a human rights perspective.*

Keywords: *Prison Statistics India Report 2021, UN Standard Minimum Rules for the Treatment of Prisoners, Modernisation of Prisons Project, Model Prisons Manual, 2016, All- India Committee on Jail Reforms.*

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I. INTRODUCTION

Quite recently, the Hon'ble High Court ("HC") of Delhi sought the Government's reply on a PIL for securing conjugal rights for Delhi's prisoners. [1]The Hon'ble HCs of Punjab & Haryana and Madras have already upheld the need for these rights. As cited by the Hon'ble Madras HC, a resolution was also passed by the Central Government which deemed prisoners' conjugal visits to be a right instead of a privilege.[2] Such discourse and discussion induce one to delve into questions like: what exactly are conjugal rights? Why should or should not they apply to prisoners? Are they a fundamental right or subject to the states' penological interests?

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[1] *Amit Sahni v. Govt. of NCT, Delhi and Anr* W.P.(C) 6666/2019, Delhi HC, (2019)

[2] The Express Web Desk, *What is the status of conjugal rights for prisoners in India*?, THE INDIAN EXPRESS (Jan. 25, 2018, 5:00 pm) https://indianexpress.com/article/what-is/what-is-the-state-of-conjugal-rights-for-indian-inmates-5038969.html. (Last Visited April 7, 2024)

Beginning with the question of conjugal rights, conjugal rights are defined as the right of a spouse to marital intercourse and society of the other spouse.[3] It must be noted therefore that conjugal rights are inherent in the institution of marriage itself. They are not only about sexual intercourse but rather encompass the sharing of common life, pleasures and challenges of marital life together.[4] There has not been a conclusive judgement by the Hon'ble Supreme Court on the matter of the conjugal rights of prisoners and HCs have given varied judgements on the matter. Apart from such much-needed judicial intervention, this issue, though having a significant impact, has largely been overlooked by successive governments of India and has been overshadowed by larger concerns of prisoners such as overcrowding,[5] undertrial prisoners[6] and long pendency of cases,[7] etc. Being a part of the state list in the constitution,[8] recognition of such rights is considered a policy matter of the state and not the Judiciary.[9] However, a dearth of empirical research and findings, lack of infrastructure and resources, lax implementation of judicial guidelines, security and other concerns inhibit national recognition of such rights.

In view of these concerns, one begins to contemplate several pertinent questions regarding the challenges in the way of such implementation, and the legal and social ramifications of bestowing conjugal rights on the prisoners in our country. Furthermore, a comparative analysis of such rights with countries across the globe could prove useful in understanding their significance and inculcating their effective interventions in our own country to enhance the welfare measures of our people. Thus, given the foregoing, the primary objective of this study is to advocate for the recognition of the conjugal rights of prisoners in India. It envisages bringing forth social, legal and ethical arguments to signify the importance of the same and

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[3] Earl Jowitt, *Dictionary of English Law'* (1959) 453.

[4] POONAM PRADHAN, FAMILY LAW LECTURES (Lexis Nexis 2021) 156.

[5] Vignesh Radhakrishnan & Rebecca Rose Varghese, *Indian jails are overflowing, in 26 States prisoner count exceeds capacity,* THE HINDU (Oct. 15, 2022, 1:07 pm) https://www.thehindu.com/data/data-indian-jails-are-overflowing-in-26-states-prisoner-count-exceeds-capacity/article65998284.ece.

[6] Varghese Radhakrishnan, *70% prisoners in India are undertrials, THE* HINDU (Sep. 11, 2020) https://www.thehindu.com/data/data-70-prisoners-in-india-are-undertrials/article32569643.ece.

[7] *UN 'disturbed' by the death of Indian activist Stan Swamy in jail,* ALJAZEERA (Jul. 6, 2021) https://www.aljazeera.com/news/2021/7/6/un-disturbed-by-death-of-indian-activist-stan-swamy-in-jail.

[8] INDIA CONST., Sch. 7, List II.

[9] *Jasvir Singh and Anr. v State of Punjab and Ors.* (2015) Cri LJ 2282.

showcase that such recognition may have in store potential benefits for both individuals (prisoners) and society. Thus, it attempts to promote a rational understanding of the issue and bats for legislative reforms and augmentation.

The scope of the study would encompass several dimensions, including a human rights perspective of the prisoners' rights and an exploration of the contribution of such recognition towards their rehabilitation and successful reintegration into society. By way of a sample study of the prison manuals and rules of 10 varied states of India along with the Model prison manual ("MPM") released by the Government in 2016, the current status of the provisions for the conjugal rights of prisoners will be studied. An analysis of the socio-legal importance of such recognition along with a comparative analysis of the approaches adopted by different countries in this context will also be involved. While delving into the challenges in the way of such reforms, an endeavour shall be made to provide suggestions regarding the same. Accordingly, the approach would be to look into three aspects. First, the current legal position regarding the conjugal rights of prisoners in India. Second, the potential benefits of bestowing such rights. Lastly, the international standards for such rights foreign countries have recognised and whether any such foreign policy measure be adopted in India as well.

II. LITERATURE REVIEW

A. Journal Articles

1. Goyal (2018)[10] in the article "*Conjugal Rights of Prisoners*" mainly discusses the two ways in which such rights can be granted (parole or visits) and the arguments in favour and against the aforementioned rights in the Indian context, in light of legal precedents, comparisons with foreign authorities and provides meaningful suggestions for providing the rights. However, she doesn't develop counterarguments to the challenges posed and doesn't delve into how foreign policy measures in this regard could be useful in an Indian context.

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[10]Shruti Goyal, *Conjugal Rights of the Prisoners*, MANUPATRA (2018) http://docs.manupatra.in/newsline/articles/Upload/22A58DF8-EA77-472B-B0B5-F06ECDF5EB61. _Goyal_Dr. _Asst._Prof._57-73_Family.pdf . (Last Visited April 7, 2024)

2. Sufrin, Roth, et al. (2015)[11] in their research paper provide meaningful insights into the challenges faced by female prisoners, focusing on reproductive health and rights and highlighting the dearth of reliable, national empirical data on the theme. However, considering the vast social and legal disparities in the context of prisons in India and the USA, since the study focuses on women in the USA, it cannot be identically applicable to the prisoners in India. Yet, inferences can certainly be drawn from findings which may be common to women in both countries.

3. Lawan, Shuaib, et al. (2016)[12] explore the sexual health, desires and coping mechanisms of prisoners in Nigeria, highlighting the adverse impact of deprivation of conjugal rights amongst both the inmates and their spouses. The piece provides much-needed empirical findings and ground realities which are consequential in policy formulation and human rights activism for incarcerated individuals. Yet, since the study is limited to Nigeria, it may not be as identically applicable to India and thus, considering the significant findings of the study, calls for similar research projects in Indian Jails as well.

4. Cavan and Zamans (1958)[13] compared several countries and found in their study (completed more than six decades ago), the importance of a humanitarian approach towards prisoners and highlighted the positive impact of prisoners' conjugal rights on their social, moral and overall well-being. The paper presents significant findings even today, yet its lack of research in India leaves some questions unanswered.

5. Vibhute (2016)[14] in his article emphasises the importance of extending fundamental and human rights, especially to people sentenced to capital punishment. The author beautifully presents a case for securing the right to rehabilitation and social

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[11] Carolyn Sufrin et al*, Reproductive Justice, Health Disparities And Incarcerated Women in the United States,* PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 213 (2015).

[12] Umar M. Lawan et al., *Sexual Health of Prison Inmates: A Case Study of Kano Central Prison, North Western Nigeria,* AFRICAN JOURNAL OF REPRODUCTIVE HEALTH 98(2016).

[13] Ruth Shonle Cavan et al., *Marital Relationships of Prisoners in Twenty-Eight Countries,* THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY, AND POLICE SCIENCE 133 (1958).

[14] K. I. Vibhute, *Right to Human Dignity of Convict Under 'Shadow Of Death' And Freedoms 'Behind The Bars' In India: A Reflective Perception,*JOURNAL OF THE INDIAN LAW INSTITUTE 15 (2016).

reintegration of prisoners. Though the article forms a basis for the argument of securing the rights of prisoners, it doesn't discuss the conjugal rights of prisoners specifically.

B. Newspaper articles

1. Bajpai, Taak, et al. (2022) delve into the contemporary questions surrounding these rights from a legal perspective. However, they do not take any side or develop any arguments for/against the topic or present any empirical findings, comparative analysis or social dimensions of the same.[15]

2. The Indian Express (2018)[16] in its piece comprehensively discusses the current position of such rights, providing examples of foreign countries and deliberating upon the development of the concepts through legal precedents. Yet, the article stopped short of developing any solid arguments for/against these rights, providing any concrete recommendations or empirical findings in this regard.

III. THE CURRENT POSITION IN INDIAN PRISONS

As per the Prison Statistics India Report 2021,[17] the total number of prisoners is 5, 54,034, up from 4, 88,511 last year and 4, 81,387 in 2019. Thus, considering the large number of imprisoned individuals in the country which has been showing an increasing trend, it can be observed that *prisoners form a considerable group amongst themselves.* Also, it is reasonable to assume that most prisoners would have some social relation i.e., family, friends, relatives, etc. outside the prison. Thus, *the impact on prisoners implies a considerable impact on the Indian population as a whole*. Furthermore, *more than 70%* of the prisoners belonged to the 18-50 age group which is generally construed as the sexually-active age group. Therefore, owing to their large proportions, it is visibly crucial to give due regard to their conjugal rights.

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[15] G.S. Bajpai et al., *Explained: The debate around Conjugal Visits for Prisoners*, THE HINDU (Dec. 7, 2022) https://www.thehindu.com/news/states/explained-the-debate-around-conjugal-visits-for-prisoners/article66236287.html. (Last Visited April 7, 2024)

[16] The Express Web Desk, *What is the status of conjugal rights for prisoners in India?* THE INDIAN EXPRESS (Jan. 25, 2018); https://indianexpress.com/article/what-is/what-is-the-state-of-conjugal-rights-for-indian-inmates-5038969.html.(Last Visited April 7, 2024)

[17] National Crime Records Bureau, *Prison Statistics India,* (2021); https://www.ncrb.in/data/prison_statisitices_India_2021.pdf. (Last Visited April 7, 2024)

Adding on, the attempts made to reduce the crowd in prisons haven't ameliorated the situation much. Even though the actual capacity of prisons has increased by 2.8%, the total capacity still stands at 4, 25,609 in 2021, falling short of capacity for more than 50,000 prisoners, thus leading to overcrowding.[18] Such overcrowding is known to have serious adverse impacts on the overall well-being of prisoners. Furthermore, as has been stated, only 1,918 convicted prisoners have been rehabilitated in 2021, while no data has been availed on the number of successful social integration upon release. A provision of conjugal rights can help to improve rehabilitation rates and social reintegration of prisoners as will be discussed further on.

A. Sample Study

In a cursory study of prison manuals, rules and official websites of 10 varied states from all parts of India, namely, Odisha, Mizoram, Rajasthan, Haryana, Punjab, Goa, Madhya Pradesh, Maharashtra, Karnataka, and Tamil Nadu, the following observations can be made:

1. Even though the official websites of some of these States provide for periodical family visits of less than or equal to 45 minutes, no manual/rules (even manuals as recent as 2020 or later) incorporate recognition of "conjugal rights/visits" for any class of prisoners.
2. The manuals of some states do not even mention family visits/interviews while most states do not even allow for private visits by family members without the supervision of some prison officer, seriously impeding the prisoners' right to privacy.
3. No document includes conjugal rights as a ground for parole or furlough. Thus, as was observed in the case of *Jasvir Singh*,[19] the petitioner had to be provided with such a right under Article 21 of the Constitution[20] owing to the absence of a provision for the same.
4. Most manuals/rules have incorporated ideals of human rights/human dignity. However, it seems ironic that no recognition of the right to privacy or conjugal rights in essence, which have been declared to be a part of the United Nations Standard Minimum Rules for the Treatment of Prisoners ("UNSMRTP").[21]

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[18] *Ibid.*

[19] *Supra* note 8.

[20] INDIA CONST., art. 21.

[21] The United Nations Standard Minimum Rules for the Treatment of Prisoners, Dec. 17, 2015, G.A. Res. 70/175

5. Even in the MPM released by the Ministry of Home Affairs ("MHA") in 2016,[22] although there are few provisions for maintaining familial ties, there is no recognition of conjugal rights.

2. The relevant provisions include:

1. Family visits

a) All the prisoners are to be provided with reasonable facilities to see or communicate with their friends, families and relatives every fortnight.[23] However, such meetings shall be in interview rooms, that too for not more than half an hour.[24] Such visits are *privileges* which are contingent upon the good conduct of the prisoner and subject to the permissions of the supervising prison officer.[25]

2. Parole/Furlough:

a) The manual recognises that the conduct of a prisoner during incarceration may be improved if paroles are provided.[26] Further, provisions related to the release of prisoners should be liberalised to maintain a harmonious relationship with the outside world.[27]

b) While convicts have been entitled to parole and furlough, undertrial prisoners have been deprived of any provision of parole or furlough[28] and their interviews shall at least be within the sight of a prison official,[29] thus leaving no privacy for the undertrials to spend time without the constant apprehension of surveillance. This negates the essential requirement of privacy and subsequently conjugal rights in essence. Taking into account that 77% of all prisoners in 2021 fall under this

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[22] *Supra* note 11.

[23] *Ibid.*, rule 8.01.

[24] *Id.,* rule 8.16.

[25] *Id.,* rule 8.05.

[26] *Id.*, rule 19.01.

[27] *Id.,* rules 19.02 (i), 19.03.

[28] *Id.,* rule 19.06.2.

[29] *Id.,* rule 8.22.

category,[30] such deprivation of more than one-third of incarcerated individuals is unjust and contradicts international standards to which India has assented (dealt with later).

c) It is further stated that such release by way of parole is a legal right of every *eligible* prisoner,[31] leaving the government with the discretion to debar prisoners or withdraw such concessions.

By and large, it can be thus observed that there is no recognition of conjugal rights in any manual/rules, including the MPM of the central government. The provisions for prisoners' contact with the outside world and family are also restricted to a great extent. One recognised way through which suicide rates and murders between inmates can be brought down (from 150 and 11 respectively),[32] is by strengthening one's emotional health via more meaningful family and conjugal contact. Thus, there is a need to liberalise the concerned provisions for the betterment of prisoners not just on paper rather in actuality.

IV. THE STANCE OF THE INDIAN JUDICIARY

The rights of prisoners were duly recognised and consolidated in *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*[33] wherein prisoners' entitlement to all fundamental and legal rights except for those which cannot be exercised owing to incarceration was upheld. In the landmark *Sunil Batra* judgement[34], the Apex Court had held that imprisonment doesn't mean farewell to the Fundamental Rights of the individual. However, in the absence of any mention of conjugal rights in any statute or rule book in India and that of a conclusive verdict by the Hon'ble Supreme Court of India, there have been varied and conflicting views on these rights by different HCs.

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The Hon'ble HC of Punjab and Haryana had already upheld these rights way back in 2015.[35] The State was directed to constitute a Jail Reforms Committee. A former Judge of the HC, a

[30] *Supra* note 18.

[31] *Supra* note 10, rule 19.

[32] *Supra* note 18.

[33] *Francis Coralie Mulin v. The Administrator, Union Territory of Delhi* AIR 1981 SC 746, 1981.

[34] *Sunil Batra v. Delhi Administration and Ors*. AIR 1579, (1980)

[35] *Supra* note 8.

Social Scientist, and an Expert in Jail Reformation and Prison Management were recommended to be its constituents, to formulate a scheme for bringing in facilities for conjugal and family visits for categories of prisoners, befitting the beneficial nature and reformatory goals behind the measure. *The right to procreation survives incarceration* and cannot be denied on the grounds of not being mentioned in the concerned rule books or statutes. Such deprivation amounts to a grave violation of Article 21 of the Constitution,[36] read with the Universal Declaration of Human Rights ("UNDHR").[37] However, the Hon'ble Court, recognising that its regulation to be a matter of policy and the sole prerogative of the state, subjected the right to reasonable restrictions and the penological interests of the state.

The Hon'ble Madras HC supported unmonitored conversations between a prisoner and the spouse as well and read down the provision which prevented the same in a recent case,[38] The Hon'ble Court emphasised the importance of scrupulously maintaining the dignity and privacy of the prisoners when meeting with their spouse, rightly upholding the conjugal rights of incarcerated individuals. The right to life is not confined only to good people, but also to people like prisoners, murderers and traitors.[39] Section 122 of the Indian Evidence Act[40] was also referred to which deals with the privileged nature of communication between spouses, to reject the argument of the prosecution that the meeting can take place only in the presence of escort police. It has also been held by the Hon'ble Madras HC that conjugal rights even include specific purposes like infertility treatment and that such rights can be claimed by convicts if they fall under the grounds of extraordinary relief. Further,

"Conjugal visits of the spouse of the prisoners is also the right of the prisoner…even though the wife is not under incarceration, but a suffering person outside the prison on account of the marital relationship with the prisoner and her legitimate expectation to have a child cannot be declined".[41]

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[36] *Supra* note 19.

[37] Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A.

[38] *Rahmath Nisha v. Additional Director General of Prison,* (2019) SCC OnLine Mad 1782

[39] Inhuman Conditions in 1382 Prisons (II), In re, (2016) SCC Online SC 1090.

[40] The Indian Evidence Act, 1872, s.122.

[41] *Meharaj vs. The State and Ors*, MANU/TN/0226/2018.

Back in January 2010, the Bombay HC had directed the state executive to look at the possibility of allowing sexual engagement of inmates with their spouses inside prison premises as a preventive step, in place of spending crores to tackle the AIDS menace in jails.[42]

Contrarily, the Hon'ble HC of Andhra Pradesh refused to provide such rights in prison premises given the adverse impact on other inmates who would not have been extended such benefit and supported the usage of paroles/temporary releases for the purpose.[43] Thus, the Hon'ble Court didn't deny the existence of such a right but rather disagreed with only a way of seeking and fulfilling the same.

V. COMPARATIVE ANALYSIS WITH OTHER COUNTRIES AND INTERNATIONAL STANDARDS

While there exist certain common standards adopted by international organisations like the United Nations which recognise the basic prisoners' rights, different countries have adopted varied approaches towards prisoners' conjugal rights.

A. International Standards

The rights of prisoners have been recognised internationally in several instances, including under the International Covenant on Civil and Political Rights ("ICCPR") [44] and the UNDHR.[45] The conjugal rights of prisoners have been specifically recognised as part of the UNSMRTP, adopted unanimously by the United Nations General Body Assembly, in 2015.[46] Being one of the most recent international documents in this regard and since the rules are inspired by the existing covenants themselves, dealing specifically with the prisoners, the discussion here is limited to these rules.

1. United Nations Standard Minimum Rules for the Treatment of Prisoners[47]

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[42] DHNS, *Bombay HC favours 'protected' sex in jails*, DECCAN HERALD (Jan. 14, 2010,), https://www.deccanherald.com/india/bombay-hc-favours-protected-sex-2468476. (Last Visited April 7, 2024)

[43] *G. Bhargavi vs. State of Andhra Pradesh*, MANU/AP/0566/2012.

[44] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

[45] *Supra* note 38.

[46] *Supra* note 20.

[47] *Ibid.*

The Revised Rules, known as "Mandela Rules" incorporate ideals inspired by international covenants and documents including the ICCPR and others.[48] It strongly emphasises on holistic care of incarcerated individuals and also confirms that it is the *responsibility of the state* to deliver comprehensive health and well-being to those imprisoned.[49] It recognises conjugal visits for prisoners and promotes gender equality, dignity and fair and safe access to such visits under rule 58. It includes the prohibition of family contact as a practice that expressly violates human dignity and that such prohibition is not to be a part of disciplinary sanctions or restrictive measures under rule 43. Under rule 103, the prisoners are to be allowed to send a portion of what they earn to their family- an act that essentially maintains a prisoner's involvement in his household and thus, can be construed to be a recognition of one's conjugal and familial rights. Rule 106 expresses the need to give due attention to maintaining and improving relations between a prisoner and his/her family and as per the next rule, consideration has to be given to the prisoner's rehabilitation and post-release future and reintegration.[50] Therefore, the rules set standards for ensuring the dignity and well-being of prisoners which are considered to be minimal in their eyes but unfortunately are still a distant dream for prisoners in India.

B. Position In Other Countries

Countries across the globe including Canada, Germany, Philippines, Russia, Spain, Saudi Arabia, Denmark, etc. recognize such rights to varied degrees. Some of the notable ones whose policies/research can be incorporated into the Indian context are as follows:

1. European Countries

Conjugal rights to prisoners are provided under the European Convention on Human Rights[51] of which all member states are signatories. For instance, France allows visits twice a week for conjugal purposes. Spouses can meet the inmates every week for an hour in New Zealand allowing spouses. Spouses are given visitation rights (without any supervision) on a Sunday

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[48] Convention on the Elimination of all forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention against Torture and other Cruel, Inhuman or Degrading Treatment, Dec. 10, 1984, 1465 U.N.T.S. 85.

[49] *Supra* note 47.

[50] Kasey McCall-Smith, 'United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)' International Legal Materials (2016) 1180

[51] Convention for the Protection of Human Rights and Fundamental Freedoms, Oct. 2, 2013, Rome, 4.XI.195

every month in Sweden, along with home and private visits, hence coveted to be amongst the most liberal countries in this regard.[52]

2. Israel and Brazil

Both countries have already gone as far as recognising same-sex conjugal rights and allowing same-sex conjugal visits. Since same-sex relationships have been decriminalised in India[53] and the relationship and adoption rights of such couples have been recognised as well,[54] the implementation of same-sex conjugal visits should also be considered.

3. The USA

Though federal prisons disallow conjugal visitations, some states have such facilities in the USA. The oldest program at the Mississippi State Penitentiary in Parchman was functional since 1918 where visits every two weeks were allowed which could last up to three days. While the programs in California, New York, Washington and Connecticut are functional, the ones in New Mexico[55] and Mississippi[56] no longer exist.

i. *Case study*: Parchman Penitentiary, Mississippi

The facility allowed an hour-long private visit with their spouse. Initially, the prison functioned as a work camp where mostly black inmates were used as free farm labour akin to slaves. The workers were allowed private time as the warden at that time believed that allowing workers to have sex with spouses/prostitutes induced them to labour harder. Gradually, as the facility developed as a prison, the original intention of allowing such conjugal visits was to control inmates. Such visits increasingly became an unlikely barometer of racial mores and the evolution of society where married same-sex couples could also participate (in prisons in

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[52] David A. Ward, *Inmate Rights and Prison Reform in Sweden and Denmark,* THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY, AND POLICE SCIENCE 240 (2018).

[53] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

[54] *Supriyo v. Union of India,* (2023) SCC OnLine SC 1348.

[55] Joseph K. Kolb, *New Mexico to eliminate conjugal visits for prisoners*, REUTERS (Apr. 17, 2014) https://www.reuters.com/article/us-usa-prisons-newmexico-idUSBREA3F2.html (Last Visited April 7, 2024)

[56] Kim Severson, *As Conjugal Visits Fade, a Lifeline to Inmates' Spouses Is Lost,* THE NEW YORK TIMES (Jan 12, 2014) https://www.nytimes.com/2014/01/13/us/with-conjugal-visits-fading-a-lifeline-to-inmates-spouses-is-lost.html. (Last Visited April 7, 2024)

California[57] and New York as well). When the program was about to be closed, a piece in the New York Times highlighted the plight of the spouses to whom such meetings meant a lot and was an important part of maintaining their relationship with their spouses. One of those women expressed disheartenment as her choice of having a child with her incarcerated husband was being taken away. Interviewed women also brought up a noteworthy point that conjugal visits were not about sex but rather about having some solace and private time in the prison system today where every letter is opened, every call monitored and regular visits are crowded.

ii. *Case study***:** Incarcerated Women in the USA

Research on incarcerated women in the USA (2015)[58] highlighted myriad problems gravely affecting the reproductive and mental health of imprisoned women including practical barriers to abortion care, shackling during labour, barriers to family planning, etc. and reiterated the significance of maintaining relationships outside of prisons for their mental health and community ties. One of the noteworthy observations of this significant study was,

"what happens to women behind bars reflects the politics of reproduction in the United States. Furthermore, to ameliorate these injustices, reproductive health care providers and advocates must work not only to improve access to reproductive health services for women while they are incarcerated but also to promote policy changes that invest in women's lives outside of prison or jail; such efforts will reduce the likelihood of women's being incarcerated and will strengthen the health and well-being of marginalized women, their families and their communities."

4. Kenya

Quite recently, the HC of Meru denied the petition for providing conjugal rights to a couple in the prison premises owing to deficiencies in the current set-up of prisons. Consequently, in the present conditions conjugal rights cannot be enjoyed without causing prejudice to the rights and freedoms of others. Thus, yet again the court denied only a way of providing conjugal

[57] *Calif. gay, lesbian inmates get conjugal visits*, NBC NEWS (Jun. 2, 2007, 3:16 pm) https://www.nbcnews.com/id/wbna18994457.

[58] Carolyn Sufrin et al., *Reproductive Justice, Health Disparities and Incarcerated Women in the United States* PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 213 (2015).

rights, however duly recognising them under the right to life[59] and reproductive health rights[60] even though their Prisons Act didn't include any provision for conjugal rights.[61]

5. Nigeria

Case study: Kano Central Prison, North Western Nigeria

A study conducted to examine the sexual health and experiences of inmates revealed significant findings, including the fact that over 80% of inmates reported frequent sexual urges, leading to unnatural sex, non-consensual acts and the spread of diseases like AIDS. Over 10% of inmates faced sexual violence and harassment, which is much higher than the prisons in the USA where conjugal visits are allowed. The research, thus, brought forth the importance of addressing their sexual needs, recognising it is a basic human desire and called for laws against sexual violence in prisons and conjugal rights and visits/furloughs.

VI. POTENTIAL BENEFITS OF PRISONERS' CONJUGAL RIGHTS

The idea of prisoners' conjugal rights is gradually and progressively being accepted by countries worldwide on various social and legal grounds, strengthening the case for recognition of these rights.

A. From a Social Perspective

Conjugal visits being a significant factor in the *preservation of family bonds,*[62] Family visitation programs can prove to be strong incentives for good behaviour, reduction of sexual activities amongst prisoners and help in the strengthening of the prisoners' families.[63] The social stigma and labelling due to the crime and the long detachment from family and loved ones hinder a prisoner's post-release reintegration into society.[64] Psychologists, psychiatrists,

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[59] KENYA CONST.., art. 26.

[60] KENYA CONST., art. 43.

[61] Sharon Mwende, *No room for intimacy! Court denies man conjugal rights in custody* THE STAR (Oct. 19, 2023) https://www.the-star.co.ke/news/2023-10-19-no-room-for-intimacy-court-denies-man-conjugal-rights-in-custody/.

[62] P. Muthumari v. Home Secretary (2018) SCC OnLine Mad 3304.

[63] *Supra* note 14.

[64] J. Varghese & V. Raghavan, *Restoration of Released Prisoners to Society: Issues, Challenges and Further Ways; Insights from Kerala, India*, INTERNATIONAL ANNALS OF CRIMINOLOGY 61 (2015).

prison reforms and academics have been suggesting conjugal visits to be helpful in a smooth return to normal life post-release for years now.[65] Mental health specialists believe that feelings of frustration, stress, resentment and heart-burnings can be brought down and humans are *better constructed* if conjugal relationships are provided for, even rarely. Keeping inmates in touch with their families and spouses also brings down criminal behaviour inside prisons.

Various pieces of research have shown conjugal visits reduce the frequency of prison riots, and decline recidivism, sexual crimes and homosexual conduct. The rates of sexual assault and rape in the prisons of the USA where conjugal visits are allowed were found to be lesser than that of prisons that prohibited conjugal visits. Thus, given appropriate policy initiatives, homosexual activities which lead to an increase in the spread of AIDS and sexual violence can be attenuated in prisons.[66] Moreover, considering the increasing cases of mental, the wide-ranging emotional benefits of recognising the conjugal rights of prisoners, it may serve as a quite economical[67] and additional supportive methods to the existing mental health measures being undertaken by the government for prisoners. Just like any other individual, prisoners would also wish to express issues they encounter, with their life partners as well as with their social relations.[68] Consequently, it may also help in bringing down the suicide rates in prisons.

Furthermore, as the spouses of the prisoners of the Parchman facility had stated above,[69] conjugal visits are not just about sex but about having some unmonitored time with their partners and prove quite helpful in maintaining family and conjugal relationships outside the prison. The significance of such private visits is accentuated as in the present *mulakat system,* meetings do not extend beyond 20 minutes and are conducted in bustling spaces, reducing the possibilities of emotional gains.[70] The new initiative of *e-mulakat* cannot match the emotional proximity and dimension of physical affection like holding hands which is an important facet

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[65] *Supra* note 18.

[66] SJ D'Alessio et al., *The Effect of Conjugal Visitation on Sexual Violence in Prison*, 38(1) AM J CRM JUST 13 (2012).

[67] *Supra* note 43.

[68] *Ibid.*

[69] *Supra* note 60.

[70] Sukanya Shantha, *Long Waits, Hostile Staff: Prison Mulakats Take a Toll on Family Members of Those Incarcerated*, THE WIRE (Dec 28, 2020), https://thewire.in/rights/prison-meeting-visitors-tiss-study.

of a conjugal relationship. Also, the scheme has not been implemented universally in all prisons and is marred with digital barriers.

B. From A Legal Perspective

From a legal perspective, as has been mentioned before, the deprivation of these facilities is seen as a violation of the *right to life of prisoners*[71] and international covenants like the UNSMRTP.[72] Such recognition not only ensures enforcement of the fundamental human rights of those incarcerated but also their spouses who suffer without any wrongdoing on their part; denying conjugal rights to prisoners is an infringement of the *right to procreate*, which has been duly recognised as part of the foremost and fundamental right to life by the hon'ble judiciary. International covenants and subsequently the MPM, 2016[73] duly recognise the *right to dignity* of prisoners. Accordingly, it falls upon the authorities to allow prisoners periodical interaction with their family and friends along with undertaking adequate measures for their rehabilitation and reintegration into society, to ensure their social wellness and dignity post-release. Since it has been proven that conjugal visits are an effective measure of effecting these results, it would be inept to not recognise such rights in the interest of the prisoner and in accordance with the objectives of prison authorities.

Furthermore, as has been laid down in the UNSMRTP, whereby conjugal visits are allowed, the authorities are responsible for ensuring equal and fair access to dignified and safe spaces for all prisoners to exercise their conjugal rights.[74] Such dignified access may ideally also include some private time with their loved ones, away from the constant surveillance of officials as only then can the emotional essence of such visits be fulfilled. Furthermore, prisons function on the idea of restitution and are meant to help rehabilitate deviant individuals' lifestyles, aiming for their reintegration into society. Conjugal visits recreate a sense of normal living for the incarcerated for a short period, providing them security and encouragement to stay on the right track, further lessening prisoners' tendency to break prison rules and regulations. Thus, recognising conjugal rights can be a significant measure in improving the

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[71] *Supra* note 36.

[72] *Supra* note 47.

[73] *Supra* note 11.

[74] *Supra* note 47, rule 58 (2).

effectiveness of the restitutive mechanism of imparting justice while also aiding in the administration of prisons.

VII. OVERCOMING CHALLENGES

Several arguments and challenges are posed in the way of recognition of prisoners' conjugal rights, which mainly include the following:

A. Burden on the exchequer

One of the arguments presented by the elected representative of Mississippi who stressed upon the closing of the Parchman Program was that it created a burden on the exchequer. Since the prisoners are there to pay their debt, conjugal visits are unwarranted.

The argument of the representative seems to be at odds with the idea of restitutive justice where the primary aim is to rehabilitate prisoners and not to make them pay for their wrongs. Moreover, the women who were being deprived of such visits were ready to pay the defray costs of such relatively inexpensive and infrequent visits and also drew attention to the unwarranted deprivation of their essential right to have children. A simple yet effective counter argument was provided by the women who were being deprived of these rights.

B. About being unfair to children born and the undesirability of single-parent families

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A same-size-fits-all approach cannot apply to all families. Children raised by same-sex couples, single parents or extended family members might as well thrive as well as in traditional family set-ups. Furthermore, the reproductive rights and the right to choose the spouses of the prisoners cannot be done away with. Therefore, instead of imposing such a blanket ban, a case-to-case evaluation might balance both sides of the spectrum.

C. Lack of infrastructure and Overcrowding

A welfare state must not shed off its responsibility of safeguarding the conjugal rights of prisoners, which is recognised as an important legal right, on such a ground which may require resources and effort but is not unattainable. Moreover, as part of the Union Government's ongoing efforts to develop the infrastructure of prisons to resolve problems like overcrowding (along with the projects of state governments), giving due regard to the development of facilities for exercising conjugal rights of prisoners shall be an effective and rather economical

measure to attain the objective of augmenting correctional administration through skilling, rehabilitation and *behaviour change* programmes,[75] while making sure that all prisoners are provided fair and equal access. Also, till the time such facilities cannot be provided for in the prison premises, the rules for granting furlough/parole to prisoners must be duly liberalised to include conjugal visits as a valid ground.

D. Contraband smuggling

To prevent any unethical exchange including contraband smuggling, measures can be taken to properly check the spouses and the prisoners before and after their visits and can be reasonably looked after as part of existing security measures; strengthening anti-corruption laws to prevent any collusion on the part of prison authorities must also be looked into. However, depriving prisoners of their rights owing to such a possibility might not be fair and agreeable.

E. Existence of more pressing concerns

Another argument that can be presented is that there exist more pressing concerns about prisoners which require primary attention. The existence of even larger concerns in our prisons doesn't imply that other issues such as this, which affect the mental health of both the prisoners and their families outside to a great extent and are not manifested directly, should be kept aside. Instead, a provision for such rights would reduce and mitigate the quantum of the larger challenges, including but not limited to the spread of diseases like HIV, sexual crimes, suicides, attempts of jail-breaking, etc. Also, it would be more feasible to insert the provision of conjugal rights together with other larger reforms when an overhaul of prison rules and guidelines is already underway in several states.[76]

VIII. SUGGESTIONS

As the Hon'ble Madras HC had suggested, a committee must be set up to address the issues pertaining to conjugal visits in prisons.[77] Firstly, liberalising the usage of parole/ furlough for

[75] PIB Delhi, *Implementation of Model Prison Manua*l MINISTRY OF HOME AFFAIRS (Mar. 15, 2023, 4:54 pm) https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1907161. (Last Visited April 7, 2024)

[76] '*Tamil Nadu, Karnataka showed most improvements in prison administration, Uttar Pradesh least: Report* THE NEW INDIAN EXPRESS (Feb. 8, 2022, 9:09 pm)https://www.newindianexpress.com/nation/2022/Feb/08/tamil-nadu-karnataka-showed-most-improvements-in-prison-administration-uttar-pradesh-least-report-2416977.html.

[77] *Supra* note 18.

exercising conjugal visits of prisoners can be one of the most economical and undemanding ways of ensuring these rights. Further on, there can be various ways of providing facilities within/around the prison premises. Open-air prisons or prisons without bars, along the lines of Rajasthan's Sanganer open camp where convicts are selected and allowed to reside with their families is a quite lenient and effective measure to enhance social integration and instill a sense of self-discipline and family responsibility among prisoners. Other ways, like the introduction of the 'Parivar Mulakat (Family Visit)' programme in the Ludhiana Central Jail and allowance of conjugal visits for inmates in Punjab prisons from September last year where exist specifically designated rooms in the premises where inmates can have face-to-face meetings with their near and dear, can also be explored to suit the needs and feasibility of the concerned prison.

Next, even though the government has worked[78] on the structural and policy changes which were recommended by the All-India Committee on Prison Reforms, chaired by Justice Mulla,[79] (considered to be the most comprehensive report on the reformation of prisons as of yet), the recommendations must be further implemented to all prisons possible, especially in the context of open-air prisons and conjugal rights. Furthermore, since the Hon'ble Supreme Court has already decriminalised same-sex relationships[80] and allowed adoptions amongst such couples as well,[81] The concept of conjugal rights of prisoners must be extended to include such lawful relationships between same-sex couples, taking insights from countries like Israel where the same has already been enforced.

The MHA has already been working on the "Modernisation of Prisons" project, (2021-2026) which aims to strengthen the security infrastructure and modernise prison equipment. As part of the project's objective to augment correctional administration through skilling, rehabilitation and *behaviour change* programmes,[82] due regard should also be given to providing necessary facilities for exercising the conjugal rights of individuals, as such exercise would certainly have

[78] Ministry Of Home Affairs, *Implementation of the Recommendations of All-India Committee on Jail Reform (1980-83)* (Vol.1, 2003)

[79] Government Of India, *Report of the All-India Committee on Jail Reforms 1980-83* (1983)

[80] *Supra* note 58.

[81] *Supra* note 18.

[82] *Supra* note 79.

a positive contribution towards the realisation of this objective. Furthermore, since a majority of states (18 as of March 2023)[83] have confirmed the adoption of the MPM 2016, the inclusion of conjugal rights in the MPM itself might prove to be an efficient way for national implementation of the right. Additionally, to ensure that no illicit exchange of contraband smuggling or the like is executed during conjugal visits, augmenting the security infrastructure and strengthening anti-corruption measures to prevent any collusion on the part of the prison authorities may also be looked into.

IX. CONCLUSION

By and large, it can be observed that recognising the conjugal rights of prisoners is a noteworthy progressive step towards the welfare of incarcerated individuals. The solutions to the questions posed can be implemented fairly easily; the challenges presented against the provision of conjugal rights are not out of hand and can be resolved. Moreover, given the vast benefits of providing conjugal rights to prisoners for better administration of justice and in the interests of society as a whole, the state must recognise such rights, ending unwarranted deprivation of those who are imprisoned. A series of legal and policy reforms would be needed to align our prison system with progressive constitutional values and international obligations. Being committed to the principles assented to under the international covenants and law, a recognition of such rights would further strengthen and uphold the universally acknowledged basic human rights and dignity, including those who are deprived of their liberty. However, this is not to suggest that the right is absolute, but rather it is an alienable part of the right to life of every individual to which incarceration should not be an arbitrary barrier. Proper implementation of conjugal visits should involve the required oversight and monitoring to ensure compliance with the protocols and maintain the safety and security of all prisoners.

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[83] *Ibid.*